PROPERTY 1108(D) MIDTERM EXAM

PROFESSOR DE BEER

MONDAY, 9 NOVEMBER 2015, 16:05 – 17:35 (**90 MINUTES**)

IN **PART I**, YOU MUST **ANSWER 1 OF 2 QUESTIONS**.

THE ANSWER IN PART I IS **WORTH 30%** OF YOUR SCORE.

IN **PART II** YOU MUST **ANSWER 2 OF 3 QUESTIONS**.

THE TWO ANSWERS IN PART II ARE **WORTH 60%** OF YOUR SCORE.

OVERALL IMPRESSION OF BOTH PARTS IS **WORTH 10%** OF YOUR SCORE.

YOU MAY COMPLETE THIS EXAM AS A COMPUTERIZED EXAM, FOLLOWING THE FACULTY OF LAW'S RULES.

IF YOU HANDWRITE THE EXAM, YOU MUST WRITE **LEGIBLY** AND **DOUBLE-SPACE** ANSWERS IN **INK**.

YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

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

THIS EXAM DOES NOT COUNT TOWARD YOUR FINAL GRADE.

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STUDENT # _____

SCORE ____ /100

(INSTRUCTOR USE ONLY)

Letter Grade	Percentage	Grade 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

Option 1												
Correctness, clarity, concision, and persuasiveness of answers												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 2												
Correctness, clarity, concision, and persuasiveness of answers												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 3												
Correctness, clarity, concision, and persuasiveness of answers												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Total Score Part I (x 3) **/30**												

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Part II

Option 1												
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
Option 2												
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
Option 3												
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
Total Score Part II (x 0.75) **/60**												

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

I. ANSWER 1 OF 2 QUESTIONS IN THIS PART, WHICH IS WORTH 30% OF THIS EXAM. YOU MUST INDICATE THE CORRECT RESPONSE AND BRIEFLY (~250 WORDS) EXPLAIN WHY YOU DID OR DID NOT CHOOSE EACH POSSIBLE RESPONSE.

***** BOTH QUESTIONS 1 AND 2 ARE BASED ON THE FOLLOWING INFORMATION *****

Last week I travelled to the Caribbean, where I was performing duties as an expert consultant for the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations. During my time there, I took the photograph below of a "chattel house" in a Barbadian village.

A chattel house in Barbados. Photo: Jeremy de Beer

Wikipedia describes a chattel house as follows:

"Chattel house is a Barbadian word for a small moveable wooden house that working class people would occupy. The term goes back to the plantation days when the home owners would buy houses designed to move from one property to another. … Chattel houses are set on blocks or a groundsill rather than being anchored into the ground. In addition, they are built entirely out of wood and assembled without nails. This allowed them to be disassembled (along with the blocks) and moved from place to place. This system was necessary historically because home "owners" typically did not own the land that their house was set on. … In case of a landlord/tenant (or employer/employee) dispute, the house could be quickly moved to a new property. Modern chattel houses tend to have a greater degree of permanence, as they are often connected to the electricity mains, and may either have a permanent septic tank or be connected to a public sewer system."

1. **Which of the following statements best describes the legal status of a chattel house? (Barbados is a common law jurisdiction, whose legal system is based upon British laws imposed during the colonial era.)**

    a. A modern chattel house is presumptively a chattel, based on the facts described on Wikipedia.
    b. An historic chattel house is presumptively a fixture, based on the facts described on Wikipedia.
    c. An historic chattel house is not legally remarkable, as houses would ordinarily be considered chattels based on applicable legal principles.
    d. An historic chattel house would, by default, be excluded from the purchase and sale of property pursuant to Ontario Real Estate Association's standard form agreement.
    e. The *Diamond Neon* case would support a tenant's claim to ownership of a modern chattel house even after the land was sold to a third party.

The correct answer is "D". An historic chattel house is a chattel, not a fixture. By default, chattels are excluded from the purchase and sale of land; fixtures are included. The OREA form contemplates exceptions to the default situation by permitting a purchaser or vendor to specifically list chattels included or fixtures excluded. "A" is incorrect: a modern chattel house is affixed to land by electrical or sewer connections, and is therefore presumptively a fixture. "B" is incorrect: an historic chattel house rests unattached to land, and is therefore presumptively a chattel. "C" is incorrect: houses would ordinarily be considered fixtures based on the degree of annexation and the nature of the object (and/or purpose of annexation). "E" is incorrect: Justice Robertson for the BCCA reached the opposite conclusion in *Diamond Neon*, which is that the tenant's claim as well as the original chattel owner was subordinate to the later purchaser of land to which signs had become affixed.

