

PROPERTY 1208B FINAL EXAM

PROFESSOR J. DE BEER

30 APRIL 2007, 9:30 – 11:30 (2 HOURS)

THERE ARE **4 (FOUR) POSSIBLE QUESTIONS** TO CHOOSE FROM.

YOU MUST **ANSWER ONLY 3 (THREE)** QUESTIONS.

ALL 3 (THREE) ANSWERS ARE WEIGHTED EQUALLY

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, MOBILE PHONES OR PDAs).

THIS EXAM IS WORTH EITHER 33% OR 66% OF YOUR FINAL GRADE.

Once your time begins, you might want to first read the entire exam, choose which questions you will attempt and thoughtfully plan your answers. The suggested time allocation (30 minutes for each of your three answers) takes account of a 30-minute “digestion” period at the outset. Feel free to write a brief outline in your exam booklet—I’d consider it for marks only if it helps your grade.

1. You've been appointed to mediate a dispute arising from the following circumstances. In preparation, analyze each party's legal rights and obligations.

Canadian Pacific Hotels Ltd. claims it is owed \$25,000 in respect of occupancy of room 11-297 at the Royal York Hotel in the City of Toronto. Mr. Bill Hodges and his wife Betty have lived in that room for well over 15 years.

Mr. Hodges decided, for reasons that at least satisfied him, that it made sense to live in a well-constructed, well-managed hotel. The hotel was willing to provide to Mr. Hodges the room, which he ultimately selected. He was charged on a monthly basis a somewhat lower rate than would have been charged to a transient guest on a per diem basis. He had told the hotel manager, and the manager agreed, that he would likely stay in the room on a year-to-year basis, and that he would notify the hotel if his intention changed. However, there was no written agreement to that effect, nor was there any discussion of the terms on which the hotel might evict Mr. Hodges.

CP Hotels promised to provide daily maid service, although Mr. Hodges sometimes refused to have maids in the rooms at certain times. Mr. Hodges introduced into the rooms some of his own furniture and decorations. The hotel kept putting up the usual standard innkeeper's signs within the two rooms. But Mr. Hodges took it upon himself to remove the signs as soon as they were put up. Mr. Hodges had even set up his own telephone line into the room.

Last month, Bill and Betty Hodges separated. Through an amicable agreement, Mr. Hodges purported to assign his "leasehold interest in room 11-297 at the Royal York" to Mrs. Hodges.

Mr. Hodges is \$25,000 behind in rent, which it is worried it cannot collect. CP Hotels might like to use provisions of Ontario's new *Residential Tenancies Act* in collecting outstanding rents. However, section 5 specifically exempts from the scope of that legislation "living accommodation intended to be provided to the travelling or vacationing public or occupied for a seasonal or temporary period in a hotel ..."

Moreover, CP Hotels is not happy that Mrs. Hodges is now in sole occupation of the room. Section 95 of the *Act* requires the landlord's consent to assign a lease, which cannot be unreasonably withheld if requested. CP Hotels did not provide such consent, and has suspended maid services for the room while it disputes the assignment.

Mrs. Hodges wants daily maid service resumed immediately, and believes she can rely on the hotel's promise to Mr. Hodges to force CP Hotels to fulfil that obligation. CP Hotels is asserting that even if a lease did exist, and its refusal to consent to the assignment was unreasonable, its promise to Mr. Hodges cannot be enforced by Mrs. Hodges.

Mrs. Hodges also objects to the hotel's recent opening of a business centre and related executive lounge on the floor where she resides. She complains of increased noise and traffic in the corridor next to her room. She wants to know what remedies might be available to her for what she considers a breach of the landlord's obligations to her.

Almost all students at least touched on most of the key issues arising in this question: lease vs. licence, assignment vs. sublease, binding covenants, quiet enjoyment/derogation, and landlord remedies. Some students lost marks by missing one or more of these issues. This was not really a question about a joint tenancy or a tenancy in common, and it certainly was not about adverse possession. Nor were constructive trusts relevant. I was surprised and disappointed that a number of students made substantive errors stating and applying the law, which led to low marks for those students. With a few exceptions, most answers to this question were well organized.

2. The media has asked you to explain the legal implications of the Tyendinaga Mohawks' land claim and comment on the strategies used to pursue it.

Rail service between Kingston and Toronto was blocked for several days a little over a week ago, when a school bus was parked across the rails in a protest over disputed land near Deseronto. CN spokesman Mark Hallman said the protest — which came on the first anniversary of an abortive police raid on another long-running First Nations blockade in Caledonia, Ont. — was affecting the entire corridor between Montreal and Toronto.

The federal government has appointed a land-claims negotiator to try to resolve the dispute, but Protest leader Shawn Brant, of the Bay of Quinte Mohawks has said talks are progressing too slowly. Since last November, Mohawk leaders and the federal government have been involved in discussions and negotiations over the land, which the Tyendinaga Mohawks claim is theirs.

On March 22, about 70 Mohawk demonstrators blocked access to the Thurlow Aggregates quarry near Deseronto. Brant said they planned to stay until the province cancels the quarry's licence. "It's very difficult to carry out meaningful negotiations at the table while they're taking out 10,000 truckloads a year of our land," Brant said. Don Maracle, chief of Tyendinaga Mohawks in the area, said he sympathized with Brant's group. But, he said, the Mohawk council did not sanction the quarry blockade.

The land claim involves more than 400 hectares on the Bay of Quinte, east of Belleville, including the sites of many businesses such as the quarry. In fact this matter involves a complaint that the Crown has improperly dealt with lands set aside for the Mohawks, but the journalist would like you to explain how this situation would be addressed *if it were* a claim for aboriginal title to the lands in question. Assuming it can be established the land was occupied exclusively at the time the Crown asserted sovereignty, the Tyendinaga Mohawks likely have a strong claim.

