

DECEMBER EXAMINATION 1999

**CML 2313(A)
CONSTITUTIONAL LAW II**

PROFESSOR JOSEPH MAGNET

**Friday, December 17, 1999
8:30 a.m.**

**Time: Eight Hours
Open book - Take Home Exam**

INSTRUCTIONS:

- 1. ANSWER BOTH QUESTIONS.**
 - 2. EACH QUESTION COUNTS FOR 50% OF YOUR FINAL MARK.**
 - 3. YOUR ANSWER TO THIS EXAM MUST BE IN 12 PT TYPE, MUST BE DOUBLE SPACED, AND MUST NOT EXCEED TEN PAGES FOR BOTH QUESTIONS.**
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QUESTION I (50%)

In April 1996, the Ontario Government established the Health Services Restructuring Commission, with a broad mandate to restructure health services throughout Ontario. The Commission was clothed with the power to issue directions in the place of the Minister of Health, and was given a relatively short time period of 4 years to complete its task.

The Commission examined the situation in the Region of Ottawa-Carleton. It first announced its intentions with regard to the directions which it proposed to issue respecting the provision of health care services in the Region, in February, 1997. Those intentions included - at the time - the closing of Hôpital Montfort no later than March 1999. Since then the Commission has modified its views, and the directions which have ultimately been issued (the "Directions") do not contemplate the closure of the hospital. However, the directions which have been issued, if implemented, will lead

to the destruction of Montfort's ability to provide truly Francophone - as opposed to "bilingual" - medical services and medical training.

The Commission's initial notice of intention, and its subsequent Directions, sparked a firestorm of opposition from the Franco-Ontarian community and others. That opposition was succinctly summarized in the phrase: "Fermer Montfort, jamais!". The Commission has attempted to respond to some of the widespread criticism which it has faced by modifying its directions; nevertheless, representatives of the Francophone community of Ontario can establish by expert sociological evidence that to proceed with the transformation of Montfort, in the manner prescribed by the Directions, will cause irreparable harm to the Franco-Ontarian community in that:

- * it will be impossible in the future for Montfort to continue to offer health care services and medical training in a Francophone milieu;
- * as a result, Montfort will not be able to continue to play its role as an institution essential to the survival of the Franco-Ontarian community; and,
- * the direct result of putting the Directions in place will be to increase the already critically high rate of assimilation of the minority Franco-Ontarian community into the English majority.

Following litigation in the lower courts of Ontario, the Hospital and representatives of the minority Franco-Ontarian community retain you to advise them of the likely success of challenging the Directions on the constitutional grounds in the Supreme Court of Canada. According to the letter instructing you, the challenge is to be made on this ground -- that

“the Directions violate one of the fundamental organizing principles underlying the Canadian Constitution, namely, the principle of protection of minorities - in this case, a minority which is an official language minority in Canada and one of the country's founding cultures.”

Your articling student does some research and discovers these additional facts. There are approximately 192 public hospitals currently operating in Ontario, including Hôpital Montfort. These hospitals are subject to extensive regulation by the provincial government through the *Public Hospitals Act*, as part of the overall regulatory regime governing the provision of health care in the province.

Hôpital Montfort provides both services to the public and training to medical professionals affecting a significant portion of the Franco-Ontarian community in the Region of Ottawa-Carleton and beyond, and it plays an important role in the Franco-Ontarian community across the entire Province.

Your student meets with sociologists who testified in the lower courts that in the last half of the century the rise of immigration, the impact of television and the modern mass media, the effects of urbanization and the general mixing of population groups have contributed to the fracturing of the

homogeneous Francophone communities of years gone by. Franco-Ontarians could no longer simply count on the milieu of their daily lives to preserve their culture. The Francophone nature of their institutions has thus become increasingly important in fulfilling the role of preserving and protecting that culture. Institutions are vital to the survival of cultural communities. Their role goes beyond providers of services. They are linguistic and cultural milieus which provide individuals with the means of affirming and expressing their cultural identity, and which by extension permit them to reaffirm their cultural adherence to a community.

