

THIS EXAMINATION CONSISTS OF 6 PAGES
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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 271
Introduction to Public Law & the Charter

Section 2
Professor Parkes

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

NOTE:

1. This examination counts for 95% of your final grade in this course.
2. You may have your notes and/or CANs with you in the examination room but you may not have the course casebook or other materials.
3. **Read every question carefully.** Be sure you understand what you are being asked to do before you begin your answer.
4. **Be careful to budget your time.** A brilliant answer to one question cannot make up for the failure to answer another question.
5. You may use short forms of case names (e.g., *Oakes*, *Sparrow*).

THIS EXAMINATION CONSISTS OF 3 QUESTIONS

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MARKS

33 QUESTION 1

The federal Minister of Justice and Attorney General, Janet Kim, has been tasked by the Prime Minister with developing legislation to forcefully combat the growing problem of hate speech online, particularly on social media. She has asked lawyers in the Department of Justice to draft legislation modeled on a 2017 German law that imposes hefty fines of up to 50 million Euros (or \$75 million Canadian) on social media companies that fail to take down content that promotes hate within 24 hours of receiving a complaint.

A majority of Canadians get their news about politics through social media giants such as Facebook. In fact, Canadians are the most active Facebook users in the world. More than 14 million Canadians check their Facebook news feed every day.

One recent study documented a 600 per cent increase in the amount of discriminatory and hateful speech in social media postings by Canadians from January 2019 to January 2020. Hashtags such as #banmuslims, #whitegenocide and #whitepower were widely used on popular social media platforms such as Twitter. Posts that are discriminatory and hateful based on gender, sexual orientation, gender identity, and religion were also found to be prevalent on social media platforms.

International studies have documented the extent to which social media companies like Facebook and Twitter have engaged in self-regulation (including through content regulation departments where staff respond to complaints, taking down some content, and banning some users). However, the existing research suggests that the self-regulation efforts of social media companies have not been successful in stopping the proliferation of hate speech on these platforms.

Section 319(2) of the *Criminal Code* provides: "Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction."

Prosecutions under this section require the consent of the Attorney General and are relatively rare, although they have increased moderately in recent years. The volume of hate speech reports made to police in Canada has been on the rise every year since 2015.

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Question 1, continued

Based on this research, Minister Kim introduced the *Social Media Accountability Act (SMAA)* in Parliament this week. The Act consists of four sections. It provides:

1. "Social media company" means a corporation which, for profit-making purposes, operates an internet platform that is designed to enable users to share any content with other users or to make such content available to the public, and that has at least one million distinct users located in Canada. News platforms offering journalistic or editorial content, the responsibility for which lies with the platform itself, shall not constitute social media companies within the meaning of this Act.
2. "Criminal hate content" means content posted on a social media company internet platform that is manifestly unlawful within the meaning of s. 319(2) of the *Criminal Code*.
3. Every social media company shall maintain an effective and transparent procedure for handling complaints about criminal hate content on its platform.
4. Every social media company that does not remove or block access to criminal hate content within 48 hours of receiving a complaint is guilty of an offence punishable by a fine not exceeding \$10,000,000.

In her speech in Parliament, the Minister stated:

With this law we are not creating any new categories of illegal content. We are simply requiring that the companies that profit from the lucrative social media industry be responsible for the harm that circulates on their platforms. Our purpose is to promote the equality rights of all Canadians by enforcing our existing hate speech laws in the online space. Law enforcement will continue to do its work to enforce the *Criminal Code* but we need the help of these companies to immediately remove material that is unquestionably criminal hate speech because of the clear and present danger it poses. We know that online hate speech can lead to real world violence and harm. Freedom of expression ends where criminal law begins.

The Canadian Civil Rights Association (CCRA) has expressed strong concern about the proposed law. They say that, to avoid fines, Facebook, Twitter and others will err on the side of caution and just delete swathes of comments and posts, including ones that are legal. The CCRA also worries that the existence of fines could create a false sense that a policy is working to prevent hate speech while protecting non-hate speech related debate, when in fact, companies will censor legitimate debate to avoid any risk.

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Question 1, continued

Facebook has issued a statement saying that they intend to challenge the law in court, calling it an assault on the freedom of expression Canadians hold dear. They note that the company has stepped up efforts to identify and remove objectionable content on the platform.

