

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

FINAL EXAMINATION – DECEMBER 2020

LAW 352.001
Aboriginal Peoples and Canadian Law

Professor Gordon Christie

EXAM PASSWORD: VMy9xY
RESUME CODE: ABB21C

TOTAL MARKS: 100

(8:50 AM PST) **PREPARATION TIME ALLOWED: 10 MINUTES**

(9:00 AM PST) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 3 HOURS**

8:50-9:00 AM Preparation Time (Exam writing not permitted) – This time is given to students to download/print your exam questions once the exam has been made available online on Canvas, to read the Exam Password on this exam coversheet, to enter the Exam Password for the exam in Exemplify, and to progress in Exemplify until you see the **STOP SIGN**, where you will **WAIT until 9:00 AM. DO NOT proceed past the STOP SIGN. DO NOT begin typing your exam answers in Exemplify until 9:00 AM!**

9:00 AM Exam Writing Time – At 9:00 AM, you may proceed past the **STOP SIGN** in Exemplify and begin typing your exam answers. Students are required to calculate and monitor their own time for writing exams. All exam answer uploads will be monitored to ensure that typing of answers only occurred during the allotted Exam Writing Time.

This is an open book examination, meaning that you can use all materials for the course (readings and powerpoints), and your own notes.

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. Do not email your professor or anyone else about this while the exam is in progress.

ACADEMIC INTEGRITY

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. Students typing exam answers before or after the allocated exam writing time may receive a grade penalty.

CONFIDENTIALITY REGULATIONS – READ CAREFULLY

As this exam is being written off-campus and is unsupervised, any communication whatsoever (including, but not limited to in person, telephone, e-mail, text, social media, etc.) concerning the contents of this examination with anyone (other than the Student Services staff of the Allard School of Law) is strictly prohibited.

In the event any information comes to your attention regarding a breach of these regulations (by others, or inadvertently by you), please immediately contact Student Academic Services (studentservices@allard.ubc.ca) and make full disclosure.

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What Do I Do If:

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- **I'm experiencing technical difficulties DURING THE WRITING of the exam**

If you experience technical difficulties with Exemplify at the very beginning or during an exam, you may attempt to solve your problem/reboot your computer **BY YOURSELF**. You are **STRONGLY** encouraged to spend **NO MORE THAN 5 minutes** attempting to do so. You will **NOT BE GIVEN ANY EXTRA TIME** to complete the exam. **If your attempt to solve the problem is unsuccessful**, or if you choose not to make such an attempt, you **MUST** immediately **begin hand-writing** your exam answers with pen on lined paper. **You may NOT type your exam answer in word-processing software.**

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You must also upload to Canvas your hand-written exam answers into the "Exam Answer File Upload (Word Processor or Hand-written ONLY)" folder. Scan or take a picture of each page (.jpg) of your exam and put them into one folder to upload.

Your answer file should be named, and the coversheet of your answers should be titled with:
Your Exam Code, Course Number, Name of Course, and Instructor Name
i.e., **9999 LAW 100.001 Law of Exam Taking - Galileo**

- **I'm experiencing technical difficulties EXITING and UPLOADING the exam**

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END OF COVER PAGES

Answer 5 (**five**) of the following questions. Only the first five answers will be graded, so if you end up answering more than five ensure that the five you wish graded are the first in order, or that you clearly indicate which answers you do not want graded. The questions are grouped into three categories, but you can choose any 5 from the entire list of 9 questions.

Category 1: Law-focused questions

1. In *Makivik Corporation v. Canada (Environment and Climate Change)*, 2019 FC 1297, the Federal Court notes that “Makivik submits that this case really is not about polar bears, nor is it about the duty to consult. It submits that this case is about the implementation of Inuit treaty rights under NILCA [Nunavik Inuit Land Claims Agreement].” How did the Federal Court respond to these fundamental claims by Makivik Corporation? Do you think this response was satisfactory? Whatever your answer, be certain to fully defend it.
2. Imagine that a First Nation has enacted an *Election Code* that restricts those who can run for Chief to those individuals who are recognized hereditary chiefs within the traditional governance system of the First Nation. While some in the community were surprised when the community election code was accepted by the Minister of Indigenous Services Canada, nevertheless it has been used in this First Nation’s most recent election. What legal challenges do you anticipate such a code might face? How do you expect such challenges might play out? Provide as much detail as possible in spelling out possible legal challenges and resolutions.
3. In discussing *An Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24), Professor Turpel-Lafond noted at several points that the language in this *Act* has shifted from what we see in all previous federal legislation. She specifically noted these sorts of provisions:

18 (1) The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.

