



# FORMATION PROFESSIONNELLE DU BARREAU DU QUÉBEC

## EXAMINATION BOOKLET

### DROIT PUBLIC ET ADMINISTRATIF

#### SUPPLEMENTAL EXAMINATION

May 27, 2002

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- 1) The examination in the DROIT PUBLIC ET ADMINISTRATIF section is intended to determine the extent to which you have met the ultimate goals set forth in the document entitled « Préambule de Droit public et administratif ».
- 2) You have a maximum of four hours to complete the examination. You are entirely responsible for managing your time.
- 3) The examination contains questions relating to the following section :
  - Droit public et administratif
- 4) The questions total 100 marks. You must obtain a mark of 60 % or more in order to pass this examination.
- 5) You may use any written documentation which you deem to be useful.
- 6) For photocopying purposes, kindly use a **pen with black ink** to write your answers in your answer booklet.
- 7) **You must write legibly, otherwise your answers will not be graded.**
- 8) Please ensure that your examination booklet contains **15** pages (including this page) and that your answer booklet contains **7** pages.

**N.B. :** You may assume that the *Civil Code of Québec* and Titles II and III of *An Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57 apply. Do not take the transitional provisions into account, except those relating to the publication of rights.

**FILE 1 (30 MARKS)**

**The situation described in File 1 is an evolving one : all the supplementary facts are to be added to the main portion of the fact pattern to form part thereof.**

**Extracts of the relevant legislation are reproduced in a schedule hereto on pages 6 and 7.**

Doctor Marie Monette is a general practitioner. She has been a member of the Ordre professionnel des médecins du Québec since 1988. Over the years, she has had numerous run-ins with her professional order. The majority of them have resulted from her holistic approach to the practice of medicine. According to this approach, health problems are caused by psychological, environmental and biological factors.

Doctor Monette has developed a field of practice focused on musculoskeletal problems related to highly stressful situations. In this regard, she advocates the injection of a homeopathic product into the tissues surrounding the injured tendons.

On December 7, 2000, she receives the following letter from the Régie de l'assurance maladie du Québec.

Quebec City, December 5, 2000

[...]

The Régie has noted an appreciable discrepancy between your record of practice and the record of practice of your colleagues as regards intramuscular injections (code 0478).

We have reviewed the payments claimed by you for services provided for the period from January of 1996 to December of 1999, during which you received an amount of \$534,567.

[...]

This review establishes that you provided services which were not always justified by medicine and, therefore, were furnished more frequently than necessary. According to our review, this failure to abide by the law resulted, during the period from January of 1996 to December of 1999, in the erroneous payment of fees in the amount of \$43,875.

Accordingly, your file will be submitted to the appropriate Revisory Committee constituted under section 42 of the *Health Insurance Act* (R.S.Q., c. A-29). This notice is being sent to you in accordance with section 47 of the *Health Insurance Act*.

[...]

We are enclosing herewith the analysis of your record of practice which we are forwarding to the Revisory Committee. The Committee will contact you in due course.

[...]

The committee of general medical practitioners established under section 42 of the *Health Insurance Act* is comprised of the following members : Dr. Roméo Langevin and Dr. Lucie Malenfant, doctors chosen from the list provided by the Ordre professionnel des médecins; Dr. Roger Dubé, the chairperson of the revisory committee; Dr. Louise Turmel, vice-chairperson of the revisory committee, and Dr. Jeanne Lévesque, doctors chosen from the list provided by the Fédération des médecins omnipraticiens du Québec; M<sup>e</sup> Noël Gauthier, notary, the member appointed upon the recommendation of the Office des professions, and Louise Morrissette, the functionary appointed upon recommendation of the Régie.

On January 8, 2001, Dr. Monette receives the following letter :

January 5, 2001

[...]

**RE:** Revisory Committee

[...]

Following the letter sent to you on December 5, 2000, please take note that the Revisory Committee constituted under the *Health Insurance Act* will hear your observations at a meeting to be held on January 26, 2001 at 9:30 a.m. in room A-3440 at 1010 René-Lévesque Blvd. West in Montreal.

The Revisory Committee will be comprised of the following members :

Dr. Roméo Langevin  
Dr. Lucie Malenfant  
M<sup>e</sup> Noël Gauthier

Furthermore, please note that you cannot be represented by a lawyer at this meeting.

*Roger Dubé*  
\_\_\_\_\_  
Roger Dubé  
Chairperson of the Committee

On January 26, 2001, Dr. Monette attends the meeting accompanied by her lawyer, M<sup>e</sup> Paul Girardeau. He submits to the committee that his client has the right to be represented by a lawyer under the *Charter of Human Rights and Freedoms* as well as under section 12 of the *Act respecting administrative justice*.

#### QUESTION 1 (8 marks)

- a) **What argument of law may be asserted against M<sup>e</sup> Paul Girardeau's allegation to the effect that Dr. Marie Monette has the right to be represented by a lawyer under the *Charter of Human Rights and Freedoms*?**
- b) **What argument of law may be asserted against M<sup>e</sup> Paul Girardeau's allegation to the effect that Dr. Marie Monette has the right to be represented by a lawyer under section 12 of the *Act respecting administrative justice*?**

<b>SUPPLEMENTARY FACTS</b>
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On February 22, 2001, the committee sends the following letter to Dr. Monette :

[...]

