



# FORMATION PROFESSIONNELLE DU BARREAU DU QUÉBEC

## EXAMINATION BOOKLET

### PREUVE ET PROCÉDURE

October 9, 2003

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- (1) The examination in the PREUVE ET PROCÉDURE section is intended to determine the extent to which you have met the ultimate goals set forth in the document entitled “Préambule Preuve et Procédure”.
- (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 sections:
  - Preuve et procédure
  - Rédaction
- (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 **6** pages.

**N.B:** You may assume that the Regulation of the Court of Québec, O.C. 673-2003 (2003) 135 G.O. II, 2003, which came into force on July 17, 2003 and the Rules to amend the Rules of Practice in Civil Matters (Règlement de procédure civile), 135 G.O. II, 2752, and the Rules to amend the Rules of Practice in Family Matters (Règlement de procédure en matière familiale), 135 G.O. II, 2757, which came into force on September 13, 2003 do not apply to this examination.

<b>FILE 1 (40 MARKS)</b>
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**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.**

On January 8, 2003, M<sup>e</sup> Achille Biron files a motion to institute proceedings in the Superior Court for the District of Quebec for the purpose of seeking the resiliation of a commercial lease, the payment of rent and damages, the whole for an amount of \$65,000.

The motion describes the plaintiff as follows: “*Placements Beaulieu inc.*, a duly constituted legal person having its head office at 865 St-Jean Street, in the City and District of Quebec, G1R 1R2”. The defendant is described therein as follows: “Hector L’Heureux, doing business under the name *L’Heureux Bouquet enr.*, domiciled and residing at 201 Fraser Avenue, in Rivière-du-Loup, District of Kamouraska, G5R 1G7”.

The motion sets out the following, among other things:

- the lease relates to premises A-12 in the shopping centre located at 25 Hôtel-de-Ville Street in Rivière-du-Loup;
- the lease was entered into at Rivière-du-Loup on July 1, 2001;
- the lease includes an election of domicile by the parties in the judicial district of Quebec;
- the lease covers the period from July 1, 2001 to June 30, 2006;
- the monthly rent is \$5,000, payable on the first day of each month;
- as at January 8, 2003, the lessee had failed to pay the instalments owed on October 1, November 1 and December 1, 2002 as well as on January 1, 2003, for a total of \$20,000;
- in addition to the resiliation of the lease and the rent owed, the plaintiff is seeking, as damages, compensation for re-leasing of the premises equal to three months of rent, namely \$15,000, and an additional amount of \$30,000 for damages to the leased premises.

When the motion to institute proceedings is filed, it is filed together with a notice to the defendant which includes, among other things, disclosure of the exhibits alleged in support of the motion, as well as the date and time the motion will be presented in the Practice Division of the Superior Court for the District of Quebec, namely Thursday, February 13, 2003, at 9 a.m. These documents are served by bailiff upon Hector L’Heureux on January 9, 2003.

On January 10, 2003, Hector L’Heureux gives M<sup>e</sup> Hélène Paris, a lawyer practising in Rivière-du-Loup, the mandate to represent him in the defence to this action.

**JANUARY 2003**

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**FEBRUARY 2003**

S	M	Tu	W	Th	F	Sa
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**QUESTION 1 (5 marks)**

**Assuming that M<sup>e</sup> Hélène Paris does not file an appearance within the statutory deadlines, as of what date can M<sup>e</sup> Achille Biron inscribe the case for judgment by default to appear?**

**SUPPLEMENTARY FACTS**

On January 14, 2003, M<sup>e</sup> Paris files an appearance in the court record as the lawyer for the defendant and sends a copy thereof to M<sup>e</sup> Biron. She also indicates to him that she intends to contest the motion.

In the days that follow, the two lawyers undertake negotiations with a view to arriving at an agreement as to the conduct of the proceeding. They agree on numerous points, including the communication to M<sup>e</sup> Paris of a copy of each of the exhibits alleged in support of the motion to institute proceedings and the deadlines for the examination on discovery before the filing of the defence.

However, they cannot agree on which court has jurisdiction. M<sup>e</sup> Paris insists that the case be transferred to the Court of Québec while M<sup>e</sup> Biron argues that the action was validly instituted before the Superior Court because it is an action for rescission of a contract, the lease, whose value exceeds \$200,000.

M<sup>e</sup> Paris further insists that the case be transferred to the District of Kamouraska, the place of the defendant's domicile, while M<sup>e</sup> Biron claims that the action was validly instituted in the District of Québec.

Notwithstanding this disagreement, on January 27, 2003 the two lawyers sign an agreement as to the conduct of the proceeding, which agreement sets out the intention of the parties to ask the court to rule on its jurisdiction on February 13, 2003. However, the agreement is silent as to the form of the eventual defence. The agreement is filed in the court record that same day.