If Facebook is charged under s. 4 of the *SMAA*, would they likely be successful in arguing that the section violates s. 2(b) of the *Charter* and is not saved by s. 1? Discuss the arguments that Facebook and the government will make and how a court will likely decide all s. 2(b) and s. 1 issues in the case. Do not discuss remedies. **(33 marks; approx. one hour)**

MARKS

37 QUESTION 2

Of the approximately 14,000 people serving federal prison sentences (two years or more) in Canada, women account for just 850 (5%). Approximately 40% of the federal women's prison population is designated minimum security, while for men the rate is approximately 14%.

Until the late 1990s there were only two women's prison in Canada, both located in Kingston, Ontario. One was the Prison for Women (P4W) which incarcerated women of all security levels (minimum, medium, maximum) from across Canada. The other was the Minimum Women's Prison (MWP) which was a small institution in an old Victorian era house, with capacity for 10 women designated minimum security.

A federal task force report released in 1990 examined all aspects of women's corrections and concluded that women had long been disadvantaged as "correctional afterthoughts." The vast majority of correctional planning and programming was focused on men. In the wake of the report, a "gender responsive" strategy for women prisoners was developed to address the needs of women who come into conflict with the law (such as experiences of trauma, poverty, substance use and the impacts of colonization that contribute to disproportionately high numbers of Indigenous women in prison). This strategy involved closing P4W in 2000 and relocating the women to five regional prisons in

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Question 2, continued

BC, Alberta, Ontario, Quebec, and Nova Scotia respectively. These new prisons are, like P4W, multi-level institutions that incarcerate women of all security classifications. They have high perimeter fences with razor wire, many security cameras, multiple locked doors, and numerous other high security features. Women designated minimum security are incarcerated inside the prison compound in a minimum security unit where there are fewer security features than in the medium or maximum security units in the prison, but more security than the MWP.

There are 40 federal prisons for men. Given the vastly larger numbers of incarcerated men, most men's prisons are much larger than the women's prisons. There are six stand-alone minimum security prisons for men scattered across Canada. None of them have razor wire fences and, like the MWP, all of them have fewer security features than the minimum security units inside the women's prisons.

Currently there are eight women incarcerated at the MWP. This week they received notice that the federal correctional service will permanently close the MWP, effective May 1, 2022 and that all women incarcerated there will be transferred to the minimum unit inside the multi-level women's prison in Ontario. The notice further states that the MWP is in need of substantial repairs, that the minimum security units in the women's prisons are more modern, have better facilities such as a gym and library, and are more conducive to providing a range of programming to all incarcerated women.

You are a lawyer working in a public interest law clinic in Kingston. You have been contacted by Piper Chapman, a woman currently incarcerated at the MWP. She and the other women there think the closure of the MWP is sexist and unfair and they strongly oppose the transfer. She wants to know if she can challenge the decision and get a court to order that the MWP remain open.

- a) How will you advise Piper? Do you think the decision to permanently close the MWP amounts to a violation of s. 15(1)? Explain your answer. Assume that the *Charter* applies to this decision. Do not discuss s. 1. **(27 marks; approx. 48 minutes)**
- b) Assume for purposes of this question that a judge of the Ontario Superior Court found that the decision to close the MWP unjustifiably infringed s. 15 of the *Charter*. Is the Court likely to order the remedy Piper is seeking or a different remedy? Explain your answer. **(10 marks; approx. 18 minutes)**

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MARKS

30 QUESTION 3 – Answer ONE of the following questions (approx. 54 minutes)

- a) Writing in 1987, then law professor Andrew Petter argued that “while sold to the public as part of a ‘people’s package,’ the *Canadian Charter of Rights and Freedoms* is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians.” In the 35 years since this statement was made, do you think it has been proven true or false? Explain your answer with reference to course materials and concepts, including at least three cases that deal with different provisions.

OR

- b) In a number of instances in this course we have seen the Supreme Court of Canada adopt a **contextual** approach. Some critics argue that appeals to context contribute to unprincipled decision-making and provide cover for judges to simply impose their own policy preferences. Do you agree or disagree with this view? In your answer, consider the Court’s use of “context” in at least these three areas:
- Statutory interpretation;
 - Section 1 of the *Charter*; and
 - Section 15 of the *Charter*.

END OF EXAMINATION