

**THIS EXAMINATION CONSISTS OF 8 PAGES  
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER**

**THE UNIVERSITY OF BRITISH COLUMBIA  
FACULTY OF LAW**

**FINAL EXAMINATION – APRIL 2022**

**LAW 271  
Introduction to Public Law and the Charter**

**Section 1  
Professor Liston**

**TOTAL MARKS: 100**

**TIME ALLOWED: 3 HOURS  
Including 20 minutes reading time**

\*\*\*\*\*

- NOTES:**
1. This examination counts for 100% of your final grade.
  2. This is an **open book** examination. You may make use of class notes, the syllabus, and your condensed annotated notes (CANS). The use of library books is not permitted.
  3. **You are NOT permitted to use either a physical or electronic version of the course textbook.**
  4. THIS EXAMINATION CONSISTS OF THREE (3) PARTS.  
Answer all questions in PART I – FACT PATTERN.  
Answer two (2) of the four (4) questions in PART II – SHORT ANSWER.  
Answer one (1) of the two (2) questions in PART III – ESSAY.

Please turn over ☞

5. Read every question carefully. Be sure you understand what you are being asked to do before you begin your answer.
6. Guidance about time and marks allocation has been provided. Be careful to budget your time. A brilliant answer to one question cannot make up for the failure to answer another question.
7. 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.
8. You may use the short form of case names (e.g., *Oakes*, *Roncarelli*).
9. Good luck!

LAW 271, Section 1

**PART I      FACT PATTERN**

**60 marks      PART 1 consists of a fact pattern with four (4) questions. You must answer ALL of the questions. You should allocate 70 minutes to answer PART I of the exam.**

Since January 2020, a major pandemic has swept the world. Because of Covid-19, many governments have implemented measures aiming to control the spread of the virus, protect the health of citizens, prevent the health system from being overwhelmed, and mitigate the social and economic impact of the pandemic. In jurisdictions like British Columbia, states of emergency were declared. In December 2021, medical experts confirmed that a fifth wave of the pandemic was underway and that a more easily transmissible variant of the original virus was on the increase.

While scientific evidence about the original virus, and efforts to control its effects and spread, have improved, the new variant presents empirical uncertainties. A majority of provincial medical experts agree that Covid has posed, and continues to pose, an exceptional threat to public health. Within this expert group, agreement also exists on the nature of the conditions in which the virus can be transmitted, as well as the risks of transmission. Relying on several highly-regarded, but not fully conclusive, reports and studies, these medical experts have affirmed several core findings: 1) the virus can be transmitted through direct contact with respiratory droplets from an infected person when that person talks, sings, shouts, coughs and/or sneezes; 2) that rates of transmission increase in settings where people are together in close proximity over a prolonged period of time and where poor ventilation exists; 3) the virus can be transmitted by people who are pre-symptomatic (i.e., not yet having symptoms) and asymptomatic (i.e., never developing symptoms) which makes relying only on screening a suboptimal strategy for preventing spread of the virus and its variants since these infected people will unknowingly infect others; 4) large gatherings in enclosed spaces increase the risk of transmitting this airborne virus through close contact and socialization indoors; and, 5) improper or inconstant use of face coverings exacerbate the risk of transmission in social settings. While not absolutely proven, these medical experts believe there is a highly likely causal relationship between certain restrictive measures and reductions in the number of cases. In making these assessments, health care professionals adhere to the precautionary principle which is set out in section 5 of BC's *Public Health Act (PHA)*.

Relying on this guidance, the government of BC created a comprehensive strategy under the *PHA* which, among other measures, imposed restrictions on in-person gatherings in order to prevent the rise of Covid and variant cases in the province. Section 16 of the *PHA* restricts in-person gatherings by limiting attendance to 15 percent of venue capacity. This restriction has affected the entertainment industry and numerous religious communities. Notably, educational, workplace, restaurant, and retail settings are deemed "essential" and remain exempt so long as they comply with the applicable public health standards mandated by the *PHA*.

