

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

FINAL EXAMINATION – APRIL 2021

LAW 291.002
Aboriginal and Treaty Rights

Johnny Mack

EXAM PASSWORD: 34Q7He
RESUME CODE: B1200A

TOTAL MARKS: 100

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

(9:00 AM PDT) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 2 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. Candidates may use any materials distributed in 291 or which they have produced themselves. Library and text books are not permitted.

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.

A breach of these regulations may constitute student misconduct, and you may be subject to penalty or discipline under UBC's Academic Misconduct policies.

What Do I Do If:

- **I cannot access the exam questions on Canvas**

If you experience technical difficulties accessing the exam questions on Canvas, email studentservices@allard.ubc.ca and the exam questions will be emailed to you. Please provide your phone number when emailing Student Services.

- **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.**

When you have finished writing the exam, you must upload the exam answers that you completed in Exemplify (if you are prompted for a Resume Code, it is on the coversheet of the exam questions). Email Bernie Flinn, flinn@allard.ubc.ca, for help with this. Please provide your phone number in the email. Bernie or another IT Support staff person will then help you to upload any answers that you typed in Exemplify.

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**

If you experience any difficulty exiting and uploading your Exemplify exam answers, you must wait until the allocated time period specified on the coversheet of the exam has ended, then email Bernie Flinn, flinn@allard.ubc.ca, and he or another IT Support staff person will help you to upload your Exemplify exam file. Please provide your phone number in the email.

If you have approved accommodations to type your answers using Word Processing Software, and experience difficulties uploading your exam answer file to Canvas, email your exam answer file to studentservices@allard.ubc.ca.

- **I fall ill in the middle of an exam, or am otherwise interrupted such that I'm unable to continue writing my exam**

Please stop writing, note the time that you stopped, and email studentservices@allard.ubc.ca immediately to notify them and discuss options. Please provide your phone number when emailing Student Services.

EXAM NOTES:

1. This examination is **OPEN BOOK**. Candidates may use any materials distributed in 291 or which they have produced themselves. Library and text books are not permitted.
 2. Do not concern yourself with statutes, cases or other sources not covered in the course materials.
 3. State clearly any facts you assume in answering the questions. Where appropriate, you should describe the arguments that might be made on both sides of an issue, and give some sense of the relative strengths of the arguments.
 4. Full citations of cases are not necessary. You may refer to cases in short form.
-

ABORIGINAL AND TREATY RIGHTS:
THIS EXAM CONSISTS OF 2 QUESTIONS

Please answer *both* questions below and divide your time appropriately:

Question 1 (60 marks—72 minutes)

On December 1, 2020, British Columbia granted a tree farming licence (TFL) to the Kanfor Timber Corporation. The tree farming licence includes Atleeoh Grove. The Sterling First Nation (SFN) consider Atleeoh Grove an important and nourishing cultural place. Atleeoh Grove is the traditional territory of the Tatuus First Nation (TFN) and is home to some of the largest old growth red cedar trees still standing in British Columbia. The TFN oppose logging in Atleeoh Grove, but they cannot afford to finance an Aboriginal Rights claim. They are currently in treaty negotiations with British Columbia, and the Province's policy with respect to Aboriginal rights claims is to "negotiate or litigate." A First Nation cannot do both. The SFN, on the other hand, are not in treaty negotiations and they are considering whether or not to advance an Aboriginal Rights claim to Atleeoh Grove, with the aim of halting logging and protecting the old growth forests in the area.

The SFN and the TFN are traditional allies, and have a long history of intermarriage, trading and sharing resources going back to time immemorial. In fact, George Cook, the first European to meet the TFN in 1815 wrote in his journal that "Relations between the Juno and Kawin tribes are so affable that we Initially thought they were the same Nation". The SFN's territory is on the Fraser River and they had access to a bountiful salmon fishery and the TFN's territory is inland, away from the Fraser River but home to the most monumental cedars in the world. So when the SFN needed a large cedar tree to construct a house post or make a large canoe, they would trade salmon for the TFN's cedar. One of these house posts is in the Field Museum in Chicago,

and is recorded as being made to honour the coming of age of the SFN Chief's first-born daughter in 1821. SFN elder and knowledge keeper, Ruth Stanley reports that the house pole was given to honour the birth of the first-born son seven years earlier.

