

## **Question I – Part A – Montfort**

There can be no question that the province of Ontario in restructuring Montfort Hospital is acting pursuant to its exclusive provincial jurisdiction over the establishment, maintenance, and management of hospitals in and for the province *via* s.92(7) of the Constitution Act, 1867. However, on the evidence adduced by the research assistant, it seems clear that the closure of Montfort is in direct conflict with a fundamental organizing principle of the Canadian Constitution, namely the protection to minority rights that the Constitution affords. By virtue of s.52 of the Constitution Act, 1982, the Constitution is deemed the Supreme law of Canada, and no lawmaking authority in Canada has the constitutional capacity to enact laws that conflict with the provisions of the Constitution: Therens; Hunter v. Southam. Yet can the basic principles underlying the Constitution be given such substantive content that they can be grasped on their own as substantive legal tools in mounting a defence against a jurisdictionally-valid provincial political act that exerts an impact on those fundamental rights?

In the Secession Reference, the Supreme Court considered the use that it could make of underlying constitutional principles and indicated that such principles “may in certain circumstances give rise to substantive legal obligations (have “full legal force”..) which constitute substantive limitations on government action”, which may give rise to obligations “specific and precise in nature” (para 54). As counsel for Montfort, I would argue before the Court that this is a situation in which substantive legal content need be poured into a constitutional principle in order to protect an official language minority in a context where the current structure of the federation is itself insufficient to protect those interests. Without such a legal instrument, the Constitution is unable to safeguard the underlying interests that give it legitimacy.

Operating on the assumption that it is permissible to clothe a constitutional principle like minority protection so as to give it substantive form as a legal tool, to what extent can a government encroach on those rights? Is the traditional federalism test of “fit” sufficient, or is a test of

“demonstrably justified as *Charter* issues warranted? It would be my contention that a sliding scale of “fit” as outlined by Dickson CJC in GM v. City National Leasing is sufficiently flexible, and that the test of fit must necessarily be a strict one where such basic constitutional rights are involved. In the Montfort case, the evidence demonstrates that the ancillary impact of restructuring appears to be that minority rights are regulated in their core or essential aspects. The regulation of hospitals by the provincial government through the *Public Hospitals Act* seems to be an extensive and comprehensive regulatory scheme, but the mandate of the Health Services Restructuring Commission is very broad. The discretion of the Commission to issue directions in place of the minister also seems extensive. It cannot be denied that the Commission has attempted to respond to many of the concerns of the Hospital, yet it has failed to do so in a manner that recognizes the fundamental nature of the rights affected, and it is questionable whether these rights could be made to yield to economic considerations in such a context. They clearly have been identified as necessary to the successful, purposeful operation of the hospital.

### **Question I – Part B – Pierre Le Gros**

Pierre Le Gros should under the circumstances defend against both charges together, as many of the same constitutional susceptibilities are present in both by-laws. The municipality must of necessity derive its authority from provincial legislative delegation, and it cannot exceed the bounds of the delegated authority. Pierre may be able to defend against the charges here by arguing that the central purpose and dominant characteristic of the bylaws is the restriction of socially undesirable conduct which should be suppressed or punished. Such a purpose is *ultra vires* the municipality or the province as in relation to matters of criminal law, an area of exclusive federal jurisdiction under s.91 of the *Constitution Act, 1867*. As noted by Rand J in the Margarine Case, “[p]ublic peace, order,

security, health, morality: these are the ordinary though not exclusive ends served by the criminal law”. The “presence or absence of a criminal public purpose or object is thus pivotal” in establishing that a provincial or municipal enactment is *ultra vires* (Morgentaler 1993). It can be argued that both of these bylaws have as a fundamental goal the regulation of public peace by penal sanction and, particularly in the case of the begging bylaw, the punishment by penal sanction of conduct deemed morally suspect.

