

# PROPERTY 1108(B) FINAL EXAM

PROFESSOR DE BEER

MONDAY, 14 DECEMBER 2009, 13:30–16:30 (**180 MINUTES**)

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I SUGGEST THAT YOU FIRST SPEND **60 MINUTES READING** THE EXAM, TO CHOOSE WHICH QUESTIONS TO ATTEMPT AND **PLAN YOUR ANSWERS**.

IN **PART I**, YOU MUST ANSWER 3 OF 4 MULTIPLE CHOICE QUESTIONS. THESE THREE ANSWERS ARE **WORTH 30%** OF YOUR EXAM SCORE (5 MARKS/ANSWER + 5 MARKS/REASON = 10 MARKS/QUESTION). YOU SHOULD SPEND ABOUT **30 MINUTES** TOTAL ON THIS PART OF THE EXAM.

IN **PART II** YOU MUST ANSWER 3 OF 4 ANALYTICAL PROBLEMS OR ESSAY QUESTIONS. YOU MAY, THEREFORE, CHOOSE TO ANSWER 2 PROBLEMS AND 1 ESSAY, OR 2 ESSAYS AND 1 PROBLEM, DEPENDING ON YOUR PREFERENCE. THESE THREE ANSWERS ARE **WORTH 70%** OF YOUR EXAM SCORE (20 MARKS/QUESTION + 10 MARKS/OVERALL IMPRESSION). YOU SHOULD SPEND ABOUT **90 MINUTES** ON THIS PART OF THE EXAM.

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YOU MUST WRITE LEGIBLY AND DOUBLE-SPACE ANSWERS IN INK.

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YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

(*E.G.* BOOKS OR NOTES, BUT NOT LAPTOPS, MOBILE PHONES OR SIMILAR DEVICES).

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**THIS EXAM IS WORTH 70%** OF YOUR FINAL GRADE IN THE COURSE.

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**PLEASE PROVIDE YOUR STUDENT # \_\_\_\_\_**

<b>SCORE</b> ____ /100	<b>LETTER</b> ____
(INSTRUCTOR USE ONLY)	

Letter Grade	Percentage	Point Value	Definition
A+	90-100	10	Exceptional
A	85-89	9	Excellent
A-	80-84	8	Excellent
B+	75-79	7	Very Good
B	70-74	6	Very Good
C+	65-69	5	Good
C	60-64	4	Good
D+	55-59	3	Passable
D	50-54	2	Passable
F	0-49	0	Failure

**Part I**

<b>Option 1</b>				
Correct choice of response				
0		5		
Explanation (i.e. correct rationale for chosen answer, relative strengths to other possibilities)				
1	2	3	4	5
<b>Option 2</b>				
Correct choice of response				
0		5		
Explanation (i.e. correct rationale for chosen answer, relative strengths to other possibilities)				
1	2	3	4	5
<b>Option 3</b>				
Correct choice of response				
0		5		
Explanation (i.e. correct rationale for chosen answer, relative strengths to other possibilities)				
1	2	3	4	5
<b>Total Score Part I</b>				
				<b>/30</b>

**Part II**

<b>Option 1</b>												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
<b>Option 2</b>												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
<b>Option 3</b>												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
<b>Total Score Part II (÷2)</b>												<b>/60</b>

<b>Overall Exam Impression</b>												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
												<b>/10</b>

**I. ANSWER 3 OF 4 QUESTIONS IN THIS PART, WHICH IS WORTH 30% OF THIS EXAM. BRIEFLY EXPLAIN YOUR ANSWERS.**

- 1. Which of the following would best support a claim of aboriginal title to land?**
  - a. Oral testimony about a nation's use of the land for sacred, ceremonial purposes prior to the arrival of Europeans.
  - b. Documentary evidence of a nation's present use of the land for resource harvesting.
  - c. Oral testimony about aboriginal laws that historically permitted other groups of aboriginal peoples to reside temporarily on the land.
  - d. Proof of incidental or proximate occupancy of the land prior to the assertion of crown sovereignty.
  