**QUESTION 2 (5 marks)**

**What must M<sup>e</sup> Hélène Paris do to ensure that her declinatory exceptions are heard by the court?**

**QUESTION 3 (10 marks)**

**(a) Is the request of M<sup>e</sup> Hélène Paris to have the case transferred to the Court of Québec well founded?**

**Justify your answer by referring to one or more specific and relevant provisions of the *Code of Civil Procedure*.**

**(b) Is the request of M<sup>e</sup> Hélène Paris to have the case transferred to the judicial district of Kamouraska well founded? Explain your answer.**

**QUESTION 4 (5 marks)**

**What form will the eventual defence by M<sup>e</sup> Hélène Paris have to take?**

**Justify your answer by referring to one or more specific and relevant provisions of the *Code of Civil Procedure*.**

**SUPPLEMENTARY FACTS**

On March 14, 2003, M<sup>e</sup> Paris asks M<sup>e</sup> Biron to amend their agreement as to the conduct of the proceeding dated January 27, 2003, in order to extend by one week the deadline set out therein for holding the examination on discovery before the filing of the defence of the plaintiff's representative. M<sup>e</sup> Paris is no longer able to abide by this deadline because the trial for another case in which she is involved was recently and unexpectedly scheduled. Furthermore, because she practises alone, no one can replace her at the examination. M<sup>e</sup> Biron refuses this request.

**QUESTION 5 (5 marks)**

**In these circumstances who has jurisdiction to authorize the amendment of the agreement dated January 27, 2003?**

**Justify your answer by referring to one or more specific and relevant provisions of the *Code of Civil Procedure*.**

**SUPPLEMENTARY FACTS**

The proof and hearing take place and, on September 8, 2003, judgment is rendered. The judgment grants the resiliation of the lease and orders the defendant to pay the plaintiff an amount of \$49,900. This amount represents \$20,000 of owed and unpaid rent, \$15,000 as compensation for re-leasing of the premises and \$14,900 for damages to the leased premises. The judgment also awards interest at a rate of 12% per year, as provided for in the lease, on the amount of \$49,900 as of the date of summons, namely January 9, 2003.

Hector L'Heureux is dissatisfied and gives M<sup>e</sup> Paris the mandate to appeal this judgment. On October 2, 2003, M<sup>e</sup> Paris serves and files an inscription in appeal.

Today, October 9, 2003, M<sup>e</sup> Biron also receives the mandate from his client, *Placements Beaulieu inc.*, to appeal the judgment in order to obtain the full amount of the damages claimed in first instance.

**QUESTION 6 (10 marks)**

**(a) Was M<sup>e</sup> Hélène Paris required to obtain leave to appeal the judgment rendered?**

**Justify your answer by referring to one or more specific and relevant provisions of the *Code of Civil Procedure*.**

**(b) Will M<sup>e</sup> Achille Biron be required to obtain leave to appeal the judgment rendered?**

**Justify your answer by referring to one or more specific and relevant provisions of the *Code of Civil Procedure*.**

<b>FILE 2 (15 MARKS)</b>
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You are an articling student in the office of M<sup>e</sup> Claude Bourgault who provides you with the file relating to Gaston Moreau. The file reveals the following facts.

A few years ago, Gaston Moreau bought a parcel of land located in range 7 in St-Claude and designated as follows: “An immovable known and designated as being lot number 1498232 of the cadastre of Quebec, registration division of Richmond.”

He had a residence built on the lot and an in-ground swimming pool installed. He also fitted out the basement so that his mother, Rita Viens, of whom he is the mandatary pursuant to a judgment homologating a mandate in the event of incapacity, could live there.

Behind this parcel of land is the agricultural land owned by Richard Boivin and described as follows: “An immovable known and designated as being lots number 1498227 and 1498228 of the cadastre of Quebec, registration division of Richmond”.

A stream runs through one of the lots, namely lot number 1498228. During the month of August of 2003, Richard Boivin decided to build a small dam in the stream in order to create a pond.

On September 15, 2003, a heavy, but rather foreseeable rainfall for this period of the year, drenched the St-Claude region. At approximately 5:00 p.m., a tide made up of mud and water and originating on Richard Boivin’s land spilled into Gaston Moreau’s swimming pool and into the basement occupied by Rita Viens.

There is no doubt that the construction of the small dam on lot 1498228 is the reason for the sudden overflow of this mass of water and mud.

The damage caused to Gaston Moreau’s property, including the cleanup costs, totals \$10,500. As for Rita Viens, all of her carpets and a few pieces of her furniture were damaged and will have to be replaced at a cost of \$5,000.

Your articling supervisor, M<sup>e</sup> Claude Bourgault, is of the opinion that this is a case of significant aggravation of the legal servitude of flowing water provided for in article 979 of the *Civil Code of Québec*.

