Attachment: Course Outline (4 Pages)

THIS EXAMINATION CONSISTS OF 7 PAGES
PLUS ONE ATTACHMENT THAT CONSISTS OF 4 PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE COPY

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 291
Aboriginal and Treaty Rights

Section 4
Professor Beaton

TOTAL MARKS: 100

TIME ALLOWED: 2 HOURS
AND 20 MINUTES TOTAL (INCLUDING READING TIME)

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NOTE:

1. This is an open book examination. You may refer to any printed or hand-written notes and materials you bring with you, as well as to the Course Outline attached to this Examination.

2. THIS EXAMINATION CONSISTS OF 2 QUESTIONS. Each question has two options: A and B. FOR EACH QUESTION, ANSWER EITHER OPTION A OR B.

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QUESTION 1

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OPTION A

Consider the following hypothetical scenario. British Columbia ("the Province") is considering approving a mining project at a site within a few kilometres of the territory over which the Tsilhqot'in Nation holds Aboriginal title pursuant to the decision of the Supreme Court of Canada ("SCC") in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44. While the proposed mine site itself is outside the territory held under Aboriginal title, environmental assessment of the proposed mining project indicates it may have adverse impacts on the land, water, air, and wildlife both at the mine site itself and within the territory held under Tsilhqot'in Aboriginal title.

The Tsilhqot'in Nation asserts Aboriginal rights over territory that includes the proposed mine site. The Aboriginal rights asserted include the right to manage the wildlife, water, and forests in this territory surrounding and including the mine site ("the Asserted Territory"). The Asserted Territory was not part of the *Tsilhqot'in* litigation and no judicial findings have been made about the existence of Aboriginal rights in the Asserted Territory or about the *prima facie* strength of the Tsilhqot'in Nation's claims in the Asserted Territory. (You can assume that there are no procedural barriers to the Tsilhqot'in Nation asserting Aboriginal rights, including through litigation if the Nation so chooses, over territory that was not part of the Tsilhqot'in Nation litigation.) Assume also that the Tsilhqot'in Nation's asserted Aboriginal rights in the Asserted Territory have not been recognized in any treaty agreement.

In early discussions between with the Tsilhqot'in Nation, the Province has stated: "Available historical evidence indicates that, for at least several decades in the mid-20th century, the Tsilhqot'in people did not occupy the Asserted Territory and did not engage in any sustained activities there. If the Tsilhqot'in Nation or its ancestors ever possessed Aboriginal rights or title in the Asserted Territory, those rights and title have been lost or abandoned. Based on the available evidence, the Province considers the Tsilhqot'in Nation to have weak *prima facie* claims of Aboriginal rights in the Asserted Territory. The Province will fulfill all its obligations to consult the Tsilhqot'in Nation in accordance with available evidence. The Province also looks forward to engaging with the Tsilhqot'in Nation to understand its concerns about potential impacts on the territory over which the Tsilhqot'in Nation holds Aboriginal title."

The Tsilhqot'in Nation has responded, in part: "We are deeply disappointing to hear the Province relying on discredited arguments about the 'loss' or 'abandonment' of Aboriginal rights. The Tsilhqot'in Nation, like other First Nations in the Province, endured a great deal of disruption in the 19th and 20th centuries

QUESTION 1, <u>OPTION A</u> (continued)

through disease, disregard, and mistreatment by colonial and provincial governments. This disruption cannot be used by the Province today to justify stripping us of rights that we have always fought to maintain. We have specifically asked the Province to recognize Tsilhqot'in laws and legal processes for evaluating the viability of the proposed mining project—both within our Aboriginal title lands and the Asserted Territory—and for managing any project activities that might ultimately be authorized."

Imagine you are a lawyer advising the Tsilhqot'in Nation or the Province, and you are asked about the Crown's legal obligations to the Tsilhqot'in Nation if it wishes to move forward with the proposed mining project. (For purposes of this question, "the Province" and "the Crown" are interchangeable; consider them to be one and the same.) Draft a memorandum providing your advice. Address all issues you consider relevant (within the time constraints of the exam, of course), but be sure to include advice in response to the following specific questions:

(i) What are the Province's obligations with respect to the territory over which the Tsilhqot'in Nation holds Aboriginal title?

(ii) In light of the SCC's decision in *Haida Nation v British Columbia*, 2004 SCC 73, what are the Province's legal obligations with respect to the Tsilhqot'in Nation's asserted Aboriginal rights in the Asserted Territory?

(iii) What would you advise regarding the Province's argument that any Tsilhqot'in rights in the Asserted Territory were likely lost or abandoned in the 20th century?

(iv) What would you advise regarding the Tsilhqot'in Nation's request that the Province recognize Tsilhqot'in laws and legal processes in evaluating the viability of the proposed mining project and in managing any activities that might be approved?