**Members of the Committee :**

Dr. Roméo Langevin  
 Dr. Lucie Malenfant  
 M<sup>e</sup> Noël Gauthier

[...]

The Committee noted a considerable discrepancy between the record of practice of Dr. Monette and the records of practice of practitioners with a practice similar to hers in the same region. Indeed, during the period from January of 1996 to December of 1999, Doctor Monette made an average of 347 intramuscular injections per year as compared to 200 injections for the other practitioners in the region who practise in the same discipline. Under these circumstances, the Committee believes that the conclusions of the review referred to in the letter dated December 5, 2000 are well founded. Consequently, the Committee recommends to the Régie de l'assurance maladie du Québec that it claim reimbursement of the fees overpaid to Dr. Monette, namely the amount of \$43,875.

[...]

Roméo Langevin  
 Dr. Roméo Langevin

Noël Gauthier  
 M<sup>e</sup> Noël Gauthier

Lucie Malenfant  
 Dr. Lucie Malenfant

**QUESTION 2 (9 marks)**

**State three grounds that M<sup>e</sup> Paul Girardeau could raise in order to contest the legality of the revisory committee's recommendation.**

**For each ground, justify your answer by referring to one or more specific and relevant provisions of any legislation.**

**ONLY THE FIRST THREE GROUNDS WRITTEN IN THE ANSWER BOOKLET WILL BE CORRECTED.**

<b>SUPPLEMENTARY FACTS</b>
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On March 6, 2001, the Régie de l'assurance maladie du Québec confirms the recommendation of the revisory committee and issues a written substantiated decision. M<sup>e</sup> Girardeau contests this decision before the Administrative Tribunal of Québec.

On February 7, 2002, the Administrative Tribunal of Québec holds a hearing in the case of Dr. Monette.

During the pleadings, M<sup>e</sup> Girardeau argues that the second paragraph of section 49 of the *Health Insurance Act* must be interpreted in light of section 7 of the *Canadian Charter of Rights and Freedoms*, which, according to him, protects the freedom to choose the therapy which seems appropriate to the physician. The lawyer for the Régie de l'assurance maladie du Québec opposes having the Tribunal consider this argument on the ground that M<sup>e</sup> Girardeau did not serve a notice on the Attorney General in accordance with article 95 of the *Code of Civil Procedure*.

### QUESTION 3 (5 marks)

**What argument can M<sup>e</sup> Paul Girardeau assert against the allegation of the lawyer for the Régie de l'assurance maladie du Québec to the effect that he should have had a notice served in accordance with article 95 of the *Code of Civil Procedure*?**

### SUPPLEMENTARY FACTS

On April 29, 2002, the Administrative Tribunal of Québec renders a decision which includes the following two paragraphs, among others :

[...]

[78] As discussed at the hearing, the Tribunal notes that by requiring Dr. Monette to reimburse the amounts paid to her, the Régie de l'assurance maladie du Québec is infringing section 3 of the *Charter of Human Rights and Freedoms* (R.S.Q., c. C-12) which enshrines freedom of conscience, freedom of opinion and freedom of expression.

[...]

[99] Furthermore, the Tribunal is of the opinion that the decision of the Régie de l'assurance maladie du Québec goes against all the evidence heard. Indeed, the actuarial evidence established that the Régie used an erroneous method to establish a similar record of practice. The age group of the patients treated, their socio-economic origin and their gender differ in all respects from those of the patients treated by Dr. Monette.

[...]

### QUESTION 4 (8 marks)

**Assuming that the Régie de l'assurance maladie du Québec were to file a motion for judicial review to contest the decision rendered by the Administrative Tribunal of Québec, state the rule of judicial review (norme de contrôle judiciaire) that the Superior Court should apply to paragraphs 78 and 99 of the decision. Explain your answer.**

**SCHEDULE : EXCERPTS OF AN ACT RESPECTING THE RÉGIE DE L'ASSURANCE MALADIE DU QUÉBEC****CHAPTER I  
ESTABLISHMENT AND ORGANIZATION OF THE BOARD**

[...]

Function.

**2.** The function of the Board shall be to administer and implement the programs of the health insurance plan instituted by the Health Insurance Act (chapter A-29) and any other program entrusted to it by law or by the Government.

Functions.

The Board shall, in particular, for such purposes,

- a) assume the cost of services and goods provided for under the programs;
- b) control the eligibility of persons to the programs, the remuneration paid to health professionals, and payments or reimbursements made, as the case may be, to institutions, laboratories, the person dispensing the service or furnishing the goods or the person who received them;

[...]

Composition.

**7.** The Board shall consist of 15 members, including a president and a vice-president, appointed by the Government.

[...]

Remuneration.

**7.1.** The Government shall fix the remuneration, social benefits and other terms of employment of the president.

[...]

Appointment.