On September 16, 2003, M<sup>e</sup> Claude Bourgault served a demand letter. The letter requires Richard Boivin “to demolish the small dam built on lot 1498228 no later than September 23, 2003” and demands the payment to Gaston Moreau and Rita Viens, within the same period of time, of the damages mentioned hereinabove, failing which legal proceedings will be instituted.

Given that M<sup>e</sup> Claude Bourgault has not received an answer within the stipulated deadline, he asks you to prepare an action so that, in accordance with the demand letter, the required work is carried out and his clients are compensated. However, he adds that no interlocutory application is necessary.

**QUESTION 7 (15 marks)**

**Draft the conclusions of this motion to institute proceedings. In order to protect your anonymity, do not sign the written proceeding.**

<b>FILE 3 (45 MARKS)</b>
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**The situation described in File 3 is an evolving one: all the supplementary facts are to be added to the main portion of the fact pattern to form part thereof.**

On January 15, 2003, you meet with your client Martial Lacoste who relates the following facts to you.

In January of 1986, he met Antoinette Patry. They were both widowed and soon found that they had a lot of common interests; in January of 1987, they began living together.

At the time they met, Antoinette Patry had a son from her first marriage, Jean Despatie. Your client also had a son from his first marriage, Claude Lacoste.

Your client informs you that Antoinette's son, Jean Despatie, was very displeased with their decision to live together. Indeed, Jean often accused your client, in the presence of Antoinette, of only being interested in his mother's wealth, Antoinette having inherited an amount of three million dollars in 1985 following the death of her first husband, Armand Despatie. Antoinette Patry always answered her son that Martial made her happy and showed unfailing love and total devotion.

On June 20, 1996, notwithstanding Jean's objections, Antoinette and Martial were married. Throughout their life together and their marriage, Antoinette had a happy family life with Martial's son treating her as if she were his mother.

However, the strained relationship between them and Jean dampened Antoinette's happiness. Jean, who lived in New Brunswick, contacted his mother only to criticize her decision to live together with Martial and to marry him.

Antoinette died on January 10, 2002 and pursuant to a will signed on March 14, 2001 before Notary Philippe Lebel, she bequeathed almost her entire fortune to your client.

On January 14, 2003, your client was served with the motion to institute proceedings reproduced hereinbelow. This motion, presentable on February 25, 2003, was accompanied by a notice to the defendant and to the two mis en cause (not reproduced) and included the notice of disclosure of exhibits P-1 to P-8 (notice and exhibits not reproduced).

CANADA

**SUPERIOR COURT**

PROVINCE OF QUEBEC  
 DISTRICT OF RICHELIEU  
 NO.: 765-17-000028-034

JEAN DESPATIE, domiciled and residing at  
 8822 Perry Boulevard, in Moncton, Province of  
 New Brunswick, V7K 5H3

Plaintiff

v.

MARTIAL LACOSTE, domiciled and residing at  
 5520 Marie-Victorin Blvd., in Verchères, District  
 of Richelieu, Province of Quebec, J0L 2B9

Defendant

and

CLAUDE LACOSTE, domiciled and residing at  
 1610 Salzbourg Crescent, in Brossard, District of  
 Longueuil, Province of Quebec, J8V 5P9

Mis en cause

and

PHILIPPE LEBEL, notary, practising his  
 profession at 710 René-Lévesque Blvd. West,  
 Suite 500, in Montreal, District of Montreal,  
 Province of Quebec, H2B 9S4

Mis en cause

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**MOTION TO INSTITUTE PROCEEDINGS**

IN SUPPORT OF HIS ACTION, THE PLAINTIFF STATES AS FOLLOWS:

1. The Plaintiff, born on June 2, 1955, is the son of Antoinette Patry and Armand Despatie, as it appears from the birth certificate, Exhibit P-1;
2. The Plaintiff and his parents always had an excellent relationship and were a very close family despite the Plaintiff's move to New Brunswick in 1975;
3. Armand Despatie, born in Montreal on March 15, 1925, died in Montreal on January 22, 1985, as it appears from the death certificate, Exhibit P-2;
4. Following the death of Armand Despatie, Antoinette Patry inherited an amount of three million dollars;
5. On June 15, 1985, Notary Françoise Doré drew up a will in which Antoinette Patry bequeathed to the Plaintiff all of her movable and immovable property, as it appears from an authentic copy of the will, Exhibit P-3;
6. M<sup>c</sup> Françoise Doré had been the Despatie family's notary and Armand Despatie's legal advisor since 1965;
7. After the death of his father in 1985, the Plaintiff's love and support for his mother grew, despite the distance between them;
8. Indeed, the Plaintiff regularly visited his mother and spoke to her frequently on the telephone;

