TIME ALLOWED: 3 HOURS and 10 minutes reading time

MATERIALS PERMITTED: This is an open book examination. Students may bring into
the examination room the casebook, the Constitution Acts 1867-1982, and their notes.

NOTE: Professor Edinger’s and Professor Johnston’s individual exams are attached as
separate exams. You are free to answer the questions in any order you prefer. We will
mark our own components independently.
NOTE: this is an open book examination. Students may bring into the examination room the casebook, the *Constitution Acts 1867-1982*, and their notes.

If you find that you need additional information, state what that information would consist of and explain its relevance.

**THIS EXAMINATION HAS 2 QUESTIONS**
1. Skinnydipper Services Inc. (Skinnydipper) has just retained you.

Skinnydipper is a society whose principal object is to provide services for naturists (nudists) and to promote naturism. Since 2015, Skinnydipper has rented the Newton Wave Pool, a municipal facility in Surrey, for late night private skinnydipping (nude swimming) one night per month. Only society members are permitted to attend the sessions at the pool. During those rental sessions, the windows of the facility are covered with opaque blinds which prevent any non-Skinnydippers from viewing the pool. The lifeguards on duty volunteer for that shift.

Several weeks ago a local newspaper published a story about Skinnydipper’s use of the Newton Wave Pool, describing it as use by “a group of nudists for a late night private members only nude swim.” Many Surrey residents immediately complained vigorously and loudly to the Surrey Council about this abhorrent and disgusting use of public resources and stated that they would never use the Newton Wave pool again if Skinnydippers were permitted to continue renting it.

The matter was hotly debated at the last Surrey Council meeting. The meeting was open to the public. Only one Council member, a lawyer, defended the rental to Skinnydippers. He stated that “for those of us who came of age in the 1960s, skinnydipping hardly seems to be a threat to the moral fibre of western civilization” and, referring to the Surrey complainants, he said that they were like the persons described by an English judge as “people who were annoyed and angered by what they saw and heard, and shocked by what they had neither seen nor heard, but suspected.”

Skinnydippers has just received a letter from the Surrey Council stating that their rental agreement for the Newton Wave Pool has been cancelled for the rest of 2018 and that no future rentals will be available. The letter cites health concerns with their rental, and refers to Surrey by-law no. 100, s. 42:

s. 42. No person shall enter or bathe in any water at any bathing beach or in any swimming pool without being clothed in proper bathing attire.

Section 83 of that by-law imposes penalties for breach:
s. 83. Anyone who violates any provision of this by-law is liable on summary conviction to a penalty of not less than $50 and not more than $2,000, or to a term of imprisonment not exceeding three months, or to both.

The letter states that the by-law is based on s.73 of the *Swimming Pool, Spray Pool and Wading Pool Regulations* enacted pursuant to the *Health Act*, R.S.B.C. 1996, c. 179.

s. 73. Every swimming pool manager shall ensure that:

(1) only persons in clean bathing attire are allowed to enter the pool area, except as otherwise permitted in these regulations.

Skinnydipper informs you that it had anticipated possible concerns about its planned use of public swimming pools and so it had contacted provincial authorities before it ever contacted the Newton Wave Pool. Skinnydipper provides you with a copy of the letter received from the Provincial Health Department in 2014 in response to its inquiry about the permissibility of nude swimming in city pools. The letter stated that the Ministry was “not aware of any health concerns with respect to the use of pool facilities and bathing without swimming attire” but drew to Skinnydipper’s attention s. 174(1) of the *Criminal Code*, R.S.C. 1985, c. C-46:

174 (1) Everyone who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

(2) For the purposes of this section, a person is nude who is so clad as to offend against public decency or order.

Skinnydipper asserts that Surrey has violated its right to freedom of expression.

Draft a memorandum setting out any and all arguments which can be made attacking the constitutional validity of the Surrey by-law. In addition to the constitutional arguments, set out the remedies you will seek on
behalf of Skinnydippers, specifying the relevant authorizing provisions of

2. Honey and Teddy Bare are a young couple who have been married since
2001. They have no children. They decided to become foster parents. The
Bares are devout members of the Protestant (Free Reformed) Church who
considered telling any lies to be completely impermissible.

The Children's Aid Society in their city ran a course for new foster parents.
The Bares took the course and during the course disclosed to the
instructors both their devotion to their church and what they described as
their inability to lie. They specifically informed the course instructors that
they would not be able to lie to any future foster children about Santa
Claus or the Easter Bunny. They were approved as foster parents.

