

THIS EXAMINATION CONSISTS OF 5 PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 291
Aboriginal & Treaty Rights

Section 3
Professor Parkes

TOTAL MARKS: 100

TIME ALLOWED: 2 HOURS PLUS 15 MINUTES READING TIME

NOTE:

1. This examination counts for 100% of your final grade in this course.
2. This is an open book exam. You may have your notes and course materials with you in the examination room.
3. **Read every question carefully.** Be sure you understand what you are being asked to do before you begin your answer.
4. **Be careful to budget your time.** A brilliant answer to one question cannot make up for the failure to answer another question.
5. You may use short forms of case names (e.g., *Oakes*, *Sparrow*).

THIS EXAMINATION CONSISTS OF 2 QUESTIONS

LAW 291, Section 3

MARKS

75 QUESTION 1 (approx. 90 minutes)

On October 26, 2021, British Columbia granted a mining permit to the Natural Coal Corporation. The mining permit includes lands in Red Elk Valley North. The Salmuth First Nation (SFN) live in Red Elk Valley South, but they consider the area covered by the mining permit to be a sacred. Red Elk Valley North has become the SFN's 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 in 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 for more than 8000 years.

In November of 2001 Red Elk Valley North was recognized within a Harvesting and Trapping Agreement (HTA) entered into by the Provincial and Federal Crown and the Nanahmuth First Nation (NFN). The HTA recognizes Red Elk Valley North as the traditional trapping territory of the NFN and the agreement does not mention the SFN. The NFN have traditionally trapped Lynx throughout their territory, including in 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 developing complex trapping technologies and maintaining extensive traplines. George Fraser, a Hudson's Bay Company fur trader and the first European known to encounter the peoples of Red Elk Valley in 1810 noted as much. His 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 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. The Nanult, to the contrary, do not hunt the elk, instead they draw sustenance from their extensive traplines.

LAW 291, Section 3

Question 1 continued...

SFN oral history tells that the Red Elk was the primary source of food for the SFN. 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, introduced diseases that significantly reduced the Western Red Elk population. In the late 1830s, 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 Red Elk. Today the Red Elk is on the endangered species list, as there is only one small herd left. By 1850 the SFN was no longer able to hunt the Red Elk and instead began hunting the White Tail Deer, using the same techniques and ceremonies previously used with respect to the Red Elk. While the White Tail Deer were originally present throughout Red Elk Valley, increased mining activities, and later on climate change, has meant that the vast majority of the White Tail Deer population now live solely in NFN territory, 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 to allow the SFN hunters into Red Elk Valley North. A potlatch is a ceremony integral to the laws, governance and spirituality of many First Nations in the territory now called British Columbia, including the SFN and NFN. Since the 1849 potlatch the SFN has had access to Red Elk Valley North for ceremony 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 mining permit issued last October. The NFN supports the mining permit as it sees the mine as bringing much-needed economic benefits and employment opportunities to their community. The Province consulted with the NFN prior to issuing the mining permit, eventually agreeing to place the mine beside, rather than on top of, one of NFN's sacred burial sites. The Province's Environmental Assessment also determined that the mine would not have significant impact on the NFN's trapping practices. The Environmental Assessment did not consider the impact on the White Tail Deer, and the issue was not raised by the NFN in their consultation with the Province.

LAW 291, Section 3

Question 1 continued...

The NFN are sympathetic to the SFN's concerns about White Tail Deer but their current leadership will not raise the issue with the Province as they do not want to jeopardize the economic benefits associated with the proposed mine.

British Columbia also consulted with the SFN prior to issuing the mining permit, but to a much lesser extent. The SFN were notified of the mining permit 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 SFN 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 they would 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 Tailed Deer's natural predator, but the wolf is a sacred animal for the SFN. No material changes to the mining permit application were made in issuing the approval (other than the slight adjustment of location to avoid the NFN burial site). The Natural Coal Corporation also met with the SFN. In return for support of the project the company proposed providing several employment opportunities for SFN members at the mine. The SFN leadership are deeply concerned about climate change generally and are opposed to coal development in principle. They have been unwavering in their opposition to the mining permit and they have rejected the accommodation measures proposed by the Province and Natural Coal Corporation.

Natural Coal Corporation has begun operations to dig its first mine pursuant to the permit. SFN has come to the Aboriginal law firm where you are working as an articling student, indicating their desire to take legal action to stop the mining development in Red Elk Valley and to protect the White Tail Deer. A senior lawyer in the firm has asked you to provide her with a memo discussing the s. 35(1) issues associated with SFN's proposed legal action, including what remedy or remedies they might be able to obtain through the courts. If there is information you think you would need to provide the advice sought, indicate what that information is and say why it would be relevant, but do not depart from the stated facts.

Question 2 begins on the next page.

LAW 291, Section 3

MARKS

25 QUESTION 2: Answer ONE of the following questions (approx. 30 minutes)

- a) In *R v Sparrow*, [1990] 1 SCR 1075, Chief Justice Dickson quoted with approval the following statement by law professor Noel Lyon:

“Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”

To what extent does the case law examined in this course amount to a renunciation of the “old rules of the game”? In particular, to what extent has the Supreme Court of Canada, in interpreting and applying s. 35(1), questioned sovereign claims made by the Crown? Explain your answer with reference to at least three cases considered in this course.

OR

- b) In *Sparrow v Canada*, [1990] 1 SCR 1075, Chief Justice Dickson drew on case law that predated the entrenchment of s. 35(1) for the proposition that “the honour of the Crown is at stake in dealings with aboriginal peoples.” What does it mean to say that the Crown must act honourably in dealings with Indigenous peoples and what, concretely, does this mean for Aboriginal and treaty rights claims? With reference to at least three cases examined in this course, discuss how the Supreme Court of Canada has developed and applied the doctrine of the honour of the Crown.

END OF EXAMINATION