9. In 1986, Antoinette Patry met the Defendant and they began living together as of January of 1987;
10. At that time, the Defendant had a son from a first marriage, the Mis en Cause, Claude Lacoste, a physician specializing in geriatrics;
11. As of January of 1987, the Plaintiff experienced great difficulty in communicating with and visiting his mother;
12. The few times that the Plaintiff was able to visit his mother, the Defendant refused to leave Antoinette Patry alone with the Plaintiff, always dominating the conversation and obviously exercising total control over her;
13. The Defendant's only wish was to take Antoinette Patry's fortune for himself;
14. As of 1989, Antoinette Patry's health gradually deteriorated;
15. Indeed, Antoinette Patry had been profoundly deaf since 1990;
16. She also suffered from mild dementia which had been diagnosed in 2000;
17. The Mis en Cause, Claude Lacoste, had been Antoinette Patry's general physician since 1989, as it appears from a letter from the Régie de l'assurance-maladie du Québec dated October 15, 2002 to which there is annexed a list of all the doctors who treated Antoinette Patry since 1986, Exhibit P-4;
18. On June 20, 1996, the Defendant married Antoinette Patry, as it appears from the marriage certificate, Exhibit P-5, this being his second marriage;
19. Before their marriage they entered into a marriage contract adopting the regime of separation as to property, which marriage contract was signed before Notary Françoise Doré, as it appears from an authentic copy of the marriage contract, Exhibit P-6;
20. On March 14, 2001, Antoinette Patry signed a will before the Mis en Cause, Notary Philippe Lebel, as it appears from an authentic copy of the will, Exhibit P-7;
21. This will revoked the prior will drawn up on June 15, 1985 by Notary Françoise Doré, Exhibit P-3;
22. Under the will dated March 14, 2001, Exhibit P-7, the Plaintiff was disinherited because he inherited only the sum of \$100,000, while the Defendant inherited the rest of Antoinette Patry's fortune evaluated at four million dollars;
23. Under this will, Exhibit P-7, the Mis en Cause, Claude Lacoste, was appointed the liquidator;
24. On January 10, 2002, at the age of 74, Antoinette Patry died in Montreal, as it appears from the death certificate, Exhibit P-8;
25. The will, Exhibit P-7, is null for the following reasons:
  - (a) the Defendant and the Mis en Cause, Claude Lacoste, did all they could to drive Antoinette Patry apart from her family and friends;



- (b) the Defendant and the Mis en Cause, Claude Lacoste, isolated Antoinette Patry in order to exercise complete control over her;
- (c) the Defendant and the Mis en Cause, Claude Lacoste, took advantage of Antoinette Patry's physical and intellectual weakness to cause her to sign the will, Exhibit P-7, before the Mis en Cause, Notary Philippe Lebel, which will completely favours the Defendant;
- (d) at the time of signing of the will, Exhibit P-7, Antoinette Patry was not capable of understanding the nature of the act or its consequences due to her fragile physical and mental state;
- (e) in fact, on March 14, 2001, the Defendant acknowledged that Antoinette Patry was deaf.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

NULLIFY the will drawn up by the Mis en Cause, Notary Philippe Lebel, on March 14, 2001;

The whole with costs.

Sorel, January 13, 2003

(s)Isabelle Cadieux

ISABELLE CADIEUX

Attorney for the Plaintiff

True copy

*Isabelle Cadieux*

Attorney for the Plaintiff

This motion was also served together with the written statement of Edmond Patry, Antoinette's brother, which was communicated under article 294.1 of the *Code of Civil Procedure* and two notices communicated under article 402.1 of the *Code of Civil Procedure* regarding the expert reports of doctors Alain Paulhus and Michèle Thibert.

The first expert report, dated November 15, 2002, was prepared by Doctor Alain Paulhus, an otorhinolaryngologist specializing in hearing problems. This report states that Doctor Paulhus, who did not examine Antoinette Patry, analyzed three complete audiograms and the detailed notes relating to three hearing tests which Antoinette Patry had undergone in 1987, 1989 and 1993. According to him, the three audiograms show a slow progression in Antoinette Patry's deafness. Doctor Paulhus concludes that on March 14, 2001, Antoinette Patry could not hear anything at all.

The second expert report, dated December 8, 2002, was prepared by Doctor Michèle Thibert, a psychiatrist specializing in geriatrics. The report indicates that Doctor Thibert did not examine Antoinette Patry. In order to prepare her expert report, she based herself on the version of the facts obtained from the plaintiff and certain members of his family during meetings held in October of 2002 as well as on an analysis of the following documents:

- the deceased's medical record at the hôpital Sacré-Cœur de Montréal;
- the will dated June 15, 1985, Exhibit P-3;
- the marriage contract, Exhibit P-6;
- the will dated March 14, 2001, Exhibit P-7.

Doctor Thibert concludes that, in view of Antoinette Patry's profound deafness and mild dementia, she was not capable of expressing her wishes in a free and informed manner in the drafting of her will dated March 14, 2001.

Doctor Thibert places emphasis on the fact that the services of Notary Philippe Lebel were used for purposes of the 2001 will, thereby, in her opinion, breaking a long-standing relationship with the family's notary, M<sup>e</sup> Françoise Doré.