**11.** The secretary and the other officers and employees of the Board shall be appointed in accordance with the Public Service Act (chapter F-3.1.1).

[...]

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**SCHEDULE : EXCERPTS OF THE HEALTH INSURANCE ACT**

[...]

**DIVISION V  
REVISORY COMMITTEES**

Committees established.

**41.** For each class of professionals in the field of health, at least one revisory committee is established to make recommendations to the Board in respect of matters it refers to it under section 47.

Composition.

**42.** Each committee consists of seven members appointed for a term not exceeding two years by the Government, which shall designate a chairman and a vice-chairman from among them.

[...]

General practitioners.

Another committee includes five general practitioners, of whom two are chosen from a list of at least four names furnished by the Ordre professionnel des médecins du Québec and three are chosen from a list of at least six names furnished by the Fédération des médecins omnipraticiens du Québec; such persons must not hold any elective or full-time office within such order or federation.

[...]

Advocate.

The sixth member of each committee, who must be an advocate duly registered with the Barreau du Québec, is appointed on the recommendation of the Office des professions du Québec.

Functionary of the Board.

The seventh member of each committee who is non-voting functionary of the Board is appointed on the recommendation of the Board.

[...]

Quorum.

**46.** Three voting members, including the chairman or, if he is absent or unable to act, the vice-chairman, constitute a quorum.

Casting vote.

In case of a tie-vote, the chairman or the vice-chairman has a casting vote.

Grounds for referring matter to revisory committee.

**47.** Where the Board believes that the insured services or a part of them for which a professional in the field of health has claimed or obtained payment during the 36 preceding months were not justified by medicine, optometry, dentistry or pharmacy and therefore were furnished more frequently than necessary or were dispensed in an excessive manner, it shall refer the matter to the appropriate revisory committee and must then inform the professional concerned.

Professional heard.

Before making its recommendation, the revisory committee must allow the professional concerned to present observations.

[...]

Recommendation of revisory committee.

**49.** The revisory committee to which a matter has been referred under section 47 shall, after study, recommend to the Board either to pay the amount claimed in whole or in part or to refuse to pay that amount, or to require the reimbursement of any overpayment, by compensation or otherwise. The revisory committee may, before making its recommendation, obtain the opinion of the professional order concerned.

Discrepancy in records of practice.

The revisory committee may base its recommendation on the fact that, in the dispensation of an insured service for a given period, an appreciable discrepancy is apparent between the record of practice of a professional and the records of practice of the professionals in the same discipline or carrying on the same activities under similar conditions or in similar social health regions.

Recommendation substantiated.

The recommendation must be substantiated and signed by the chairman or the vice-chairman or the vice-chairman and the assenting members. Any dissenting member may make a separate report.

[...]

Decision of the Board.

**50.** The Board must render a substantiated decision within 30 days of receiving the recommendation of the revisory committee and make compensation, except where the decision of the Board is not in conformity with the recommendation of the revisory committee. It must forthwith, by registered mail, inform the professional contemplated in the decision, the professional order and the professional federation or association concerned. The notice transmitted to the professional must be accompanied with a copy of the recommendation of the revisory committee.

Contestation before ATQ.

Any professional aggrieved by a decision rendered pursuant to the preceding paragraph may, within 60 days of notification of the decision, contest the decision before the Administrative Tribunal of Québec. The burden of proof that the decision of the Board is ill-founded is on the professional, except where the decision of the Board is not in conformity with the recommendation of the revisory committee, in which case the burden of proof is on the Board.

[...]

<b>FILE 2 (54 MARKS)</b>
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**The situation described in File 2 is an evolving one : all the supplementary facts are to be added to the main portion of the fact pattern to form part thereof.**

Sylvie Ryan was born on October 3, 1974. Since her early years, she has felt that her true nature is that of a man. As long as she can remember, she has never felt comfortable as a woman.

In January of 1995, she is hired as a butcher by *Supermarché Du Jardin inc.* As a result, she is a member of the *Syndicat des employés de l'industrie alimentaire* (hereinafter the « *Union* ») which is certified to represent all the employees of *Supermarché Du Jardin inc.*

On June 7, 1999, after many years of reflection, she begins hormone therapy and undergoes the first surgery with a view to a sex change.

On September 15, 1999, the registrar of civil status authorizes a change of the designation of sex and given name on Sylvie's act of birth. Henceforth, it reads Sylvain Ryan.

As of that moment, he insists that people call him Sylvain, he dresses like a man and he uses the men's washroom in the building in which the supermarket is located. His decision radically changes his relationship with his employer, his co-workers and the customers.

His employer refuses to provide him with the uniform usually worn by the men on the ground that the one Sylvain already has is in perfect condition. Similarly, the employer refuses to replace Sylvie's photograph on the employee board at the entrance to the supermarket in order to reflect his metamorphosis.

The other employees no longer have the same attitude towards their co-worker. The female staff keep their distance from him. As for his male co-workers, some of them do not hesitate to tell him that he « is not a real man » and that he « doesn't belong in the men's washroom. » The disparaging comments come one after the other, sometimes even with the complicity of the employer's representatives or of certain customers.

