Attachment: List of readings (1 page)

**THIS EXAMINATION CONSISTS OF 5 PAGES (PLUS ATTACHMENT)**

**PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER**

**THE UNIVERSITY OF BRITISH COLUMBIA**

**Peter A. allard school of LAW**

**Final EXAMINATION – april 2023**

**LAW 291**

**Aboriginal and Treaty Rights**

**Section 3**

**Professor Mickelson**

**total marks: 100**

**time allowed: 2 hours**

**\*\*\*\*\*\*\*\*\*\*\*\*\*\***

**note:**

1. This is a closed book examination for which you may bring in 5 double-sided (8 ½ by 11) pages of your own notes.

2. The examination is made up of 2 parts.

Part A consists of a fact pattern with three accompanying questions. You must answer all of these questions. Marks: 65; suggested time allocation: 78 minutes.

Part B gives you a choice between three questions. Answer two out of three. Marks: 35 (17.5 per question); suggested time allocation: 42 minutes (21 minutes per question).

3. Please take the time to think through and outline your answers, and try to review and correct mistakes before the end of the exam. **Coherence and structure will be taken into account in evaluation.**

**THIS EXAMINATION CONSISTS OF 2 PARTS**

**PART A**

MARKS

65 Long Neck Island is a 330-hectare island now known as Jane Island, after Jane Smith, a prominent colonial government official. Long Neck Island is one of many islands located off the coast of what is now Vancouver Island. It is directly adjacent to the shores of the X̱PÁ First Nation (XFN) reserve lands on Vancouver Island. The XFN are an ocean people. Their traditional ways of life revolve around sustenance from and travel throughout the many islands within their territory. They would establish temporary village sites as they traveled through the islands during the spring and summer. During the winter months, the XFN typically stayed at their winter village sites on southern Vancouver Island, avoiding ocean travel in harsher weather.

The importance of these islands to the XFN is noted by anthropologist Jessica Diamond in her study of XFN in 1935. She recorded the practices and significance of fishing, hunting, maintaining camus fields, and the presence of burial grounds throughout the islands. Diamond noted how temporary village sites on the islands were created from boards, which the XFN would carry with them by canoe from their winter village sites and pack up again when they left to another location. Diamond also recorded how some of the larger islands were visited by neighbouring Indigenous groups, and how intermarriage and kinship existed across those distinct groups in intricate and complex ways. Most of the specific examples provided by Diamond relate to the larger islands within XFN territory, with no direct mention of Long Neck Island in any of her materials.

Following the completion of the 1846 Oregon Treaty, which asserted British Sovereignty over the area, Jane Smith was tasked with initiating settlement of the region. In 1852 Smith signed a Treaty with the XFN. To date, perspectives on the Treaty differ. The Crown considers it a cede and surrender Treaty, which surrendered all lands, waters and resources to the Crown, excepting what was protected by the treaty. The XFN consider it a Peace and Friendship Treaty, to reflect peaceful relations between the XFN and the Crown. The Treaty was drafted by the Crown, using wording that says the XFN “do consent to surrender, entirely and forever” the land. In consideration for their consent in surrendering these lands the Treaty provides several promises. The Treaty reads as follows in that regard:

The conditions of our understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

The Treaty goes on to describe a specific area of land on southern Vancouver Island, which does not include references to Jane Island or any of the other islands within XFN territory.

The XFN, generally, have protested the inadequacy of their assigned reserve lands from the outset. The XFN have also consistently maintained that the Treaty was a Peace and Friendship Treaty and they did not surrender any land within, or outside of, the Treaty area. More specifically, the XFN have claimed ownership of Jane Island all along, and have petitioned to the Crown in that regard for at least the last four decades.

The XFN have creation stories for Long Neck Island that speak of the island as a relative. Elders share stories of how the island was used for hunting duck, harvesting seafood, and cultivating camus fields. Long Neck Island was the location of a temporary village site and it has a burial ground where their ancestors are buried. In addition to oral history, there is archaeological evidence of the burial ground and shell midden where the temporary village site was located. The XFN emphasize how their ancestors regularly visited the entire island until that was made impossible in areas of the island now under private ownership. XFN members do still fish off the shores of the island and at times visit the foreshore of the island where public access is allowed. XFN have also recently launched a seaweed farm off the shores of Long Neck Island, which they consider an important and sustainable economic development opportunity and response to the climate crisis.