Doctor Thibert also concludes that, in her opinion, Antoinette Patry was under the total control of her husband Martial Lacoste and his son Claude.

Finally, she considers that the fact that Claude Lacoste, Antoinette Patry's general physician, was named as liquidator results in a conflict of interests and a violation of certain sections of the *Code of ethics of physicians*.

On January 20, 2003, you file an appearance on behalf of the defendant.

After having obtained copy of exhibits P-1 to P-8, you carry out an in-depth analysis of the case.

Upon reading the will dated March 14, 2001, exhibit P-7, you note that it contains the following clause, among others:

[...]  
 CLAUSE 2:  
 "I, the undersigned, Antoinette Patry, hereby declare that I am of sound mind and fully lucid. I declare that I have full enjoyment of all my physical, mental and intellectual faculties and I declare that I understand the meaning and scope of the provisions set forth in this will. This will is made voluntarily and with full knowledge of the facts and it contains my last wishes after careful consideration. The provisions set forth herein are a faithful representation of the formal expression of my wishes and must be respected. I revoke all prior testamentary dispositions, codicils and other appointments of heirs made prior to this will, which will is the only one containing the expression of my last wishes."  
 [...]

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

**In order to prove, at the trial, that Antoinette Patry was not capable of making a will on March 14, 2001, must the plaintiff proceed by way of improbation?**

**Select the correct answer from among the answers written hereinbelow and circle the corresponding letter in the answer booklet.**

- (a) Yes, improbation is required because the notary had the task of observing the capacity of the testatrix.**
- (b) No, improbation is not required for an application to annul the act by reason of a defect of consent.**
- (c) Yes, improbation is required because this is a contestation of a recital in the authentic act.**
- (d) No, improbation is not required because this is not a forgery or alteration of an act.**

<b>SUPPLEMENTARY FACTS</b>
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Thereafter, you agree with M<sup>e</sup> Cadieux on an agreement as to the conduct of the proceeding, which agreement is signed and filed in the court record on February 21, 2003, namely before the date for presenting the motion to institute proceedings on February 25, 2003.

The agreement provides that an examination on discovery before the filing of the defence will be held on March 25, 2003. In preparation for this examination, on March 4, 2003 you serve the plaintiff with a writ of *subpoena duces tecum* asking him to bring various documents, including all of Antoinette Patry's medical and hospital records since 1960. M<sup>e</sup> Cadieux considers this request to be excessive and irrelevant as regards documents prior to 1985. She tells you that she intends to raise an objection to that effect.

**QUESTION 9 (5 marks)**

**Can the parties obtain a ruling on this objection prior to the examination being held?**

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

<b>SUPPLEMENTARY FACTS</b>
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On April 25, 2003, you serve your client's defence upon M<sup>e</sup> Cadieux by fax.

In his defence, your client alleges the following, among other things:

[...]

AND IN ORDER TO RE-ESTABLISH THE FACTS, THE DEFENDANT ADDS THE FOLLOWING:

15. Far from being harmonious, as implied by the Plaintiff, the family relationship between the Plaintiff and Antoinette Patry was very strained prior to 1986;
16. Indeed, the Plaintiff left the family home and moved far from Montreal due to the major disagreements between him and his parents, Antoinette Patry and Armand Despatie;
17. The Plaintiff's allegation to the effect that the Defendant was with Antoinette Patry only for her money is shocking, insulting and downright defamatory;
18. The Plaintiff was never able to accept that his mother spent time with the Defendant, because, according to him, she should have remained a widow until the end of her life out of respect for the memory of his father;
19. Antoinette Patry developed a relationship with the Mis en Cause, Claude Lacoste, similar to the relationship between a mother and son;

20. Moreover, notwithstanding her partial deafness, Antoinette Patry understood perfectly well the will she signed before the Mis en Cause, Notary Philippe Lebel, because he read it out loudly and ensured that Antoinette Patry could hear him;
21. Similarly, at the time she signed the will before the Mis en Cause, Notary Philippe Lebel, Antoinette Patry was perfectly of sound mind and understood the nature of this act and its consequences;
22. The Plaintiff has only himself to blame for having been disinherited by his mother because he had broken off his relationship with her several years before;
23. The will signed by Antoinette Patry before the Mis en Cause, Notary Philippe Lebel, was the subject of a rational and carefully thought out decision;

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

DISMISS the Plaintiff's action;

[...]

On June 5, 2003, M<sup>c</sup> Cadieux serves his answer on you as well as the inscription for proof and hearing and the declaration under article 274.1 of the *Code of Civil Procedure*. These documents as well as exhibits P-1 to P-8, both expert reports communicated under article 402.1 of the *Code of Civil Procedure* and the statement of Edmond Patry, Antoinette's brother, communicated under article 294.1 of the *Code of Civil Procedure* were filed in the court record within the statutory deadlines.