On November 15, 1999, Sylvain is transferred to the night shift in the cold storage warehouse.

On December 13, 1999, in accordance with the collective agreement, the *Union* files a grievance to contest Sylvain's transfer to the cold storage warehouse. The grievance claims a breach of section 2.06 of the collective agreement :

2.06 The employer shall not discriminate on the basis of race, colour, sex, religion or union allegiance.

On September 12, 2001, the grievance arbitrator renders his decision dismissing the grievance. His decision includes the following extracts:

[...]

[28] It is manifestly clear that there was discrimination based on gender within the meaning of section 2.06 of the collective agreement. Nonetheless, the evidence clearly shows that the complainant's transfer did not result from malicious intent on the part of the employer. Consequently, I consider that it is not appropriate to intervene.

[...]

[32] At the hearing, the union also pleaded that the complainant's transfer constituted discrimination within the meaning of sections 10 and 16 of the *Charter of Human Rights and Freedoms*. However, I do not have jurisdiction over this issue which raises an argument based upon the *Charter*.

[...]

The grievance is dismissed.

#### **QUESTION 5 (8 marks)**

**State two errors of law committed by the grievance arbitrator in his arbitration award.**

**ONLY THE FIRST TWO ERRORS WRITTEN IN THE ANSWER BOOKLET WILL BE CORRECTED.**

#### **SUPPLEMENTARY FACTS**

On October 4, 2001, the *Union* notifies Sylvain that it refuses to file a motion for judicial review to contest the arbitration award.

#### **QUESTION 6 (4 marks)**

**As at October 4, 2001, can Sylvain Ryan, acting on his own, exercise the recourse for judicial review? Explain your answer.**

**SUPPLEMENTARY FACTS**

On November 26, 2001, Sylvain files a complaint with the Commission des droits de la personne et des droits de la jeunesse for discrimination based on sex, in order to contest his transfer.

On January 8, 2002, the Commission renders the following decision :

[...]

Without ruling on the merits of the complaint, the Commission refuses to act in favour of the complainant because a period of 25 months has elapsed between the date of the transfer and the date on which the complaint was filed.

FOR THESE REASONS, the Commission ceases to act.

**QUESTION 7 (4 marks)**

**Can Sylvain Ryan directly submit an application to the Human Rights Tribunal? If so, indicate within what time limit. If not, explain your answer.**

**SUPPLEMENTARY FACTS**

On January 28, 2002, after some reflection, Sylvain Ryan, acting in accordance with the prescribed procedure, files a motion for mandamus against the Commission in order to require the Commission to rule on the merits of his complaint.

**QUESTION 8 (5 marks)**

**What argument of law can the lawyer for the Commission des droits de la personne et des droits de la jeunesse assert against the motion for mandamus?**

**SUPPLEMENTARY FACTS**

Sylvain Ryan's troubles are not finished. The operations he has undergone as part of his sex change procedure have had a serious impact on his physical and psychological health, such that he has become unable to perform any work whatsoever. Therefore, he filed an application for disability benefits under his employer's group insurance plan of which he is a beneficiary. The insurance contract defines a disability as follows :

« disability » : total and continuous disability which results from an accident or illness requiring medical care and which prevents the insured from holding any remunerative employment or carrying out any work capable of earning him a profit or salary and for which his education, experience and training have reasonably prepared him. Disability shall exclude any physical or psychological complication resulting from surgery involving a structural modification of the sexual organs intended to change a person's secondary sexual characteristics.

The insurer refuses to pay benefits to Sylvain, relying on the exclusion set forth in the insurance contract. This exclusion is based upon actuarial data showing a higher incidence of risk.

On February 26, 2002, Sylvain Ryan institutes an action in order to claim the disability benefits from the insurer. He alleges that the exclusion in the insurance contract constitutes discrimination based upon sex within the meaning of the *Charter of Human Rights and Freedoms*.

#### QUESTION 9 (4 marks)

**Assuming that the insurer were to admit that the clause is discriminatory, would it nevertheless have an argument of law, based upon the *Charter of Human Rights and Freedoms*, to assert against Sylvain Ryan's action? If yes, state which argument. If not, explain your answer.**

#### SUPPLEMENTARY FACTS

On September 24, 2001, Norbert Sirois, one of Sylvain Ryan's co-workers, returns to work after a period of disability of 16 consecutive weeks following an accident suffered at a hockey game. Norbert resumes in his position as butcher at the *Supermarché Du Jardin inc.*

On September 25, 2001, he learns about a letter of agreement signed on August 1, 2001 between the *Union* and the employer. The letter of agreement amends the collective agreement which came into effect on January 1, 1998 and expires on December 31, 2001. The letter of agreement provides as follows :

1. Section 8.01 of the collective agreement is amended by adding the following paragraph thereto :

« The regular weekly salary of all butchers with at least three years of seniority on the date hereof shall be increased by 5 % . »

2. As consideration for the foregoing, the first Monday of September and the second Monday of October shall be withdrawn from the list of non-working, paid legal holidays and section 9.03 of the collective agreement shall be replaced by the following :

« Section 9.03. The following days shall be non-working, paid legal holidays :

- January 1<sup>st</sup>;
- Good Friday;
- Easter Monday;
- the Monday preceding May 25<sup>th</sup>;
- The fête nationale;
- July 1<sup>st</sup> or July 2<sup>nd</sup> if July 1<sup>st</sup> is a Sunday;
- December 25<sup>th</sup> . »

Norbert Sirois, who was hired on June 1, 1999, is not eligible for the salary increase because he has just over two years of seniority. His annoyance increases when he realizes that the letter of agreement was signed without having been submitted to a prior vote of the members of the *Union* and that it results in a loss for him of two non-working legal holidays.