The operators of and investors in area businesses are confused about the implications this could have on them. First Nations peoples are also confused about their rights in respect of these lands, were a claim of title to be successful. For example, could they simply take over the quarry for themselves? Or lease the quarry to the company currently operating it? Even the provincial government is confused. Would it be an infringement of aboriginal title to reissue a mining licence to the current quarry operators? Could such an infringement be justified? Could either level of government extinguish the aboriginal title? Are there other implications that flow from this claim?

I was generally disappointed by students' performance on this question. You were told that the Tyendinaga likely have a strong claim of aboriginal title. Describing and applying the test for title was, therefore, a waste of time. Moreover, there weren't really any facts to which you could apply the test for title, which led many students to simply spew from their notes. Other than delving into proof of title issues, students who did poorly had descriptive rather than analytical answers that failed to apply the law to these specific facts. This question was about the implications that follow from that conclusion. The best students explained the sui generis nature of aboriginal title, and the consequences of each feature of that title. For example, its communal nature has a bearing on the apparent rift between Bryant and Maracle. Its inalienability except to the Crown impacts significantly on the relationship between the Tyendinaga and the local businesses. Whether the Tyendinaga could take over the quarry depends on whether or not that is irreconcilable with the nature of their past and future connection to the land. And so on. It was also essential to discuss issues of infringement and extinguishment by the federal and provincial governments, including the importance of constitutional protection, the Crown's fiduciary obligation and other related issues.

3. Has Canadian law pertaining to property and the family satisfactorily evolved from that described below in Blackstone's *Commentaries*? Support your opinion with specific reference to remarks from the Supreme Court of Canada and/or other materials studied in this course.

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything ...

Many students answered this question persuasively in the affirmative—the law has evolved satisfactorily. Though a few of you expressed caveats, almost nobody defended the opposite view. It was obviously necessary to discuss constructive trusts in general and Peter v. Beblow specifically. The depth of students' discussion of these issues separated the A's from the C's. Those who alluded to the evolution of Supreme Court jurisprudence were rewarded. I was not impressed by a number of students who merely transcribed Maggie Conway's arguments, though students who critically evaluated her remarks in context did well. I also glad to see several students refer to the state of the law on resulting trusts, where gender-based biases still seem apparent. Some students went on tangents talking about conditional gifts and public policy. I failed to see how those issues related to this specific question.

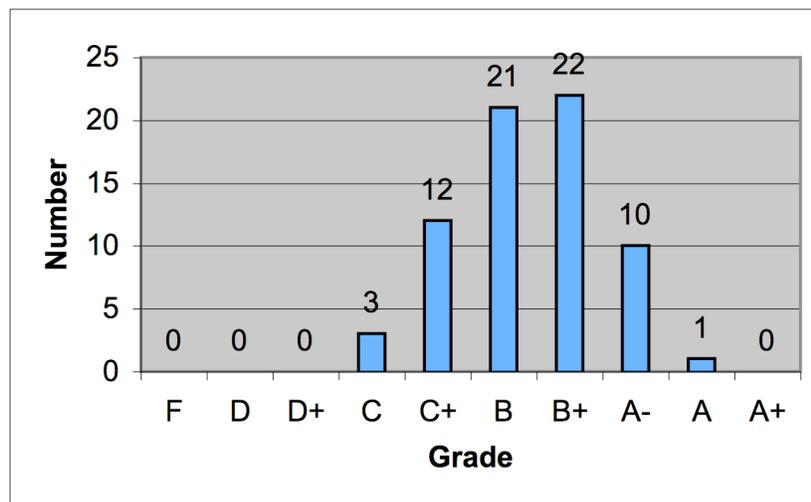
4. In this course we studied numerous state limitations on private owners' freedoms to do as they wish with their property, including prohibitions on uncertain or impossible conditions, conditions that violate public policy, conditions that restrain alienation or the rule against perpetuities. Which of these state limitations is most justifiable in our society, and on what grounds? Which is least justifiable, and on what grounds?

I was pleased with the quality of students' answers to this question. Some students' responses were too brief and lacked depth, which was likely attributable to time mismanagement. Those students did less well than students who were able to offered a detailed and convincing defence

of their position. To be honest, I was very surprised by the diversity of answers to this question. Roughly half of students defended state limits pertaining to public policy, while the other half stood steadfastly by limits on restraints on alienation and even the RAP! Among the best students (who rationalized their arguments with reference to the role and importance of property in our society), this exposed a fundamental division between advocates of social justice and those with more utilitarian bent. I did not look more favourably on either perspective, but simply enjoyed seeing that many students had clearly appreciated the themes I was trying to convey in this course. Students who talked about conditions that were impossible or uncertain were generally critical of the apparent arbitrariness of aspects of the law on these issues, which was certainly understandable. On a related point, I was pleased by students who delved into issues about legal certainty, the rule of law, judicial activism and equity, but only if that was done in the context of justifying the response to this question. Some students talked about the state limits placed on aboriginal title, which is not really what this question was about. If, however, that was linked clearly to a broader discussion of restraints on alienation or economic theory more generally, those students were still able to do well.

THE END.

Overall, I am proud of this class' performance. The GPA was 6.36, which is at the very upper end of the Faculty's allowable guidelines. The final grade distribution is reflected below.



There was a fairly equitable division of students whose grades improved, students whose grades were lowered and students whose grades stayed constant following the final. This was the first year I experimented with the variable weighting of midyear and final grades (i.e. 66% for the best exam, 33% for the other). That clearly worked to students' advantage, and I am inclined to continue with this method.
