

THIS EXAMINATION CONSISTS OF SIX (6) PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2023

LAW 271
Introduction to Public Law and the *Charter*

Section 3
Professor Yuvraj Joshi

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS

- NOTES:**
1. This examination counts for 95% of your final grade.
 2. This is an open book examination. You may make use of printouts of the casebook and other course readings, the class slides, your class notes, and your condensed annotated notes (CANS). You are not permitted to access either digital or physical copies of any other materials during the exam.
 3. THIS EXAMINATION CONSISTS OF TWO (2) PARTS.
Please answer all questions in PART I – FACT PATTERN (67 MARKS).
Please answer one (1) of the two (2) question options in PART II – ESSAY (33 MARKS).
 4. Please read every question carefully. Be sure you understand what you are being asked to do before you begin your answer.
 5. Please budget your time carefully. A brilliant answer to one question cannot make up for the failure to answer another question.

6. If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.
7. You may use the short form of case names (e.g., *Oakes*).
8. Good luck!

PART I FACT PATTERN (67 MARKS in total)

Ontario elementary school students' scores in the province's mathematics standardized assessment have declined. Between 2015 and 2018, the percentage of students achieving scores at or above the provincial standard decreased 5 points for Grade 3 students and 2 points for Grade 6 students.

In addition to Ontario's provincial test, there are two sources of students' math performance data: the Pan-Canadian Assessment Program ("PCAP"), which tests samples of Grade 8 students in each Canadian province; and the Organization for Economic Co-operation and Development's ("OECD") Programme of International Student Assessment ("PISA"), which tests samples of 15-year-old students from OECD member states.

- In the 2019 PCAP results, Ontario had the highest reading and science scores in Canada and the second highest math scores after Quebec.
- In the 2018 PISA results, Ontario had the 13th highest math scores among OECD countries and the second highest in Canada behind Quebec.
- The 2018 PISA results further revealed a general decline in both Canadian and OECD math scores, with Quebec being an exception.
- Quebec's math performance was not only significantly higher than all other Canadian provinces, but also one of the highest in the world.

In 2018, op-eds reacting to Ontario's mathematics standardized assessment proclaimed, "Ontario children are falling behind" and "Those who can't do, teach our children!" Some complained about "woke math" being taught in Ontario schools, arguing that "an anti-racist mathematics curriculum" corresponded with a decline in student test scores. One survey found that Ontario parents want schools to go "back to basics" and hire "qualified" teachers.

Meanwhile, an Ontario politician claimed that Ontario "teachers aren't smarter than sixth graders." After winning the 2018 election, his government announced over \$200 million in funding to improve math learning, removed language about racism and colonialism from text accompanying its math curriculum, and proposed stricter certification requirement for teachers.

In order to teach in Ontario public schools, teachers must be certified by the Ontario Teachers College, which was created by the *Ontario Teachers College Act* in 1996 ("OTCA"). The certification requirements are set out in the *Ontario Teachers Act* of 1990 ("OTA") and regulations promulgated under the OTA. In 2019, the Ontario legislature enacted the *Future Einsteins Act* ("FEA"), which amended the OTA to require that teacher candidates pass a math competency examination.

After the FEA passed, an Ontario government agency responsible for province-wide testing conducted a social science review and a comparative jurisdictional analysis on teacher competency exams. It found that:

- There is some positive correlation between teacher math competency scores and student math outcomes.
- Several foreign jurisdictions, including several US states, the UK, Australia, Japan, Singapore, and China, use some form of math competency testing for teacher candidates.
- Quebec does not use a teacher math competency test but requires trainee teachers to take courses in math content and methodology.
- Mandatory standardized tests reduce racial diversity within the teacher pool.

Following this review, the agency devised a four-hour Math Competency Test (“MCT”) that assesses teacher candidates on math skills taught between Grades 3 and 10. Both before and after each administration of the MCT, the agency performs an “equity review” of the test questions with the aim of reducing cultural bias. Developing and administering the MCT has so far cost over \$2 million.

In a Field Test conducted in January 2020, 2,000 applicants took the test, of whom 80 percent passed. Voluntary demographic data showed that candidates who identified as belonging to certain non-White ethno-racial groups failed the MCT at a significantly higher rate than candidates who identified as White.

In the First Test conducted in June 2020, demographic data again showed that candidates who identified as belonging to certain non-White ethno-racial groups failed the MCT at a significantly higher rate than candidates who identified as White. The racial disparity in test outcomes reduced slightly since the Field Test.

Teacher candidates who fail the MCT are allowed unlimited rewrites for a small fee. Rewrites are held the following June and most candidates who retake the MCT pass it by their third attempt. There are racial disparities in rewrite passage rates and most candidates who fail the MCT once do not retake it.

While Ontario does not collect data about candidates who failed and did not retake the MCT, one newspaper article featured the following social media post from @futureteacher dated July 7, 2020, which was ‘shared’ 14 times and ‘liked’ 119 times:

“Failed Ontario’s new teacher math test, guess I won’t be a future teacher after all 🙄💔 Who can wait a full year for a rewrite? I need a job asap!!”