- 2. Which of the following statements about transfers of property (taken directly from your casebook) is the most accurate?**
  - a. A testamentary transfer "to trustees on trust for my wife during her life, then to her children for their lives, then to such of her grandchildren who attain the age of 21 years" would be invalid according to the common law rule against perpetuities.
  - b. A testamentary transfer "[To the City of Moncton] on the condition that this property is to be held and used for all time for civic purposes in perpetuity" creates a vested interest subject to a condition subsequent with a corresponding right of re-entry to the testator's heirs, which may or may not be valid.
  - c. Following a transfer of property "to my son Stewart ... absolutely subject only that should my other son, Floyd, decide to return to live here, that a lot of land of three acres along highway #2 be transferred to him," Stewart would have an interest that is contingent upon Floyd residing elsewhere.
  - d. A transfer of property subject to the qualification that it "never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood" would be void for impossibility.
  
- 3. Which of the following statements about the concepts and materials studied in our property law course is most accurate?**
  - a. The case of *The Amistad*, (1841), 40 U.S. 518, as presented in the 1997 Hollywood film, proves the value of litigating issues on the basis of broad principles rather than legal technicalities.
  - b. Professor Lindberg's explanation of Cree concepts of property contradicts the Supreme Court's characterization of rights protected by Section 35 of the *Constitution Act*, 1982.
  - c. The documentary film, "No Place Called Home" demonstrates the need to reform matrimonial property and other family laws to address the increasing feminization of poverty.
  - d. *Yanner v. Eaton*, (1999) 166 A.L.R. 258 (H.C.) reflects the merits of having general consensus on the meaning of the term "property."

4. Assume that you are retained to draft a clause designed to achieve a testator's objective encourage a son to stay on the family farm by using a proprietary interest to entice such action. How would you best do so without running afoul of the rules relating to uncertainty? Assume that if the clause that you draft is found to be uncertain, your client would rather have the son receive nothing, and the property go to charity.
- a. "To my son I leave the family farm when he arrives at the age of 30 years providing he stays on the farm, and at his death the property shall pass to charity."
  - b. "My son shall have the family farm so long as he maintains his principal place of residence there. I leave the residue of my estate to charity."
  - c. "I leave the family farm to my son on the condition that he live on said farm and cultivate the same, and if this condition is breached then the farm shall go to charity."
  - d. "I leave my financial investments and real estate to charity, except for the family farm, which I leave to my son if and when he resides there."
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## **II. ANSWER 3 OF 4 QUESTIONS IN THIS PART, WHICH IS WORTH 70% OF THIS EXAM.**

### **1. On September 24, 2009, the UK's Times Online ran the following (slightly edited) story with the headline, "Metal detector enthusiast unearths huge hoard of Anglo-Saxon gold."**

The largest hoard of Anglo-Saxon gold ever found has been unearthed on farmland in Staffordshire by a metal detector enthusiast, archaeologists revealed today.

Terry Herbert, 55, from Burntwood, came across the huge treasure estimated to be worth more than £1 million as he searched a field near his home. The exact location of the discovery has not been disclosed but it is understood to be near the Lichfield border in South Staffordshire, in what was once the independent Anglo-Saxon kingdom of Mercia.

Experts said that the collection of more than 1,500 military artefacts, including helmet, sword pommel and sword hilt ornaments possibly looted on the field of battle 1,400 years ago by a victorious warlord, may have belonged to Saxon royalty.

The hoard contains around 5kg of gold and 2.5kg of silver, far bigger than previous finds such as the Snettisham hoards. Some of it was lying in the open on top of the ploughed field. ...

The hoard is being held in secure storage at Birmingham Museum and Art Gallery, but some items are to be displayed at the museum from tomorrow until October 13.

Staffordshire County Council, Birmingham Museum and the Potteries Museum and Art Gallery have already discussed buying the treasure jointly. ...

Dr Michael Lewis, of the British Museum's Department of Portable Antiquities and Treasure, said that some of the items in the Staffordshire Hoard were unique and could not be compared to any earlier find in order to ascribe a value. He warned that it would be hard to identify who buried the treasure because so few writings survived from the Dark Ages, and most of what did related to Christian figures rather than pagan kings and fighters. But the richness of the hoard pointed to it belonging to a king.

