PROPERTY 1108(B) FINAL EXAM

PROFESSOR DE BEER

WEDNESDAY, 13 DECEMBER 2017, 09H00 – 12H00 (**180 MINUTES**)

IN **PART I**, YOU MUST **ANSWER 3 OF 4 QUESTIONS**.

THE THREE ANSWERS IN PART I ARE **WORTH 30%** OF YOUR SCORE.

IN **PART II** YOU MUST **ANSWER 3 OF 4 QUESTIONS**.

THE THREE 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 IS WORTH 60% OF 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

Question # _____												
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
Question # _____												
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
Question # _____												
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 **/30**												

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Part II

Question # _____												
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
Question # _____												
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
Question # _____												
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 (÷2) **/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 3 OF 4 QUESTIONS IN THIS PART, WHICH IS WORTH 30% OF THIS EXAM.

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1. In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, Lamer CJC wrote:

> "I am cognizant that the *sui generis* nature of aboriginal title precludes application of 'traditional real property rules' to elucidate the content of that title (*St. Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657, at para. 14)."

In *St. Mary's*, the appellant's surrender of reserve land to the Crown was subject to the following stipulation:

> "… that should at any time the said lands cease to be used for public purposes they will revert to St. Mary's Indian Band free of charge."

Based on "the minutiae of the language" (to quote Chief Justice Lamer's words) and the materials you have studied in our property law course, what would be the common law implications of that stipulation?

a. The stipulation would be void for public policy reasons, based on *Re Leonard Foundation Trust*.
b. The stipulation would be void as impossible, based on *Unger v Gossen*.
c. The stipulation would not be void for uncertainty, based on *HJ Hayes Co v Meade* and *Fennel v Fennel*.
d. If the stipulation were void for any reason, the transfer would be absolute.
e. If the stipulation were void for any reason, the transfer would also be void.

The best answer is (d). This stipulation closely resembles the condition subsequent in *Caroline v Roper*. The words "should at any time … cease to be used for" have the same effect as words like "should it happen that …" and "but if …". A void condition subsequent for any reason (in *Caroline*, that happened to be the rule against perpetuities, which is not examinable) results in an absolute transfer (unless the transfer instrument was rectified to reflect the will of the parties, as in *Caroline*). Option (e) would be the best answer if the stipulation were a determinable limit, indicated by words like "until", "during", or "so long as". Option (c) is not the best answer as, arguably, being "used for public purposes" is even more uncertain than the factually different residency stipulations in *Hayes* and *Fennel*. Option (b) is not best because this stipulation is not impossible and quite different from the facts of *Unger*. Option (a) is not best for the same reason: there is no public policy problem, at least not of the sort in *Leonard Foundation*.

AND/OR

2. On February 15, 2017, CTV News ran the following story:

$100,000 found inside old TV at Ontario recycling plant

An old television is seen at the Barrie, Ont. recycling plant where in January more than $100,000 was found inside a discarded TV.

More than $100,000 in cash was found inside an old television that was being processed at a recycling plant in Barrie, Ont., and police say the money was a man's lost inheritance.

The shocking discovery was made in January by an employee, who uncovered a cash box inside the TV as it was dismantled. The recycling company then contacted police. "There was like, four stacks of $50 bills, and I knew it was a large amount of money," Rick Deschamps, general manager for GEEP told CTV Barrie.

Inside the cash box were documents that helped lead police to the money's rightful owner: a 68-year-old man from Bolsover, Ont. When investigators spoke with the man, he told them that he stored the money inside the television about 30 years ago. The plan was to pass along the money to family members as an inheritance.

That is, until he forgot about the cash and gave the TV to a family friend. The recycling company has praised the employee for her honesty.

"She's representative of all our employees and it's what we stand for and this kind of behaviour is really what we would expect from everyone here," said Lew Coffin, GEEP vice president of operations.

Which of the following claimants would have the best claim to the money?