or

2. **Which of the following statements is most legally accurate?**

    a. My photography and use of a Barbadian chattel house may infringe Barbados' famous association with such distinctive architectural designs.
    b. The inventor of the first chattel house has the exclusive right to make, use and sell chattel houses for her lifetime plus 50 years.
    c. I have rights in my photograph of a Barbadian chattel house for my lifetime plus 50 years.
    d. Based on the *Théberge* case, my rights in the photograph would prevent the owner of the chattel house from dismantling, moving and reassembling the house elsewhere.
    e. Based on *INS v AP*, I am prohibited from republishing Wikipedia's report about Barbadian chattel houses.

The correct answer is “C”. My photograph is an original artistic work, and as such, copyright arises automatically and lasts for my life as author plus 50 years. (The TPP, which would extend copyright term to life plus 70 years, has not yet been implemented.) “A” is incorrect: while a Barbadian government or company might conceivably apply for some form of trademark protection for a mark that is distinctive of wares or services, my photography and use of this chattel house is not likely to cause confusion (see *Mattel*). “B” is incorrect: while the inventor of the first chattel house might have applied for a patent if this invention were new, useful and not obvious, that (hypothetical) patent would last 20 years, not 50 years as with copyright. “D” is incorrect: *Théberge* supports the opposite proposition. Justice Binnie, writing for a majority of the Supreme Court, held that copyright in artwork did not constrain the owner of tangible property embodying copyrighted expression. Moreover, the facts of *Théberge* are not analogous, since here my expression is based on a pre-existing tangible object, while in *Théberge*, the tangible object was based on the pre-existing expression. “E” is incorrect: whether or not Wikipedia could be considered a news gatherer like AP (highly doubtful), and whether or not its webpages could be considered hot news (not inconceivable perhaps but highly doubtful here), based on Justice Pitney’s reasons in *INS v AP*, its quasi-property rights would extend only for a limited time against commercial competitors that undermine incentives to collect and report news, *i.e*. not non-commercial use by members of the general public like me.

II. ANSWER 2 OF 3 QUESTIONS IN THIS PART, WHICH IS WORTH 60% OF THIS EXAM. PROVIDE YOUR ANSWERS (~750 WORDS PER QUESTION) IN THE FORMAT APPROPRIATE FOR EACH QUESTION.

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3. On November 2, 2015, lawyers from the Australasian law firm AJ Park reported on a recent New Zealand court decision. The case and its reporting generated interesting commentary from lawyers in Ontario and elsewhere on an email listserv to which a great many IP practitioners subscribe. A slightly edited abridgment of the firm's report follows.

You are a summer student in a Canadian law firm. A senior partner, who skimmed the listserv discussion but lacked time to read it thoroughly, has asked you for a memorandum explaining whether and how this changes the law covered in your property law course. Write the memorandum.

The Supreme Court of New Zealand decides digital files constitute 'property'

Written by Ken Moon and Laura Carter

The bouncer who released footage from a Queenstown, New Zealand bar featuring English rugby player Mike Tindall, has had his conviction under the *Crimes Act* upheld by the Supreme Court. The court's decision is based on its finding that the digital file Mr Dixon removed from the bar constitutes property under the *Crimes Act*.

Background

During the Rugby World Cup 2011, the English rugby team had a night out in Queenstown. In the course of that night, the vice captain of the English rugby team Mike Tindall (who also happens to be married to Queen Elizabeth II's granddaughter) had an encounter with a woman. The bar in question had CCTV. A bouncer at that bar, Jonathan Dixon, took a copy of the CCTV footage of Mr Tindall from the bar and tried to sell this footage. When he was unable to do so, he uploaded it to YouTube.

Mr Dixon was convicted of accessing a computer system for a dishonest purpose, under section 249 of the *Crimes Act*. Section 249 makes it a crime to:

"directly or indirectly, [access] any computer system and thereby … [obtain] any property, privilege, service, pecuniary advantage, benefit, or valuable consideration".

In Mr Dixon's case, he was originally convicted on the basis that he obtained "property".

Mr Dixon appealed to the Court of Appeal, and his conviction was substituted for one that he had obtained a "benefit" under section 249. The Court of Appeal reached this position

based on its view that the digital file Mr Dixon took could not be considered "property".