You review the case in order to prepare your declaration under article 274.1 of the *Code of Civil Procedure*. You then notice that Edmond Patry's name does not appear on the plaintiff's list of witnesses. However, you would like to cross-examine him on his written statement. You contact Edmond Patry in order to ensure that he will be in court on the day of the trial, but he categorically refuses to attend.

#### QUESTION 10 (5 marks)

**In order to ensure that Edmond Patry will be at the trial so you can cross-examine him on his written statement, must you necessarily summon him by a writ of *subpoena*? Explain your answer.**

#### SUPPLEMENTARY FACTS

On July 15, 2003, you file your declaration under article 274.1 of the *Code of Civil Procedure*.

The trial takes place today, October 9, 2003.

M<sup>c</sup> Cadieux calls his first witness, the plaintiff Jean Despatie, and asks him the following questions.

Q. Mr. Despatie, as of 1987 how often did you visit your mother?

A. I would have liked to visit her more often, but I'd say I saw her about once or twice a year...

Q. Why?

R. Because the defendant Martial Lacoste prevented me from seeing my mother on the pretext that this was too tiring for her.

Q. What do you think about Martial Lacoste's explanation?

A. I think that instead...

You object to this last question.

#### QUESTION 11 (5 marks)

**State a ground in support of this objection.**

#### SUPPLEMENTARY FACTS

The examination of the plaintiff Jean Despatie continues and M<sup>e</sup> Cadieux asks him the following questions.

Q. Did you see your mother in March of 2001?

A. Yes. I had to travel to Montreal for work from March 4<sup>th</sup> to 11<sup>th</sup>, 2001. I called her upon my arrival on March 4<sup>th</sup> and I went to visit her on March 11<sup>th</sup> before leaving Montreal.

Q. How was she?

A. I found her to be very tired, old and confused... I was never sure if she knew who I was.

You object on the ground that the plaintiff, in his capacity as heir, cannot testify to contradict the terms of the will, exhibit P-7, and particularly clause number 2.

#### QUESTION 12 (5 marks)

**Is your objection well founded?**

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

**SUPPLEMENTARY FACTS**

M<sup>e</sup> Cadieux's second witness is Rolande St-Onge. After a few introductory questions, M<sup>e</sup> Cadieux asks her the following questions.

Q. On March 14, 2001, before noon, where were you?

A. In the waiting room of Notary Lebel's office.

Q. Who was in the waiting room, besides you?

A. Antoinette Patry and Martial Lacoste, both friends of mine.

Q. How was Antoinette Patry?

A. She was rocking back and forth, staring into space, with trembling hands on her knees. The notary's secretary came to get her, walked towards her, introduced herself to Antoinette and asked her if she was indeed Antoinette Patry. Antoinette looked at her as if she did not understand the question, and it was Martial who answered: "Yes that's her, but she's deaf, so she doesn't really hear you."

You object on the ground that the witness is relating the defendant's words and this is hearsay.

**QUESTION 13 (5 marks)**

**Is your objection well founded? Explain your answer.**

**SUPPLEMENTARY FACTS**

M<sup>e</sup> Cadieux then calls one of her experts, Doctor Thibert, a psychiatrist.

After having established her qualifications as an expert, M<sup>e</sup> Cadieux asks her to file her report and to explain the mandate entrusted to her as well as the methodology used. She then asks her the following questions.

Q. Doctor Thibert, what are your conclusions regarding Antoinette Patry's capacity to make a will in March of 2001?

A. Given her cognitive deficiencies and mild dementia, together with her significant and very advanced deafness, Mrs. Patry did not have the capacity to express her wishes in a free and informed manner when she signed her will on March 14, 2001.

Q. What else did you notice when you examined Mrs. Patry's file?

R. The fact that the services of Notary Philippe Lebel were used for the will signed on March 14, 2001 broke a stable, trusting and long-standing relationship with the family's notary, M<sup>e</sup> Françoise Doré. Based on these conclusions, I deduce that Martial Lacoste and his son Claude Lacoste totally controlled Antoinette Patry. Their control over her led to the signing of the will dated March 14, 2001 which greatly favours Martial Lacoste and to the appointment of Claude Lacoste as liquidator. This is highly reprehensible and constitutes a flagrant violation of several sections of the *Code of ethics of physicians* liable to result in serious disciplinary consequences.

Q. How does this violate the *Code of ethics of physicians*?

**QUESTION 14 (5 marks)**

**Can you object to this last question? If so, formulate the objection. If not, explain your answer.**

**SUPPLEMENTARY FACTS**

After having called all her witnesses, M<sup>c</sup> Cadieux declares that she has finished presenting her evidence.

You call your first witness for the defence, Notary Philippe Lebel, who is accompanied by his lawyer. You ask Notary Lebel the following question.

