

THIS EXAMINATION CONSISTS OF **FIVE PAGES**
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 291
ABORIGINAL AND TREATY RIGHTS

Section 2

TOTAL MARKS: 100

TIME ALLOWED: 2 HOURS
and 15 minutes including reading time

- NOTE:**
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.

THIS EXAM CONSISTS OF 2 QUESTIONS

Please answer both questions below and divide your time appropriately:

Question 1 (60 marks—72 minutes)

Background: On October 26, 2021, British Columbia granted a mining permit (MP) to the Natural Cole Corporation (NCC). The MP includes lands in Red Elk Valley North. The Salmuth First Nation (SFN) live in Red Elk Valley South, but consider the area covered by the mining permit to be a sacred. Red Elk Valley North has become their most important hunting grounds. Before each hunt, members of the SFN will go to Red Elk Valley to carry out a ritual fast and to conduct their winter ceremonies. Today, the SFN hunt the white tail deer species at Red Elk Valley North. Meat and furs from the hunt are divided amongst the community through kinship groups, as practiced as far back as time of memory. The archaeological record suggests that the SFN have been in Red Elk Valley South more than 8000 years.

In November of 2001 the Red Elk Valley North was recognized within a Harvesting and Trapping Agreement (HTA), supported by both the Provincial and Federal Crown, as being the traditional trapping territory of the Nanahmuth First Nation (NFN). The HTA does not mention the SFN. The NFN have traditionally trapped Lynx throughout their territory, including at Red Elk Valley North. Lynx is prominent throughout NFN culture, appearing in various carvings and crests. The NFN do not generally hunt the white tail deer.

The SFN and NFN are neighbours and historical allies, with intermarriage and trade being common. While the SFN and NFN have many cultural and linguistic similarities, a few sources note some important distinctions. The SFN were generally a hunting people, while the NFN were known for maintaining developing complex trapping technologies and maintaining extensive traplines. George Fraser, a Hudson's Bay fur trader and the first European known to encounter the peoples of Red Elk Valley in 1810 noted as much. Fraser's 1812 journal states:

The Salmut and Nanult [as he called them] are two of the larger tribes in this valley that I might name "Red Elk Valley," because the Indian's name is unpronounceable to a civilized tongue and because of the majestic burgundy coated elk that that I have only encountered there. These two

tribes appear to have developed a cordial relationship which is facilitated by their distinct methods of gathering food. They do not seem to compete with one another. The Salmut rely primarily on the elk, and have masterful hunting techniques. To the foreign eye, it seems as though the elk submit themselves to their obsidian headed arrows. The Nanult, to the contrary, do not hunt the elk, instead draw sustenance from their extensive traplines.

SFN oral history identifies the western red elk as a primary source of food. The Elk was also a source of ceremonial significance. The elk hides were used to make large drums and the antlers incorporated into the ceremonial masks used in winter rituals.

The white tail deer, introduced in 1825 by European sport hunters, brought diseases that significantly reduced the western red elk population. In the late 1830's coal was also found in the region, leading to the development of a number of mining operations, particularly within Red Elk Valley South. These mining operations further impacted the western red elk. Today the western red elk is on the endangered species list, as there is only one small herd left. By 1840 the SFN was no longer able to hunt the western red elk and instead began hunting the white tail deer, using the same techniques and ceremonies previously used with respect to the western red elk. While the white tail deer were originally present in throughout Red Elk Valley, but increased mining activities and the effects of climate change, has meant that the majority of the white tail deer now live in Red Elk Valley North.

The oral histories of both the SFN and the NFN recall their communities being devastated by smallpox in the early contact period. The NFN suffered greater losses and were reduced to 32 people. The SFN were reduced to a population of 120. The two Nations held a potlatch in 1849 to formalize a new relationship within which the SFN promised to protect the NFN's territory and people and the NFN agreed allow the SFN hunters into Red Elk Valley North. Since the 1849 potlatch the SFN has had access to Red Elk Valley North for ceremonial and hunting purposes, and they provide the NFN with a portion of fresh and cured meats from the hunt. The NFN would also provide a number of Lynx pelts to SFN each year in recognition and renewal of the 1849 agreement. Until recently, this reciprocal arrangement helped to maintain strong peaceful relations between SFN and NFN.

The source of recent disagreement relates to the MP issued last October. The NFN supports the MP as it brings in much needed cash and employment opportunities. They have been promised one million dollars over five years, four low level labour jobs and a waste management contract. The Province consulted with the NFN prior to the MP approval, eventually agreeing to place the mine beside rather

than on top of one of an NFN burial site. The Province's Environmental Assessment (EA) also determined that the mine would not have significant impact on the NFN's trapping practices. The EA did not consider the impact on the white tail deer, and the issue was not raised by the NFN. The white tail deer population is strong throughout most of British Columbia. The SFN believe the white tail deer left Red Elk Valley South because of mining activities in the area. The NFN are sympathetic to the SFN's concerns about white tail deer but their current Band Council will not raise the issue with the province as they do not want to jeopardize the economic benefits associated with the MP.

British Columbia also consulted with the SFN prior to issuing the MP, but to a lesser extent. The SFN were notified of the MP application, the location and extent of the proposed mining operations, and were given an opportunity to provide a written statement to the Province for their consideration. The NFN informed the Province of their concerns about the white tail deer. In response the Province denied that the mine would impact the white tail deer population but indicated that take measures to ensure that the population remains healthy by increasing the number of wolf hunting permits in the area. The wolf is the white tail deer's natural predator, but the wolf is a sacred and defining crest of the NFN. No material changes to the MP or mining location were made in issuing approval. The NCC also met with the SFN. In return for support of the project the NCC proposed providing several employment opportunities for SFN members at the mine. The SFN leadership are deeply concerned with climate change generally and are opposed to coal development in principle. They have been unwavering in their opposition to the MP and reject the accommodation measures proposed by the Province and NCC. The SFN would like to launch an Aboriginal Rights claim at Red Elk Valley to stop the mining development in the area and to protect the white tail deer.

Directions:

You are an articulated student at an Aboriginal law firm that is representing the SFN. 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 Aboriginal rights to Red Elk Valley North?
- b. Presuming that proof will not be made out in the immediate future, can NCC begin its mining operations 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.

Question one:

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:

So today it appears, much as it did in Fanon's day, that colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political, and economic framework of the colonial relationship itself.

Drawing on your understanding of s.35 case law, our readings, and discussions in class, to what extent do s.35 rights transform the foundations of the colonial relationship between Indigenous peoples and the state? Either way, defend your answer as fully as possible.

---Or---

Question two:

In reference to the 1760-61 treaties signed with the Mi'kmaq, Lieutenant Governor Belcher proclaimed:

"The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience."

How much protection did this great hedge afford Aboriginal treaty rights holders? Has the recognition and affirmation of Aboriginal Treaty rights under s.35.1 strengthened Aboriginal treaty rights?

END OF EXAM