Write Your Exam Code Here: ____________________
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THIS EXAMINATION PAPER CONSISTS OF SIX (6) PAGES
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THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

EXAMINATION – April 12 2018

LAW 201c.003
Charter: Professor Da Silva

LAW 201b.003
Aboriginal & Treaty Rights: Professor Teillet

TOTAL MARKS: 100

YOU HAVE THREE HOURS TOTAL TO COMPLETE THIS EXAM. There is no separate reading time.

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NOTES:

1. This is an open book examination. Candidates may have with them any written material they wish. Laptops are only permitted for the use of ExamSoft.

2. If you are handwriting, write legibly on alternate lines and on only one side of each page.

3. Communication devices such as mobile phones, tablets, etc. are not permitted.

4. This examination is designed to test material covered in this course only. Do not concern yourself with sources not covered in the course materials, class discussions, or lectures.

5. Read the question carefully. Be sure you understand what you are being asked to do.

6. You should describe the arguments that might be made on both sides of an issue, but should ultimately provide substantive argument for your position.

7. State clearly any facts you assume in answering the questions.

8. Full citation of cases is unnecessary. You may refer to cases in short form (e.g., “Oakes”).

THIS EXAMINATION CONSISTS OF FOUR (4) QUESTIONS IN TWO (2) PARTS:

PART ONE: CHARTER – THREE (3) QUESTIONS
PART TWO: ABORIGINAL & TREATY RIGHTS – ONE (1) QUESTION
PART ONE: CHARTER (Recommendation: Two (2) hours)

You are an articling student for the Government of Canada [Canada]'s Department of Justice. Canada is concerned about the possibility of a section 2(b)-based constitutional challenge to its proposed Marijuana Modernization Act [MMA], which restricts the content of advertisements for and requires warning labels on some cannabis products. Canada is considering enacting this statute prior to the legalization of cannabis in December. A litigant, Bob, is also lodging a section 7-based challenge to Canada's rescinding of the federal Access to Cannabis for Medical Purposes Regulations [Medical Regulations]. Advise, based on the facts below:

Questions (Suggested Times in Brackets Based on 20 Minutes of Prior Reading Time)

1. Will the proposed Marijuana Modernization Act infringe section 2(b) of the Charter? (20 minutes)

2. If the proposed Marijuana Modernization Act infringes section 2(b) of the Charter, can this infringement be justified under section 1? (35 minutes)

3. Will Bob be able to make a successful claim that Canada's rescinding of the Access to Cannabis for Medical Purposes Regulations infringed his section 7 Charter right(s)? Do NOT do a section 1 analysis of this claim. (45 minutes)

Your response will be graded holistically with equal weight for each stage of analysis. Go through each stage of analysis for each question unless you are specifically told otherwise. If you think a question can be solved at an early stage of analysis, run arguments in the alternative for additional stages until all stages have been addressed. Clearly state relevant tests for each stage of analysis and use the facts below and of analogous cases when applying the tests. You are not expected to address Charter remedies in your response.

The Facts

Cannabis is a controlled drug listed in Schedule II of the Controlled Drugs and Substances Act [CDSA]. Possession and trafficking (selling, administering, giving, transferring, transporting, sending or delivering) of Schedule II drugs, including cannabis, is prohibited. Possession and trafficking are indictable offenses, commission of which makes one liable to imprisonment.

The Government of Canada [Canada] recently tabled proposed legislation, the Marijuana Modernization Act [MMA]. The MMA will amend the CDSA, removing cannabis from Schedule II. Criminal sanction, including possible imprisonment, will remain for possession and trafficking under the limited circumstances in which one (a) sells or otherwise provides cannabis to those under the age of 18, (b) sells cannabis to another person without a license, or (c) possesses over 30g of marijuana (licensed sellers exempted).

Yet Canada remains concerned about the health effects of cannabis use. It seeks to curb use through a public relations campaign concerning the health effects of consumption and through measures under the 'Promotion' provisions of the MMA. The MMA's 'Purpose' provision reads:
The purpose of this Act is to protect public health and public safety and, in particular, to
(a) protect the health of young persons by restricting their access to cannabis;
(b) protect young persons and others from inducements to use cannabis;
(c) provide for the licit production of cannabis to reduce illicit activities related to same;
(d) reduce the burden on the criminal justice system in relation to cannabis;
(f) provide access to a quality-controlled supply of cannabis; and
(g) enhance public awareness of the health risks associated with cannabis use.

The Promotion provisions that are relevant to your task read:

Promotion
21 (1) No person shall promote a cannabis product by means of a testimonial or an endorsement, however displayed or communicated.
(2) For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial or endorsement.

