

EXAM NUMBER \_\_\_\_\_

**THIS EXAMINATION CONSISTS OF 6 PAGES  
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER**

**THE UNIVERSITY OF BRITISH COLUMBIA  
ALLARD SCHOOL OF LAW**

**FINAL EXAMINATION – DECEMBER 2018**

**LAW 382.001: Health Law**

**Professor Bobinski**

**Overview of Examination Instructions**

**This examination has two parts (I, II) and both parts include options.**

- **Part I (40 points) begins with a fact pattern raising a number of potential legal issues. You will select two options from a list for discussion and analysis.**
- **Part II (50 points) presents five short essay topics from which you will select two for discussion and analysis.**

**TOTAL MARKS: 90**

**TIME ALLOWED: 3 Hours**

**(AND 15 MINUTES READING TIME)**

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- NOTE:**
1. This is an open book examination. Students may bring in and refer to written notes, books, or any other printed materials. Accessing electronic materials or other resources through, e.g., mobile phones, laptops etc. is not permitted. **Students are permitted to annotate the examination paper but may not begin answering the exam questions during the 15 minutes reading time.**

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2. Record your Exam Number at the top of the Exam Cover page. Students who handwrite their examination answers should write their exam number on the front of each examination booklet used for their answers. All examination papers and all booklets must be turned in to the invigilator at the completion of the exam.

**Part I****MARKS**

- 40 Art Able (age 43) and Betty Bin (age 38) had been trying to conceive a child for six years when they made an appointment to meet with Dr. Cassandra Chan at the Coastal View Fertility Clinic in Vancouver. The couple had an extensive initial meeting with Dr. Chan in which they provided information about their medical and family histories. Among other things, they explained to Dr. Chan that they had delayed seeking advice at a fertility clinic for several years because they had wanted to try “natural” remedies with a local neighbourhood unlicensed and unregistered healer, known as “Doc” Dubus. Dubus had examined them and conducted studies on their urine in an effort to diagnose the source of their difficulties. Dubus thereafter had encouraged them to eat well, exercise, get enough sleep, meditate, limit screen time, and drink a specially-prepared “Dubus” tea daily. Unfortunately, despite years of following Dubus’s instructions, they still had not been able to achieve a pregnancy. Dr. Chan advised the couple about statistics indicating that pregnancy becomes more difficult to achieve as women moved through their 30’s. She provided detailed information about the proposed next steps for determining possible causes of their infertility and the couple agreed to go through the relevant diagnostic studies.

Dr. Chan met with the couple again after they had completed the medically-appropriate diagnostic procedures. After securing appropriate consents regarding disclosure, Dr. Chan revealed the results of the tests and then discussed the medically-appropriate options, including the possibility of pursuing IVF using Art’s sperm and Betty’s eggs. The couple elected the IVF procedure and were thrilled when later that year they had achieved a successful pregnancy and had 3 embryos in storage for possible use in a future pregnancy. As a part of their fertility treatments, Art and Betty signed a number of consent forms, including one which stated:

Art Able has agreed to provide sperm and Betty Bin has agreed to provide ova/eggs for use in an IVF procedure to create embryos for Betty Bin’s reproductive purposes. Either party to this agreement can withdraw consent to the creation of embryos or their use at any time before implantation.

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(Part I, Continued)