## LAW 271, Section 1

The *PHA*'s restriction caused distress in many religious communities. Some religious organizations resisted the restriction and engaged in civil disobedience. The Church of the Eternal Afterlife of Perfect Bliss ("the Church") is a not-for-profit religious organization with members located in the rural and small-town environs of BC's interior. Church members and their leader, Pastor Michael Luther, have decided to launch a Charter challenge instead of engaging in civil disobedience. They believe they, not the government, should decide what is "essential" and for them church worship is a fundamental necessity. They argue that the restriction on attendance at religious services arbitrarily targets places of worship, especially when compared to other settings like restaurants and retail stores. Pastor Luther and his congregation contend that the restriction significantly harms their ability to practice their religion because they believe that when there is no physical gathering of the entire community to worship, there is no church. According to their interpretation of Christian scripture, the very idea of a church means that all members hold faith together, pray together, and worship together. From their perspective, this restriction obliterates the very meaning of belonging to a church. They consider Zoom to be a woefully inadequate substitute because a virtual experience cannot replicate the quality of an in-person gathering. Moreover, being unable to gather for special services on Christmas and Easter exacerbates feelings of isolation and demoralization, thereby negatively affecting the congregation's mental and spiritual health. Not all Christian churches share these beliefs and views.

Their church building can accommodate 600 people and, in pre-Covid times, approximately 400 people attended Sunday service each week. The Church has engaged a different group of medical experts who dispute the evidence the government is relying on. These experts believe that: 1) higher caseloads are correlated with areas of population density and the interior of the province has lower density; 2) infection rates are primarily linked to advanced age and vulnerability; 3) more severe outcomes are also linked to advanced age and vulnerability; and, 4) a properly managed religious gathering raises no greater risks than restaurant and retail settings. The Church asks: why can one hundred people shop at Costco at the same time but not attend a church service? The Church believes that, given the effect of the restriction on religious freedom, the government should have to rely on undisputed scientific evidence to conclusively demonstrate that restricting in-person gatherings actually reduces the transmission of Covid and its variants. BC, they say, has overreacted.

It is February 2022 and you are clerking at the BC Supreme Court. In preparation for hearing this Charter challenge, your supervising judge has asked for your legal analysis regarding several questions. Remember that your legal opinion should be neutral and even-handed. During the preparation of your legal analysis, you have learned that the BC government intends to argue the following points:

- gatherings for religious services are not banned outright;
- section 17 of the *PHA* permits Internet services for large virtual attendance and facilitates offering multiple in-person religious services for smaller groups;
- religious settings with in-person gatherings pose higher transmission risks due to an innate inclination to have close personal contact in a community environment which includes activities like handshaking, hugging, and singing together;

LAW 271, Section 1

**PART I continued**

- the risk factors for retail settings are different because people are not interacting as part of a community and visits are much shorter;
- the exemptions are essential to protect the economy.

The relevant provisions of the statute can be found after the questions.

1. Explain to your supervising judge how a not-for-profit religious organization like the Church of the Eternal Afterlife of Perfect Bliss can access the s2(a) guarantee of religious freedom. (10 marks out of 60 marks; 15 minutes out of 70 minutes)
2. In your legal opinion, does the BC government's restriction infringe s2(a) of the Charter? (20 marks out of 60 marks; 20 minutes out of 70 minutes)
3. In your legal opinion, can the restriction survive the *Oakes* test? (25 marks out of 60 marks; 30 minutes out of 70 minutes)
4. Briefly discuss what you believe to be the appropriate remedy in these circumstances. (5 marks out of 60 marks; 5 minutes out of 70 minutes)

---

**PUBLIC HEALTH ACT, RSBC 1998 c10**

Definitions

“public health emergency” means a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise ...

Objects and Purposes

1. The object of this Act is to protect the health of the general population and to create conditions favorable to the maintenance and improvement of the state of health and well-being of the people of the province of British Columbia.
2. Public health actions must be taken with the aim of protecting, maintaining or improving the state of health and well-being of the population in general and can only target persons insofar as they are taken for the benefit of the community or a group of individuals.