The Bares' first foster children were sisters, two and six years of age. The
Bares provided presents at Christmas and chocolate at Easter but they
never talked to the children about Santa Claus or the Easter Bunny. When
asked a direct question about Santa Claus by the six year old on her return
from school, they simply changed the subject.

The children were healthy and happy but the case worker for the
Children's Aid Society assigned to the little girls was very upset with the
Bares as as foster parents. She insisted that the Bares tell the foster
children about Santa Claus and the Easter Bunny, arguing that the culture
of the little girls required the Bares to do so. She quoted Society policy to
the Bares: the Society undertook to “maintain the cultural connections” of
all foster children. Ultimately, the little girls were removed and the Bares’
home was de-listed as an approved foster home.

The Bares subsequently applied to adopt a child but their application was
rejected. They believe that they have been blacklisted by the Children’s
Aid Society. The Bares allege that the Children’s Aid Society has infringed
their freedom of conscience and religion by delisting their home as a foster
home and by blocking their proposed adoption. They retain you to bring
an action against the Children’s Aid Society. Draft a memorandum advising
the Bares concerning the arguments which you may make on their behalf
in the proposed litigation.

END OF FEDERALISM AND CHARTER EXAMINATION
THISEXAMINATIONCONSISTSOF3PAGES
PLEASEENSURETHATYOUHAVEACOMPLETEPAPER

THEUNIVERSITYOFBRITISHCOLUMBIA
FACULTYOFLAW

FINALEXAMINATION
APRIL2018

LAW201
CONSTITUTIONALLAW

SECTION4
PROFESSORJOHNSTON

TOTALMARKS—100

TIMEALLOWED—1HOUR

NOTE: thisisanopenbookexamination. Studentsmaybringintothexamination
roomthecasebook, the Constitution Acts 1867-1982, and their notes.

THISEXAMINATIONHAS1QUESTION
The Sturgeon First Nation (SFN) is located in the interior of British Columbia. Although they number fewer than 500 members, they make ample use of their extensive traditional territory. Their annual cycle of fishing, hunting, and trapping, takes them throughout the watershed of the Peaceful River. They also travel for cultural and spiritual purposes. The most important spiritual event of the year is the Feast of the Dead which takes place at their ancestral burial ground situated below the Western Falls. According to oral tradition, this waterfall is key to their creation story. It was at the Falls that the ancient Sturgeon Beings transformed into humans and emerged from the river to live on land. Tradition teaches that, since their emergence, the Sturgeon people have always returned to the Falls to bury their dead. It is the obligation of the living to provide ongoing care for the dead. Every autumn, the people travel to the burial ground to offer food, medicine, and songs to their ancestors.

The SFN have never signed a land surrender treaty with the Crown. They have been involved in the British Columbia Treaty Commission since 2005 but have made little progress in negotiations. Three years ago, the Province of British Columbia announced plans to dam part of the Peaceful River that runs through the unceded traditional territory of the SFN. The project will cause the water levels to rise so that their ancestral burial ground will be inundated. The SFN was given no advance notice of the project; they first heard about it through media reports. They are shocked and dismayed that this site, which lies at the heart of their cultural and spiritual lives, faces destruction. When they contacted the Environment Minister’s office to request a meeting they were told that the matter had been referred for an environmental assessment and that they should contact the British Columbia Environmental Assessment Office (BCEAO) to express their concerns.

The SFN attended the Environmental Assessment hearings and were invited to make submissions. Their position was that the dam must be redesigned in order to avoid destruction of their ancestral burial ground. The proponent, B.C. Hydro, said that it was not feasible to change the design of the dam and that it would be easier to move the burials. In reply, the SFN stated that it was against their traditional law to disturb the resting place of their ancestors and that they would never agree to do so. In its report, BCEAO concluded that the economic benefits of the dam outweighed the concerns of the SFN. As mitigation measures, however, BCEAO recommended that BC Hydro cover cost of removing the burials to a new site and that the removal process be monitored by the SFN. Last week the Environment Minister approved the project.

Imagine that you are an articling student at the Vancouver law firm which represents the SFN. They have indicated that they are completely opposed to the flooding of their ancestral burial ground and that they will do whatever they can to protect it from
disturbance. They are seeking your advice on their legal options. In providing your advice, specify any assumptions that you are making and explain why you are making them.

END OF ABORIGINAL AND TREATY RIGHTS EXAMINATION

END OF EXAMINATION