However, the Supreme Court reviewed the relevant law from New Zealand, the US and the UK and found that the digital file was "property", so the original conviction was reinstated.

Reasoning of the Supreme Court

The primary issue for the Supreme Court was whether digital footage stored on a computer system was "property", as defined in the *Crimes Act*.

The Court of Appeal in this case had decided that it was not. It pointed to the English criminal case of *Oxford v Moss* which had held that information, even confidential information, was not "property" and the Court of Appeal noted this was consistent with the general approach taken in civil cases. The Court of Appeal, in analysing whether digital footage might be distinguished from confidential information, concluded it could not—"bytes cannot meaningfully be distinguished from pure information".

The Supreme Court disagreed, taking the view that digital files were more than pure information and thus felt able to put aside the criminal and civil authorities which had held information was not "property".

The Supreme Court considered it was a fundamental characteristic of property that it was something capable of being owned and transferred. The digital files taken by Mr Dixon were capable of being sold and this was another indicator they constituted "property".

The Supreme Court preferred to equate digital files with software rather than information, and thus felt the way was clear to adopt those US authorities which had held software to constitute property. It decided that there was no reason not to accord digital files the same status in New Zealand for the purposes of the section 249 of the Crimes Act.

So what does it all mean?

While the case is about section 249, which covers the narrow crime of accessing a computer for a dishonest purpose, it can be expected that the definition of "property" used by the Supreme Court will be applied in other situations.

This question is a variant on what has become a fairly standard question on my exams from year-to-year: what is property? More specifically, the problem here is framed as whether or not some particular "thing" of value can be called property, which in turn begs the question of the meaning of "property." This allows for a wide-ranging discussion, although the students who do best will be those who provide a well-focussed and logically structured answer. I might begin answering this question by identifying the root problem (as I just framed it). I would be sure to explain that the meaning of "property" is not as settled as one might presume.

While *Yanner v Eaton* was the first case we studied in association with this problem, students would do better to instead (or also) cite cases more analogous to this one on their facts. For instance, one could explore whether digital video footage has some or all of the characteristics of

news, which Justice Pitney called quasi-property in *INS v AP*, and if so, whether there is a difference between quasi-property and property as mentioned in the *Crimes Act*. Is digital video footage of a sports star doing something newsworthy (or gossip-worthy) anything like the sports spectacle at issue in *Victoria Park*, which was held not to be property? Perhaps not. Either of these cases would provide a better grounding for discussion than *Moore*, although there is a small opening to mention the body parts issue in the article's concluding remarks about "other situations." Digital video is arguably more (but not exactly) like property in cyberspace, which we explored through *Intel v Hamidi*. Note that in most of those cases, the question of whether something is or is not property was not easily divorced from the justifications for property. Which if any justifications for considering CCTV files property might apply here? Students would do well to touch upon that point, but only very briefly, as this is not the focus of the question.

No answer to this question would be complete without a discussion of property in domain names, perhaps the closest comparison we have studied to (but still not the same as) digital video files. The ONCA's judgment in *Tucows v Renner* would be a required reference. In the context, students needed to cite various characteristics that define something as property or not. Is it the one core right of exclusivity? A bundle of some various rights? Anything at all? While students should have demonstrated familiarity with Merrill's taxonomy of three theories of property, the risk in this question was rambling on a purely theoretical discussion without grounding that in the rich case law we studied.

Finally, note that the format of this question required a legal memorandum. Students would be substantially rewarded for paying attention to that instruction and writing their answers accordingly.

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and/or

4. **This past summer, *The Globe and Mail* published the following sarcastic editorial. You are a summer student in a national law firm that represents CP Rail. The client has asked your firm to help it craft an objective response to this public relations issue. CP would like to release an open letter explaining the legal background to this matter, its legal position and the strategic significance of CP actions. CP feels its reputation and credibility would be enhanced if city residents, its shareholders and the general public better understood the property laws that necessitated its actions. Your task is to write the first draft of the letter.**

Arbutus Corridor: CP Rail feels your pain, a little bit

Workers clear debris and gardens from a stretch of abandoned CP Rail line near East Blvd. and West 68th Ave. in Vancouver, B.C..

Dear Arbutus Corridor Resident:

By now, you may have noticed that we've been doing some work on the CP Rail line that runs through your neighbourhood. It's been fairly well publicized, especially after we tore out your community gardens, some of which have been in place long enough for fruit-bearing trees to actually bear fruit. We feel kind of bad about that part. We haven't said or done anything to indicate that we feel bad, but trust us – we do. A little bit.