Q. What did Mrs. Patry tell you during her visit to your office on March 14, 2001?

Notary Lebel's lawyer objects to this question on the ground that Notary Lebel is bound by law to respect professional secrecy; he therefore invokes section 9 of the *Charter of Human Rights and Freedoms*.

After having heard the parties' lawyers, the judge disallows the objection raised by Notary Lebel's lawyer.

**QUESTION 15 (5 marks)**

**Can this decision by the judge be appealed immediately?**

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

**SUPPLEMENTARY FACTS**

After having called all your witnesses, you declare that you have finished presenting your evidence.

The judge suspends the hearing until the following morning when he will listen to the closing arguments of the parties. When exiting the courthouse with your client, you hear the plaintiff Jean Despatie confidently say to M<sup>c</sup> Cadieux: "We've already won. We have an auditory expert who testified and concluded that my mother was deaf, while the opposing party presented only ordinary witnesses who stated that she could still hear a little in 2001... the defendant did not file any expert report which contradicts Doctor Paulhus. Therefore, the court will necessarily conclude that she was deaf and that she did not hear the notary read out the will in a loud voice... I'm sure we'll win!"

**QUESTION 16 (5 marks)**

**Will the court necessarily have to conclude that Antoinette Patry was deaf on March 14, 2001? Explain your answer.**

**CORRIGÉ**  
**PREUVE ET PROCÉDURE - EXAMEN RÉGULIER**  
9 octobre 2003

**DOSSIER 1 (40 POINTS)**

**QUESTION 1 (5 points)**

Dans l'hypothèse où M<sup>e</sup> Hélène Paris ne produirait pas de comparution dans les délais légaux, à compter de quelle date M<sup>e</sup> Achille Biron pourrait-il inscrire la cause pour jugement par défaut de comparaître?

À compter du 21 janvier 2003.  
(Art. 6, 7, 8, 119, 192 *C.p.c.*)

1.

**QUESTION 2 (5 points)**

Que doit faire M<sup>e</sup> Hélène Paris pour s'assurer que ses moyens déclinatoires soient entendus par le tribunal?

Elle doit les dénoncer par écrit à la partie adverse.  
(art. 151.5 et 159 *C.p.c.* et règle 72 *R.p.c.*(C.S.))

2.

**QUESTION 3 (10 points)**

a) M<sup>e</sup> Hélène Paris est-elle bien fondée d'exiger que le dossier soit transmis à la Cour du Québec?

**Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes du Code de procédure civile.**

Oui, art. 34, al. 1 par. 3 *C.p.c.*  
(Il s'agit d'un recours en résiliation de bail et le montant réclamé pour loyers et dommages-intérêts est d'une valeur inférieure à 70 000 \$).

3.

b) M<sup>e</sup> Hélène Paris est-elle bien fondée d'exiger le transfert du dossier dans le district judiciaire de Kamouraska? Dites pourquoi.

Non, il s'agit d'une action personnelle et la demanderesse a choisi le district judiciaire de Québec qui est le district d'élection de domicile contenu dans le bail et allégué par la demanderesse dans sa requête (art. 68 al. 1 par. 1 *C.p.c.*).

4.

**QUESTION 4 (5 points)**

Quelle forme l'éventuelle défense de M<sup>e</sup> Hélène Paris devra-t-elle prendre?

**Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes du Code de procédure civile.**

La forme orale, art. 175.2, par. 4 c) *C.p.c.*

5.



**QUESTION 5 (5 points)**

Dans ces circonstances, qui a compétence pour autoriser la modification de l'entente du 27 janvier 2003?

Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes du *Code de procédure civile*.

Le greffier spécial, art. 44.1 par. 1 *C.p.c.*

OU

Le tribunal, art. 151.2 *C.p.c.*

6.  5

**QUESTION 6 (10 points)**

a) M<sup>e</sup> Hélène Paris devait-elle obtenir la permission d'en appeler du jugement rendu?

Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes du *Code de procédure civile*.

1. Non, art. 26 al. 1 ET 27 *C.p.c.*

(Il s'agit d'un cas d'appel de plein droit parce que la valeur de l'objet en litige en appel est au moins égale à 50 000 \$, compte tenu du montant du jugement, des intérêts et de l'indemnité additionnelle.)

1.  5 pts

OU

2. Non, art. 26 al. 1 *C.p.c.*

2.  3 pts

7.  5

b) M<sup>e</sup> Achille Biron devra-t-il obtenir la permission d'en appeler du jugement rendu?

Appuyez votre réponse en faisant référence à la ou aux dispositions précises et pertinentes du *Code de procédure civile*.

1. Non, art. 26.0.1 *C.p.c.*

(Puisque le défendeur, Hector L'Heureux, a lui-même interjeté appel du jugement, la partie adverse peut interjeter appel de plein droit.)