22 (1) Subject to this section, no person shall promote a cannabis product by means of an advertisement that depicts, in whole or in part, a cannabis product, its package or a brand element of a product or that evokes a cannabis product or a brand element.
(2) A person may advertise a cannabis product by means of information advertising or brand-preference advertising that is in a publication that is provided by mail and addressed to an adult who is identified by name or signs in a place where young persons are not permitted by law.
(3) Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons. ... 

23 (1) All cannabis products (e.g., rolled cigarettes, rolling papers, loose marijuana) must contain an unattributed health warning authorized by Health Canada.

An “unattributed health warning” is later explained to be a statement containing information about the health effects of cannabis with no indication of who is providing the information.

In introducing the MMA, Canada points to the importance of balancing the need to avoid overcriminalization for morally neutral and now-otherwise lawful behavior and the need to protect youths and curtail the negative health effects of cannabis. In a press conference, the Minister of Health stated “We don’t think it is right that people should go to prison for using cannabis. We don’t see anything wrong with consenting adults smoking marijuana, but let’s not pretend this stuff is harmless.” The Minister of Justice said “Smoking pot is wrong. But our prisons are overcrowded. I cannot see why we should focus on this wrong. Let’s focus on the kids.”

Several publications suggest that cannabis can impact the development of children, particularly their cognitive skills. A Royal Commission of Canada Report noted that the health effects impact users aged 21 or younger, but the effects are most severe for users aged 14 or younger. The government points to these works and some publications suggesting that cannabis use among
adults can inhibit the cognitive skills of adults to justify the MMA. In response, cannabis advocates note that a majority of published works on the topic find that the negative health effects for adults are minimal. The Liberty Institute recently released a report stating that there is insufficient evidence in the published record suggesting that people will be more likely to smoke marijuana if exposed to marijuana advertisements and that fictional characters do not inspire use.

Sublime Santeria Inc. [SSI] is an international company that plans to sell rolling papers and rolled marijuana cigarettes to newly-licensed cannabis retailers beginning in December 2018. They have legally sold in other countries in the past and are well-known for the potency of their cigarettes, the quality of their papers, and their mascot, the ska-performing anthropomorphic cartoon rolled cannabis cigarette ‘Burnie’. SSI counsel recently sent a memorandum to Canada stating that (i) SSI considers the restraint on the use of Burnie in SSI advertisements and the mandatory health warnings to be violations of the section 2(b) right to freedom of expression and (ii) sections 21, 22, and 23 of the MMA thus violate the Charter. SSI claims that SSI should have control over the content of packaging and including Burnie in advertisements on signs where young persons are not permitted by law will not harm children’s health, especially given the fact that the science on the health effects of cannabis generally is contestable and there is no definitive proof that Burnie would cause children to use cannabis in the first place.

In 2001, Canada passed regulations under the CDSA, the Access to Cannabis for Medical Purposes Regulations [Medical Regulations], which exempted those who possess cannabis for medical purposes and receive a prescription from a recognized health care provider from the CDSA’s main possession offence. The Medical Regulations also exempted licensed retailers who filled cannabis prescriptions from the CDSA’s main trafficking offense. The Medical Regulations also established criteria under which health care providers could legally prescribe cannabis and established a distributor licensing regime.

Two months ago, in February 2018, Canada rescinded the Medical Regulations. The Government noted that the continuation of the regulations scheme would confuse retailers and consumers about what is allowed prior to full legalization. Confusion in the marketplace about the legal status of marijuana retailing would result with mistake of law defences in marijuana cases clogging the courts. Canada further noted that most provinces planned to only grant licenses to government agencies in any case, so all retailers would close soon. Media reports suggested enforcement of the possession law in the interim would be minimal and there would be a de facto exemption for medical users, but that medical use would become formally illegal.

In March, police raided Tosh Hearts Curie [THC], a medical marijuana retailer who had been exempt under the now-rescinded Medical Regulations, and arrested five customers who were shopping at the time, including Bob, who has cancer and received a prescription for medical marijuana use for two years prior. Bob plans to challenge his possible possession conviction on the grounds that rescinding of the Medical Regulations constitutes a government decision that infringes his section 7 rights. Bob, who used cannabis recreationally prior to his diagnosis and now uses it to control his pain and build his appetite, claims that rescinding the Medical Regulations forced him into a choice between criminal sanction and managing his symptoms in a way that violates section 7. The lack of exemptions for medical marijuana retailers will make him unable to find a legal source for the marijuana he uses to deal with his cancer.

