

Write Your Exam Code Here: _____

Return this exam question paper to your invigilator at the end of the exam before you leave the classroom.

**THIS EXAMINATION CONSISTS OF 4 PAGES (INCLUDING COVER)
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER**

**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

FINAL EXAMINATION - DECEMBER 2019

**LAW 201
Federalism**

**Section 003
Professors Asha Kaushal**

TOTAL MARKS: 100

**TIME ALLOWED: 1 HOUR
and 15 minutes reading time**

- NOTE:
1. This is an open book examination.
 2. You have 15 MINUTES of reading time, in addition to the 1 HOUR allowed for the exam. You must not start writing in your exam booklets or typing on your computer during this time but you may make notes on a piece of paper that should not be handed in.
 3. Full citation of cases is not necessary. You may refer to cases in short form (*e.g., Morgentaler*).
 4. This examination is designed to test material covered in this course – both assigned readings and lecture materials. Only refer to materials covered in course materials or lectures.
 5. This exam is “fail-safe”, which means that this exam mark will only count for 25% of your final grade if it would increase your final grade in the course.
 6. The facts and scenarios in this exam are fictional. No knowledge of actual events or legislation is required to answer the question. If you need to make assumptions to answer the question, please indicate what those assumptions are and what, if anything, follows from them.
 7. Good luck and happy holidays!

THIS EXAMINATION CONSISTS OF 2 QUESTIONS SET OUT ON PAGE 4.

Electronic commerce or “e-commerce” (buying and selling goods and services through the internet) has grown rapidly in the past two decades. A 2014 report by Ottawa-based think tank, National Policy Options, found that in the previous year there had been more than 10 million e-commerce transactions made by Canadians, 25% over the previous year’s volume, with further growth projected. The report further found that nearly 60% of the e-commerce transactions of Canadian companies are local transactions, buying and selling goods and services within one province.

Governments have tried to keep up with the legal and economic issues arising from this growth. In 2014 the British Columbia government passed the *Electronic Commerce Act (ECA)*. The preamble of the *ECA* states:

Whereas electronic commerce is an important engine for the economic growth and development of British Columbia which ought to be facilitated in all of its aspects;

And whereas it is desirable for individuals and corporations engaged in electronic commerce to have confidence in the validity and enforceability of electronic contracts;

And whereas British Columbians have an interest in the protection of their personal information.

E-commerce businesses had lobbied the BC government for this legislation, which cleared up some legal uncertainties concerning the form and validity of contracts concluded electronically, especially in situations where the contract was, prior to e-commerce, required to be “signed” and “in writing.”

At the same time, the collection and use of peoples’ personal information in the course of online transactions has become a major source of concerns for consumers. BC’s Minister of Corporate and Consumer Affairs (MCCA) was lobbied to include substantial privacy protection provisions in the *ECA*, but declined to do so. She opted instead for an approach in the *ECA* that balances the facilitation of e-commerce with the need for limited privacy protections for consumers. The Act requires all e-commerce companies operating in British Columbia to report to the MCCA any breaches of their customers’ personal data occurring in the course of transactions with their company. The Minister stated in the legislature that she was confident that the reporting requirement, together with existing *Criminal Code* provisions, such as those prohibiting fraud, adequately address the misuse of personal information collected during commercial transactions.

In 2015, the Canadian media reported on several personal data breaches by Canadian companies, including one by British Columbia e-commerce corporation, Glamazon. The Glamazon breach involved the accidental disclosure of a customer list with over 2,000 names, addresses and credit card numbers.

In 2017 Canada’s federal Parliament enacted the *Privacy in Electronic Transactions Act (PETA)*. The *PETA* was passed to bring Canada into compliance with the European Union’s Directive on Data Protection which states that European Union countries cannot trade “personal data” (defined

as “information relating to an identified or identifiable natural person”) with countries that do not ensure an adequate level of privacy protection in relation to commercial transactions.

The *PETA* was modeled in key respects on legislation adopted in a number of European Union countries. Those countries have reported significant decreases in breaches of personal data in the years following enactment, as well as increased consumer confidence in e-commerce. When the Bill creating the *PETA* was introduced in Parliament, the Minister of Industry stated:

“The Act was developed in response to a very real and pressing need. Canadians have told us in clear terms that they want their personal data protected no matter where it goes, no matter who uses it, trades it, or holds it. Business wants a level playing field, with competitors bound by the same rules. The intent of this bill is to regulate the commercial use of personal information.”

The relevant provisions of the *PETA* state as follows:

s. 2 (2) “commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character.

s. 2 (3) “personal data” means information relating to an identified or identifiable natural person.

s. 4 (1) This act applies to every corporation in respect of personal data that the corporation collects, uses or discloses in the course of commercial activities.

s. 5 Corporations shall implement policies and practices to give effect to privacy principles including

- a. Implementing procedures to protect personal information;**
- b. Establishing procedures to receive and respond to complaints and inquiries; and**
- c. Training staff and communicating to staff about the corporation’s policies and practices.**

The *PETA* created the federal Privacy Regulatory Agency (PRA) to ensure that the privacy objectives of the *PETA* are met. The PRA will assist corporations in developing the policies and procedures required by s. 5. People who believe their personal data has been misused can make complaints to the PRA. The *PETA* requires corporations to participate in an investigation conducted by the PRA to follow up on any complaints. The PRA can also require any corporation to submit to a privacy audit, that is, a process during which the PRA reviews a corporation’s privacy policies to ensure that they comply with the *PETA*. The *PETA* includes a provincial opt-out clause:

s. 26 The Minister of Industry may exempt a corporation from the application of the PETA with respect to the collection, use or disclosure of personal data that occurs within a province that has passed legislation deemed to be substantially similar to the PETA.

At the time the *PETA* was introduced, no province other than Quebec had comprehensive privacy legislation governing the private sector. Since its enactment, Alberta and Ontario have also enacted similar laws. Pursuant to s. 26, the Minister of Industry has exempted from the application of the *PETA* intra-provincial personal data practices and transactions in these three provinces. However, the premiers of Alberta and Quebec have complained publicly in recent election campaigns about the “overreaching” of the federal government into provincial economic jurisdiction through the *PETA*.

The federal government wants to clear up any confusion about the constitutionality of *PETA*. You work as an articling student for the federal Department of Justice. In preparation for submitting a reference question to the Supreme Court of Canada, your supervising lawyer has divided up the legal issues among the Department’s articling students. She has asked you to answer the following questions:

QUESTION 1

70 Marks

Is the federal legislation as a whole valid under the federal government’s trade and commerce power? Do not discuss other heads of power or the ancillary doctrine.

QUESTION 2

30 Marks

Is there a persuasive argument that the federal paramountcy doctrine applies in respect of the *PETA* and the *ECA* in this case?

END OF EXAMINATION