

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

FINAL EXAMINATION – APRIL 2021

LAW 291.004
Aboriginal and Treaty Rights

Professor Darlene Johnston

EXAM PASSWORD: hWbs82
RESUME CODE: B12357

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, meaning that you can refer to all course materials, including assigned readings, class PowerPoints, and lecture 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.

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**

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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.

INFORMATION AND INSTRUCTIONS

1. This exam counts for 100% of your final grade for this course.
2. This exam consists of 2 questions. Each question is worth 50 marks out of the total of 100 marks. It is recommended that you spend 60 minutes answering each question.
3. For case citations you do not need to use the full case name. It will suffice to use the name of the defendant/claimant, e.g., Delgamuukw. You do not need to provide references to paragraph numbers.

Question 1 Marks: 50

Recommended Time: 60 minutes

The Alpha First Nation (AFN) is located in the Rocky Mountains in southeastern British Columbia. Their traditional territory is more than 60,000 square kilometers in extent. At the heart of their territory is a mountain which towers above all of the other mountains. According to AFN oral tradition, one of their ancestors was transformed into this mountain during the time when the world was new. They believe that this ancestor protects their people and their territory. In reciprocity, the AFN understands that they have an obligation to protect the mountain. Out of reverence for the spirit of the mountain, which they consider sacred, the AFN avoid living and hunting on the mountain. However, they conduct annual ceremonies at the base of the mountain's western slope where their youth go on vision quests.

There was a time, when fur traders first came into their territory around 1820, that the AFN began hunting big game on the sacred mountain. This coincided with a catastrophic smallpox epidemic that reduced their population from over 1,000 to fewer than 200 members. It would take more than 100 years for their population to return to its former size. The AFN attributed the epidemic to their failure to honour their relationship with the sacred mountain and rededicated themselves to its protection from encroachments.

The AFN has never signed a land surrender treaty with the Crown. In 1995, they entered into the British Columbia Treaty Commission process hoping to gain recognition of their ownership of their traditional territory. When they discovered that they would only be able to retain 5 per cent of their lands and that title to the other 95 per cent would be extinguished, they walked away from the treaty negotiations.

Recently, the government of British Columbia has granted fee simple title for the sacred mountain to a multinational corporation, Ice Cap Enterprises, that plans to develop an all-season ski resort on the mountain's western slope. The operation of the ski resort would bring much needed tourism revenues and jobs to this economically depressed region of the province. British Columbia did not consult with the AFN prior to making this grant to Ice Cap Enterprises. The AFN found out about the grant when they encountered surveyors while their elders were conducting ceremonies at the base of the

mountain. The AFN wrote to the BC government objecting to the grant and demanding that it be cancelled. At a meeting with the Minister of Lands and Forests, the AFN expressed their concerns over the proposed development. They explained the importance of their relationship with the sacred mountain and their fear that if they failed to protect it great harm would come to their people. The AFN also pointed out that the proposed route for an access road to the development would destroy the location where

vision quests are conducted. The Minister rudely dismissed the AFN's concerns as superstitions not worth addressing. He did acknowledge that there were some environmental concerns with the development and indicated that these would be considered during an environmental assessment that was required before the development could be approved. The Minister invited the AFN to participate in the environmental assessment and offered them funding to do so. The AFN has refused the Minister's offer because they aren't willing to participate in a process that will be dominated by a western technical approach and that will not respect their own laws and spirituality. The AFN proposed to the Minister that they would conduct their own assessment based on evidence from elders and knowledge keepers. However, the Minister has refused to provide funding for an AFN assessment.

Imagine that you are an articling student at a Vancouver law firm that represents the AFN. They are seeking advice on how to stop the development on their sacred mountain and how to protect their spiritual practices. Your principal has asked you to write a memorandum discussing the strengths and weaknesses of potential AFN claims based on the assertion of Aboriginal rights, Aboriginal title and the duty to consult. If you need more information to address a particular issue raised by the facts provided, indicate what type of information is required and why it matters to your analysis.

Question 2 Marks: 50

Recommended Time: 60 minutes

In the *Mikisew* (2005) decision, Justice Binnie describes the purpose of s.35(1) in the following terms: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions [para.1]." Trace how the concept of reconciliation has factored into the justification analysis first developed in the *Sparrow* decision and revised by the *Gladstone* decision. Further, examine how the concept of reconciliation operates in the *Haida* decision. Finally, provide your opinion on the extent to which the objective of reconciliation has worked to protect the Aboriginal and treaty rights which are recognized and affirmed in s.35(1).

END OF EXAMINATION