THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION - April 12 2018

LAW 201.001 Canadian Constitutional Law

PART I: Charter (Professor Hastie) (recommended time: 2 hours)

PART II: Aboriginal & Treaty Rights (Professor Mack) (recommended time: 1 hour)

TOTAL MARKS: 200

THE TIME REQUIRED TO COMPLETE BOTH PARTS IS THREE HOURS PLUS 20 MINUTES READING TIME

NOTES:

1. This examination is OPEN BOOK. Candidates may use any materials they have brought into the examination room during the examination and the reading period. Electronic devices are not permitted and laptops are only permitted if using ExamSoft/Examplify.

2. Do not concern yourself with statutes, cases or other sources not covered in the course materials.

3. Read the question carefully. Be sure you understand what you are being asked to do before you begin your answer.

4. State clearly any facts you assume in answering the questions. Where appropriate, you should describe the arguments that might be made on both sides of an issue, and give some sense of the relative strength of the arguments.

5. Full citations of legal sources are not necessary. You may refer to such sources in short form.

6. Part I of your exam (Charter) counts for 2/3 of your mark on the final Constitutional Law exam. Part II of your exam (Aboriginal & Treaty Rights) counts for 1/3 of your work on the final Constitutional Law exam. Your total mark (Parts I and II combined) counts for 100% of your final grade, unless it would improve your grade to count your December examination mark, in which case the latter mark will count for 25% of your final grade.

THIS EXAM CONSISTS OF TWO PARTS AND THREE QUESTIONS
PART I: CHARTER

Question 1 (100 marks)

You are an articled student working for a law firm that represents the City of West Vancouver ("the City"). The City recently learned that a constitutional challenge to its By-Law #0001 ("the By-Law") has been filed in court. You have been asked to provide a research memo analyzing the challenge and its chance of success. The relevant facts are set out below.

In your memo, ensure you:

- Identify and explain whether the Charter is applicable.
- Assess the likelihood of the claim succeeding under s. 2(b) of the Charter.
- Assess the likelihood of the City justifying a potential infringement under s. 1 of the Charter.
- Identify and explain the likely remedy in the event a Charter infringement is found.

The By-Law

Following several incidents involving public drunkenness and disturbances associated with large gatherings at the City’s beaches during the summer months in 2017, the City passed By-Law #0001 in September 2017.

By-Law #0001 states:

No large gatherings are permitted on City property between the hours of 5:00 P.M. and 8:00 A.M.

“Large gatherings” are defined as a group exceeding 12 persons.

“City property” is defined to include all public property in the City of West Vancouver, municipal buildings, and lands owned by the City, including Ambleside Beach.

The incidents leading to adoption of the By-Law included the following, as reported by the City and West Vancouver Police Department:

- Several thefts during a Canada Day celebration at John Lawson Park on July 1 2017;
- Destruction and vandalism of City property at Ambleside and Whytecliff beaches throughout July and August 2017;
- A consistent volume of litter at Lighthouse Park in July and August 2017, comprised of beer cans and glass alcohol bottles;
- Several incidences of public drunkenness during fireworks displays at Ambleside Beach in July and August 2017, involving loud yelling, verbal aggression towards bystanders, and one assault on a police officer; and,
- Several noise complaints from residents in neighbourhoods bordering municipal parks and beaches concerning large groups at beaches after 10:00 P.M. in July and August 2017.
Several statements made by City representatives, including the Mayor of West Vancouver, establish that the purpose of the By-Law is to enhance community safety, as well as minimizing public disturbances and nuisances.

The City distributed an internal memorandum to by-law officers communicating the purpose of the new By-Law, and encouraging officers to issue tickets when large group gatherings constituted a safety risk, or where a group was causing a public disturbance through excessive noise, public drunkenness, and/or aggressive behaviour.

The Challenge

The Friends of the Ocean Organization ("FOO") is a grassroots activist network dedicated to protecting and preserving marine ecosystems in Coastal British Columbia.

