

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2020

LAW 358B.001
Topics in First Nations Law: Aboriginal Taxation

Adjunct Professor Michael Welters

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 90

WRITING TIME ALLOWED: 2 HOURS
READING TIME: 15 MINUTES
PREPARATION TIME ALLOWED: 10 MINUTES

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This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings. The use of library books is not permitted.

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.

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THIS EXAMINATION CONSISTS OF 6 QUESTIONS

QUESTION 1 – 20 Points

Five bands, including Prairie First Nation and Southern First Nation, have come together to create a single development corporation, DevCo. The purpose of DevCo was to create economic opportunities for the members of the five bands, whether they live on reserve or in urban areas. DevCo is focused on hiring Indigenous persons and providing services to Indigenous persons and reserves in remote locations through-out the Province. The head office of DevCo is located on Southern First Nation reserve. The manufacturing facility of DevCo is located in the Large City. The board of directors meets on a monthly basis, always on reserve but on a rotating basis.

DevCo contributes to the reserve communities through donations in support of cultural and sporting events. The profits of DevCo are paid by dividends to its shareholders, the bands. How they use the dividend proceeds is up to the bands.

Mr. M is a member of Prairie First Nation. His grandparents left the reserve resulting in Mr. M being raised in Large City. He would like to live on the Prairie First Nation reserve but there are no employment opportunities there. Mr. M worked in the manufacturing facility. Mr. M never performs employment duties on reserve.

Ms S is also a member of Prairie First Nation and has never lived on reserve. Ms S is an area administrator working in the head office. She oversees sales and volume reports and monitoring DevCo's systems. Ms S occasionally travels to other reserves as part of her administrative work.

Payments for Ms S and Mr. M were administered from the head office and made by way of direct deposit to their bank accounts.

DevCo issued them T4s that reported their income as exempt. The CRA has now issued tax reassessments to Ms S and Mr. M and demanded that they pay tax on their income.

Mr. M and Ms S have asked you whether they are likely to succeed in an appeal to the CRA's appeal division, and if that is not successful, whether they are likely to win if they go to Tax Court.

QUESTION 2 – 15 Marks

You work for the CRA in rulings division, which means you provide answers to the taxpayers who write in with specific facts and want to be sure of the tax consequences. Rulings issued by the CRA are binding on the CRA; the taxpayer who receives the ruling can rely on it when preparing their tax return.

The CRA was asked whether the taxpayer's income would be considered situated on a reserve, and thus exempt from tax for purposes of section 87 of the Indian Act in the following circumstances:

- The First Nation provides funding to the School Board for the services of a qualified teacher to deliver a program (“the Program”) for on-reserve First Nation students;
- The taxpayer earns employment income as a teacher delivering the Program to First Nations students living on-reserve;
- The School Board and the schools at which the taxpayer teaches are located off-reserve; and
- The taxpayer is registered as an Indian under the Indian Act, but lives off-reserve.
- The taxpayer went to a bank branch located in a major mall located on a reserve (there are no schools on this particular reserve) and invested some of her employment income in a banker’s acceptance. The taxpayer has received full payment on the banker’s acceptance.

QUESTION 3 – 25 Marks

Within the area covered by Treaty 8, a proponent has proposed an oil & gas development that would be located near a reserve. After a long series of negotiations in which your corporate commercial partner acted on behalf of the band, the proponent and the band council concluded a benefits agreement. The benefits agreement provides for a significant cash payment that will be placed into a trust fund. The trust fund will be managed by a major bank. There will be three trustees of the trust: a hereditary chief, who lives on reserve; a band councilor selected by the band council, who also lives on reserve; and the bank, who will be represented by a senior employee in their aboriginal services division (who will not live on reserve and will not be a status Indian person). The trustees will meet on reserve three times a year. The income in the trust is expected to be paid out half to the band, to be used for band priorities as determined by the band council from time-to-time, and half to band members. The elected band leaders are quite excited about the benefits agreement because they see it as an opportunity to provide some relief to the housing crisis on the reserve.

A band member has been hired to administer the benefits agreement, including the implementation and administration of the trust, overseeing the distribution of funds to the band and its members annually, and helping plan how the band will spend its share of the annual income of the trust. The agreement administrator does not reside on reserve. Because of the remote location of the reserve, the agreement administrator will work one day a week on reserve and four days a week from her home in Northern Alberta Small Town. Both the band and the agreement administrator have accounts at a bank located off reserve in Northern Alberta Small Town.

The new chief administrative officer (“CAO”) of the band has come to you for some advice related to implementing the benefits agreement.