You may have also noticed the signs that have gone up recently that read: CPR Railway Operations Recommencing. Active Railway Traffic – Do Not Stop on Tracks – Obey Flag Persons. For More Information Call 3-1-1.

Yes, we know. 3-1-1 is the number for the City of Vancouver contact centre. We don't want to hear your complaints. And channelling all of your discontent to the city is exactly our plan.

As we resume railway operations, you may notice some changes in your neighbourhood from King Edward, south to Marine Drive.

First, we'll start rolling trains through the neighbourhood very slowly, just so you know we're there. A diesel engine with a couple of harmless-looking cars attached to it. This may affect east-west traffic as well as transit routes on King Edward, 33rd Avenue, 41st Avenue, 49th Avenue, 57th Avenue and Marine Drive as well as all side streets where we have the right of way. We'll do our best to do this in off-peak hours, but we're not saying a train might not stop for no reason at 41st and West Boulevard at like, 8:15 in the morning or 5 in the afternoon. Plan accordingly.

A reminder that there are no railway crossing arms or signals at any of these locations. Please obey the flag persons. If you've become used to using the rail corridor as a walking or biking trail, well, those days are over. Don't forget to tell your kids, too.

Moving rolling stock during off-peak hours means that we may use the line to assemble trains between the hours of midnight and 4 a.m. This will be done for training purposes. This activity may cause a considerable amount of noise due to shunting and impact, particularly with trainees since they tend to be especially zealous when it comes to coupling rail cars. Also, they really like the sound of the whistle, which you will learn is not the train whistle you remember from childhood but rather an earth-shattering horn blast.

As well, since the tracks haven't been used in 15 years, we expect a lot of screeching. The metal-on-metal kind of screeching you feel in your teeth. Also, there is the noise of the diesel engines, not to mention the exhaust. If noise is a problem, please call 3-1-1. If air quality is your concern, please contact Metro Vancouver or Vancouver Coastal Health.

We're not ruling out livestock. From time to time it may be necessary to utilize the corridor for short-term storage of livestock destined for processing, or material bound for the rendering plant. We apologize in advance for any odour issues. We are sincerely sorry.

Also, you may wake up one morning to find a long line of DOT-111 tanker cars sitting in front of your house. They look exactly like the ones you've seen in the news – coal-black and menacing. But the likelihood that these will explode is virtually zero, statistically speaking. They may be fully loaded or they may not. We're not saying for security reasons. You're the ones who moved in across the street from a rail line. Deal with it.

At present, there is no plan to transport nuclear waste, mine tailings, nor any other form of toxic waste through the Arbutus corridor. It would be a shame though if that changed, don't you think? I mean, if something were to go wrong?

We're not saying any of this is going to happen. It doesn't have to happen. There's a way to make this all go away – if you get our drift.

Sincerely,

CP management

"Committed to our shareholders."

Stephen Quinn is the host of On the Coast on CBC Radio One, 88.1 FM and 690 AM in Vancouver.

Although not *prima facie* apparent, this is a question about expropriation. Recognizing that fact was a key part of the challenge. The question was also framed very differently than what might expect from a question on this topic. There were no ostensible facts in which to ground an opinion about whether there was or was not an expropriation. Indeed, the question did not ask for such an opinion. Instead, it asked for a letter to the public explaining the legal background in

clear and simple terms. Only students who were well-prepared, who read *Vancouver v CPR* very closely and who fully understand the law of *de facto* takings in Canada could do that well.

The background begins, of course, with *Vancouver v CPR*. Students were required to brief that case for the public in a very concise and easily understandable way, which is no easy feat. Students then had to connect CPR's current actions with the facts leading to the Supreme Court's decision, and the outcome of that case. The key point is that for the last 15 years CPR didn't want to use the line, but rather wanted to develop it. However, CPR was prohibited from doing so by Vancouver's municipal bylaw. When CPR alleged the bylaw constituted a *de facto* expropriation, the Supreme Court disagreed. (The accuracy with which a student explained this legal issue would reveal much about his/her understanding of the materials. References to alleged unconstitutionality, as the case would have been framed in the United States, would have demonstrated significant misunderstanding of Canadian law.)

Chief Justice McLachlin's decision was underpinned by the actual not theoretical consequences of Vancouver's bylaw. As in *Mariner v Nova Scotia*, the property owner was not deprived of "all reasonable uses of the property." The CJ was clear: "The bylaw does not prevent CPR from using its land to operate a railway." CPRs actions that triggered Quinn's sarcastic editorial were in essence just what the Supreme Court had sanctioned. The subtext of the SCC's judgment was that unless CPR is prevented from using the corridor as a railway (its original and obvious purpose) it has little legal basis to complain its rights have been expropriated.