The bylaws are suspect on a number of grounds. First, both bylaws cover behaviour historically regulated by the criminal law, and are therefore suspect on their face: Morgentaler 1993. On behalf of Mr. LeGros I would adduce evidence that both forms of conduct have been governed by the criminal law since the time of Confederation. Further, Pierre might also seek evidence from the minutes taken of council meetings that indicate that the by-laws were enacted in with a view to regulate conduct deemed socially offensive or “criminal”. Such evidence, though outside the “four corners” of the legislation, would be indicative of the practical effect of the bylaws and thus evidence of a colourable criminal law purpose.

Second, though begging may no longer be governed by the Criminal Code, “the absence of operative federal legislation does not enlarge provincial jurisdiction” (Morgentaler 1993). In order for the bylaws to avoid condemnation as exerting a provincial morality power, each must be firmly anchored in an independent provincial head of power (Morgentaler, Rio Hotel). The municipality most likely would characterize the bylaws as incidents of their authority to legislate in respect of “matters of a merely local or private nature” pursuant to s.92(16) of the CA, 1867. Pursuant to s.92(16) the municipality may claim jurisdiction to regulate municipal streets or public nuisances. However, as naked prohibitions on a form of public conduct reaching outside privately-owned property, each bylaw must demonstrate a sufficient nexus to a valid provincial regulatory power or program to support the prohibition (Rio Hotel). The city of Ottawa would therefore need to show that the bylaws in pith and

substance are related to the control of the streets or public highways: Westendorp. The apparent absence of such a regulatory scheme here is telling, though the facts are not clear on this. Even if the city could show that the regulations are part of a comprehensive scheme directed at city streets, the prohibition on being on city streets “for the *purpose* of causing a disturbance” is susceptible to the treatment that a similar bylaw, related to prostitution, received in Westendorp. The current Criminal Code offence of “causing a disturbance” is brought into operation by the commission of the disturbance itself. The bylaw is overbroad here, as just being on the streets for the purpose of creating a disturbance brings into operation of the law resulting in penal sanctions. Though the provinces are free to legislate to prevent the commission of crime, the bylaw here weakens the enforcement of the criminal law, and may therefore be deemed in operational conflict with the Code provision: Husky v. MNR, Chiasson. The Code provision would then be deemed paramount and the bylaw inapplicable.

## **Question II – Trans Saskatchewan Pipelines**

In order to mount an effective constitutional defence to the action taken against it, Trans Saskatchewan Pipelines will want to challenge the *Oil Reservoir Emergency Act* (hereinafter *OREA*) in a number of ways. First, the company will determine the constitutional validity of the law by characterizing its subject matter as *ultra vires* the federal government. Secondly, the company may challenge the applicability of the federal legislation to the company as a provincial Crown corporation by invoking the interjurisdictional immunity doctrine.

The first step involved in challenging the validity of the federal legislation here is to identify the matter of the *Oil Reservoir Emergency Act* by its pith and substance, object and purpose, it’s leading feature. The federal government will try to justify the *Oil Reservoir Emergency Act* by arguing that the legislation deals with matters of interprovincial trade, an area of exclusive federal jurisdiction pursuant

to s.92(2) of the *Constitution Act, 1867*, or alternatively as a valid exercise of its power in relation to matters falling within the peace, order, and good government clause of s.91 of the *CA, 1867*. Each of these characterizations of the law is susceptible to challenge by Saskatchewan Pipelines.