On September 28, 2001, Norbert meets with the president of the *Union*. He informs him of his dissatisfaction and tells him that sections 1 and 2 of the letter of agreement are contrary to the *Act respecting labour standards*. Norbert adds that the letter of agreement has no legal effect because it was never submitted to a vote by the employees.

#### QUESTION 10 (8 marks)

- a) **Is Norbert Sirois' allegation to the effect that section 1 of the letter of agreement is contrary to the *Act respecting labour standards* well founded?**

**Justify your answer by referring to one or more specific and relevant provisions of the *Act respecting labour standards*.**

- b) **Is Norbert Sirois' allegation to the effect that section 2 of the letter of agreement is contrary to the *Act respecting labour standards* well founded?**

**Justify your answer by referring to one or more specific and relevant provisions of the *Act respecting labour standards*.**

#### QUESTION 11 (4 marks)

**What argument can the president of the *Syndicat des employés de l'industrie alimentaire* assert against Norbert Sirois' allegation to the effect that the letter of agreement has no legal effect because it was not submitted to a vote by the employees?**

<b>SUPPLEMENTARY FACTS</b>
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On October 10, 2001, Norbert discovers that the letter of agreement was never filed at the office of the Labour Commissioner General.

On October 17, 2001, as a protest, Norbert Sirois resigns as a member of the *Union* and begins to take steps for the purpose of forming a new association of employees. To this end, he joins the *Association des salariés du Québec* and he gets a few co-workers who are also dissatisfied with the agreement to sign membership cards. However, Norbert quickly puts an end to these steps when the president of the *Union* tells warns that the process is destined to fail because the deadline for filing an application for certification has expired.

**QUESTION 12 (5 marks)**

**Is the warning of the president of the *Syndicat des employés de l'industrie alimentaire* stating that the deadline for filing an application for certification has expired well founded? Explain your answer.**

**SUPPLEMENTARY FACTS**

From November 19, 2001 to December 2, 2001, Norbert is absent from work due to illness. A medical certificate is submitted to the employer in a timely manner in order to justify the absence.

Upon his return to work on December 3, 2001, Norbert Sirois is dismissed. The employer claims that the frequency and duration of his absences from work over the past year justify the dismissal. Notwithstanding Norbert's repeated requests, the *Union* refuses to file a grievance in order to contest the dismissal, on the ground that Norbert is no longer a member of the *Union*. The collective agreement does not authorize an employee to file a grievance on his own.

Faced with this refusal, on January 14, 2002, Norbert files two complaints with the office of the Labour Commissioner General in order to contest his dismissal. In the first complaint, he alleges that he was dismissed in violation of section 15 of the *Labour Code* and, in the second complaint, he claims he was dismissed by reason of illness or accident in violation of the provisions of the *Act respecting labour standards*.

**QUESTION 13 (8 marks)**

**State one ground of law which the lawyer for *Supermarché Du Jardin inc.* could raise in order to contest the admissibility of each of these recourses.**

**a) Complaint of dismissal relating to a violation of section 15 of the *Labour Code*.**

**ONLY THE FIRST GROUND WRITTEN IN THE ANSWER BOOKLET WILL BE CORRECTED.**

**b) Complaint of dismissal by reason of illness or accident in violation of the provisions of the *Act respecting labour standards*.**

**ONLY THE FIRST GROUND WRITTEN IN THE ANSWER BOOKLET WILL BE CORRECTED.**

**QUESTION 14 (4 marks)**

**What recourse can Norbert Sirois exercise in order to be authorized to contest his dismissal before a grievance arbitrator?**

**Justify your answer by referring to one or more specific and relevant provisions of any legislation.**

**FILE 3 (16 MARKS)****Situation 1**

Jacques Tanguay is a construction contractor. He acquired a dozen parcels of land in Saint-Jean-sur-Richelieu. The parcels of land are located in zone RB-11 of the zoning plan which forms an integral part of the City's zoning by-law. In accordance with the specifications grid of the said by-law, the only uses permitted in zone RB-11 are single-family and multifamily housing.

Over the next few weeks, Jacques wants to begin construction of five multifamily dwellings on his parcels of land.

On May 10, 2002, one of Jacques's employees informed him that at the most recent municipal council meeting held on May 6, 2002, a notice of motion of a by-law amending the City's zoning by-law was properly given by councillor Yveline Latendresse. Draft by-law number 01-12, filed at the same time as the notice of motion, provides that multifamily dwellings will henceforth be prohibited in zone RB-11.