...

LAW 271, Section 1

Precautionary principle

5. Public health actions may be informed by the precautionary principle which advises that where there are threats of serious or irreversible damage, a lack of full scientific certainty will not be used as a reason for postponing cost-effective measures to prevent further harm to general public health and to the individuals who comprise the public.

...

Gatherings

14. Gatherings may be prohibited only if a reasonable belief that a health hazard exists, or if an activity presents a significant risk of causing a health hazard during a public health emergency.

- (a) Gathering means a grouping of ten or more persons in general proximity to each other who have assembled for a common purpose or reason, regardless of whether it occurs in public or at a private residence or on other private property.

...

Restriction on Gatherings

16. Except as otherwise permitted, all persons are prohibited from assembling in a gathering if the number of persons exceeds 15 percent of venue capacity at any indoor place or in the common areas of a multi-unit residence during a public health emergency.

Exemption for services deemed essential

- (a) Section 16 does not apply to schools, restaurants, retail operations, or places of employment which adhere to the public health requirements set out in section 30.

Places of worship

17. Churches, mosques, synagogues, temples and other places of worship are not exempt from section 16 while a public health emergency is in effect.

- (a) Religious leaders may conduct services at places of worship and those services may be made available to members of the religious community over the Internet;

- (b) Religious leaders may offer church services multiple times over the course of a day of observation to smaller in-person gatherings that constitute no more than 15 percent of total number of persons that the venue is capable of accommodating.

...

LAW 271, Section 1

## **PART II      SHORT ANSWER QUESTIONS**

**20 marks      PART II consists of four (4) 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. *Canada (Prime Minister) v Khadr* is a case where the limits of judicial review in our legal system were confronted. What principled reasons were put forward for limiting the scope of judicial review (and judicial power) in *Khadr*? Do you believe that the remedy the Supreme Court of Canada ultimately selected was constitutionally appropriate or constitutionally problematic? Make sure that you briefly explain what a legal remedy is in your answer.
2. Consider *Shell Canada Products Ltd v Vancouver*. Briefly explain why the City of Vancouver is part of the Executive Branch of government. What was the legal issue in *Shell Canada*? How did the majority decide this issue? What reason(s) did the dissent give to support its decision? In answering these questions, make sure you discuss the unwritten principle of democracy and its meaning in your legal analysis. Which decision do you agree with and why?
3. The preamble to the *Constitution Act, 1982* reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...". Briefly explain what the Supreme Court of Canada says the principle of the rule of law means. In your legal opinion, what does the "supremacy of God" mean? If you could re-draft the preamble, provide one reason why you would or would not include the words "supremacy of God".
4. What does justiciability mean? Explain the general guidelines and boundaries of justiciability as discussed throughout the course. Identify two (2) cases from the course where justiciability played a key role and explain why this was so.

LAW 271, Section 1

**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. You will be assessed on the clarity and organization of your writing, as well as the quality of your arguments in your essay answer.

1. What are the main differences between static and dynamic approaches to interpretation in public law? How does interpreting an ordinary statute differ from interpreting the text of the constitution? Why does the Canadian approach to interpreting the constitution reject originalism? To answer these questions, you must refer to three (3) cases that we have studied in this course and your selection can include a mix of statutory and Charter cases. For Charter cases, you may **not** use s2(a) religious freedom cases in your answer.

**OR**

2. Explain the reasons for the jurisprudential lines that have been drawn in the case law concerning section 32 of the Charter. To answer this question, you must refer to three (3) cases that we have studied in this course. In answering this question, select two (2) of the following key issues that you wish to focus on: the public/private distinction; the indirect effect of the Charter on the common law; defining government in/action; or, determining what is 'law' for the purposes of sections 1 and 32. Make sure that you explain why you agree or disagree with any of the lines that have been drawn in the issues that you have selected to discuss.

**END OF EXAMINATION**

**HAVE A SAFE AND REJUVENATING SUMMER!**