Mr Herbert claimed that finding it with his 14-year-old detector was destiny. “I have this phrase that I say sometimes: ‘Spirits of yesteryear take me where the coins appear’, but on that day I changed coins to gold,” he said.

“I don’t know why I said it that day, but I think somebody was listening and directed me to it. Maybe it was meant to be, maybe the gold had my name on it all along, I don’t know.” ...

Dr Kevin Leahy, National Finds Adviser from the Portable Antiquities Scheme, who catalogued the hoard, ... speculated that the treasure might have been built up by a warlord in the course of a long military career, but could equally have been the loot from a single battle. He predicted that historians would debate it for decades.

The fact that the largest of the golden crosses had been unceremoniously treated, its arms folded inwards so that it could fit into a smaller space, has already prompted speculation that the hoard was buried by pagans. ...

Mr Herbert, who has been metal detecting for 18 years, came across the treasure on July 5 after asking a farmer friend if he could search on his land. The farmland is leased from The National Trust, an independent charitable trust that works with its tenants to ensure that land is managed in ways that support the environmental and aesthetic aims of the Trust, while appreciating the challenges of sustaining farm viability and increasing the vitality of the farming industry.

Mr. Herbert’s son accompanied him the day the hoard was discovered. It took the pair several hours to excavate some of the artefacts. Upon realizing the scale of the find, Mr Herbert and his son turned to archaeologists who completed the excavation over the following weeks.

“This is what metal detectorists dream of, finding stuff like this. But the vast amount there is just unbelievable,” said Mr Herbert.

“My mates at the [metal detecting] club always say if there is a gold coin in a field I will be the one to find it. I dread to think what they’ll say when they hear about this.” ...

Steve Dean, County Archaeologist for Staffordshire, said: “It wasn’t until Duncan started to send the photographs through that it actually dawned that this was something incredibly more substantial than we’d previously imagined.

“We had a look at our records and there was no indication for that area actually having the potential for that sort of find so it was a big surprise. ...”

**The UK’s *Treasure Act, 1996* would impact various parties’ legal rights in this case, but suppose that a dispute arose to be decided solely according to the concepts and materials studied in our property law course. If you were a judge, how would you resolve a dispute among all parties that might reasonably claim an interest in the finding? Where appropriate, state the grounds for and implications of your assumptions.**

## **2. The New York Times recently ran a story (an edited version follows) about the legal tactics employed by Denmark’s Lego Group to protect its products.**

In much of the world, Lego is synonymous with toy plastic building blocks. So it is not too surprising Lego Group of Denmark zealously guards its intellectual property rights.

“There are many who have tried to capitalize on the good will we have built with consumers,” said Poul Hartvig Nielsen, head of legal services at the company.

But what Lego casts as an effort to maintain a quality product is, its competitors say, an attempt to use intellectual property law unfairly to dominate the building-block world.

“They are a company that enjoyed many years of monopoly in this market category, and now they want to stifle anything competing against them in the construction-toy aisle,” said Brahm Segal, a vice president and lawyer for Mega Bloks of Montreal.

Since the early 1990s, Mega Bloks has been involved in about a dozen lawsuits, most of them filed by Lego and still active. Best-Lock (Europe), which makes blocks compatible with Lego’s, is involved in eight Lego-related lawsuits in Germany alone.

“We’ve definitely been spending more on lawyers than I would consider necessary to be in this business,” said Torsten Geller, chief executive of Best-Lock, a small company based in British Columbia. “Basically, Lego is trying to extend its patents to the end of all time.”

Lego’s management has been feeling the effects of increased competition ever since Mega Bloks decided in 1991 to go beyond its original product, jumbo bricks designed for infants, into Lego-size blocks.

NPD Funworld, a market research group that tracks retail toy sales, would not give market figures but said that Mega Bloks was the No. 2 player, after Lego, in the construction-toy market for the United States, which is the products’ largest market.