Jacques met with the permit-issuing clerk of the City one week before the council meeting and showed him all of the plans for the proposed construction. However, no formal permit application was filed at the time of this meeting.

On May 10, 2002, Jacques filed five permit applications in good and proper form for the proposed construction. He assures you that the applications comply in every respect with the regulatory requirements in force at that time. He also confides to you that any delay in the construction would be disastrous because the dwellings have already been sold.

**QUESTION 15 (4 marks)**

**Is Jacques Tanguay entitled to issuance of the permits requested on May 10, 2002?**

**Justify your answer by referring to one or more specific and relevant provisions of any legislation.**

\*\*\*\*\*

**Situation 2**

Kevin McNally's summer home is located in Baie-des-Feux. Three kilometres from his home, Paulette Couture converted her house into a bed and breakfast, with the result that many clients are now travelling in what was previously a quiet area. These comings and goings cause a lot of noise. In addition, musicians entertain the bed and breakfast's clients during the weekend, making the situation even more intolerable.

According to the municipality's zoning by-law, no bed and breakfast is permitted in zone VILL-1 in which Kevin's and Paulette's properties are located.

Kevin met with the mayor on this matter and the mayor informed Kevin that the municipality would not take action against Paulette because, according to him, « the situation is not serious and everyone is entitled to earn a living. » Yet, Kevin had eloquently described to the mayor the nuisances caused by the unlawful operation of Paulette's bed and breakfast.

Kevin therefore institutes proceedings against Paulette under the *Act respecting land use planning and development* in order to force the bed and breakfast to close. Paulette's lawyer contests the admissibility of the motion on the ground that Kevin does not have the necessary standing to exercise this recourse.

### QUESTION 16 (4 marks)

**Does Kevin McNally have the necessary standing under the *Act respecting land use planning and development* to institute proceedings against Paulette Couture? Explain your answer.**

\*\*\*\*\*

#### Situation 3

Audrey Dionne is the clerk of Sainte-Catherine, a municipality governed by the *Cities and Towns Act*.

Drainage work is required on new streets in the municipality.

On October 5, 2001, the director general, who does not want to wait until the next municipal council meeting, awards a \$26,895 contract for the work to *S.D. Excavation inc.* Prior thereto, the director general had, by telephone, requested from three contractors that they provide an estimate for the work. *S.D. Excavation inc.* had submitted the best price.

The clerk questions the legality of the grant of the contract. She found only one relevant document regarding the powers of the director general, namely the following extract of the minutes of a meeting of the council held in 1996 :

« Resolution no. 96-760 : It is unanimously resolved to allow the director general of the municipality to authorize expenditures of up to \$30,000 and, consequently, to enter into contracts with respect to roads and public works within the territory of Sainte-Catherine. »

### QUESTION 17 (8 marks)

**State two grounds that could be raised to argue that the contract between *S.D. Excavation inc.* and the municipality of Sainte-Catherine was not awarded in accordance with the law.**

**ONLY THE FIRST TWO GROUNDS WRITTEN IN THE ANSWER BOOKLET WILL BE CORRECTED.**

**CORRIGÉ**  
**DROIT PUBLIC ET ADMINISTRATIF - EXAMEN DE REPRISE**  
27 mai 2002

**DOSSIER 1 (30 POINTS)**

**QUESTION 1 (8 points)**

- a) Quel argument de droit peut-on faire valoir à l'encontre de la prétention de M<sup>e</sup> Paul Girardeau selon laquelle D<sup>re</sup> Marie Monette a le droit d'être représentée par un avocat en vertu de la *Charte des droits et libertés de la personne*?

Elle n'a pas le droit d'être représentée par un avocat parce que le comité de révision n'exerce pas de fonctions quasi judiciaires (le droit à l'avocat en vertu de l'art. 34 *CDLP* ne s'applique pas en l'espèce art. 56 *CDLP*).

**OU**

Elle n'a pas le droit d'être représentée par un avocat parce que le comité (n'est pas assujetti à un processus de nature quasi judiciaire puisqu'il n'a qu'un pouvoir de recommandation (art. 49 *Loi sur l'assurance maladie*)).

1.

- b) Quel argument de droit peut-on faire valoir à l'encontre de la prétention de M<sup>e</sup> Paul Girardeau selon laquelle D<sup>re</sup> Marie Monette a le droit d'être représentée par un avocat en vertu de l'article 12 de la *Loi sur la justice administrative*?

Le comité n'est pas un organisme qui exerce des fonctions juridictionnelles (art. 9 *L.j.a.*).

2.

**QUESTION 2 (9 points)**

Énoncez trois motifs que M<sup>e</sup> Paul Girardeau pourrait invoquer pour contester la légalité de la recommandation du comité de révision.

Pour chacun des motifs, appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes de tout texte de loi.

SEULS LES TROIS PREMIERS MOTIFS INSCRITS AU CAHIER DE RÉPONSES SERONT CORRIGÉS.