Do not worry about formal details of subject line, addressee, citation format, etc. You may deal with these briefly however you see fit, or simply begin directly with the content of your memorandum. Focus on the substance of your memorandum, providing a clear explanation of the Crown's legal obligations, as you understand them. Provide citations to the case law as appropriate—but, again, without worrying about citation format. You may simply cite the case name used in class discussions. Keep in mind that the substance of your answer is more important than simply identifying case names.

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QUESTION 1 (continued)

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OPTION B

Consider the following hypothetical scenario. A First Nation in northeastern British Columbia ("the Province") has a treaty agreement with the Crown, dating to the late 19th century. The treaty text, as recorded by Crown negotiators, includes the guarantee that members of the First Nation

> shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout their traditional territory, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Historical records and oral histories from the area indicate that the First Nation was in contact with European traders from around 1800. By 1850, a thriving Métis community was also well established a short distance from the First Nation's traditional territory. By around 1900, shortly after the treaty agreement between the First Nation and the Crown, the entire region—including the First Nation's traditional territory and the nearby Métis settlement—was under effective Crown control.

The Province is proposing to build a transmission line carrying hydro-electric power across the First Nation's traditional territory covered by the treaty. Over this same territory the First Nation also asserts Aboriginal title, though this assertion has not been litigated or recognized in any treaty agreement. The First Nation argues that its treaty agreement with the Crown did not involve any surrender or limitation of its title over its traditional territory, but simply a recognition by the Crown of its pre-existing hunting, trapping, and fishing rights. The First Nation also argues that it never accepted any treaty term that allowed the Crown unfettered discretion to "take up" land for settlement, mining, lumbering, trading or other purposes. (For purposes of this question, you can assume that the treaty provision quoted above constitutes the entire written text of the treaty agreement, as recorded by the Crown.)

Independent of the First Nation's treaty rights and asserted Aboriginal title, descendants of the Métis settlement claim hunting, fishing, trapping, and timber rights that may be adversely impacted by the proposed transmission line.

Imagine you are legal counsel for the Province or the First Nation or descendants of the Métis. Your client tells you to assume the Province wishes to move forward with the proposed transmission line. (For purposes of this question, "the Province"

QUESTION 1, <u>OPTION B</u> (continued)

and “the Crown” are interchangeable; consider them to be one and the same.) Your client wants your advice on the following questions:

(i) How would a court determine the legally enforceable terms of the treaty provision that was recorded, in the Crown’s written text of the treaty, in the terms quoted above?

(ii) What are the Crown’s legal obligations that might flow from the treaty in this context?

(iii) What are the Crown’s legal obligations that might be triggered by the First Nation’s assertion of Aboriginal title?

(iv) What are the Crown’s legal obligations that might be triggered by the assertion of Aboriginal rights by descendants of the Métis settlement?

How do you advise your client?

Do not worry about formal details of subject line, addressee, citation format, etc. You may deal with these briefly however you see fit, or simply begin directly with the content of your memorandum. Focus on the substance of your memorandum, providing a clear explanation of the Crown’s legal obligations, as you understand them. Provide citations to the case law as appropriate—but, again, without worrying about citation format. You may simply cite the case name used in class discussions. Keep in mind that the substance of your answer is more important than simply identifying case names.

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QUESTION 2

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OPTION A

What role do the specific time frames of European **contact**, effective European **control**, and assertion of Crown **sovereignty** play in the tests for Aboriginal rights and title developed by the Supreme Court of Canada ("SCC") under section 35 of the *Constitution Act, 1982*?

Explain both the doctrinal role of these time frames and how the SCC relates this doctrinal role to "reconciliation". In other words, answer the following questions: How has the SCC characterized reconciliation as a goal of section 35? How, according to the SCC, do the specific time frames noted above contribute to reconciliation through the role they play in the tests for Aboriginal rights and title?

If you wish, evaluate the SCC's characterizations of reconciliation and how the chosen time frames help or hinder reconciliation. That is, you may offer an external critique of the SCC's characterization of reconciliation (for instance, noting aspects that you think work or don't work and why, as well as possibly offering an alternative characterization) and a critique of the SCC's choice of time frames (where, again, "critique" can involve addressing aspects of the doctrine that are either positive or negative, in your assessment).

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QUESTION 2 (continued)

MARKS

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OPTION B

In the legal doctrines developed by the Supreme Court of Canada ("SCC") under section 35 of the *Constitution Act, 1982*, what roles does the "Aboriginal perspective" play in the tests for establishing Aboriginal rights and title and for interpreting treaty provisions? Are these roles consistent across the cases you have read for this course?

How, according to the SCC, are these doctrinal roles for the Aboriginal perspective supposed to contribute to reconciliation?