Marc Bertrand, the Mega Bloks president and chief executive, said the company had a stronger market position in parts of Europe where construction toys are a bigger business relative to the population.

Mega Bloks has also been quick to use innovative marketing techniques, including social media. It has uploaded a mashup of a Lego commercial to YouTube, and has a strong online presence, including on its newest website, [www.betterlego.com](http://www.betterlego.com).

As a result of the increasing competition and changing toy trends, Lego has faced several years of eroding sales and weakened financial performance.

Lego did not develop the idea of plastic blocks that lock together with small knobs. The blocks were invented in England by Harry Fisher Page, who went on to found Kiddicraft, an early maker of plastic toys.

Nielsen, the Lego lawyer, acknowledges that Kiddicraft bricks “inspired” Ole Kirk Christiansen and Godtfred Kirk Christiansen, Lego’s founder and his son, to make their first plastic blocks.

But in 1958, Lego made a subtle change in the bricks that even its competitors agree brought enormous improvement. The company introduced tiny tubes inside the bricks to give the knobs on top of other blocks more places to grip.



**Screen Capture from  
Mega Bloks’  
YouTube mashup of  
a Lego commercial**

“We have, over the years, seen ourselves as being copied, although others say they are imitating,” Nielsen said.

“Since the late ‘60s, we have been very cautious about our intellectual property rights and have tried to police them.”

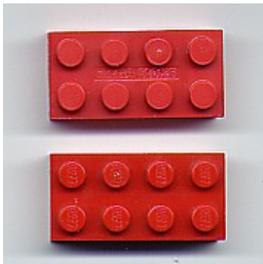
Mega Bloks grew out of a \$2-million-a-year toy distribution business known as Ritvik Holdings that was owned by Rita and Victor Bertrand, the parents of Marc Bertrand.

In the early 1980s, the elder Bertrands wanted to move the company from importing and into manufacturing “a proprietary product that could be worldwide rather than Canadian in scope,” as Marc Bertrand put it.

About the same time, Tyco Industries, which was later acquired by Mattel, was in a legal battle in the United States with Lego over a line of interlocking bricks it had introduced. Tyco ultimately prevailed, but Mega Bloks waited until 1991 before directly confronting Lego.

Bertrand said that Mega Bloks applied some lessons from Tyco’s bricks, which ultimately were not commercially successful. Any Lego competitor, he said, must be more than just a discount alternative. Like Lego in recent years, Mega Bloks avoided emphasizing bulk packages of blocks and hired designers to develop kits based on themes like dragons and robots.

Mega Bloks’ move in 1994 into Europe, which now accounts for about half of its sales, was the start of the full-scale legal war with Lego.



Mega Bloks (above) fit with Lego pieces (below).

While Nielsen said he accepted the idea that patents were intended to give inventors only limited protection from competition, he insisted that Lego’s bricks were designed with “eye appeal,” which is still covered by certain kinds of intellectual property rights.

The complexity of the legal cases means that neither protagonist can provide a clear score sheet. Lego, for example, won a victory in a Chinese court last year over the design of a pirate set produced by a small Chinese toymaker. But Mega Bloks has won significant court cases in France and Italy, as well as before the European Union’s intellectual

property offices.

Last month, Best-Lock was successful in the highest German court, which previously decided twice, first in 1964, that only Lego could make pieces that interlocked with its blocks.

While Best-Lock’s Geller, who is German, is obviously pleased by the German court decision, he does acknowledge that when it comes to the public’s sympathies, if not its buying habits, Lego may always have the upper hand.

“It was the company I knew best as a child,” Geller said. “When I first showed some of my blocks to friends in Germany, they said, ‘How can you do this to a nice company like that?’”