1.  5 pts

OU

2. Non, art. 500 *C.p.c.*

2.  3 pts

8.  5

DOSSIER 2 (15 POINTS)

QUESTION 7 (15 points)

Rédigez les conclusions de cette requête introductive d'instance. Ne signez pas l'acte de procédure pour assurer votre anonymat.

RENDRE une ordonnance d'injonction enjoignant (ou ENJOINDRE ou ORDONNER) au défendeur de 9.   
démolir, le barrage érigé sur son terrain décrit comme suit:

« Un immeuble connu et désigné comme étant le lot numéro 1 498 228 du cadastre du Québec circonscription 10.   
foncière de Richmond. »

dans un délai de X jours de la signification du jugement à intervenir sur la présente requête. 11.

CONDAMNER le défendeur à payer au demandeur personnellement 12.

la somme de 10 500 \$ avec intérêts au taux légal et l'indemnité additionnelle prévue par la loi, 13.

à compter du 24 septembre 2003.

CONDAMNER le défendeur à payer au demandeur, en sa qualité de mandataire de Rita Viens, 14.

la somme de 5 000 \$ avec intérêts au taux légal et l'indemnité additionnelle prévue par la loi, 15.

à compter du 24 septembre 2003.

16.

Le tout avec dépens.

**Aucune autre conclusion** 17.

**Qualité de l'expression écrite** 18.

DOSSIER 3 (45 POINTS)

QUESTION 8 (5 points)

Afin de prouver, lors du procès, qu'Antoinette Patry n'était pas apte à tester en date du 14 mars 2001, le demandeur doit-il procéder par inscription de faux?

Choisissez la bonne réponse parmi celles inscrites ci-dessous et encerclez la lettre correspondante dans votre cahier de réponses.

- a) Oui, l'inscription de faux est requise car le notaire avait pour mission de constater la capacité de la testatrice.
- b) Non, l'inscription de faux n'est pas requise en cas de demande d'annulation de l'acte pour cause de vice de consentement.
- c) Oui, l'inscription de faux est requise parce qu'il s'agit de contredire une mention à l'acte authentique.
- d) Non, l'inscription de faux n'est pas requise car il ne s'agit pas d'une contrefaçon ou d'une altération d'un acte.

Réponse : b) Non, l'inscription de faux n'est pas requise en cas de demande d'annulation de l'acte pour cause de vice de consentement. 19.

QUESTION 9 (5 points)

Préalablement à la tenue de cet interrogatoire, les parties peuvent-elles faire trancher cette objection?

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

Oui, art. 396.3 C.p.c.

20.

QUESTION 10 (5 points)

Afin de vous assurer de la présence d'Edmond Patry lors du procès pour le contre-interroger sur sa déclaration écrite, devez-vous obligatoirement l'assigner par bref de *subpoena*? Dites pourquoi.

Non, ce n'est pas nécessaire, parce qu'il suffit d'envoyer un avis à M<sup>e</sup> Cadieux (art. 294.1 al. 2 C.p.c.)

21.

QUESTION 11 (5 points)

Énoncez un motif au soutien de cette objection.

Le témoin, Jean Despatie, ne peut que témoigner sur un fait à sa connaissance personnelle (art. 2843 C.c.Q.)  
OU

On ne peut demander au témoin Jean Despatie son opinion (art. 2843 C.c.Q.).

22.

**QUESTION 12 (5 points)**

**Votre objection est-elle bien fondée?**

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

Non, art. 2864 *C.c.Q.*

23.

**QUESTION 13 (5 points)**

**Votre objection est-elle bien fondée? Dites pourquoi.**

Non, puisque la déclaration provient de la partie adverse qui est présente

**OU**

Non, c'est un aveu extra-judiciaire qui est allégué au par. 25 e) de la requête

24.

**QUESTION 14 (5 points)**

**Pouvez-vous formuler une objection à cette dernière question? Si oui, formulez l'objection. Si non, dites pourquoi.**

Oui, la question dépasse largement le cadre de son domaine d'expertise, qui porte sur la capacité d'Antoinette Patry.

**OU**

Oui, l'expert ne peut témoigner sur la notion de conflit d'intérêts, réel ou potentiel, qui constitue une question de droit.

25.

**QUESTION 15 (5 points)**

**Cette décision du juge est-elle appellable immédiatement?**

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

Oui, art. 29 al. 2 *C.p.c.*

26.

**QUESTION 16 (5 points)**

**Le tribunal devra-t-il nécessairement conclure qu'Antoinette Patry était sourde le 14 mars 2001? Dites pourquoi.**

1. Non, le tribunal n'est pas lié par le témoignage de l'expert, celui-ci est laissé à l'appréciation du tribunal.

1.  5 pts

**OU**

Non, le tribunal peut préférer une preuve testimoniale profane à celle d'un expert.

**OU**

**OU**

27.

2. Non, la force probante du témoignage est laissée à l'appréciation du tribunal (art. 2845 *C.c.Q.*)

2.  3 pts