

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2021

Law 271.001
Public Law and the Charter

Professor Mary Liston

EXAM PASSWORD: Ach36m
RESUME CODE: B117D4

TOTAL MARKS: 100

(8:50 AM PDT) **PREPARATION TIME ALLOWED: 10 MINUTES**

(9:00 AM PDT) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 3 HOURS (WHICH INCLUDES 20 MINUTES READING TIME)**

8:50-9:00 AM Preparation Time (Exam writing not permitted) – This time is given to students to download/print your exam questions once the exam has been made available online on Canvas, to read the Exam Password on this exam coversheet, to enter the Exam Password for the exam in Exemplify, and to progress in Exemplify until you see the **STOP SIGN**, where you will **WAIT until 9:00 AM. DO NOT proceed past the STOP SIGN. DO NOT begin typing your exam answers in Exemplify until 9:00 AM!**

9:00 AM Exam Writing Time – At 9:00 AM, you may proceed past the **STOP SIGN** in Exemplify and begin typing your exam answers. Students are required to calculate and monitor their own time for writing exams. All exam answer uploads will be monitored to ensure that typing of answers only occurred during the allotted Exam Writing Time.

This is an open book examination, meaning that you can refer to class notes, casebooks, other class readings, and your condensed annotated notes (CANS). The use of library books or internet searches for material relevant to the question is not permitted.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question. Do not email your professor or anyone else about this while the exam is in progress.

ACADEMIC INTEGRITY

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software. Students typing exam answers before or after the allocated exam writing time may receive a grade penalty.

CONFIDENTIALITY REGULATIONS – READ CAREFULLY

As this exam is being written off-campus and is unsupervised, any communication whatsoever (including, but not limited to in person, telephone, e-mail, text, social media, etc.) concerning the contents of this examination with anyone (other than the Student Services staff of the Allard School of Law) is strictly prohibited.

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What Do I Do If:

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- **I'm experiencing technical difficulties DURING THE WRITING of the exam**

If you experience technical difficulties with Exemplify at the very beginning or during an exam, you may attempt to solve your problem/reboot your computer **BY YOURSELF**. You are **STRONGLY** encouraged to spend **NO MORE THAN 5 minutes** attempting to do so. You will **NOT BE GIVEN ANY EXTRA TIME** to complete the exam. **If your attempt to solve the problem is unsuccessful**, or if you choose not to make such an attempt, you **MUST** immediately **begin hand-writing** your exam answers with pen on lined paper. **You may NOT type your exam answer in word-processing software.**

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You must also upload to Canvas your hand-written exam answers into the "Exam Answer File Upload (Word Processor or Hand-written ONLY)" folder. Scan or take a picture of each page (.jpg) of your exam and put them into one folder to upload.

Your answer file should be named, and the coversheet of your answers should be titled with:
Your Exam Code, Course Number, Name of Course, and Instructor Name
i.e., **9999 LAW 100.001 Law of Exam Taking - Galileo**

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LAW 271.001: INFORMATION AND INSTRUCTIONS

1. This examination counts for 100% of your final grade.
2. Read every question carefully. Be sure you understand what you are being asked to do before you begin your answer.
3. Be careful to budget your time. A brilliant answer to one question cannot make up for the failure to answer another question.
4. You may use short forms of case names (e.g., *Oakes*, *Roncarelli*).
5. Good luck!

PART I FACT PATTERN

60 marks **PART 1 consists of a fact pattern with THREE (3) questions. You must answer all of the questions. You should allocate 70 minutes to answer PART I of the exam.**

In December 2020, the province of Québec enacted Bill 33 – *The Secular State Act*. This statute prohibits individuals who are employed by the provincial government from wearing religious symbols while at work. The ban on religious symbols includes crosses, hijabs, niqabs, turbans, and yarmulkes. When Bill 33 was first introduced in the legislature, the Minister of Immigration, Diversity, and Inclusion affirmed that the purpose of the legislation was to further State neutrality with respect to the diverse religious communities in the province as well as to enhance secularization throughout government and the delivery of government services. Not surprisingly, the legislation was polarizing and attracted strong support from secularists and nationalists while also galvanizing trenchant opposition from civil rights advocates and religious groups. Many religious organizations—Catholic, Protestant, Hindu, Islamic, and Jewish—quickly organized against Bill 33 since it particularly affected their members. For many religious organizations, the preferred solution is that there be no ban at all on wearing religious symbols while working in the public employment context.

You are articling at the Québec branch of the Canadian Civil Liberties Association (CCLAQ). The CCLAQ is working in partnership with the Québec Association of Muslims (QAM) to challenge Bill 33 in the courts. This community believes that they are the most seriously affected by Bill 33. They also believe that the prohibition particularly harms Muslim women who wear face coverings. Not all Islamic communities, however, believe that a face covering is a requirement of Islam. Your principal has asked for your legal opinion on a number of questions about Bill 33's constitutionality.