CPR appears considerably more sympathetic in the eyes of the public when its actions are framed in this way—what else is CPR supposed to do, besides Supreme Court suggested? The only other option is to leave the land economically idle. That may not be reasonable if the purpose is truly a public one, *i.e.* that the corridor is for parks and pathways. But if that's the intention, it is the public who should pay for it, not CPR.

Students might have also mentioned in their open letters with some reference to the sanctity of private property in our society, whether for economic or other reasons. By making such arguments, the public might more easily see the matter from CPR's perspective.

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and/or

5. **This past summer, the following report [edited for brevity] appeared in the *LA Times*. What arguments would justify having property rights in water, such that it could allegedly be stolen by Tom Selleck? Write a short essay defending property rights in water.**

Tom Selleck, water district reach tentative settlement in dispute

Someone has been taking huge amounts of water from a public hydrant and delivering it to actor Tom Selleck's 60-acre ranch in Westlake Village.

It had all the makings of a latter-day water war, pitting a Ventura County water district against actor Tom Selleck.

The Calleguas Municipal Water District accused Selleck of illegally moving water from Thousand Oaks to his 60-acre Hidden Valley estate, and it spent about $22,000 on a private investigator to track the deliveries, according to a complaint filed in Ventura County Superior Court.

As California's drought ravaged water supplies and the district sent cease-and-desist letters to Selleck's addresses, the unlawful deliveries continued, the complaint said.

But the skirmish came to a halt Thursday when the water district announced that it had reached a tentative settlement with Selleck. Details are confidential pending approval by the water district's board, said Eric Bergh, Calleguas' resources manager.

The board is scheduled to consider the settlement at its meeting Wednesday.

"We're happy about it," Bergh said. "It's good news."

The tentative resolution caps an episode that, fueled by celebrity and the novelty of the purported misconduct, prompted fascination and still more questions: Was Selleck himself, the mustachioed "Magnum, P.I." and "Blue Bloods" star, pulling up to a fire hydrant and plundering the city's water system? Did it not constitute a crime, such as grand theft?

According to the complaint, a water tender truck was spotted multiple times filling up at the same Thousand Oaks fire hydrant on Irving Drive, then delivering the water to Selleck's property in Hidden Valley.

Staff writers Sarah Parvini and Amanda Covarrubias contributed to this report.

The above article is relatively light on factual details or legal arguments, because the heart of this question is stated directly at the outset: what principles might justify property rights in water? Note also that the question requires students to take a specific position in defence of property rights, rather than a neutral approach. Students who failed to follow that instruction would have done poorly.

The basis for your answer to this question is in chapter 1. However, it might have been possible to also reference peripheral matters like boundaries and riparian rights (*Robertson v Wallace*) or contextual circumstances such as navigability or First Nations perspectives (*Nikal*). The key to mentioning those matters would have been the degree to which students could connect them to the main issue, rather than simply dropping names of cases that have something to do with water.

The most logical format for an answer would have been to divide justifications for property rights in water into two categories: economic arguments and natural rights. In the context of economic arguments, students were required to accurately discuss the opinions of leading thinkers like Justice Posner, Professor Ellickson and others—the more resources that are "propertized" the better, on this view, to facilitate market exchanges of rights. No answer would be complete without discussion of Hardin's tragedy of the commons, and Ostrom's opposing perspective on the same. Precision is important here: is the argument supporting property rights in water one about incentives to create value (like *INS v AP*) or rather one about conservation. The latter seems more compelling in the context of California's drought.

Noting the context behind this question—increasing scarcity of a resource as important as the air we breathe—sets up potential consideration of natural rights arguments. Could we justify a right to water in the same way Waldron would justify everyone's right to "be" somewhere? What are the similarities and differences? Moreover, what are the implications in the context of Mr. Selleck's scenario. After all, he couldn't credibly claim to need this water to survive; he was for watering his 60-acre luxury ranch. Student could have usefully explored whether and how this context might matter.

The danger lurking in this question was that students might use it as an invitation to ramble on about property theories in the abstract, without linking them to the specifics of this water-related problem. Students who just tried to "name-drop" various legal scholars or political philosophers would not have done well. It is easy for me to see through such thin responses.

THE END.