

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

FINAL EXAMINATION – APRIL 2021

LAW 291.003
Aboriginal and Treaty Rights

Robert Clifford

EXAM PASSWORD: 78wDp9
RESUME CODE: B121B4

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.

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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.

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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**

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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.
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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 potlatch 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*, the SCC articulates the purpose of s.35 as follows:

what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.

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

-OR-

2. With reference in large part to the jurisprudence flowing from s.35 and the constitutional recognition of existing aboriginal and treaty rights, Glen Coulthard writes:

"...I argue that 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."

Drawing on your understanding of s.35 case law, our readings and discussions in class, has s.35 been a positive development for aboriginal rights or has it worked to reproduce the dominance of the state? Either way, defend your answer as fully as possible.

END OF EXAMINATION