

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL

LEGAL EDUCATION CERTIFICATE
FIRST YEAR SUPPLEMENTARY SPECIAL EXAMINATIONS, OCTOBER 2012

LEGAL DRAFTING AND INTERPRETATION

(TUESDAY, OCTOBER 30, 2012)

Instructions to Students

- (a) Time: 3 ½ hours
- (b) Answer **FIVE** questions.
- (c) In answering any question, a candidate may reply by reference to the law of any Commonwealth Caribbean territory, **but must state at the beginning of the answer the name of the relevant territory.**
- (d) It is unnecessary to transcribe the questions you attempt.
- (e) Answers should be written in black or dark blue ink.

PLEASE REMAIN SEATED UNTIL YOUR SCRIPT HAS BEEN COLLECTED.

QUESTION 1

Reggae Town is a major tourist resort in your jurisdiction which attracts large numbers of artisans and craftsmen seeking to take advantage of the lucrative tourist trade.

Tom Peel, who makes a living by producing and selling local mahogany products, set up a stall in Reggae Town to market his wide array of goods. Among the items displayed are wooden carvings of male and female nude figures in sexually suggestive positions.

While on duty one afternoon in the town, Constable Rey saw Peel's stall, and challenged him on the display of the nude items. Peel was then charged for producing obscene objects, namely, carved mahogany figures, for purposes of trade contrary to section 3 of the Obscene Publications (Prohibition of) Act ("the OPPA").

Section 3 of the OPPA provides:

"3. Any person who, for purposes of or by way of trade, or for distribution or public exhibition, makes or produces or has in his possession any obscene writings, drawings, prints, paintings, printed matter, pictures, posters, photographs or any other obscene objects, shall be guilty of an offence and shall upon summary conviction be liable to a penalty not exceeding ten thousand dollars."

OPPA was enacted in swift response to calls from various local groups, which were alarmed at the potentially damaging influence on the society of the pornographic industry in the United States, particularly the publication of magazines.

In court, counsel for the Director of Public Prosecutions/Attorney General argued for Peel's conviction on the basis that the mahogany carvings, while not coming within any

of the specific items listed in section 3 of the OPPA, still fall within the wide ambit of “any other obscene objects” under the section.

You represent Peel at the trial, and have been called on to respond to the prosecution’s argument.

Present your submission to the court.

QUESTION 2

The Discrimination (Prohibition of) Act (“the DPA”) was enacted in the wake of a sustained public outcry against the growing incidence of discrimination in several areas of national life.

Part II of the DPA deals with discrimination in the field of education. Section 38, which falls under Part II, prohibits school managers in both public and private educational institutions from discriminating against prospective employees by reference to “religion, colour, or ethnic or national origins.”

There is no definition of “ethnic” under the DPA, nor any other indication from the statute as to the scope of the term.

Lisa Rue is an ardent member of Kultcha Free (“KF”), a local cultural group formed about a century ago in a remote area of your jurisdiction. KF’s mandate involves the promotion of the return to a simpler, “natural” lifestyle, and members live in rustic housing, use public transportation exclusively and eat only vegetarian products. They

also dress in a distinctive manner, hold unique cultural meetings and, among themselves, speak a dialect exclusive to the group.

KF is not a religious organisation and its members do not form a distinct race within the jurisdiction.

Rue responded to a recent newspaper advertisement issued by a private high school seeking to employ a teacher of Cultural Studies. Rue is fully qualified for the job, but at the outset of the job interview, the school principal bombarded her with questions about her attire and beliefs. No question was raised about her qualifications and experience.

Ultimately, Rue's application was denied. Upset with the decision, Rue has made a claim under section 38 of the DPA for illegal discrimination by reference to her "ethnic origins".

In court, the school's counsel contends that the claim has no merit since:

- the DPA is silent on the scope of the meaning of the word "ethnic";
- accordingly, effect should be given to the ordinary, literal meaning of "ethnic", which necessarily contemplates a group of distinctive race or biological origin; and
- KF members do not constitute a separate, biological race in the jurisdiction.

The judge now calls on you to respond to the argument of the school's counsel.

Present your response to the court.

QUESTION 3

Section 21 of the Loitering (Prevention of) Act (“the LPA”) provides:

“Every person who shall be found by night in the vicinity of any building with intent to commit felony therein shall be guilty of an offence and sentenced to two years imprisonment.”

The LPA was enacted to curtail the spate of burglaries that had occurred in your jurisdiction, in circumstances where suspicious persons had been observed lurking in the immediate area before the commission of many of the crimes.

Pat Coe has been unemployed since the beginning of 2012, and has become desperate to turn his fortunes around. One night in July this year, Coe was walking through a middle-class neighbourhood en route to his home when he noticed that a particular residence was in darkness. However, the street lights enabled him to make out an open window at the side of the house, and on the spur-of-the-moment he decided to enter the premises and take any valuables he could find.

Coe climbed through the window, and was rifling through a drawer in one of the bedrooms when he was surprised by a householder. Coe was subdued and eventually taken into custody. He has been charged for violation of section 21 of the LPA.