END OF PART ONE
PART 2: ABORIGINAL & TREATY RIGHTS *(Recommendation: One (1) Hour)*

The Manitoba Métis Federation (MMF) is a not-for-profit corporation, duly incorporated pursuant to the laws of Manitoba. It is the governing body that represents the Manitoba Métis people. Hydro is a provincial Crown corporation and the province's major energy utility. The Province of Manitoba (the Province) created Hydro as a Crown corporation and is a party to all Hydro agreements with Indigenous peoples.

In Manitoba since the 1930s multiple hydro projects have flooded the lands and resources First Nations and Métis rely on. Lands, resources, villages, and campsites were destroyed. People were relocated. Indigenous livelihoods were materially diminished. For the past 30 years, Hydro and the Province have entered into multiple million-dollar agreements with various First Nations to address these issues.

Until 2014, Hydro and the Province refused to enter into consultations with the Manitoba Métis despite the fact that several courts had found the Manitoba Métis had hunting and fishing rights that were protected by s. 35 of the Constitution Act, 1982. The MMF challenged two separate Hydro projects in court. In both challenges, Hydro argued that the consultation duty rested on the Crown and not on a Crown corporation. The Province argued that the consultation duty was triggered only by a strong claim to aboriginal title not by harvesting rights. Hydro and the Province further argued that there was no duty to consult with the MMF as it was merely a corporation. Each of these cases eventually settled out of court for millions of dollars. The court proceedings also significantly delayed the hydro projects, which also cost Hydro millions.

In 2013, Hydro, the Province, and MMF began to negotiate an agreement all parties hoped would begin to address past wrongs and help them move forward into a new and productive relationship. On November 26, 2014, the MMF, Manitoba and Hydro entered into an agreement called “Kwaysk-kin-na-mihk la paazh” (KPA). Kwaysk-kin-na-mihk la paazh means “turning the page” in Michif, the Métis language.

The KPA states, among other things, that “the Province recognizes that it has a duty to consult with Métis when any proposed Crown decision or action might adversely affect the exercise of the Aboriginal rights of Métis and to reasonably accommodate concerns about the effects of the decision or action raised in the consultation by attempting to substantially address those concerns.” The KPA also contained a commitment that he parties would engage in good faith negotiations towards an Impacts and Benefits Agreement (IBA) with respect to future developments.

On July 17, 2017, Hydro and MMF signed an IBA. Manitoba’s negotiators agreed to recommend the IBA to the Premier. The IBA contained, among other things, the following clauses:

1. $1.4 million dollars would be paid by Hydro to MMF annually for 50 years.
2. An agreement that MMF would participate in regulatory hearings with respect to future transmission projects.
3. An agreement that MMF would not litigate against Hydro with respect to future transmission projects for the duration of the agreement.
On March 18, 2018, the Premier of Manitoba rejected the IBA. On March 20, 2018, nine of the ten directors of the ‘Hydro Board’ resigned. On March 21, 2018, the Premier of Manitoba stated that he believed the board resigned because he would not agree to the IBA. The premier called the proposed payment “persuasion money.”

In response, the Board chair stated that, “The agreement with the MMF was carefully vetted by the board. It met our legal obligations, encompassed a multiplicity of projects, covered a 50-year period, and was structured to ensure the money went to the people who should benefit from it. In the view of our board it was a good transaction for Hydro. It is not clear to me how the premier could have come to his view on these matters, given that he has refused to have conversations with us for over a year, and efforts that we made to engage with him on this issue were continually rebuffed.”

While MMF, Hydro, and the Province were in negotiations towards the IBA, Hydro was in consultations and accommodations with First Nations with respect to two future projects that will traverse Métis lands. It entered into agreements with those First Nations at a cost of several hundred million dollars. As a result of the rejection of the MMF’s IBA by the Province, MMF claimed it had not been consulted or accommodated with respect to the new projects.

On March 26, 2018, the Premier appointed a new Hydro Board. On March 27, 2018, the new Board announced it was terminating the KPA and the IBA and that it would not engage in future consultations with MMF.

On March 28, 2017 the MMF announced that it was taking legal action against the Province and Hydro.

You act for the MMF. Identify at least two arguments based in aboriginal law that MMF might use in its case against the Province and Hydro. Develop one of these arguments fully.

Your response will be graded holistically with equal weight for each stage of analysis. Go through each stage of analysis for your argument. Please state the relevant test and provide your analysis of the test using the above facts. You may use additional facts of your own invention, but if you do use new facts, please state them clearly. You are not expected to address remedies in your response.

END OF PART TWO

END OF EXAMINATION