The sociological evidence also establishes that French is doomed to become a second language for the Franco-Ontarian in a bilingual setting, because in that setting the language used will inevitably be the language of the one unilingual Anglophone in the group. In a minority setting, bilingualism risks becoming the first stage of assimilation for the minority bilingual group.

Your student also reports that in 1975 Montfort adopted an official policy regarding its Francophone nature, based upon the following premises:

- a) that its Francophone character was its *raison d'être*;
- b) that it was necessary to offer all hospital services in French; and,
- c) that it was necessary to offer a complete range of medical care, except for certain highly specialized services already available elsewhere in the region.

This is unique in Ottawa-Carleton and, indeed, in the province of Ontario.

(PART A) (25%) Provide the Hospital with the opinion for which you are retained.

During one of the rallies in support of Hôpital Montfort a scuffle breaks out. Pierre Le Gros is standing in the vicinity of the scuffle. He had been begging for “spare change.” When the police break into the crowd and make arrests, Pierre yells:

“Eh! Laisse moi tranquille – tué.”

An officer approaches him.

“What?”

“Mangez la mer-.”

He is arrested and charged with one count of causing a disturbance under the following City of Ottawa By-Law:

- “1. It is unlawful to be on a City of Ottawa street for the purpose of causing a disturbance.
2. Anyone who contravenes s. 1 is guilty of an offence punishable by a fine not to exceed \$500.00.”

and one count under the following City of Ottawa By-Law:

- “1. It is unlawful to be on a City of Ottawa street for the purpose of begging.
2. Anyone who contravenes s. 1 is guilty of an offence punishable by a fine not to exceed \$500.00.”

Pierre Le Gros consults you for advice on whether he can defend against the charges on constitutional law grounds (excluding the Charter of Rights).

(PART B) (25%) Advise Pierre Le Gros.

QUESTION II (50%)

Trans Saskatchewan Pipelines Ltd. is a provincial crown company that owns and operates the Saskatchewan portion of a pipeline that extends from Alberta to Ontario. New understandings in metals technology reveal that flex in the pipeline’s metal construction may cause the pipeline to give way over time. The company becomes concerned that the pipeline may some day break. In consequence, it constructs a storage facility in a dried out lake bed. The facility is capable of holding a vast quantity of oil. As a test, the company fills the reservoir with oil.

The company discovers that pumps designed to replace the oil from the reservoir to the pipeline are insufficient. It seeks provincial approval to leave the oil in the reservoir. On January 1, 1999, the province agrees that the oil may stay in the reservoir for one year. As a condition, pursuant to the Saskatchewan *Environmental Protection Act*, the province requires that the Company adhere to a rigorous licensing inspection system, under the control of the provincial Department of Energy.

The Federal Department of Energy becomes aware of the agreement. Canada enacts as follows:

“Her Majesty, by and with the advice and consent of the Senate and House of Commons, enacts as follows:

- 1) This statute may be cited as the *Oil Reservoir Emergency Act*.
- 2) There is established the Oil Reservoir Protection Board consisting of the Chairman, the Vice Chairman, the Secretary, the President and such officers and officials as may be specified in the regulations. [...]

14) The Board shall establish a system of inspection of the oil reservoir facility in order to ensure that no activities related to the oil storage materially degrade the water reservoirs supplying two or more provinces, and where the Board is satisfied that the activities of any person pose a risk to the purity of water reservoirs extending beyond the limits of a province, it may give such directions to such persons as in its discretion it thinks fit and proper to reduce the risk to interprovincial water supplies. [...]

28) Every person shall comply with any direction ordered by the Board.

29) Every person who contravenes section 28 is guilty of an offence punishable on summary conviction.

The Board orders Trans Saskatchewan to remove all oil from the reservoir immediately. Trans Saskatchewan Pipelines Ltd. does not wish to comply with the Federal direction. The provincial licensing conditions allow Trans Saskatchewan to leave the oil in the reservoir. The Company wants your constitutional law advice as to what it should do.

Advise Trans Saskatchewan Pipelines Ltd.