THIS EXAMINATION CONSISTS OF 5 PAGES

PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA

PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – DECEMBER 2022

LAW 352

Aboriginal Peoples and Canadian Law

Section 1

Professor Christie

**TOTAL MARKS**: 100

**TIME ALLOWED:** 3 HOURS

and 15 minutes reading time

[For a total of 3:15]

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

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

2. THIS EXAMINATION CONSISTS OF 8 (EIGHT) 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 8 questions.

1. As Nigel Baker-Grenier noted in his discussion of the modern treaty process, the 2019 federal ‘rights recognition’ policy, which has come to strongly influence what the BC Treaty Commission sees as its mandate and operations, holds that “[i]n British Columbia, pre-existing inherent rights of Indigenous Nations continue to exist today and the reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty through treaties, agreements and other constructive arrangements remains largely outstanding.” Under this policy as well, however, private lands continue to be removed from negotiations. What, then, do you think this means for how we come to think about the pre-existing inherent rights of, for example, the Musqueam, who find that over 90% of their traditional territory within the city limits of Vancouver is now taken up by privately-held lands? Is there some way to make sense of this position, which seems to recognize pre-existing rights but then ignore situations in which those rights have been largely removed through Crown action? If you feel there is no real tension or conflict in having these two positions within the new federal policy, explain why you believe so (and defend your answer). If you feel that there is significant tension, do you think future changes must be made to Canadian law and policy to reduce this tension? If so, what would you recommend be done? Be sure to explain and defend your answers.
2. Professor Clifford spoke of the continuing role of W̱SÁNEĆ law in guiding how the W̱SÁNEĆ think of their relations to their lands and waters. Madam Justice Church, however, in *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264, held that (at 127):

As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions.

If the TMX pipeline is finished and tanker traffic passing through W̱SÁNEĆ waters more than doubles, are there any ways you can see that the W̱SÁNEĆ can make arguments in Canadian law about how, under its law, this is unacceptable? How would you assess the probability of any of these arguments being successful? Be sure to defend your answers.

1. Much of the argumentation in *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5, before the Supreme Court of Canada will be about the role of section 25 of the *Constitution Act, 1982*, in relation to Aboriginal rights and freedoms recognized in other areas of Canadian law. How do you expect lawyers for Cindy Dickson will argue against the idea that section 25 is meant to be a shield, protecting Aboriginal peoples exercising their rights in ways that may conflict with the *Charter*? Do you expect these arguments will work to reduce section 25 to an essentially interpretive role in Canadian law? Be sure to explain and defend your answers.
2. In 2018 all judges providing decisions in *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, agreed that the duty to consult does not apply in the context of the development of legislation. Yet, Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* holds that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

On this point, is Canadian law inconsistent with the obligations on states set out in UNDRIP? If you think so, set out as precisely as possible what the inconsistency amounts to, and what you think might be possible ways that this may play out within Canadian law (for example, now that the *UNDRIP Act* is law in Canada). If you do not think there is an inconsistency, explain how these two positions can be seen to either be consistent, or at least not in conflict. Be as clear and detailed as possible.

1. Swift River First Nation [SRFN] has chosen to act under section 20(1) of *An Act respecting First Nations, Inuit and Metis Children, Youth and Families*, SC 2019, and has given notice to both British Columbia and Canada of its intention to exercise its inherent legislative authority in relation to child and youth welfare. Recently, a provincial social worker, acting under a report made following an investigation into the living conditions of Sam, a boy of five from a family living on the SRFN reserve, decided that, in the best interests of the child, the boy had to be apprehended. The provincial worker separated him from his family and took him into provincial care (exercising provincial authority over child welfare under provincial legislation). The boy has been placed in a foster home in a town approximately 30km from the reserve where the family lives.

SRFN’s legislation on child and youth welfare contains a provision that states that it will never be the case that it is lawful to remove a child from the reserve community – if it is deemed necessary (in the best interests of the child) to remove a child from its family it *must* be placed in a home or other setting within the reserve community.

A representative from SRFN has come to your law firm and asked that you work to force the province to return the boy to the reserve community. Draft a memo setting out (a) the legal framework for this situation, as you can best determine it to be, given the language in the new federal legislation and how it seems to operate, and (b) the likelihood of being able to use Canadian law to achieve the objectives of SRFN.

1. Big Sky First Nation (BSFN) has always been concerned about the health and vitality of the Old Woman River that runs though its traditional territory. Royal Imperial Oil Resources (RIOR) has been drilling wells and using fracking technology over the last decade in BSFN’s territory (which lies in a non-treaty area of British Columbia), under permits provided by British Columbia. RIOR also has an Impact Benefit Agreement with BSFN (that, in exchange for financial benefits, preferential contracts for some of the service requirements for RIOR’s operations, and employment training for BSFN members) requires that BSFN not challenge RIOR’s activities in court. RIOR recently decided to use more extensive fracking operations on all its well in the area. Fracking requires considerable fresh water, and RIOR has asked the province to amend its water allocations, allowing the company to extract three times as much water from the Old Woman River as before.

BSFN has approached British Columbia, requesting that it enter into a section 7 decision-making agreement under the *Declaration on the Rights of Indigenous Peoples Act*. Under such an agreement the consent of BSFN would be required before the province could alter the water allocation currently afforded RIOR. BC has, however, rebuffed this request, and has indicated that it will be following its usual procedures in determining whether it should issue a new water permit to RIOR, a permit that would greatly increase how much the company can draw from Old Woman River.

Representatives of BSFN have come to you for legal advice, asking about what could be done, under Canadian law, to prevent what they hold to be a potentially dangerous and unhealthy alteration of the water flow of the Old Woman River that would happen under any new, expanded water permit. Please advise the First Nation.

1. In the judgment of the Quebec Court of Appeal in *Reference to the Court of Appeal of Quebec regarding the First Nations, Inuit and Métis Child, Youth and Family Services Act (Order in Council No. 1288-2019)*, the province of Quebec’s position concerning the incorporation of Indigenous law on child welfare into federal law (giving it the force of federal law) was accepted. What were the arguments of the province that swayed the Court of Appeal on this matter? What do you think would be the best argument the federal government could make in the Supreme Court of Canada as it tries to have the high court reverse the law on this point? How do you think the Supreme Court of Canada is most likely to rule on this question of whether giving Indigenous law (in some defined situations) the force of federal law changes the constitutional structure of Canada? Why do you think the Court will rule as you think they will? Be sure to explain and defend your answers.
2. Several sites have been identified for mining operations in the ‘ring of fire’ area of northwestern Ontario (in Treaty 9 territory). In order to make actual mining operations feasible, access roads will need to be constructed into these mine sites, putting roads into areas of northern Ontario that have only had fly-in (or canoeing) access until now. Treaty 9 has the same basic clauses as the other numbered historic treaties. Sketch out how treaty law in Canada would apply to this situation. If a local First Nation has trap-lines that they argue will be adversely impacted by the road access that will be created, what arguments in Canadian law can they try to make to challenge the road construction? What challenges will they face if they do pursue legal action? How would you advise them to proceed, if they came to you and asked how best to put their energies into fighting the construction of roads through their territory?

**END OF EXAMINATION**