The judge, in delivering his decision at the trial, observed:

“It was submitted on behalf of the accused that for an offence to be committed under section 21, a person has to be found ‘in the vicinity of’ a building, that is, near to the building. Since the accused was found inside the house itself, not in

the area surrounding it, the defence strongly argued for an acquittal of the charge.

I find this argument clever, but unsound. To adopt such a strict, literal construction of the provision would be absurd, and allow a clearly criminal intent to go unpunished. I would invoke the celebrated dictum of Lord Blackburn in River Wear Commissioners v Adamson (1876-1877) 2 App Cas 743, 764-5, in which the learned judge stated that a court should interpret an Act so as to avoid a manifestly absurd result.

Furthermore, there is the case of Adler v George [1964] 2 QB 7, quite similar to the one now before me, in which the strict literal approach was rejected by the court in favour of a more generous interpretation.”

Coe was found guilty of the offence, and now desires to appeal against the conviction. He has referred the matter to you.

Critically review the judge’s statement and advise Coe as to the prospects of a successful appeal against his conviction.

QUESTION 4

Several decades ago, there was a significant upsurge in the number of cases in which certain animals used for commercial purposes strayed into public spaces and created a nuisance. In response, the legislature passed the Animals (Control of) Act (“the ACA”).

The Long Title of the ACA provides:

“AN ACT to require owners of animals reared or used for commercial purposes to control the movement of their animals in public places; to impose liability on such owners for failure to control their animals; and for connected purposes.”

Section 2 of the ACA defines “animal” to mean “a pig, chicken, goat, sheep, horse or cattle”.

Section 4 of the ACA makes the owner of an animal found straying in any public place guilty of a misdemeanour punishable by a substantial fine.

Bill Dred, a small trader in a rural area, owns a donkey which he has used for several years to transport some of his goods to market. On one occasion, while negotiating sales at a market, Dred was involved in a heated argument with another seller. During the lengthy altercation, the donkey managed to free itself from its tether and wandered off into the public square, ultimately creating a general disturbance.

Dred was charged for an offence under section 4 of the ACA on the basis that:

- it was clear from the wide ambit of the Long Title that Parliament had intended to capture animals used for commercial purposes which were creating a nuisance;
- donkeys, although not specifically mentioned in the definition of “animal” in section 2, were not so incompatible with those listed, and could fall within the broad scope of “cattle” in the section;
- the narrow, ordinary meaning of “cattle” (namely, cows and oxen) should be extended accordingly to give effect to Parliament’s intention.

You are counsel for Dred. Present your response to these arguments.

QUESTION 5

The Obscene Publications (Control) Act (“the OPCA”) was enacted in 1950 at a time of growing public concern about the increasing availability of pornographic material in the jurisdiction, owing to its potential impact on public morals.

Section 9 of the OPCA provides:

“9(1). Any person who, for purposes of or by way of trade, or for distribution or public exhibition, publishes any obscene material shall be guilty of an offence, and on conviction shall be liable to a penalty not exceeding twenty thousand dollars, and in default of payment to be imprisoned for a term not exceeding one year.

(2) In this Act, ‘publish’, in relation to “obscene material”, means to disseminate any obscene writing or other material which is directed to the public at large or any section of the public.”

Jim Krel is involved in several criminal activities, including the marketing of pirated digital video discs (DVD’s). Earlier this year Krel obtained a number of DVD’s of the latest pornographic movies produced in the United States, and organised exhibitions of

these in designated houses in various inner-city communities. Interested residents of these communities paid a fee to watch the DVD's at the designated locations.

The police, who had Krel under surveillance for some time, raided two of the designated houses while the DVD's were being exhibited, and confiscated the DVD's and associated equipment. Krel was arrested and charged for publishing obscene material, namely, pornographic DVD's, by way of public exhibition contrary to section 9(1) of the OPCA.

It is not disputed that the material on the DVD's is obscene, or that the audiences at the designated locations constituted a section of the public for purposes of the OPCA.

At the trial, Krel's counsel strenuously contends that his client cannot be guilty of an offence under section 9 of the OPCA, since Krel did not "publish" any obscene material as contemplated by the provision, in that the DVD's did not constitute writing "or other material". Counsel supports this position by arguing that:

- in 1950 when the OPCA was enacted, legislators would not have associated the phrase "other material" with the sophisticated digital technology inherent in DVD's, since such technology was only developed decades later;
- Parliament could therefore only have intended "other material" to be limited to such material as existed at the time of passing of the Act;
- such an interpretation is consistent with the historical approach to statutory interpretation, which is preferable to one which invites the court to strain the language of the OPCA and so usurp the Parliamentary function.

You represent the Director of Public Prosecutions/Attorney General in this case. Respond to the arguments of Krel's counsel.

QUESTION 6

Sam Fye is a member of a drugs trafficking network which is engaged in transporting South American-produced cocaine through your jurisdiction en route to the United States.

