

**THIS EXAMINATION PAPER MUST BE HANDED
IN WITH THE EXAMINATION BOOKLETS**

**University of Saskatchewan
College of Law**

CONSTITUTIONAL LAW 233.3

**Ken Norman
April, 2001**

TIME: THREE HOURS

The exam requires only two and one-half hours. This permits you to spend thirty minutes reviewing the entire exam and organizing your answers.

INSTRUCTIONS:

1. This is an open book examination.
 2. Answer all questions. They are of equal value. You ought not to spend more than **35 minutes on each question.**
 3. Please write legibly.
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1. There has been a good deal of debate in the Council Chambers of the City of Saskatoon in recent weeks concerning a call to have panhandlers banned from the City's downtown. The Saskatoon Chamber of Commerce is behind this proposal arguing that its members in the centre of the City are losing business because their former customers are choosing to avoid the panhandling problem by travelling in their cars to suburban shopping malls. The Chamber of Commerce has filed a consumer survey with the City Council showing that shoppers in the downtown area are increasingly of the opinion that panhandling by apparently homeless people is something which they should not have to put up with. The City Solicitor advised Council that a complete ban on panhandling in the downtown area would likely not withstand a *Charter* challenge. However, a more sophisticated approach might survive such scrutiny. To this end, she has drafted a proposed by-law aimed at meeting the Chamber of Commerce's concern. The material portions of the by-law read as follows:

The Friendly Streets By-Law, 2001

S.2(a): "panhandling" means to request, in person, the immediate provision of money using the spoken word.

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S.3: No person shall panhandle between the hours of 10:00 a.m. and 9:00 p.m. within 10 meters of any business entrance, automatic teller machine, bus stop or bus shelter located in the downtown region of the City of Saskatoon. The downtown region encompasses 1st, 2nd, 3rd, 4th or 5th Avenue, and 19th, 20th, 21st, 22nd, 23rd, 24th or 25th Streets in the City of Saskatoon.

S.4: No person shall panhandle between the hours of 9:00 a.m. and 11:00 p.m. from an occupant of a motor vehicle which is (a) parked; (b) stopped at a traffic signal; or (c) standing temporarily for the purpose of loading or unloading on any of the avenues or streets cited in s.3.

Please discuss whether the proposed *Friendly Streets By-Law* would survive a challenge under s.2(b) of the *Charter*. Your discussion should include a s.1 analysis.

2. Aggravated assault, section 268 of the *Criminal Code of Canada*, was defined as follows in the 1958 Revised Statutes of Canada:

268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

In 1997, to put an end to certain traditional surgical procedures on girls that have been condemned by the World Health Organization, the government of Canada opted to treat them as a form of aggravated assault. The procedures are known as FGM (female genital mutilation). They are sometimes referred to as female circumcision. These ritual practices are found mainly in African countries north of the equator though mild forms of the practice are reported from some Asian countries. Seventy million women worldwide have been subjected to FGM. There are three traditional forms of FGM. *Sunna* is the mildest and rarest form. It involves the removal of the clitoral prepuce. *Excision* involves amputation of the whole of the clitoris and all or part of the labia minora. *Infibulation* involves the amputation of the clitoris and the labia minora as well as, at least, the anterior two-thirds and often the whole of the medial part of the labia majora. The following amendments were made to section 268

(3) For greater certainty, in this section, “wounds” or “maims” includes to excise,

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infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person , except where

(a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of that person or for the purpose of the person having normal reproductive functions or normal sexual appearance or function: or

(b) the person is at least eighteen years of age and there is no resulting bodily harm.

A new Canadian group called the Association for Genital Integrity has announced that it will launch a s. 15 Charter challenge to the above 1997 amendments to s. 268 of the *Criminal Code*. The group's aim is to ban the circumcision of baby boys. At a press conference announcing this court challenge Dr. Arif Bhimji, a Toronto-area emergency room physician, stated:

Every day in this country a quarter of the boys that are born are having this procedure performed on them without their consent and without any medical need. We don't see why half of our society should be protected by a law and not the other half.

Later that same day Frank Dimant, a spokesman for B'nai B'rith Canada, a Jewish advocacy organization, said such a move would be disastrous for the Jewish and Muslim communities, who require male circumcision as part of their religious practice.

Does the Association for Genital Integrity have standing to carry this case into court or will it have to find a person willing to do so on its behalf? Please discuss the merits of the Association for Genital Integrity's s. 15 Charter challenge to s.268 (3) of the *Criminal Code*.

