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 358C

TOPICS IN FIRST NATIONS LAW – TAXATION, ASSIMILATION

AND RECONCILIATION

Section 1

Adjunct Professor Faille

**TOTAL MARKS**: 100

**TIME ALLOWED:** 3 HOURS

and 20 minutes reading time

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**NOTES:**

1. This is an open book examination, meaning candidates may refer to class notes, case law, presentation slides, and other class readings.

2. ANSWER ALL QUESTIONS.

3. PLEASE INDICATE WHAT QUESTION YOU ARE ANSWERING.

PLEASE NOTE INSTRUCTIONS BELOW REGARDING THE ORDER IN WHICH

YOU ANSWER QUESTIONS IN PART I.

4. THIS EXAMINATION CONSISTS OF 6 QUESTIONS IN TOTAL,

DIVIDED INTO 2 PARTS. PART I (FACT PATTERN) CONTAINS 5 QUESTIONS.

PART II CONTAINS 1 QUESTION.

**LAW 358C.001 DECEMBER 2022 EXAMINATION**

**PART I (FACT PATTERN) (5 QUESTIONS) (85 MARKS TOTAL)**

**Instructions: Read the fact pattern below. There are five (5) questions relating to the fact pattern. It is recommended that you read each of the five questions before answering any of them.**

**You can answer the questions in any order, with following exception: you must answer Question 1(a) before answering Question 1(b).**

**In each case, please clearly indicate what question you are answering.**

In 2021, eight British Columbia coastal First Nations came together to form a new corporation, Salish Seafoods Inc. (“SSI”), a for-profit corporation under the B.C. *Business Corporations Act*. SSI engages in commercial fishing and harvesting of various seafood products, including: salmon, lingcod, halibut, tuna, rockfish, crab, spot prawns, mussels and oysters. The eight coastal First Nations have been fishing, harvesting these products, and have sold or traded them, for thousands of years.

90% of the catch is sold to market for profit, to buyers across B.C., Canada, the United States and Asia. 10% of the catch is donated, being distributed to the eight coastal First Nations, in proportion to their respective membership/populations, for food as well as for ceremonial purposes.

Seven of the eight Nations have at least one reserve; one does not (their reserve was unlawfully surrendered to Canada over a hundred years ago).

SSI is entirely owned by the eight coastal First Nations, through shares in the corporation that they own, roughly in proportion to their respective membership/populations. The board of directors of SSI, which sets the strategic direction of the company and appoints its Chief Executive Officer, consists of 11 members: one from each of the eight coastal First Nations, and three additional members with experience in the commercial fishing industry. The board of directors holds 12 meetings a year (one per month). Each of the eight coastal First Nations hosts one such meeting, and four are held at other locations (usually: Vancouver, Whistler, Tofino and a sun destination in the U.S. – in either Hawaii, Arizona or California). Four of the eight meetings hosted by the Nations are held on reserve. However, as noted, one of the Nations does not have a reserve. Three other Nations have reserve land but do not have adequate facilities to host a board meeting. Accordingly, when it is their turn to host, those four Nations arrange to have the board meet at a hotel conference room in a nearby (off-reserve) community.

The profits of the company are distributed to each of the eight coastal First Nations, in proportion to their membership/population, and are then used by the First Nations to support the social, cultural and economic advancement of their Nations.

**(FACT PATTERN CONTINUED ON NEXT PAGE)**

**PART 1 (FACT PATTERN, CONTINUED)**

The head office of SSI is located on-reserve, at Musqueam (one of the eight coastal First Nations that established and own SSI). The head office has a staff of around 30 employees and senior management, including: the Chief Executive Officer, Chief Financial Officer, the Chief Operating Officer, and the head of human resources. The other staff include administrative support, as well as the SSI sales team, whose role is to find local and international buyers for SSI’s seafood catch and to enter into sales contracts with them. Around 20 of the 30 employees who work at the head office have Indian status. These employees spend at least 90% of their time working at the head office.

