THIS EXAMINATION CONSISTS OF 4 PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – DECEMBER 2021

LAW 352.001
ABORIGINAL PEOPLES AND CANADIAN LAW

Professor Christie

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS
and 15 minutes reading time
[For a total of 3:15]

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NOTE:
1. This is an open book examination: candidates may use any materials used for the course

2. THIS EXAMINATION CONSISTS OF 9 (NINE) QUESTIONS, OF WHICH YOU ARE ASKED TO ANSWER 4 (FOUR)

Answer 4 **(four)** of the following questions. Only the first four answers will be graded, so if you end up answering more than four ensure that the four you wish graded are the first in order, or that you clearly indicate which answers you do not want graded. You can choose **any 4** from the list of 9 questions.

1. Consider one or two of the examples of Indigenous communities asserting powers of self-determination discussed as case-studies in the Yellowhead Report *Land Back*. How do these situations intersect with Canadian law? That is, do you see any arguments those involved in these activities can muster *within Canadian law* that might protect the same interests they are trying to protect? How successful do you think such arguments are likely to be, if the communities or individuals you are discussing do end in Canadian courts asserting their authority under their own Indigenous laws? What seems most likely to make their legal struggles within Canadian law so challenging?

2. What was the 'eligibility' issue that the Canadian Human Rights Tribunal ruled on in 2016 and in subsequent decisions, that the Federal Court then had to rule on in their 2021 judgment? What positions had the two sides to that dispute taken on as to who was eligible? How had the CHRT ruled, and what did the FC finally decide on this issue? Do you agree with the most recent decision (the FC 2021 judgment), or do you think that some who now find themselves ineligible should have been considered eligible? Defend your position.

3. Given the ratification of the *Declaration on the Rights of Indigenous Peoples Act* in 2019 by the BC government, what can support, *within Canadian law*, the actions of the province in the fall of 2021 as they went about supporting the enforcement of the injunction issued to Coastal Gaslink in relation to the Wet'suwet'en Land Defenders? Consider all the pieces of the legal puzzle and put them into as sensible a pattern as possible. Do you think there is a resolution of this situation that is possible within current Canadian law? What would have to happen for this to come about?

4. In the *United Nations Declaration on the Rights of Indigenous Peoples* there are several Articles that speak directly to issues of identity:

> (9) Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right; and
>
> (33) (1) Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
>
> (2) Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures

   How do you imagine these provisions would intersect with how Canadian law approaches matters of identity for Indigenous peoples *in a specific context*? Please focus on one specific matter, of your choice (for example, you could look at how Métis identity is dealt with within *Powley* and *Daniels*, or First Nations identity is dealt with within the *Indian Act*, or non-status identity in *Daniels*, etc.). If UNDRIP were fully implemented in Canadian law, do you think how the specific matter you are examining is currently dealt with would have to be changed (for example, would Canadian courts have to deal differently with Métis identity, or non-status identity, etc.)? Explain and defend.

5. Imagine that a First Nation has enacted a bylaw that sets out its own *Election Code*, one that establishes two categories of voters, each of which has its votes directed toward two classes of councillors. That is, this band expects to have a band council composed of 8 members, 4 of whom will be 'male councillors' and 4 of whom will be 'female councillors'. Male voters in the band will elect the male councillors and the female voters will elect the female councillors. These 8 councillors will then decide amongst themselves who will be the Chief. While the band council will be understood to work as an integrated unit, some of the responsibilities will also be understood to be split along gender lines, with the male councillors responsible for those activities considered to be modern expressions of the traditional male roles (hunting and provision, etc.) and the female councillors responsible for those activities considered to be modern expressions of traditional female roles (caring for the young, tending the home, etc.). What legal challenges do you anticipate such a code might face? How do you expect such challenges might play out? Provide as much detail as possible in spelling out possible legal challenges and resolutions.

6. If an Indigenous community wishes to exercise its own legislative authority over child and youth welfare and services, what are the steps required under the federal legislation? The Quebec government is challenging the constitutional status of the federal legislation, arguing (amongst other things) that it amounts to a change to the division of powers in Canada's federalism, adding a third order of government (which should only be possible, Quebec argues, as a result of constitutional amendment). Do you think that the way an Indigenous Governing Body can come to exercise jurisdiction without a coordination agreement supports this argument? Why or why not? Defend your position.

7. In their introduction to *Resurgence and Reconciliation* Borrows and Tully question the use of Marxist thought and strategy that animated third-world struggles against colonialism in the 1960s and 70s, arguing that this sort of approach is inapplicable and useless in a modern first-world country like Canada. Coulthard, by contrast, has focused a lot of attention on how the Dene in the 1970s and 80s were attempting to create a homeland that would not simply be a part of the larger liberal-capitalist world. He argues that the Dene were working to craft their own unique modern economic model, a blend of a traditional Dene economy and a socialist form (where the people would own and collectively benefit from all the substantial economic activities). Do you think Borrows and Tully are correct in holding that Indigenous scholars, lawyers and activists should not concern themselves with imagining alternatives to modern neoliberal capitalism, and should instead focus on 'transformative reconciliation'? Why or why not? Defend your answer.

8. Both Mack and Clifford argue that traditional narratives, grounded in the stories of their respective peoples, are vitally important in rebuilding Indigenous law from the ground up. What are similarities and differences between how they work to use traditional narratives and how the Indigenous Law Research Unit works with traditional stories when ILRU works with an Indigenous community in working toward an articulation of its Indigenous law? Are these varied approaches more complementary or more in tension with each other? Be sure to explain and defend your position.

9. Over the next few years several more cases will be decided by Canadian courts that will engage with the notion of cumulative effects (beyond the *Yahey* case that is, which it seems will not be appealed to the BCCA). That is, over the next decade or so Canadian courts will increasingly have to work out how to deal with arguments that, given previous industrial development in an area, the foreseen effects of a currently-proposed project are greatly magnified. Imagine a non-treaty area of British Columbia, traditional home to a First Nation [FN] with asserted Aboriginal rights to hunt and fish over their territory. Imagine that the territory of FN has been subject to nearly a century of extensive industrial development, such that at the present moment it is difficult to find areas in which to hunt, or waters that are sufficiently non-polluted that it is safe to consume fish caught within them. What arguments in Canadian law could FN make that might bring to bear the question of cumulative effects on its asserted Aboriginal rights? Do you think such arguments are likely to be sufficiently strong to ensure FN's rights are adequately protected?

END OF EXAMINATION