3 / 5

3 points / bulle

1. Le président ou le vice-président du comité de révision doit faire partie du quorum du comité, art. 46 *Loi sur l'assurance maladie*. 1.
2. M<sup>e</sup> Noël Gauthier, qui est notaire, ne peut faire partie du comité de révision, art. 42 *Loi sur l'assurance maladie* 2.
3. On ne peut réclamer de D<sup>re</sup> Marie Monette des paiements obtenus avant les 36 mois qui précèdent la demande du 5 décembre 2000, art. 47 *Loi sur l'assurance maladie*. 3.  3.
4. La recommandation devait être signée par le président ou le vice-président, art. 49 *Loi sur l'assurance maladie*. 4.

Compte tenu de l'interprétation possible de la trame factuelle, la réponse suivante est aussi acceptée :

5. Seulement deux médecins ont été choisis parmi la liste fournie par la Fédération des médecins omnipraticiens du Québec, art. 42 *Loi sur l'assurance maladie* 5.

**QUESTION 3 (5 points)**

**Quel argument M<sup>e</sup> Paul Girardeau peut-il faire valoir à l'encontre de la prétention du procureur de la Régie de l'assurance maladie du Québec selon laquelle il aurait dû faire signifier un avis conformément à l'article 95 du *Code de procédure civile*?**

M<sup>e</sup> Girardeau devrait faire valoir qu'il n'a pas à expédier un avis en vertu de l'art. 95 *C.p.c.* puisqu'il ne demande pas au Tribunal de déclarer invalide **OU** inapplicable constitutionnellement **OU** inopérant l'article 49 de la *Loi sur l'assurance maladie*.

4.

**QUESTION 4 (8 points)**

**Dans l'hypothèse où la Régie de l'Assurance maladie du Québec intenterait une requête en révision judiciaire pour contester la décision rendue par le Tribunal administratif du Québec, énoncez la norme de contrôle que devrait appliquer la Cour supérieure pour les paragraphes 78 et 99 de la décision. Dites pourquoi.**

Paragraphe	Norme	Pourquoi
78	Erreur simple	Interprétation d'un texte de loi à portée générale ( <i>Charte des droits et libertés de la personne</i> )
99	Erreur manifestement déraisonnable	Appréciation de la preuve dans l'exercice de sa compétence.

5.

6.

DOSSIER 2 (54 POINTS)

QUESTION 5 (8 points)

Énoncez deux erreurs de droit commises par l'arbitre de grief dans sa sentence arbitrale.

SEULES LES DEUX PREMIÈRES ERREURS INSCRITES AU CAHIER DE RÉPONSES SERONT CORRIGÉES.

2 / 3

4 points / bulle

1. L'intention malicieuse n'est pas un critère pertinent en matière de discrimination. 1.
2. À partir du moment où l'arbitre constate qu'il y a discrimination au sens de la convention collective, il doit intervenir. 2.  7.
3. L'arbitre de grief est compétent pour interpréter et appliquer la *CDLP* (art. 100.12 a) *C.t.*) 3.

QUESTION 6 (4 points)

En date du 4 octobre 2001, Sylvain Ryan peut-il exercer lui-même ce recours en révision judiciaire? Dites pourquoi.

Non, Sylvain Ryan n'était pas une « partie » devant le tribunal d'arbitrage.

OU

Non, Sylvain Ryan n'a pas l'intérêt requis.

8.

QUESTION 7 (4 points)

Sylvain Ryan peut-il saisir directement le Tribunal des droits de la personne de sa demande? Si oui, indiquez dans quel délai. Si non, dites pourquoi.

Non, puisque la Commission a refusé d'agir, Sylvain Ryan n'a pas de recours devant le Tribunal des droits de la personne.

9.

(art. 84 ou art. 111 *CDLP* OU *Ménard c. Rivet [1997] R.J.Q. 2108 (C.A.)*)

QUESTION 8 (5 points)

Quel argument de droit le procureur de la Commission des droits de la personne et des droits de la jeunesse peut-il faire valoir à l'encontre de la requête en mandamus?

La Commission dispose d'un pouvoir discrétionnaire et elle a exercé cette discrétion. De ce fait, la requête en mandamus est mal fondée (art. 77 al. 2 (1) *CDLP* ou art. 844 *C.p.c.*).

OU

La *Charte des droits et libertés de la personne* n'impose aucun devoir à la Commission de se saisir d'une plainte déposée plus de deux ans après les faits pertinents (art. 77 al. 2 (1) *CDLP*).

10.

QUESTION 9 (4 points)

Dans l'hypothèse où l'assureur admettrait que la clause est discriminatoire, dispose-t-il quand même d'un argument de droit, fondé sur la *Charte des droits et libertés de la personne*, à faire valoir à l'encontre de l'action de Sylvain Ryan? Si oui, dites lequel. Si non, dites pourquoi.

Oui, la clause est réputée valide puisque son utilisation est légitime et que le motif qui la fonde constitue un facteur de détermination de risque, basé sur des données actuarielles (art. 20.1 *CDLP*).

11.

**QUESTION 10 (8 points)**

- a) La prétention de Norbert Sirois selon laquelle l'article 1 de la lettre d'entente est contraire à la *Loi sur les normes du travail* est-elle bien fondée?

Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes de la *Loi sur les normes du travail*.

Non, art. 87.2 *L.n.t.*

12.

- b) La prétention de Norbert Sirois selon laquelle l'article 2 de la lettre d'entente est contraire à la *Loi sur les normes du travail* est-elle bien fondée?

Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes de la *Loi sur les normes du travail*.

Oui, art. 60 *L.n.t.* ou art. 59.1 *L.n.t.*

13.

**QUESTION 11 (4 points)**

Quel argument le président du *Syndicat des employés de l'industrie alimentaire* peut-il faire valoir à l'encontre de la prétention de Norbert Sirois selon laquelle la lettre d'entente n'a pas d'effet juridique parce qu'elle n'a pas été soumise à un vote des salariés?

Le défaut de respecter l'obligation de tenir un scrutin secret ne donne ouverture qu'à une plainte pénale, (art. 20.4 *C.t.*)

OU

Le défaut de respecter l'obligation de tenir un scrutin secret n'affecte pas la validité de la lettre d'entente

14.

**QUESTION 12 (5 points)**

L'avis du président du *Syndicat des employés de l'industrie alimentaire* selon lequel les délais de recevabilité pour une demande d'accréditation sont expirés est-il bien fondé? Dites pourquoi.

Non, le défaut de déposer la lettre d'entente dans les soixante jours de sa signature donne ouverture au droit à l'accréditation en faveur de toute autre association (art. 72 *C.t.*)

15.

**QUESTION 13 (8 points)**

Énoncez un motif de droit qui pourrait être soulevé par le procureur de *Supermarché Du Jardin inc.* afin de contester la recevabilité de chacun de ces recours.

- a) Plainte de congédiement relative à la violation de l'article 15 du *Code du travail*.

SEUL LE PREMIER MOTIF INSCRIT AU CAHIER DE RÉPONSES SERA CORRIGÉ.

1. La plainte est irrecevable puisqu'elle a été déposée (le 14 janvier 2002, soit) plus de 30 jours après le congédiement (survenu le 3 décembre 2001). (art. 16 *C.t.*) 1.  4 points

OU

2. La plainte est irrecevable puisqu'elle est hors délai

OU

2.  2 points

16.

- b) Plainte de congédiement pour cause de maladie ou d'accident en violation des dispositions de la *Loi sur les normes du travail*.

SEUL LE PREMIER MOTIF INSCRIT AU CAHIER DE RÉPONSES SERA CORRIGÉ.

Il n'y a pas ouverture au recours puisque Norbert Sirois s'est absenté durant une période de plus de 17 semaines (au cours des 12 derniers mois) (article 122.2 *L.n.t.*)

17.

**QUESTION 14 (4 points)**

Quel recours Norbert Sirois peut-il exercer afin d'être autorisé à contester son congédiement devant un arbitre de grief?

Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes de tout texte de loi.

Une requête au Tribunal du travail<sup>(18)</sup>, art. 47.3 *C.t.* ou 47.4 *C.t.*<sup>(19)</sup>

OU

Une plainte au ministre du Travail<sup>(18)</sup>, art. 47.3 *C.t.*<sup>(19)</sup>

18.

19.

DOSSIER 3 (16 POINTS)

QUESTION 15 (4 points)

Jacques Tanguay a-t-il droit à la délivrance des permis requis le 10 mai 2002?

Appuyez votre réponse en faisant référence à la ou aux dispositions pertinentes de tout texte de loi.

Non, art. 114 al.1 *Loi sur l'aménagement et l'urbanisme*.

20.

QUESTION 16 (4 points)

Kevin McNally a-t-il l'intérêt requis, en vertu de la Loi sur l'aménagement et l'urbanisme, pour intenter un recours contre Paulette Couture? Dites pourquoi.

Oui, Kevin McNally est un intéressé étant donné qu'il est propriétaire d'un immeuble dans la même zone que celui de Paulette Couture (art. 227 al. 1 par. 1° *L.a.u.*).

21.

(*Giroux c. Legault, J.E. 81-57 (C.S.)*)

QUESTION 17 (8 points)

Énoncez deux motifs qui pourraient être invoqués pour soutenir que le contrat entre *S.D. Excavation inc.* et la municipalité de Sainte-Catherine n'a pas été octroyé conformément à la loi.

SEULS LES DEUX PREMIERS MOTIFS INSCRITS AU CAHIER DE RÉPONSES SERONT CORRIGÉS.

2 / 3

4 points / bulle

1. L'autorisation n'a pas été accordée par règlement (art. 477.2 al. 1 *Loi sur les cités et villes*). 1.
2. L'autorisation de dépense n'est pas valide puisqu'elle n'a pas fait l'objet d'un certificat du trésorier indiquant qu'il y a pour cette fin des crédits suffisants (art. 477.2 al. 4 *Loi sur les cités et villes*) 2.
3. Le contrat est illégal parce qu'il n'a pas été adjugé après une demande de soumissions faite par voie d'invitation écrite (auprès d'au moins deux entrepreneurs) (art. 573.1 *Loi sur les cités et villes*). 3.

22.