The Parsons case established two branches of the federal trade and commerce power in s.91(2). Parliament was credited with the capacity to legislate in respect of matters of interprovincial and international trade, and in relation to the general regulation of trade affecting the whole dominion. Under the first branch of the federal power, “once an article enters the flow of interprovincial or external trade, the subject matter and all its attendant circumstances cease to be a mere matter of local concern” (Ref Re Farm Products Marketing Act). The federal government will argue federal competence under the circumstances of this scenario to regulate oil once it is in the pipeline and destined for out-of-province export. An analysis of pith and substance, however, begins by looking at the legislation itself and determining its “legal effect” or “strict legal operation”: Morgentaler, 1993. The legal effect of the *OREA* here is to subject the oil in question, and thus the company, to regulation at a point before it leaves the province. While its ultimate destination may be extraprovincial, this fact alone will not give Parliament jurisdiction over the subject matter, as it cannot be categorically said that ultimate extraprovincial destination will foreclose provincial regulation of *intermediate steps in the marketing process*: Manitoba Egg, *per* Laskin CJC. The company should argue that the regulation of the distribution of oil in the present circumstances is in pith and substance in relation to a matter exclusively reserved to the provinces. Using a “physical things in physical spaces” approach, the company should argue that the oil, sitting in a reservoir, has not left the province and as such as the federal government is not competent to regulate the holding of the oil as a commodity within the province: Reference Re Natural Products Marketing Act. Rather, this power is reserved to the provinces *via* s.92A.(b): “development, conservation, and *management* of non-renewable natural resources...in the province”.

In purporting to regulate the subject matter here under the second branch of its trade and commerce power, the federal government must argue that the OREA in pith and substance is directed at a matter of general concern affecting the whole dominion. To be justified under this branch, however, the impugned legislation must manifest some of the indicia of validity set out by Laskin CJ. in Vapour Canada, as expanded upon by Dickson CJ. in GM v. City National Leasing. Indicia include the fact that the impugned provision or legislation be part of national regulatory scheme, that it involves oversight by a federally appointed agency, that it be concerned with trade in general, that the provinces jointly or severally would be constitutionally incapable of passing such legislation, and that the failure to include one or more provinces would jeopardize its successful operation. Whether or not there is even a valid regulatory scheme in place here is questionable. Though the party being regulated has perhaps caused the need for the regulation, the Act appears to delineate in general terms the prohibited conduct, the ability to regulate here is fully in the discretion of the appointed Board. On the given facts, there is no apparent legislation on how to regulate, which would serve to indicate the existence of a regulatory scheme. Further, there is no evidence of oversight by a federally-appointed regulatory agency to enforce the scheme; rather, this also appears to be left with the Board. Additionally, the concern here seems not to be with trade in general, but rather with a particular industry – the oil industry. That indicia supportive of a valid national regulatory scheme are absent is contrary to the requirements set out in GM v. City Nat'l Leasing. Even were the federal government able to convince the Court that a sufficient proportion of the necessary indicia had been satisfied, the scope of the legislation comes into question. While legislation enacted pursuant to a head of exclusive jurisdiction may have an incidental impact on subject matters within the other order of government's jurisdiction, such impact must meet a test of "fit" where a provision extends into an area of *prima facie* exclusive jurisdiction: GM v. City Nat'l Leasing. Saskatchewan Pipelines may be able to argue that the federal power held in ss.14 and

28 of the *OREA* to “give such directions to such persons as in its discretion it thinks fit and proper” and to force the compliance by threat of penal sanction involves a deep incursion into provincial powers to regulate the oil industry under s.92A of the *CA, 1867*. The depth of the incursion here requires a test of “fit” between the provisions and the legislative scheme that strictly justifies the intrusion as “truly necessary” to the purposes of the scheme. The lack of any inherent limits on the federal power of enforcement here, indicated by the unrestrained discretion of the Board in giving “directions” to the subject company, belies the possibility of a “truly necessary” incident of federal authority. There is no evidence here that the efficacy of the regulatory scheme requires such potentially unlimited discretion. Therefore, sections 14 and 28 of the *OREA* are particularly susceptible to challenge by Saskatchewan Pipelines as *ultra vires* Parliament.