Trading monumental cedar from Atleeh Grove stopped in 1931 when Canada's *Indian Act* was amended to make the Potlach and all forms of Indigenous ceremony illegal. Cedar was still central to the SFN, but they now used it to make baskets, curtains and clothing. The sacred crests, rites and histories that were previously carved into the house posts and painted onto their canoes would, after 1931, be woven into cedar baskets, curtains and hats. The SFN did harvest cedar bark from forests in their own territory, but these forests soon gave way to urban development. The SFN hosted a secret potlach in 1940 and invited the TFN. At the potlach, the SFN put their tattered, worn out crests on display. A particularly powerful crest was said to have been given to an ancestral SFN matriarch directly from the thunderbird's serpent. The SFN gifted this powerful crest to the TFN. To reciprocate, the TFN promised that the SFN could harvest as much cedar from their territory as needed to keep their crests alive. Ruth Stanley attended this potlach and recalls that "the Tatuus Chief reminded us that the Atleeh Grove cedars had long been sisters to the Sterling people and that he would be honoured to have us continue the respectful relationship. Following the secret potlach, the SFN have come to Atleeh Grove every fall when the cedar bark is ready for harvest. The SFN are now internationally recognized to produce some of the best weavers in the world and they source their cedar bark exclusively from Atleeh Grove old growth trees. In 2019, Martha Stanley, an SFN master weaver, sold three hats to a Dutch art collector for \$200,000. Martha's case is exceptional, and most SFN weavers are only supplement their income with their craft. In 1991s, the SFN established an encampment in Atleeh Grove for their people to come to in the winter months to make sure the forest is in good health and perform winter ceremony.

An archeologist surveying the area for Kanfor noted that the SFN have a unique method of harvesting cedar bark that allows for remarkably quick regeneration. Further, he noted that "there is scarcely a red cedar in Atleeh Grove to be found unmarked by Sterling First Nation."

British Columbia consulted with the TFN prior to issuing the Tree Farming Licence to Kanfor. The TFN initially requested that Atleeh Grove be removed from the TFL. Kanfor insisted that without Atleeh Grove's pristine forests, the TFL would not be economically viable. On November 3, 2020 the TFN signed on to an impact benefit agreement and are set to receive two million dollars over three years to allow Kanfor to proceed as planned. They intend to use the money to support treaty negotiations.

British Columbia sent the SFN notice of their intention to permit logging in Atleeh Grove in September, 2020. The SFN Chief responded, writing that "The SFN are forcefully opposed to any logging of old growth in the Atleeh area." Kanfor did not respond. In January 5, 2021, after hearing news of the TFN's impact benefit agreement, the SFN held a protest outside Kanfor's main office in Vancouver. Kanfor is now willing to meet with the SFN to protect some, but not all of the old growth. The SFN Chief says they are obligated to protect all the old growth that remains in Atleeh Grove.

Directions:

You are an articulated student at an Aboriginal Rights law firm that is representing the Sterling First Nation. Your principle has asked you to provide her with a memo discussing the following:

- a. Assess how likely it is that the SFN can prove site specific rights to Atleeh Grove?
- b. Presuming that proof will not be made out in the immediate future, can Kanfor cut Atleeh Grove old growth without breaching any of the Crown's pre-proof consultation obligations?

Question 2 (40 marks—48 minutes)

Answer one of the following two questions. Explain and defend your answer with reference to materials covered in our class.

1. In *Van der Peet*, Lamer J. characterizes Aboriginal rights in the following way:

17. ... [While] Section 35(1), it is true, recognizes and affirms existing aboriginal rights, ... it must not be forgotten that the rights it recognizes and affirms are aboriginal.

18. In the liberal enlightenment view, reflected ... indirectly ... in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected:

Why might the court frame Aboriginal rights in this fashion? Do you believe that this is an appropriate interpretation of s.35.1?

-OR-

2. In reference to the constitutional entrenchment of Aboriginal rights, Glen Coulthard states:

"... instead of ushering in an era of peaceful coexistence grounded on the ideal of *reciprocity* or *mutual* recognition, the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of

colonialist, racist, patriarchal state power that Indigenous people's demands for recognition have historically sought to transcend."

Why do you think Coulthard might characterize Aboriginal rights in this way? Do you agree or disagree?

END OF EXAMINATION