Excerpts from Bill 33 – *The Secular State Act* follow the questions on the next page.

1. In your legal opinion, does Bill 33 infringe s2(a) of the Charter?
(25 marks out of 60 marks; 25 minutes out of 70 minutes)

2. In your legal opinion, can Bill 33 survive the *Oakes* test? In your answer, make sure you specify whether or not you think the remedy of 'striking down' Bill 33 is appropriate. (25 marks out of 60 marks; 30 minutes out of 70 minutes)
3. Briefly discuss the constitutional implications of section 25 of *The Secular State Act*. (10 marks out of 60 marks; 15 minutes out of 70 minutes)

BILL 33 THE SECULAR STATE ACT

Preamble

AS the Québec nation has its own characteristics, such as its civil law tradition, distinct social values, and specific history, and that these characteristics have led it to develop a particular attachment to a secular State;

AS, in accordance with the principle of parliamentary sovereignty, it is incumbent on the Parliament of Québec to determine the governing principles that apply to relations between the State and various religious communities in the province;

AS State neutrality should be absolutely enshrined in Québec's legal order;

AS a stricter duty of restraint regarding religious matters should be established for persons exercising public functions, resulting in their being prohibited from wearing religious symbols in the exercise of their public functions;

AS a secular State should be affirmed in a manner that ensures a balance between the collective rights of the Québec nation and human rights and freedoms;

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

Affirmation of the Secular State

1. The State of Québec is a secular State.
2. The secular nature of the State is based on the following principles:
 - (1) the separation of State and religions;
 - (2) the religious neutrality of the State;
 - (3) the equality of all citizens; and
 - (4) freedom of conscience and freedom of religion.
3. State secularism requires parliamentary and government institutions to comply with the principles listed in section 2, in fact and in appearance, while pursuing their mandates.

For the purposes of this Act,

- (1) "parliamentary institutions" means the National Assembly and the persons appointed or designated by it to an office under its authority;
- (2) "government institutions" means the bodies listed in Schedule I.

Prohibition on wearing religious symbols

4. Persons working in the entities listed in Schedule I are prohibited from wearing religious symbols in the exercise of their public functions.

...

Services with face uncovered

15. Personnel members of the entities listed in Schedule 1 must exercise their public functions with their face uncovered.

16. Section 15 does not apply to persons whose face is covered for health reasons or because of a handicap.

...

Transitional and final provisions

25. This Act has effect notwithstanding sections 2 and 7 to 15 of the *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the *Canadian Charter of Rights and Freedoms*).

SCHEDULE 1

1. Government departments.
2. The public service.
3. Administrative agencies.
4. Municipalities.
5. Public transit authorities.

PART II SHORT ANSWER QUESTIONS

20 marks PART II consists of four short answer questions. You will answer **TWO (2)** out of the four and each answer is worth 10 marks. You should allocate 45 minutes to answer PART II of the exam.

1. The Supreme Court of Canada used the 'reading in' remedy in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 [*Rizzo Shoes*] and *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*]. Why did the Court believe it was appropriate to use this remedy in each case? On what basis did Major J dissent in *Vriend*? In answering this question, make sure you explain what the 'reading in' remedy entails.
2. What is prerogative power? Drawing on relevant cases, explain how and why prerogative power poses problems for judicial review in public law.
3. Unwritten constitutional principles are fundamental in our legal system. Cases often cannot be decided without their drawing on their content. But, the use of unwritten principles is not risk free and may create problems in public law. Evaluate the use of unwritten principles in these two cases and explain the pros and cons of their use in each case: *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*] and the *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 [*Provincial Judges Reference*]. Make sure you explain what unwritten principles are and how they should be used.
4. How would you explain the difference between the principle of parliamentary sovereignty and the principle of democracy? How did each principle inform the decisions in *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 [*Shell Canada*]? Do you agree with the majority or the dissent in *Shell Canada* and why?

PART III ESSAY QUESTION

20 marks PART III consists of two essay questions and you will answer ONE (1). You should allocate 45 minutes to answer PART III of the exam.

1. Judges don't always agree with each other. We often see this in hard cases involving difficult political issues and contentious matters of interpretation. Clearly explain the interpretive disagreement(s) in the following cases. Provide a short argument explaining which decision you would sign on to if you were a judge at the Supreme Court in each case:

- *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554 [*Mossop*];
- *R v Keegstra*, [1990] 3 SCR 697 [*Keegstra*]; and,
- *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers*].

OR

2. Many cases in this course raise concerns about the separation of powers. What does the separations of powers mean? Explain why this principle matters in the following cases:

- *Agraira v Canada (Public Safety & Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36 [*Agraira*];
- *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr*]; and,
- *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Supreme Court Reference*].

END OF EXAMINATION

HAVE A SAFE AND REJUVENTATING SUMMER!