

**FINAL EXAMINATION - APRIL 2003**  
**LAW 435:C3**

**CONSTITUTIONAL LAW (CARVER)**

*Time Allotted:* Two (2) Hours, and Thirty (30) Minutes.

*Code Number:* DO NOT ENTER YOUR NAME ON ANY ANSWER SHEETS OR BOOKLETS. A list will be circulated and your name is to be entered opposite a number on that sheet. That number will be your code number FOR THIS EXAMINATION ONLY and should be entered on the examination booklets in the space provided for your surname. This will provide for anonymity during marking.

- Special Instructions:*
1. This examination constitutes 75% of the overall mark value for this course. The exam is 75 marks in total.
  2. This examination paper contains **Three Parts**. **There are 5 pages in the exam**. Check to ensure it is complete before starting.
  3. Answer **ALL** questions in Parts I and II. Select **One** of two questions in Part III.
  4. **Part I** is worth 30 marks. **Part II** is worth 25 marks in Total. **Part III** is worth 20 marks.
  5. This is an **OPEN BOOK** examination. Cell phones, pagers, beepers and related equipment are strictly forbidden. These items must be turned off and stowed. Lap top computers are not allowed.
  6. The time estimates given with each Part are guides for your assistance only, and are based solely on Mark value of each Part.
  7. Adhere to the overall time limitation imposed on this examination strictly. **Failure to stop writing at the end of the examination will lead to a deduction of grades or a failure to accept the examination paper.**
  8. As the early exit of some students from the examination room is very disruptive for those students finishing the examination, it is requested that no one leave the examination room during the last 15 minutes of the examination. **THANK YOU.**

## PART I

### VALUE

30 MARKS

60 MINUTES (ESTIMATE)

Assume that in 1998, the federal government signed the International Convention for the Prevention of Commercial Exploitation of Live Organ Donation (the “Convention”). The stated purpose of the Convention is to prevent the development of an international market in donated organs for transplant, in which a person would agree, in exchange for payment, to donate an organ. Many people had expressed the concern that poor people, especially in Third World countries, would be exploited should such arrangements be legal and enforceable. The Convention calls on signatory countries to prohibit commercial transactions regarding organ transplants.

After signing the Convention, the federal Ministers of Justice and Health met with their provincial counterparts to discuss methods of implementing the Convention’s provisions in Canadian domestic law. Four provinces enacted laws that rendered any contracts involving payment for organ donations to be unenforceable. Two provinces with advanced biotechnology industries were opposed to any restrictions. The other provinces saw benefits in encouraging organ donation, and were unsure how they wished to regulate live organ donation.

In late 2002, Parliament passed the Prevention of Commercialized Live Organ Donation Act. The Preamble to the Act contains the following clauses:

*“Whereas the development of a commercial trade in organ donation has become an urgent concern in Canada due to increasing numbers of foreign nationals coming to this country to enter into such transactions, and due to the confusion caused by variation in laws across Canada;*

*Whereas the commercialization of organ donation creates a risk of exploitation of persons of low income;*

*Whereas organ donation may nevertheless be of benefit to Canadians, so long as the risks of commercial exploitation are avoided....”*

The statute operates in the following way. First, it prohibits commercial transactions with respect to live organ donation. That is, the statute makes it an indictable offence for a person to pay or arrange to pay another person “any monetary or other reward, other than expenses allowed under this statute” for their agreeing to donate an organ. The statute sets out stiff penalties, including imprisonment for up to five years, for this offence.

Non-commercial transactions are not prohibited in this way. Instead, the statute purports to regulate live organ donation agreements, where these are not being performed for reward. The statute states that approval for a non-commercial live organ donation must be obtained from the Director of Live Organ Donations, a federal official, and also sets out the criteria under which live organ donations may be approved. The statutory criteria include a grid of allowable payments to a potential donor to cover lost wages and health care costs, and also a list of circumstances in which live organ donation is prohibited, because they “give rise to concerns about undue influence.” One such prohibited circumstance covers live organ donations made by an employee to an employer.

The province of Alberta has not enacted any legislation dealing with live organ donation. One day, Jack Martin and John Smith visit your Edmonton law office for advice. Jack owns a small printing shop. He has been diagnosed with serious kidney disease, which means that if he does not receive a kidney transplant in the next six months, he will become extremely ill and may well die. It turns out that John has the relatively rare matching blood type and is a suitable donor. He is a long-time friend of Jack’s, and is willing to donate a kidney to him. John is also a long-time employee at the print shop. When Jack and John sought approval for John’s donation of his kidney to Jack, the Director refused due to their employment relationship. Without this approval, no physician will perform the procedure. Jack and John are distraught. John tells you, “This is awful. It denies Jack the only realistic chance he has to maintain his health. We’re both adults and we know what we’re doing. How can the government simply deny us this choice?”

**Assume Jack and/or John have standing. Discuss grounds (other than section 15 of the Charter) on which they could bring a**

**constitutional challenge, the bases on which the challenge would likely be defended, and the arguments for and against both positions. Briefly state what you believe would be the likely outcome on each ground discussed, and why.**

## **PART II**

**VALUE**

**25 MARKS TOTAL**

**50 MINUTES (ESTIMATE)**

**With respect to each of the following two short scenarios, both of which involve freedom of expression, identify no more than two (2) issues dealing with Charter jurisprudence that you believe would be important in any Charter challenge, and briefly analyse those issues based on relevant facts mentioned in the scenario and your knowledge of the case law. Do not discuss Charter section 1 issues with respect to Question 1.**

**(10 Marks)**

1. The University of Alberta announces a policy prohibiting staff or students from inviting anyone to speak at the university, including in classes, on the Israeli/Palestinian conflict, due to fights and vandalism that have erupted at recent speaker events dealing with the Israeli/ Palestinian dispute.

**(15 Marks)**

2. Section 163(1) of the Criminal Code makes it an offence for a person to “*make, print, publish, distribute, sell or have in his possession for the purpose of publication, distribution or circulation a crime comic.*” A “crime comic” is defined as a “*magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.*” Evidence shows that this offence was put in the Code in the 1920s, at a time when Canadians were concerned that comic books depicting violence and criminal activity would corrupt the morals of young people. Jane Marvel is charged under section 163(1) when it is discovered that she has produced and sold comic books that depict the committing of computer fraud and hacker crimes, in which she has shown in detail how these things can be done.

### PART III

**VALUE**

**20 MARKS**

**40 MINUTES (ESTIMATE)**

**Select one (1) of the following two short essay questions, and answer it using your knowledge of relevant case law and themes from the course.**

1. “The Supreme Court of Canada has granted itself licence to engage in creative judicial interpretation for the purpose of enhancing the legitimacy of the Constitution in the eyes of those subject to it, but in so doing has actually risked doing damage to that legitimacy.” Agree or disagree with this statement, in whole or in part, basing your discussion on any two of the following three concepts.
  - (a) substantive fundamental justice;
  - (b) unwritten constitutional principles;
  - (c) the justification test for infringement of aboriginal and treaty rights.
  
2. In the *Patriation Reference* (1981), the *Reference re the Secession of Quebec* (1998), and its early decisions on section 35(1) of the *Constitution Act, 1982*, the Supreme Court of Canada identified a significant role for negotiations between the concerned parties. Compare and contrast the respective merits of the Court’s role in establishing the basis for negotiations, and the role the Court would play should negotiations break down, in these three instances of constitutional concern. In which instance do you believe the Court made the best contribution to Canada’s constitutional order, and why?

**TOTAL: 75 MARKS**

**END OF EXAMINATION**