1. She believes that the trust will be exempt because of the band’s inherent sovereignty, the terms of Treaty 8, and the *Indian Act*, but asks whether anything specific has to be done to ensure that the trust is tax exempt. What do you advise her?

2. The CAO wants you to confirm that the agreement administrator will be exempt from income tax on her salary from the band for same reasons. What do you tell her?

QUESTION 4 - 10 Points

You are a Tax Court of Canada judge hearing an appeal by Mr. A of his income tax assessment. Mr. A is a fisherman. He is the member of the Mid-Coast Band. Mr. A does not live on reserve. His boat is kept at the Key Marina in Mid-Coast City, where he lives, but he says he used to keep his boat at a dock at the reserve until the dock became unusable (the band has applied for funds to replace the dock). Most other fishermen who live on reserve also keep their boats in Mid-Coast City, but a few tie their boats to buoys just offshore of the reserve. Mr. A fishes pursuant to a fishing licence issued in the band's name; the band has provided many of its band members, including Mr. A, a specific quota further to that licence. The band does not buy the fish from Mr. A or act as an intermediary in selling the fish to third parties; each fisherman is required to enter into his or her own arrangements with third parties. The band has put in place a training program for band members to learn how to fish, and Mr. A sometimes hires help on his boat through that program. Mr. A keeps a portion of his catch for his family and sells the remainder to the Fishery Revival Company. The Fishery Revival Company is 49% owned by the tribal council, of which the Mid-Central Coast Band is a member; it is 51% owned and is managed by non-Indigenous persons. Mr. A banks at a bank branch that is located on reserve. Mr. A's bookkeeper is located in Mid-Coast Town. Mr. A has occasionally exceeded his quota but has not been fined or otherwise penalized for doing so. The band recently commissioned a report from an anthropologist that reaches the conclusion that, prior to contact with European explorers, the Mid-Central Coast Band was engaged in extensive trading of fish with other Indigenous peoples up and down the coast.

Mr. A filed his tax returns on the basis that he was exempt from income tax on his fishing income. The Canada Revenue Agency issued a notice of assessment requiring him to pay tax on his fishing income. Mr. A appealed, unsuccessfully, to the Canada Revenue Agency Appeals Division, and has now appealed to the Tax Court of Canada (the appeal before is de novo – you can ignore the reasons given and decision made by the appeals division of the Canada Revenue Agency).

You must decide whether to allow the appeal (because his income from his fishing operations was exempt from income tax) or dismiss the appeal (because his income from his fishing operations was taxable).

QUESTION 5 – 10 Marks

Ms C and Mr. D are members of the Lakes First Nation, and reside on the band's Small Lake Reserve. Further to a grant from the Lakes First Nation, Ms C started making canoes and Mr. D started a retail operation to sell them. The canoes are based on classic designs, but have been modernized to be light yet durable. The band granted Ms C a licence to operate a manufacturing business on reserve, and Mr. D a licence to operate a canoe retail store on the reserve. Neither have incorporated, and both operate instead as sole proprietors.

Ms C believes that her exemption from tax on the fact she sells her canoes to a status person on reserve means that she is not required to collect Manitoba sales tax or GST on her sale of canoes to Mr. D. The CRA has audited her and has assessed for the GST (5%) on all sales of her canoes to Mr. D.

Mr. D sells to both members and non-members of the band. Mr. D does not collect GST or Manitoba sales tax from persons he knows to be status Indian, but is registered for both GST and Manitoba sales tax and remits the GST and provincial sales tax that he does collect. The CRA has audited him and assessed him for the GST (5%) on all the sales of canoes that he had not collected tax on.

Ms C and Mr. D have each asked you whether there is a viable argument that they have been improperly assessed.

QUESTION 6 – 10 points

The Central Nation, a nation with a comprehensive claim agreement that includes self-government (like Tlicho Government, Nisga'a Nation, Tsawwassen First Nation, Maa-Nulth First Nations, etc.), is negotiating a benefits agreement with a natural gas pipeline company, We'll Get It Built Ltd. The geography of the area in which Central Nation is located is such that it is uneconomical to go around the settlement lands of the Central Nation; We'll Get it Built Ltd. would like to build the pipeline over the settlement lands. We'll Get It Built Ltd. is 100% non-Indigenous owned but wishes to build the pipeline in partnership with affected bands. The Central Nation chief administrator has come to you for advice on the options for structuring a business venture with We'll Get it Built Ltd. to build the pipeline. The administrator is also hoping to derive tax revenues from the project. What advice do you give the administrator?

END OF EXAMINATION