For various reasons, Betty's pregnancy was considered to be somewhat more at risk for complications. She consulted with friends and various websites before selecting Dr. Eric Echo, who had staff privileges at Eastside Hospital, as her obstetrician. Betty visited Dr. Echo periodically during her pregnancy with no indications of medical difficulties. Betty did express one concern to Dr. Echo – the tattoo on her stomach was “stretching” and she wondered whether there were any steps that she could be taking to minimize harm to the unique design, which originally had been reminiscent of the Mona Lisa. Dr. Echo told Betty that he did not have much experience with the issue and asked whether he could take a picture of the tattoo to consult with colleagues. Betty agreed, taking care to ensure that her face was not visible in the photo. Thereafter, Dr. Echo loaded the photo into the “SkinMD” app on his smartphone; the app is designed to create a secure environment to facilitate informal discussions and consultations among physicians regarding interesting or unusual skin conditions. Under the subject heading, Dr. Echo wrote “Check out the Moaning Lisa!” In the text accompanying the photo, Dr. Echo asked for advice without using Betty's name. Unfortunately, Betty's unique tattoo was fairly well known in her eastside neighbourhood and one of her physician-neighbours later informed Betty that her picture had been shared using the app rather than through face to face consultations with colleagues.

As Betty's pregnancy advanced, and various friends and strangers shared their stories about childbirth, Betty became a bit nervous. Indeed, things did not go entirely as planned when Betty eventually went to the Eastside Hospital. She filled out a considerable amount of paperwork, including a form giving consent for “your physician and/or her/his designees, including trainees, along with hospital employees and others acting on behalf of the hospital to provide you with medical services.” Still, she was not entirely happy when Dr. Frank Folly appeared at her bedside to let her know (a) that Dr. Echo was not available to assist with the birth and (b) there were signs that a cesarean section delivery might be necessary.

Dr. Folly provided Betty with information about the standard risks and benefits of a cesarean delivery along with information about the alternatives. After discussing the situation with Art, Betty agreed to the cesarean delivery. Unbeknownst to Betty, Dr. Folly, who was an experienced surgeon, was carrying out an informal study of different surgical approaches to cesarean deliveries. His hypothesis was that small changes in surgical technique might result in improved outcomes for patients, including less damage to the uterus, which could reduce the risk of complications in future

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(Part I, Continued)

pregnancies. Dr. Folly enlisted the support of the nursing staff in helping him to randomly assign patients to his “standard” or “new” surgical technique; the staff also helped him to collect data on surgical outcomes and recovery times using a password protected spreadsheet. Betty was assigned to the “new” study group. Unfortunately, although she was happy to celebrate the birth of her daughter, Gina, she did have some complications related to the cesarean procedure, including increased bleeding and a longer recovery time in the hospital. The nursing staff at the hospital had some concerns about whether Dr. Folly’s patients in the “new” approach arm had complication rates higher than those receiving standard care but they had not yet communicated this information to Dr. Folly or to the hospital.

After many years of hoping and trying, Art and Betty finally had an opportunity to parent. Art proved less comfortable with the challenges of parenting than Betty and the couple eventually separated. Betty thrived as a single mom and eventually decided that she would like to have another child. She approached the Coastal View Fertility Center about the possibility of using IVF, only to discover that Art had filed a withdrawal of his consent for use of the embryos. Virtually simultaneously, the Coastal View Clinic discovered in a routine review of its paperwork and storage protocols that a former employee had made some critical errors. The Clinic was forced to inform Art and Betty that another person’s sperm had been used to create the embryos and that this person was now deceased.

These facts raise a number of potential legal issues involving a number of different individuals and organizations, including the following **options**:

- (a) Licensure-related issues involving “Doc” Dubus and Dr. Echo.
- (b) Reproductive health law issues relating to Betty’s interest in using the frozen embryos.
- (c) Malpractice/informed consent questions related to the informal research project.
- (d) Health information issues relating to Dr. Echo and the research project.

Select **two** of the options listed above (e.g., pick (a) + (b) or (b) + (c), etc). For each option that you select, discuss the legal implications arising from the facts. Be sure to identify, where appropriate, the nature of the possible legal claims or actions arising in the situation, the possible parties, the relevant legal rules, their application to the facts, and the likely or possible outcomes. Where you do not have sufficient facts to assess the claims or actions, indicate the types of information that would be relevant to your determination and why.