20 (1) If an Indigenous group, community or people intends to exercise its legislative authority in relation to child and family services, an Indigenous governing body acting on behalf of that Indigenous group, community or people may give notice of that intention to the Minister and the government of each province in which the Indigenous group, community or people is located.

21 (1) A law, as amended from time to time, of an Indigenous group, community or people [with a coordination agreement with provincial and federal governments,

or that tried to obtain such an agreement] also has, during the period that the law is in force, the force of law as federal law.

22 (1) If there is a conflict or inconsistency between a provision respecting child and family services that is in a law of an Indigenous group, community or people and a provision respecting child and family services — other than any of sections 10 to 15 of this *Act* and the provisions of the *Canadian Human Rights Act* — that is in a federal Act or regulation, the provision that is in the law of the Indigenous group, community or people prevails to the extent of the conflict or inconsistency.

What strike you as the key differences in the language contained in these sections of the new *Act* as compared to what is common in previous federal legislation that intersects with Indigenous peoples? What, essentially, is imagined will follow from these sorts of provisions? What fundamental challenges do you expect will unfold as this legislation is implemented?

Category 2: Questions focused on comparing and analyzing law

4. Why is it that if legislation can be challenged once it is *operational* on the basis that it may not abide by the requirements under the doctrine of duties to consult, this legislation can be *generated* without any requirement that potentially-affected Indigenous peoples be consulted? Explain as best you can how all this works in Canadian law. Do you see any problems in how the Supreme Court of Canada has approached this issue? If so, what are they and how do you think they might better have been addressed? If you see no serious problems in how the SCC has dealt with this issue, explain why you think this is so.
5. In *Guerin v The Queen*, [1984] 2 SCR 335, the SCC held that:

The principle of discovery which justified these claims [European claims to sovereignty] gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected.

How does this play out in contemporary Canadian jurisprudence on Aboriginal rights? How do these sorts of statements fit with the UN *Declaration on the Rights of Indigenous Peoples*? Be specific and focused in pointing out the nature of the possible relationship. If you find that the fit is not good in certain respects, would the current BC legislation, the

Declaration on the Rights of Indigenous Peoples Act (SBC 2019, c 44) require that the legal position adopted by the Supreme Court must give way? Explain.

6. In *Delgamuukw v British Columbia*, (1997) 3 SCR 1010, Lamar C.J. noted that:

As I explain below, the Court has held that s. 91(24) protects a “core” of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

It follows ... that this core falls within the scope of federal jurisdiction over Indians. That core ... encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1).

What has the SCC subsequently decided about the relationship between Aboriginal rights protected under s. 35 and the core of exclusive federal jurisdiction under s. 91(24)? Do you agree with the new direction the Court has moved toward? What reasons did they offer for going in this new direction? Do you agree with the reasons they offered for taking this new path? Be certain to explain and defend your answers.

Category 3: Critical Analysis

7. How would you characterize the ‘polarizing debates’ that Tully and Borrows argue pose such a barrier to making progress in relation to ‘transformative reconciliation’? Where might you fall along the spectrum of positions that make up these polarizing debates? How do you view the positions of others who may fall into very different positions from your own? Are they mistaken, or are they just expressing their opinions (where you would be asserting that no one is right or wrong on these matters)? Be certain to defend your answers.
8. King and Pasternak note that on the prairies some treaty First Nations are worried about the way it seems the current federal initiative – the unfolding of a ‘Recognition and Implementation of Rights Framework’ – domesticates historic treaties. How could the sorts of initiatives that fall under this framework be seen to be ‘domesticating’ (that is, what does this term mean in this context, and how does it seem to describe what happens under the framework)? How, do you expect, treaty First Nations on the prairies would like to see the federal government position change? What barriers do you envision are in the way of the federal government making the changes you expect treaty First Nations would want to see happen? Be certain to defend your answers.

9. Imagine that the province of British Columbia is about to issue a tree farm licence (TFL) to Canadian Wood Products Ltd (Canwood) to an area in northcentral British Columbia. Under the licence Canwood would have the exclusive right to harvest timber in the specified tenure parcel. Imagine as well that this area is subject to a claim for Aboriginal title by a regional Dene people, and that they assert under their inherent Indigenous title not just property rights to this area but also jurisdictional authority. Recently, members of this community have been blocking road access into the area to be logged under the TFL. Canwood has obtained an injunction, and the RCMP have moved in to remove the individuals blocking the roads and their barricades. Under Canadian law, remedies available to the Dene are too weak to prevent the eventual logging of the area covered by the TFL. How would you argue this situation should be understood? What kind of theory or model of law should be used to realistically make sense of what is happening? What law applies? What law should apply? How do you imagine this sort of situation being justly and fairly resolved?

END OF EXAMINATION