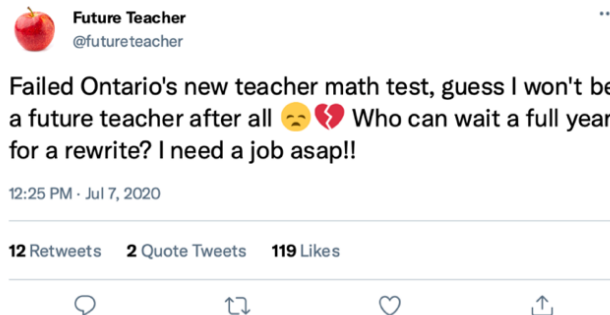


Figure 1: Screenshot of Described Tweet dated July 7, 2020, which features a yellow pensive, sad face emoji, and a red broken heart emoji.

Following the First Test, five Ontario teacher candidates (“Applicants”) challenged the MCT and the provisions requiring it under the *Canadian Charter for Rights and Freedoms*. The Applicants’ expert submitted that:

- The available empirical data does not demonstrate a causal relationship between teacher test scores and student test scores.
- The US, the UK, and Australia, where teacher competency tests are common, have lower student math test scores than Ontario.
- High-stakes teacher testing reduces the diversity of the teaching profession.
- Non-White students perform better when they have racialized minority teachers.
- The Ontario education system has historically disadvantaged Indigenous and racialized minority students, including through the residential school system and segregated schools under the *Common School Act of 1850*.

The government responded that the FEA disadvantages only “unqualified” teacher candidates and is essential for Ontario students “to succeed in the classroom and the job market,” as well as to avoid Ontario’s descent into a “non-numerical society.” The government added that the MCT is a reasonable solution to a complex social problem, which involves many stakeholders (e.g., students, parents, employers, teachers) and requires coordination among different institutions (e.g., elementary and secondary schools, university faculties of education). To deny government the flexibility to require a teacher math competency test, it said, is to destroy “the common good.” The government’s expert submitted that: (1) there is a correlation between teacher competence and student performance; (2) a mandatory math competency exam encourages “math-avoiding” teacher candidates to take a mathematics course; and (3) China, Singapore, and Japan, where teacher competency tests are used, have higher student math test scores than Ontario.

According to a 2014 study, racialized minorities represented:

- 26% of Ontario’s population, 10% of Ontario’s secondary school teachers, and 9% of Ontario’s elementary school and kindergarten teachers.
- 47% of Toronto’s population, 20% of secondary school teachers, and 18% of elementary school and kindergarten teachers.

The U.S. Bureau of Labor Statistics projects that “employment in math occupations is projected to grow 28 percent from 2020 to 2030, much faster than the average for all occupations, and will add about 67,200 jobs” in the United States. As of May 2021, the median annual wage for math-related occupations was \$98,680, higher than the \$45,760 median wage for all occupations in the United States.

You are clerking at the Supreme Court of Canada. In preparation for hearing this *Charter* challenge, Justice Kamal has asked for **your legal opinion** regarding several questions. You must limit your analysis to the facts outlined above and the materials covered in this course.

Answer **ALL** of the following four questions.

For **Question 1**, you are required to provide only a brief analysis based on the facts of this case.

1. Briefly discuss whether the *Charter* applies to these facts and why or why not. (3 MARKS out of 67)

For **Questions 2 and 3**, you should address all the steps of the relevant legal tests and engage in detail with the factual record as set out above. You should also consider competing arguments where appropriate.

2. Assuming the *Charter* applies, does Ontario’s MCT requirement infringe Section 15 of the *Charter*? (30 MARKS out of 67)
3. Assuming Ontario’s MCT requirement infringes Section 15, is it justified under Section 1 of the *Charter*? (30 MARKS out of 67)

For **Question 4**, you are required to provide only a brief analysis based on the facts of this case.

4. Assuming Ontario’s MCT requirement is not justified under Section 1, briefly discuss what you believe to be the appropriate remedy in these circumstances and why. (4 MARKS out of 67)

PART II ESSAY (33 MARKS in total)

Answer **ONE** of the following two questions. Illustrate your answer with relevant examples from the course materials.

EITHER

1. “Is the Notwithstanding Clause a reasonable safeguard to avoid a dangerous concentration of power in an unelected judiciary? Or is it a free license for legislatures to trample on the rights of vulnerable groups?”—*Harvard Law Review*, November 28, 2022

What is your view on this issue? In answering this question, discuss the benefits and drawbacks of the *Charter*'s notwithstanding clause with reference to course materials.

OR

2. The *Charter* “has made an already liberal nation that much more liberal—cementing Canada’s commitment to individual autonomy, equality, and social justice.”—*The Walrus*, July 16, 2019

What is your view on this claim? In answering this question, discuss the strengths and limitations of the *Charter*'s protections and judicial review under the *Charter* with reference to course materials, including at least two cases.

END OF EXAMINATION