3. In 2000 the executive director and spiritual leader of the Saskatoon Taoist Temple (STT), filed a personal tax return in which she sought to deduct the rent she paid on her apartment (\$12,000) from the employment income she received from STT (\$35,000). She claimed the deduction on the grounds that she was a member of a religious order ministering to a congregation as required by s.8(1)(c) of the *Income Tax Act*.

The *Act* taxes all employment income (s.5(1)) subject to certain deductions (s.8). Generally, employees are not entitled to deduct their rental or other housing costs from their taxable income. Section 8(1)(c), however, allows such a deduction in the following circumstances:

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8.(1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted...

(c) where the taxpayer is a member of the clergy or of a religious order or a regular minister of a religious denomination, and is ministering to a diocese, parish or congregation, an amount equal to rent paid by him for a residence, or, if he owns a residence, an amount equal to the fair market value of rent that could be obtained for the residence.

Revenue Canada denied her deduction on the grounds that she was not "a member of the clergy", nor was Taoism a religion or a "religious denomination", and therefore STT could not be a "religious order". Revenue Canada officials define "religion" as a theistic belief-system, that is, a belief-system characterized by the worship of a deity. Similarly, they interpret the phrase "religious order" as meaning a group of people bound by the same religious regulations and discipline, such as an order of monks.

Taoism is a spiritual tradition that originated in China over 2000 years ago. The philosopher Lao Tzu is recognized as its founder. Lao Tzu developed a philosophy that taught people to live peacefully and harmoniously with each other through contentment and simple living, appreciation for the natural way of things, and a respect for all life. Tao means Way; the Tao is the way of life. Taoists believe that all things are connected with each other and with the Tao, that they are dependent on each other for growth and nourishment. To preserve the harmony in this interdependency, we need to develop wisdom, compassion and virtue. Taoists also believe that cultivating the body is as important as cultivating the mind. The balance and circulation of energy in the body is fundamental to good health and spiritual well-being. The scriptures of Taoism are collected in the Taoist Canon, which has over 1700 volumes. As spiritual leader of the STT, the executive director is responsible for coordinating and leading a range of activities, including observance of festivals, physical exercises, meditation, education and outreach.

The executive director has appealed her tax assessment to court. She argues in her factum that the *Charter* requires extension of the s.8(1)(c) residential expense deduction to all leaders of organizations advocating a distinct moral or spiritual world-view.

Intervenor status has been granted in this appeal to People United for Secular Humanism (PUSH). PUSH believes that the *Charter* requires that s.8(1)(c) be declared invalid in its entirety. In their submission, the *Charter* prohibits the state from providing any kind of preferential treatment to individuals or organizations that promote religious or spiritual beliefs.

You are a clerk to the judge on the Tax Court who will be deciding an appeal from the Revenue

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Canada decision denying the claimed s.8(1)(c) deduction. Draft a memorandum for the judge as to whether s.2(a) of the *Charter* has been violated. Please include a s.1 analysis. Finally, assuming s.2(a) has been violated, advise the Court as to the appropriate *Charter* remedy.

4. Section 43 of the Criminal Code reads as follows:

Protection of Persons in Authority

Correction of child by force

43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Section 43 was first enacted in 1892, as part of Canada's original *Criminal Code*. The 1892 Code codified a long-standing principle of common law. The common law paternal power to use force for the correction of a child was a correlative of the paternal duties of support, education and protection. The law, of course, now attaches the immunity to parents, not just fathers. The purpose of section 43 is to aid parents in discharging their duty of educating and controlling their children. Section 43 reflects the view that this parental duty, and the accompanying correctional immunity, is delegated to schoolteachers as well.

In the absence of s.43, any use of force against a child without his or her consent would constitute the crime of assault. Section 265(1) of the *Criminal Code* provides that "A person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly." In the leading case on the interpretation of s.43, *R. v. Ogg-Moss* (1984), the Supreme Court of Canada stated that s.43 "exculpates the use of what would otherwise be criminal force by one group of persons against another. It protects the first group of persons, but, it should be noted, at the same time it removes the protection of the criminal law from the second". For this reason, the Court stated that s.43 "ought to be strictly construed". It can only be claimed by parents and schoolteachers, and will immunize from criminal liability the use of force only if it is reasonable in the circumstances and has been imposed for the benefit of the education of a child. Section 43 can have no application to the use of force by someone other than a child's parent or schoolteacher. Nor can it apply to the use of force against a child who is incapable of learning from the correction.

You are a constitutional expert who has volunteered to provide an opinion on the chances that a *Charter* challenge to s.43 will succeed. Specifically, you have been asked to assess the following

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issues:

1) Does s.43 violate s.7 of the *Charter*?

2) Does s.43 violate s.15 of the *Charter*?

Please do not engage in a s.1 analysis in answering 1) or 2).

THE END