**You are a summer student in a mid-sized Montréal law firm retained by Mega Bloks. A partner has asked for your help to prepare a first draft a legal opinion about the intellectual property rights that Lego might assert against it. Please draft such an opinion.**

**3. The Wikipedia entry for Leona Helmsley describes her as “a flamboyant personality” with “a reputation for tyrannical behavior that earned her the nickname ‘Queen of Mean’.” When the billionaire hotel operator and real estate owner died in 2007, she left the following will:**

LAST WILL AND TESTAMENT OF LEONA M. HELMSLEY

I, LEONA M. HELMSLEY, a resident of the State, City and County of New York, declare this to be my Last Will and Testament. I revoke all of my prior Wills and Codicils. ... I also direct that anything bearing the Helmsley name must be maintained in “mint” condition and in the manner that it has been accustomed to, maintaining the outstanding Helmsley reputation.

ARTICLE ONE: BEQUESTS ...

D. I direct that the following bequests be made in trust for each of the following persons. ...

(1) If my grandson DAVID PANZIRER survives me, I leave the sum of Five Million Dollars (\$5,000,000) to the trust established for his benefit....

(2) If my grandson WALTER PANZIRER survives me, I leave the sum of Five Million Dollars (\$5,000,000) to the trust established for his benefit....

(3) If my brother ALVIN ROSENTHAL survives me, I leave the sum of Ten Million Dollars (\$10,000,000) to the trust established for his benefit....

E. I direct that the following bequests be made for each of the following persons, outright and not in trust.

(1) If my brother ALVIN ROSENTHAL survives me, I leave the sum of Five Million Dollars (\$5,000,000) to him.

(2) If my grandson DAVID PANZIRER survives me, I leave the sum of Five Million Dollars (\$5,000,000) to him.

(3) If my grandson WALTER PANZIRER survives me, I leave the sum of Five Million Dollars (\$5,000,000) to him.

(4) If my chauffeur NICHOLAS CELEA survives me and at the time of my death is employed by me or any Helmsley entity, I leave the sum of One Hundred Thousand Dollars (\$100,000) to him.

F. I leave the sum of Twelve Million Dollars (\$12,000,000) to the Trustees of the LEONA HELMSLEY JULY 2005 TRUST, established under an instrument dated on or about the date of this Will, to be disposed of in accordance with the provisions of that Trust agreement. ...

G. I have not made any provisions in this Will for my grandson CRAIG PANZIRER or my granddaughter MEEGAN PANZIRER for reasons which are known to them.

...

ARTICLE THREE: RESIDUARY ESTATE ...

B. I leave my residuary estate to THE LEONA M. AND HARRY B. HELMSLEY CHARITABLE TRUST, to be disposed of for charitable purposes in accordance with the provisions of that Trust Agreement. ...

**Not apparent from this document is the fact that the sole beneficiary of the \$12 million 2005 trust is Helmsley's dog, a white Maltese named Trouble. Moreover, the stated charitable purpose of the residuary trust—valued between \$5 and 8 billion—is “the care and benefit of dogs,” while two of her grandchildren were explicitly denied any bequest at all.**

**Based on the concepts and materials studied in our property law course, on what theoretical and/or public policy grounds do you believe that Helmsley's instructions should or should not be followed?**

**4. On November 20, 2009, the National Post ran an editorial titled, “The Nisga’a revolution.” An excerpt reads:**

Canada's native reserves are beset by many problems. But underlying all of them is one basic fact: Natives who live on reserves cannot own their own homes and land. Instead, real estate is controlled collectively by the band. Individuals possess only the right to inhabit a particular home on a particular plot of land. As such, they cannot lease, sell or bequeath their land in the normal way. This is a huge barrier to both social and economic development: Without a sense of ownership, natives have little motivation to maintain their properties (which is why homes are so chronically dilapidated on many reserves). Moreover, reserve-resident natives cannot mortgage their homes — which means they are shut out from the primary source of credit financing traditionally used by entrepreneurs seeking to start small businesses. For years, reformers have tried to change this state of affairs. But they have run into several hurdles. First, there is the legal status of reserve land, which generally is government property held in trust for the band's use. Second, the whole edifice of native policy in this country is built on the patronizing myth that natives are somehow inveterate communists, and that private property is an affront to their age-old collectivist traditions. ...

**Why, in your opinion based on the concepts, materials and perspectives studied in our property law course, would similar comments about *sui generis* aboriginal title be valid or invalid?**

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**THE END.**