Several potential projects in British Columbia have caught the eye of FOO, whose members are concerned about their potential negative impact on the ocean’s marine eco-system and wildlife. The projects revolve around building resource infrastructure in BC, including expanding commercial ports and increasing commercial boat traffic in and around Coastal BC. The negative impacts FOO has identified include: destruction of marine eco-systems and habitats; risks to the orca population in Coastal BC; and, increased risk of toxic substances entering the marine environment.

To raise awareness about these projects and their potential negative impacts, FOO decided to organize a peaceful protest at Ambleside Beach on February 14th 2018. It planned to stage this protest in the evening, when there would be high levels of pedestrian traffic at and near the Beach.

The protest event, called “I Heart Our Ocean”, took place in the evening as planned and was attended by 25 FOO members. Members handed out leaflets to passers-by that contained information about the identified projects and their potential negative impacts. Members also created and displayed several protest art posters. Finally, the members staged a “sit-in” on the beach and encouraged members of the public to join them.

At 10:00 P.M., the group was approached by a municipal officer of the City. He informed the group that they were in violation of By-Law #0001 and issued by-law infraction tickets to each of the 25 FOO members.

FOO and each of its individually-named members who received infraction tickets have filed a challenge to the By-Law in court. Their challenge claims that the By-Law violates their right to freedom of expression under s. 2(b) of the Charter, and that the City cannot prohibit them from engaging in their protest activity on public property.

PART II: ABORIGINAL & TREATY RIGHTS

Question 1 (60 marks – 36 minutes)
The Sturgeon First Nation (SFN) is located in the interior of British Columbia. Although they number fewer than 500 members, they make ample use of their extensive traditional territory. Their annual cycle of fishing, hunting, and trapping, takes them throughout the watershed of the Peaceful River. They also travel for cultural and spiritual purposes. The most important spiritual event of the year is the Feast of the Dead which takes place at their ancestral burial ground situated below the Western Falls. According to oral tradition, this waterfall is key to their creation story. It was at the Falls that the ancient Sturgeon Beings transformed into humans and emerged from the river to live on land. Tradition teaches that, since their emergence, the Sturgeon people have always returned to the Falls to bury their dead. It is the obligation of the living to provide ongoing care for those who have passed. Every autumn, the people travel to the burial ground to offer food, medicine, and songs to their ancestors.

Recently, the Province of British Columbia announced plans to dam that part of the Peaceful River which runs through the traditional territory of the SFN. The project will cause the water levels to rise and submerge the SFN’s b. The SFN was given no advance notice of the project and they first heard about it through media reports. They are shocked and dismayed that this site, which lies at the heart of their cultural and spiritual lives, faces destruction. When they contacted the Ministry of Energy, Mines and Petroleum Resources (MEMPR) to arrange a meeting with the Minister, they were told that the matter was the subject of an environmental assessment and that they should contact the British Columbia Environmental Assessment Office (BCEAO).

The SFN attended in the hearings and were invited to make submissions. Their position was that the dam must be re-sited in order to avoid destruction of burial ground. The proponent, B.C. Hydro, said that it was not feasible to relocate dam and that it would be easier to move the burials. In reply, the SFN stated that it was against their law to disturb burial grounds and that they would never agree to do so. In its report, BCEAO concluded that the economic benefits of the dam outweighed the concerns of the SFN. As mitigation measures, however, BCEAO recommended that the BC Hydro the cover cost of removing the burials and that the removal process be monitored by the SFN.

Directions:

Presume you are an articling student at the firm representing the SFN. They assert but have not proven both Aboriginal Rights and Title throughout the Peaceful River Valley. They want your advice on their legal options with respect to Aboriginal Title only.
Question 2 (40 marks—24 minutes)

The jurisprudence on Aboriginal Rights suggests that the purpose of section 35 is reconciliation. In Sparrow, for example, the court states:

"What s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown."

Why might the court frame constitutionalized Aboriginal rights in this way? Has this right to reconciliation assisted Indigenous peoples in working out their relationships with the crown? Explain and defend your answer.