The federal government may also seek to justify the *OREA* as legislation enacted pursuant to its residuary powers to legislate for the peace, order, and good government clause in fields outside the areas of exclusive jurisdiction given to the provinces under s.92 of the *CA, 1867*. The regulation of the environment is not an area of jurisdiction exclusively assigned either to the provinces or to Parliament. In order to justify the exercise of its residuary powers here, however, the federal government must found the basis for the application of the *OREA* in an area of national concern, or as necessary to deal with a national emergency. While the Act is cited as the *Oil Reservoir Emergency Act*, it is doubtful that the legislation could be upheld as such, in spite of the traditional deference shown to Parliament in determining whether a state of emergency exists (Fort Francis Pulp, Re Anti-Inflation Act). It seems plausible to suggest that Saskatchewan Pipelines could adduce “very clear evidence that an emergency has not arisen”, as the legislation comes into operation where storage of oil poses a *risk* to the environment; it is not in pith and substance directed at an actual state of emergency. Further, emergency legislation must be limited by time as emergencies are by their very nature *temporary*: Re Board of

Commerce Act. There is no statutory indication here that the legislation is to expire at a certain date or at the conclusion of a certain state of events.

The federal argument would be better able to support the legislation by suggesting that its dominant purpose or aim is the protection of water reservoirs beyond the province, in other words environmental interests of national concern that have a singleness, distinctiveness and indivisibility beyond provincial concern and a scale of impact on provincial jurisdiction reconcilable with federal legislation in this area. The Crown would argue the “provincial disability test”, suggesting that the failure to deal effectively with this problem would have an unacceptable impact on extraprovincial interests, namely the quality of reservoir water in other provinces. The Crown could argue that the situation here is analogous to that in Interprovincial Co-op, and that the failure to regulate federally in this area could have the undesirable consequences of one allowing economic and environmental interests in one province to be significantly harmed in furtherance of the profit objectives of another. To allow one province to impose such burdens on unrepresented citizens is constitutionally illegitimate activity, contrary to the basic democratic principle informing the substance of our Constitution.

While the feds would likely cite the judgment of Pigeon J. in IPCO as authority for the principle that federal authority over the regulation of interprovincial waters is federal jurisdiction, and argue analogous grounds with respect to water reservoirs outside of the province, it is here that Saskatchewan Pipelines might mount some defence against the admittedly strong federal argument here. The province could simply argue the limited precedential value of IPCO in light of LeDain J.’s comments in Crown Zellerbach that the opinion of Pigeon J. regarding federal jurisdiction over pollution of interprovincial waters based on the POGG powers was not that of the majority of the court. It appears that the Supreme Court has distanced itself from Pigeon’s comments. Therefore, the company might here find some room for attacking the constitutionality of the federal law, for example by adducing evidence that the

matter here is in fact divisible and not a distinct matter warranting federal intervention in the case of oil storage, particularly where provincial legislation is already in place. In all, however, the strength of argument seems to favour the Crown with respect to the national concern doctrine, and the company would have a tough fight here.

A final possibility for Saskatchewan Pipelines here would be to suggest that, as a Crown corporation of the province of Saskatchewan, the company might be able to invoke the doctrine of interjurisdictional immunity. Although the doctrine has almost universally been applied in the protection of federal persons, things or undertakings, *OPSEU v. A-G Ont.* suggests that it may equally be applied in a converse situation. Dickson CJC noted in that case that

“the principle of interjurisdictional immunity...posits that legislation enacted by one order of government cannot interfere with, or have an impact on, subject matters under the jurisdiction of the other order of government”.

Here, the federal legislation can be said to significantly invade a vital part of a provincial undertaking by attempting to regulate the company’s dealings with its oil in a vital aspect – the storage of the product. The operation of the federal legislation directly impairs the operation of company in one of its essential aspects, and as such could be deemed inapplicable. The strength of this argument however in a constitutional division of powers characterized by the principle of federal paramountcy, however, greatly limits the potential success of this argument, particularly in a case like the present where the environment can be deemed an area of concurrent jurisdiction and where federal legislation in the event of conflict would have to prevail.