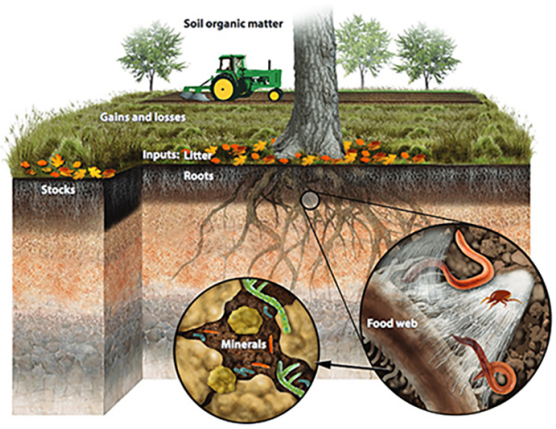
a. The finder, based on *Trachuk v Olinek*.
b. The GEEP recycling company, based on *Stuart v Gustafsen*
c. The GEEP recycling company, based on *Parker v British Airways*.
d. The finder and GEEP equally, based on *Popov v Hayashi*.
e. The true owner's heirs, based *Re Bayoff Estate*.
f. The true owner's friend, based on *Nolan v Nolan*.
g. The police, based on *Baird v British Columbia*.

The best answer is (c). The true owner would have the strongest claim to property that has been lost or hidden (not abandoned), but is not among the claimants listed as options in the question. The omission of that option threw many students off, despite our in-class rehearsal of a ranking scenario. The finder has rights against all but the true owner and those in prior possession, however, *Parker* states clearly that employees find on behalf of their employers, making (a) incorrect and (c) the best answer. Very strong students further specified GEEP's occupation (and, presumably, ownership) of the premises on which, and the television *in* which, the money was found as an additional reason to choose (c) based on *Parker*. Option (a) is not the best answer because the facts and *ratio* of *Trachuk* are inconsistent with the scenario in this question, but students who chose that option received high partial marks if their answer was otherwise accurate. Option (b) is incorrect because the property has not been abandoned: there was loss of physical control but no intent to abandon. Option (d) is not the best answer. Besides the factual differences from *Popov*, the unique reliance on principles of equity applied in that case undermine its precedential value. Option (e) is incorrect, because the owner did not deliver the money to family members as would be required for a *donation mortis causa*. Some students selected (e) thinking that the true owner did, could, or would give the money to his heirs. Option (f) is incorrect because although the television was delivered to the owner's friend, there was no intention to give away the money. Option (g) is incorrect because there is no evidence the money was the proceeds of crime. Note that this question has more options than usual because I consider it has a lower degree of difficulty than other questions. However, that resulted in an unexpectedly diverse range of answers from students, for which substantial partial marks (B-range) were typically awarded if the response was well justified.

AND/OR

3. On November 11, 2017, the *ScienceAlert* news aggregator reported the following:

Good news: Soil could be a much larger carbon sink than we hoped.



Soil holds up to 3 times as much carbon as our atmosphere. (Washington State University)

Soil minerals just a little way underground could act as a huge carbon sink to help balance out the dangerous levels of carbon dioxide in our atmosphere, according to new research.

It's thought that the earth beneath our feet is holding up to three times as much carbon as is found in the atmosphere. If we can tap into its potential to suck carbon pollution out of the air, it would be a massive advantage. …

The researchers want to see more studies looking at the potential of soil and its minerals as a carbon sink, and have compared the gaps in our knowledge about what's underground with how little we currently know about the depths of the ocean. …

"We know more about the surface of Mars than we do about either the oceans or soils on Earth," says Marc Kramer from Washington State University. …

More than half the carbon stored in soil is over 30 centimetres (1 foot) below the surface, Kramer says, and at that depth the organic matter in the soil is almost entirely associated with minerals. …

It's still early days for figuring out how best to utilise this vast potential carbon sink we're all living on top of, but we need to find the best balance between protecting the soil and producing enough food to feed a growing population. …

Which of the following statements is best supported by materials covered in our course?

a. In Ontario, soil subsidence from carbon storage would be addressed by negligence law.
b. Property owners may prohibit the use of airspace above and soil under the surface of land.
c. Justice Logan would allow all surface owners to prohibit soil use for carbon storage.
d. Justice Logan would allow all carbon storage companies to use others' soil.
e. Carbon storage in soil would happen no matter who owns subsurface property rights.