SSI has a fleet of about 50 commercial fishing boats. They conduct their fishing operations in the coastal waters in and around the Salish Sea, in the traditional fishing areas of one or more of each of the eight coastal First Nations. None of the offshore fishing takes place on reserve, since none of the reserves include any offshore waters. However, oysters and mussels are harvested by hand along the shore. Roughly 60%-70% of this harvesting of oysters and mussels takes place on reserve, on the shorelines of several of the eight coastal First Nations. Oyster and mussel harvesting accounts for around 30% of SSI’s revenues. All harvesting of oysters and mussels takes place within the traditional territories and waters of the eight coastal First Nations.

None of the fishing boats are docked on reserve. The boats, nets, traps and other fishing equipment are also repaired and maintained off-reserve and stored off-reserve during the off-season when not out on the water fishing.

In addition to the 30 employees at SSI’s head office, SSI employs on average around 250 employees, primarily to operate the fishing vessels or to engage in fishing and seafood harvesting. Typically around 200 of those employees are status Indians, mostly members of the eight coastal First Nations. Around half of those with Indian status live on reserve. With the exception of the employees who work at head office and about 30 employees who harvest oysters and mussels, none of the remaining status Indian employees spend time working on reserve; their work is always either on the fishing boats at sea, or on shore working on the boats and equipment, which always takes place off-reserve. The employees who engage in oyster and mussel harvesting spend 60-70% of their time working on reserve. Around half of them live on reserve.

The company was very profitable in its first year of operation, with over $70 million in revenues.

**(Part I questions begin on next page)**

**Part I, Question 1 (a) (30 Marks)**

Based on legal advice it received, SSI takes the position that their status Indian employees are exempt from taxation under s. 87 of the *Indian Act*. The status Indian employees of SSI have all claimed the tax exemption in their tax filings.

A Canada Revenue Agency (“CRA”) auditor has written to SSI, asking SSI to explain in writing the basis on which SSI claims that its status Indian employees are tax exempt.

You are hired by SSI to help prepare a response letter to the CRA auditor, and are asked to make the case to the CRA that all of SSI’s status Indian employees are exempt from tax under s. 87.

Set out the arguments that you would include in such a letter.

**PART I, Question 1 (b) (30 marks)**

You are a lawyer working at the CRA. The CRA auditor receives the letter based on the arguments set out in response to Question 1 (a).

Before deciding whether or not to allow the exemption, the CRA auditor asks you to provide counter-arguments as to why the employment income is NOT tax exempt. In this regard, you are asked to set out the argument, as you see fit, that the employment income of either none or at least of some of the SSI status Indian is not exempt under s. 87 of the *Indian Act* and is therefore is taxable.

Set out the arguments that you would provide to the CRA auditor.

**PART I, Question 1(c) (10 marks)**

You are SSI’s lawyer. While waiting for the results from the CRA audit, you are asked to recommend what practical changes to SSI’s operations you would suggest to help strengthen their argument that their status Indian employees are tax exempt under s. 87 of the *Indian Act*.

Briefly set out your recommendations.

**Question 1(d) (10 marks)**

You are SSI’s lawyer. You are asked to advise whether SSI’s own income as a corporation (as opposed to the employees’ income) is exempt from tax. Briefly set out and explain your answer.

**Question 1(e) (5 marks)**

SSI has just purchased a new fishing boat. The purchase was made from a dealer located off-reserve, and the vessel was delivered directly to one of SSI’s docks off reserve.

Is this purchase exempt from federal Goods and Services Tax (GST)?

Briefly set out and explain your answer.

**PART II – (1 question) (15 Marks)**

**Question 1**

You are advising a First Nation that is in the process of negotiating a self-government agreement with Canada and the province of British Columbia. The Nation’s chief negotiator has asked you what tax powers the Nation should consider exercising once it has become self-governing. Of the various taxation tools designed for First Nations, which ones would be available and which would not?

**END OF EXAMINATION**