If you wish, evaluate the SCC's characterizations of reconciliation and how the Court's consideration of the Aboriginal perspective may help or hinder reconciliation. You may offer an external critique of the SCC's characterization of reconciliation (for instance, noting aspects that you think work or don't work and why, as well as possibly offering an alternative characterization) and a critique of the doctrinal roles the SCC assigns to the Aboriginal perspective (where, again, "critique" can involve addressing aspects of the doctrine that are either positive or negative, in your assessment).

END OF EXAMINATION

LAW 291, Section 4 – EXAMINATION ATTACHMENT: COURSE OUTLINE

ABORIGINAL & TREATY RIGHTS

LAW 291.004

JANUARY – APRIL 2022

ADJUNCT PROFESSOR RYAN BEATON

Assigned Readings

PART 1 HISTORICAL AND POLITICAL CONTEXT OF MODERN ABORIGINAL LAW

January 11

Simon v The Queen, [1985] 2 SCR 387: read the full decision

Restoule v Canada (Attorney General), 2018 ONSC 7701: read paras 1-14, 208-214, 321-334

Ontario (Attorney-General) v Bear Island Foundation, 1989 CanLII 4403 (ONCA): read pages 22 to 26 as numbered in the pdf linked to here (starting at the heading "(3) Robinson-Huron Treaty as a sovereign act of extinguishment" and stopping at the heading "E. Extinguishment by other means")

John Borrows, "Indigenous Legal Traditions in Canada", 19 Wash UJL & Pol'y 167 (2005): read pages 174-184 (starting at the heading "I. LEGAL PLURALISM IN CANADA" and stopping at the heading "*A. Civil Law Legal Traditions*")

January 18

Johnson v M'Intosh, 21 US 543 (1823): skip the "syllabus" at pages 543-570 and go straight to the decision of Chief Justice Marshall beginning at page 571; read the full decision

Worcester v Georgia, 31 US 515 (1832): read from the top of page 543 to the bottom of page 548

LAW 291, Section 4 – EXAMINATION ATTACHMENT: COURSE OUTLINE (continued)

St. Catherine's Milling and Lumber Co. v The Queen (1888), 14 App Cas 46 (JCPC): you need only read the following paragraph:

> The territory in dispute has been in Indian occupation from the date of the [royal] proclamation [of 1763] until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, [Constitution Act, 1867]), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories'; and it is declared to be the will and pleasure of the sovereign that, 'for the present', they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

Mark Walters, "The Aboriginal Charter of Rights: The Royal Proclamation of 1763 and the Constitution of Canada" (2015), Queen's University Legal Research Paper No. 2015-003

PART 2 ABORIGINAL RIGHTS

January 25

R v Sparrow, [1990] 1 SCR 1075: read the full decision

R v Van der Peet, [1996] 2 SCR 507: you need only read the headnote

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February 1

R v Powley, 2003 SCC 43: read the full decision

R v Gladstone, [1996] 2 SCR 723: you need only read the headnote

PART 3 ABORIGINAL TITLE

February 8

Calder v Attorney-General of British Columbia, [1973] SCR 313: read pages 327-328, 344-345, 415-416

Guerin v The Queen, [1984] 2 SCR 335: read from the top of page 376 to the bottom of page 385

Delgamuukw v British Columbia, [1997] 3 SCR 1010: read paras 1-14, 109-186

February 15

Tsilhqot'in Nation v British Columbia, 2014 SCC 44: read the full decision

February 22 Reading Week

PART 4 TREATY RIGHTS

March 1

R v Marshall, [1999] 3 SCR 456: read the majority reasons (paras 1 to 67)

R v Marshall, [1999] 3 SCR 533 (decision on motion for rehearing and stay): read the full decision

Restoule v Canada, 2021 ONCA 779: read paras 107-114, 227-242

PART 5 HONOUR OF THE CROWN; DUTY TO CONSULT AND ACCOMMODATE

March 8

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73: read the full decision

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69: read the headnote

March 15

CATCH-UP CLASS – The readings originally assigned for this class were removed from the syllabus: you are not expected to have read them for purposes of the final exam.

PART 6 INDIGENOUS SELF-GOVERNMENT

March 22

Pastion v Dene Tha' First Nation, 2018 FC 648: read paras 1-29

Dickson v Vuntut Gwitchin First Nation, 2021 YKCA 5: read paras 1-36, 71-153

An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24: read the Preamble to the Act

PART 7 UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

March 29

United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")

Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44

An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, SC 2021, c 14

In class, we briefly discussed UNDRIP and the provincial and federal implementing legislation noted above. You are not expected, for purposes of the final exam, to know the contents of UNDRIP or the implementing legislation in any detail. Some of you might find it helpful to reference UNDRIP or the implementing legislation in your answers, particularly in developing your short-essay answer. But this is not required. It is possible to give very good answers to all questions on the exam without referring to these readings for March 29.

April 5 Review Class