The best answer is (e), based on the Coase theorem explained in the reading materials and applied to examples we discussed during class. Carbon storage will be driven by the economics of the technology, not the ownership of property rights. When the value of carbon storage rises above the value of soil to the subsurface owners, the Coase theorem suggests that soil/subsurface owners will sell or license (and carbon storage businesses will buy) the soil for carbon storage. Until that happens, soil/subsurface owners will be unwilling to sell or licence (and carbon storage businesses unwilling to buy) the soil. Fewer students than I hoped responded correctly to this question, convincing me that it was more difficult than I anticipated. My marking was adjusted accordingly, with the result that many students received high marks (B, B+, or A-) for well-justified but unexpected responses (especially for choosing, (b) or (d) with very strong supporting reasons). Option (a) is not the best answer; the differences (topography, especially) between the Ontario and New Zealand contexts were expressly addressed as the rationale for applying the negligence rule in *Blewman*. Option (b) is not the best answer because it rests on an oversimplified and outdated interpretation of the *cujus es solum* maxim; owners may control airspace and the subsurface only to the extent it can be reasonably used and enjoyed. Option (c) is not the best answer; Justice Logan, dissenting in *Edwards v Sims*, would have ruled against the surface owner because the surface owner did not labour to access or use the subsurface. Option (d) is a better answer than option (c), but still not the best answer because it is phrased too strongly. Justice Logan would recognize rights of those who labour to improve others' subsurface in cases the subsurface would be otherwise unused/unusable.

AND/OR

4. During class, I mentioned the case of *Moore v Sweet*, 2017 ONCA 182. The case is described in the following article published in *Law Times* earlier this year:

Court of Appeal rules on unjust enrichment

In *Moore v Sweet*, the court set aside a motion judge's decision to grant $250,000 in proceeds of a dead man's insurance policy to a former wife, Michelle Moore, who had been paying policy premiums, instead of giving them to his common law wife, Risa Sweet.

The case turned on whether a constructive trust is available as a remedy in only two situations, which are when unjust enrichment and wrongful acts have taken place.

The case also concerned whether provisions in the *Insurance Act* provided a juristic reason for the enrichment of one of the parties or whether there should be a finding of unjust enrichment. …

The case concerned the fact that Moore had been named the beneficiary of the life insurance policy before she was divorced from her husband, Lawrence Moore, but she was never labelled as an irrevocable beneficiary. Despite having an oral agreement with Moore that she would receive the proceeds of the policy if she continued to pay the premiums, the former husband later designated Sweet as an irrevocable beneficiary.

The dispute arose out of who was entitled to the proceeds of the policy when he died. The motion judge ruled in favour of Moore.

A two-judge majority held that the *Insurance Act*, under which Sweet had been designated the irrevocable beneficiary, provided a valid juristic reason for Sweet's enrichment.

Therefore, there could be no finding of unjust enrichment. Jeremy Opolsky, the lawyer who represented Sweet on the appeal, says the majority's decision accurately reflects what he thinks the laws surrounding unjust enrichment and constructive trusts should be. …

The lawyer representing Moore, David Smith, says he intends to seek leave from the Supreme Court of Canada to appeal. ……..

Which of the following positions is most likely to be adopted by the Supreme Court?

a. Ms. Sweet must prove there is no juristic reason for the enrichment.
b. Ms. Moore must prove there is no juristic reason for the enrichment.
c. Ms. Sweet must prove that she herself has been deprived of a benefit.
d. Ms. Moore must prove that she herself has been enriched.
e. Ms. Moore must prove the common intention of a resulting trust.