Early one morning several months ago, Fye and two accomplices were travelling in a “go fast” boat on a drugs trafficking mission in your country’s territorial waters. The boat contained several packages of cocaine. The police, acting on intelligence, intercepted the boat while it was close to shore.

The two accomplices jumped into the sea and managed to escape. Fye was seen throwing the packages overboard, and was taken into custody. The packages of cocaine were then recovered from the sea. Fye was charged with an offence under section 37 of the Narcotics Trafficking Act (“the NTA”), which reads:

“37. Any person found in possession of a Class A narcotic is guilty of an offence and is liable on conviction to the penalties prescribed in the Schedule.”

Cocaine is a Class A narcotic.

The NTA was enacted in direct response to the recommendations of a Government-appointed Task Force, which had submitted its Report entitled “Combating Illegal Drugs: a New Approach”. The Report identified drugs dealing as the single greatest threat to the stability of the country, and lamented the poor conviction record for drugs offences. It called for resolute legislative action to reverse the alarming increase in drugs offences.

At the trial, the defence argued that Fye should not be found guilty of the offence, based on the following:

- the phrase “found in possession” in section 37 of the NTA has a single meaning, which requires an accused to actually have the articles in his custody at the time of apprehension;
- when Fye was apprehended in the boat, no cocaine was found on board;
- consequently, Fye could not, on a literal construction of section 37, be characterised as a person “found in possession” of a Class A narcotic.

For its part, the Crown contended that:

- the phrase “found in possession” is capable of bearing more than one meaning;
- there is the narrow interpretation requiring that a person be apprehended with the prohibited articles in his custody;
- there is the wide interpretation which would include a person being observed with the prohibited articles in his custody, even if at the actual time of apprehension the articles are no longer under the person’s control;
- the court, in view of the ambiguity in the language of the provision, should examine the background to the NTA to discover the mischief which the statute was intended to redress;
- it was clear from the Report of the Task Force that the scourge of drugs dealing required a strong legislative remedy; accordingly, a narrow literal construction which allowed clear criminality to escape the reach of the law would defeat the intention of Parliament;

- a wide interpretation should therefore be given to “found in possession”, so that the observation by the police of Fye’s jettisoning of the packages into the sea would be sufficient to ground the offence under section 37.

You are the judge considering these submissions. Critically assess them in light of relevant case law and advise of your ruling.

QUESTION 7

Under the Housing (Inner-City Development) Act (“the HIDA”), modest housing in designated areas may be allocated to residents of inner-city communities for rental on concessionary terms. Section 34 of the HIDA provides that on the death of any such resident (referred to as a “statutory tenant”), “a member of the immediate family” may succeed to the tenancy once certain conditions are satisfied.

There is no specific definition of “a member of the immediate family” under the HIDA, and the scope of the term is unclear from a reading of the statute as a whole.

Gail Boss was a statutory tenant under the HIDA at the time of her death in May 2012. Ian Wale, her common law husband of seven years, had been a bedrock of support to her and their two children during the union, and particularly during Boss’s final illness. He is desirous of continuing the statutory tenancy in his name.

The administrators of the scheme at the Housing Department are sympathetic to Wale’s position, but take the view that he does not qualify as “a member of the immediate family” within the meaning of the HIDA, on the grounds that:

- there is no explicit provision in the Act recognising the status of a common law spouse;
- accordingly, “a member of the immediate family” should be construed to cover the children and legal spouse of the statutory tenant.

Distressed, Wale consults you as to his options. Your research into Hansard reveals that during the Parliamentary debate leading to the passage of the HIDA, the Minister for Housing, in introducing the Bill, spoke passionately about the “new dawn” that the legislation would usher in for persons with unsatisfactory housing arrangements, as well as those “loved ones” who shared accommodation with them.

Advise Wale whether there is any legal basis on which to challenge the position taken by the Housing Department.

QUESTION 8

Cal Jona is the Lessee of a dwelling house. The lease was prepared by Jim Seer, the Lessor, who relied on several precedents provided by a para-legal secretary. The lease contains the following provisions:

“5. The Lessee covenants with the Lessor not to erect, or permit the erection of any pole, mast or wire upon the premises, except in connection with the provision of telephonic, television or satellite communication services.

....

23. The Lessee agrees not to permit the installation of any pole, mast or wire upon the premises, including in connection with telephonic, television or satellite communication services, unless with the express written consent of the Lessor.”

In June this year, Jona entered into an arrangement with Cable B Ltd. for the provision of cable television services to the leased property. The services required the mounting of poles and cable wires on the roof and other parts of the premises. Jona did not consult Seer, the Lessor, regarding these works.

During a recent visit to the dwelling house, Seer observed the installations, which he considers to be unsightly. He became upset with Jona as he recalled that he had included a provision in the lease prohibiting such works without his written consent. However, on reviewing the lease, Seer now believes that paragraphs 5 and 23 are totally irreconcilable.

In a quandary as to how to proceed, Seer consults you for advice.

Advise Seer on the legal effect of paragraphs 5 and 23 of the lease.

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