In 1874, the Province split Jane Island into two parcels, issuing a Crown grant to one parcel, which was subsequently registered as private property. The remaining portion of the island is Crown land. The private parcel has since passed through multiple owners, and the Province has approved a range of activities and developments on this portion of the island over the years. In 1994 Wireless Corporation, a registered company, purchased Jane island. In hopes of creating an eco-resort community on the island, Wireless Corporation has submitted a rezoning application to the Province. A rezoning approval is needed to allow the development of the eco-resort.

Initially Wireless Corporation ignored the XFN claims to the island. More recently, Wireless Corporation has preferred a more collaborative approach, including suggesting an advisory role for the XFN in the eco-resort and employment opportunities for XFN members. Wireless Corporation remains adamant that the resort should move ahead. The XFN are fully opposed to the resort and any further dispossession and development of the island. The XFN are also concerned that increased boat traffic and the new boat dock necessary for the resort will negatively impact their new seaweed farm. Ultimately, the XFN want ownership of the island and the ability to choose what uses to put the land and adjacent waters. Given their small reserves, the XFN also want more territory to house its members.

The Crown is currently in discussions with the XFN about partnering to create and co-manage a marine protected area in the region. While the Crown provided notice of Wireless Corporation’s rezoning application to the XFN, it maintains that any concerns that the XFN have with development in the region should be raised through the marine protected area discussions. In these discussions, the Crown has suggested that an eco-resort is not necessarily inconsistent with a marine protected area and that it will consider the full public interest in approaching their decision on the rezoning application.

Drawing on what you know of Aboriginal and Treaty rights, advise the XFN in regard to all three of the following questions:

1. The likelihood of a successful Aboriginal title claim to all or part of Long Neck Island and its adjacent waters that would prevent the resort plans from proceeding;
2. In the alternative, briefly address whether XFN have a treaty right to all or part of Long Neck Island;
3. Whether the Crown has fulfilled any consultation and accommodation duties such that it can proceed with granting the rezoning application for the resort.

Ensure you fully support your answers and that you assess the strengths and weaknesses of the XFN claims. Should you require further information please indicate what that is and why it would be relevant.

**PART B**

This section gives you a choice between three short-answer questions, each of which is worth 17.5 marks. Answer two. Ensure your answers are substantially different from one another.

MARKS

35 1. In *Sparrow*, the Supreme Court of Canada stated that:

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.

Assess the extent to which the Court has interpreted or applied section 35(1) in a “generous, liberal” manner. Your assessment must include one specific example that, in your view, reflects such an approach and another of where, in your view, the Court has departed from this interpretive principle.

2. Our guest panel discussed how rare it is for Canadian courts to issue brave remedies in Aboriginal and treaty rights. Describe one example of judicial bravery from the cases we read this term (thereby excluding the cases covered by the guest panel). Yours could be an example of the remedy, or another aspect of the judgment. Provide a rationale for your choice.

3. In *Van der Peet*, Lamer C.J. states:

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

Provide one specific example of how this statement impacts the legal test for aboriginal rights. Explain what you understand Lamer C.J. to mean in this passage and its connection to your example.

**END OF EXAMINATION**

**Attachment: List of readings**

**Introduction to the course (January 12)**

* Emma Feltes & Glen Coulthard, “The Constitution Express Revisited”, 13-18

**Aboriginal Rights: Entrenchment (January 19)**

* *R. v. Sparrow*,1990 CanLII 104 (SCC).

**Aboriginal Rights: Characterization and Framework (January 26)**

* *R. v. Van der Peet*, 1996 CanLII 216 (SCC). Majority opinion

**Aboriginal Rights: Infringement (February 2)**

* *R. v. Gladstone*, 1996 CanLII (SCC) Majority opinion
* McLachlin J. dissent from *Van der Peet*, paras 301-321.

**Métis Rights (February 7)**

* *R. v. Powley,* 2003 SCC 43

**Aboriginal Treaty Rights (February 16)**

* *R. v. Marshall*, 1999 CanLII 666 (SCC) Majority Opinion.
* Case from which excerpts were discussed in class: *R. v. Marshall* (No. 2), 1999 CanLII 666

**Aboriginal Title Framework (March 2)**

* *Delgamuukw v. British Columbia,* 1997 CanLII 302 (SCC). Majority opinion, paras. 1-14, 109-169, 184-186 (focus on paras. 133-169)

**Aboriginal Title Developments (March 9)**

* *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, paras. 3-116, 152-153

**Duty to Consult & Accommodate Part 1 (March 16)**

* *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

**Duty to Consult & Accommodate Part 2 (March 23)**

* *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69.

**Contemporary Issues: Guest Panel (March 30)**

Cases discussed by guest panel (no reading required):

* *Yahey v. British Columbia*, 2021 BCSC 1287
* *Bill C-92 Reference*, 2022 QCCA 185