Option (b) is correct: the *plaintiff* (Moore) bears the overall onus of establishing a lack of juristic reason for an enrichment. That includes the initial onus to prove that none of the established categories of juristic reasons apply in a particular case. After that the onus shifts to the defendant

(Sweet) to prove there is another juristic reason that would make the enrichment just (or not unjust). Ms. Sweet would need to prove there *is* a juristic reason to to keep the enrichment; but option (a) says the opposite. Option (c) is incorrect; Sweet (the defendant) received and was not deprived of the benefit. Option (d) is incorrect; Moore (the plaintiff) was deprived not enriched. Option (e) is most clearly incorrect; since the *Kerr* and *Vanesse* companion cases, common intention resulting trusts are not applicable to the breakdown of intimate relationships. This question was answered correctly by almost everyone who attempted it.

END OF PART I. THE EXAM CONTINUES WITH PART II.

II. ANSWER 3 OF 4 QUESTIONS IN THIS PART, WHICH IS WORTH 60% OF THIS EXAM.

Questions 5 and 6 both involve the following report, from CBC News on November 19, 2017. The additional details provided for question 5 and question 6 are separate, not cumulative.

[Remember that you need only answer 3 of 4 questions in this Part II. So, you may answer one or both of questions 5 and 6; answering neither question is not an option.]

Maine's top court hears Nova Scotia company's arguments in seaweed harvesting case

Acadian Seaplants wants the right to harvest rockweed in tidal waters along private property.

Rockweed floats on the water at high tide

By Frances Willick

Seven justices of Maine's top court are preparing to make a decision that could have serious implications for a Canadian company from Dartmouth, N.S., and devastate a multimillion-dollar marine industry in that state.

And it all comes down to slimy seaweed.

Rockweed, a common seaweed that lines the shores of the northeastern U.S. and Canada's Maritime provinces, is big business. After processing, the rockweed industry is estimated to be worth about $20 million in Maine alone.

Dartmouth-based Acadian Seaplants Ltd. harvests rockweed and turns it into fertilizer and additives to animal feed.

In 2015, a group of homeowners in Maine took Acadian to court over the company's practice of harvesting in the tidal waters adjacent to their land.

The homeowners claim that the seaweed belongs to them and the company has no right to harvest it without their permission.
But Acadian believes the seaweed is a public resource that, like fish, the public has a right to harvest.

In March, a Maine Superior Court justice ruled in favour of the homeowners. Acadian immediately appealed that decision.

Last week, lawyers for both sides made their oral arguments during the appeal at Maine Supreme Judicial Court.

Seaweed a 'product of the sea'

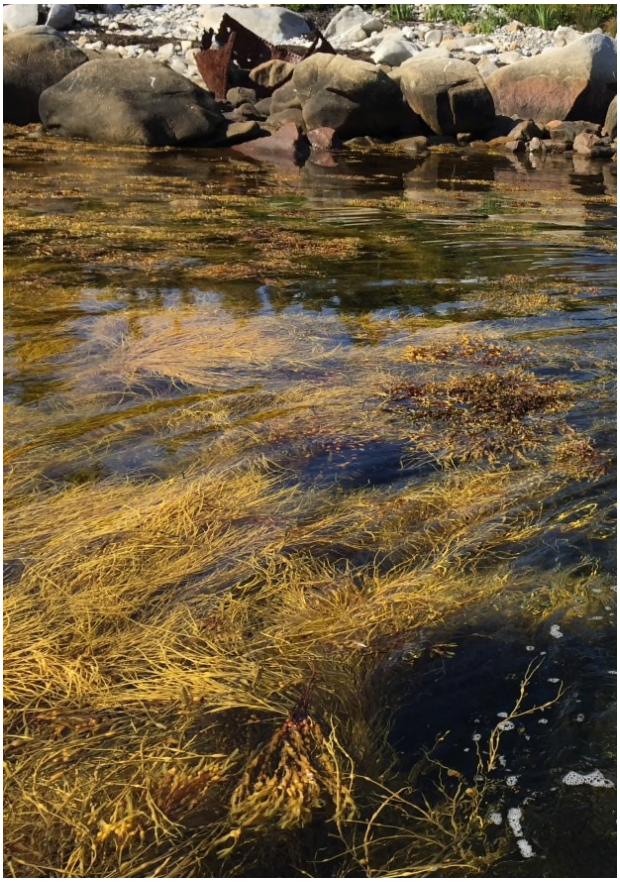
The company's argument is, in part, that seaweed is a marine organism that is more akin to shellfish than plants, so it should be included in public fishing rights.