**Part II. Short Essays:** There are five possible topics – select **two** for discussion

MARKS

50 **Option 1:** The *Canada Health Act* (“CHA”) establishes five major program requirements that provinces must meet to ensure federal contributions, one of which is “comprehensiveness.” (Canada Health Act, RSC 1985, c C-6, s.7). “Comprehensiveness” means that “the health care insurance plan of a province must insure all insured health services provided by hospitals, medical practitioners or dentists . . . .” (Id. at s.9) “Insured health services” includes “hospital services” (certain defined services provided to hospital patients “if the services are medically necessary” for achieving specified health purposes) and “physician services” (defined as “any medically required services” provided by medical practitioners, which commenters suggest incorporates medical necessity as well). (Id. at s.2). The CHA does not define “medical necessity.” Should the CHA be amended to include (a) a substantive definition of “medical necessity” (e.g., perhaps incorporating QALYs); and/or (b) a requirement that provinces establish medical necessity through a transparent process that includes public input? Be sure to consider the strengths and weaknesses of the current system before considering the advantages and disadvantages of amending the CHA to incorporate a definition and/or process requirement.

**Option 2:** Some of the textbook authors, including Professors Flood, et al. and Jackman, suggest that Canada’s health care system suffers from an accountability deficit. They note that governmental decisions about the health care system, such as those relating to coverage and funding, have a profound impact on individuals and identifiable groups that may be economically or politically disadvantaged. Governmental decisions to exclude some types of care from public coverage or to provide limited funding for other forms of care might therefore impinge upon rights protected by the *Canadian Charter of Rights and Freedoms* (The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11). How do the courts respond to *Charter* challenges to governmental decisions to exclude or limit coverage for certain types of health care? How are these court decisions justified? How do you think that courts should respond to these types of claims? Be sure to consider the risks and benefits of your proposed approach.

**Option 3:** In Chapter 6 of our textbook, Professor MacIntosh analyzes law’s dual role as an instrument of, and a challenge to, colonialism. Indigenous health concerns are woven through the health law course in areas such as (a) the distribution of jurisdiction over health to the federal government, provinces, and indigenous communities; (b) the intersection of licensure with indigenous health practices and practitioners; (c) the standards for medical decision making on behalf of minors; (d) special considerations

(Part 2, Continued)

relating to research involving indigenous communities and indigenous health; and (e) the standard of care applicable to indigenous practitioners. Select **two** areas of the health law course and discuss for each (a) the state of the law in relation to indigenous issues; (b) whether the law appropriately incorporates indigenous perspectives, practices and/or governance concerns; and (c) whether and how the law should be changed. What would be the benefits and risks of your proposed approach?

**Option 4:** How does medical malpractice law address the problem of medical error? What are the strengths and weaknesses of the medical malpractice approach to medical error? How do no-fault systems address medical error and what are the strengths and weaknesses of no-fault approaches? How should Canada address the problem of medical error? Discuss whether you would propose keeping the current malpractice system, modifying it in some way, or moving to some form of no-fault system. Whatever you recommend, be sure to provide reasons for your proposed approach and to consider the strengths and weaknesses of your proposal.

**Option 5:** A significant number of Canadians pursue complementary/alternative medicine (CAM) therapies each year, yet much of the case law in medical malpractice and informed consent focuses on “traditional” health professionals such as physicians and dentists. The growth of CAM raises important policy considerations and the legal response to CAM is still evolving. Consider the issues and offer your recommendations about the following questions: Should traditional medical practitioners be required to provide information about CAM alternatives to traditional medical care when carrying out their informed consent duties? If so, what should be the test for determining which CAM therapies should be discussed? How should the standard of care be defined for CAM practitioners? Should the standard of care depend on whether the CAM practitioner is a member of a provincially-recognized profession? Should CAM providers have an obligation to obtain informed consent that includes a requirement that they provide information about the “alternative” of traditional medical care? Are there other legal issues that you believe need to be addressed? Be sure to explain your reasoning and to consider potential opposing arguments.

END OF EXAMINATION