"Rockweed, just like oysters, mussels and clams, is a product of the sea," argued Acadian's lawyer, Benjamin Leoni, in a written brief. …

The seaweed doesn't get nutrients from soil, like a plant, the company's lawyer argued. Rather, it absorbs nutrients directly from the sea, like marine organisms.
The lawyer for the homeowners, Gordon Smith, said the company's "novel" argument is "ignoring the basic biological gulf between plants and animals," and stated bluntly that rockweed is "indisputably a plant and not an animal."

Smith pointed out that rockweed is stationary and has the ability to photosynthesize. "Shellfish … do not photosynthesize," he wrote.

Smith argued that the principles of property law mean that ownership of real estate includes the soil and whatever grows on it. "Just as there is no dispute that terrestrial trees, shrubs and crops belong [to] the owner of the land on which they grow, there should be no dispute that rockweed, like any other plant, is the property of the owner of the flats on which it grows."



Rockweed is a very common seaweed found along the coast of the northeastern U.S. and the Maritimes in Canada

Fishing, fowling and navigation

…

Both sides argued that legal or historical precedents favoured their position in the case. In Maine, colonial ordinances dating back to the 1640s refer to the public's right to "fishing, fowling and navigation."

But whether rockweed harvesting falls under any of those categories will be up to the court. A decision could take six months or longer, Smith told CBC in an email.

Impacts on industry

If the court upholds the previous decision in favour of the homeowners, it could decimate the industry in Maine.

"The implications of this case are immense," wrote the company's lawyer in the brief. "An entire marine industry and the maritime jobs that depend on it rest on the outcome."

The decision is unlikely to slow down Acadian's extensive rockweed harvesting operations in Nova Scotia. The company and several of its competitors have licences to harvest the seaweed here.

5. **You are a summer student in a law firm from Nova Scotia. A senior partner explains that an American corporate client (a competitor of Acadian Seaplants) is worried about a similar legal dispute with private property owners arising in Canada. The client is not certain what difference the biological debate about plants and animals makes, why it matters where the rockweed grows or flows, and whether the licenses referenced by the reporter at the end of the article are relevant and/or valid.**

   Complicating matters is the fact that rockweed harvesting in the region takes place on and around ancestral homelands of Mi'Kmaq, Maliseet, and Passamaquoddy Aboriginal Peoples of Canada. The Peace and Friendship Treaties signed between these Peoples and the British Crown do not surrender land rights.

   Prepare a memorandum briefing the senior partner about the client's legal rights and responsibilities in Canada. In your legal analysis, indicate any missing factual information material to your conclusions, and specify any factual assumptions you make. Your analysis should also include a strategy to mitigate foreseeable legal risks.

The starting point for students is to answer this question in the form of a memorandum, written to support advice to an American client about Canadian law applied to similar facts. The law of Maine is not important in that context.

Whether rockweed is a plant or animal has legal implications. Many students unexpectedly cited *Schmiesier* for the proposition that there is a difference between lower and higher life forms. It was usually unclear, however, how that case about patentability applies to this scenario.

More relevantly, it is necessary to assess, if rockweed is an animal, whether, when, and by whom possession of it is taken. This requires analysis and application of cases such as *Yanner v Eaton*, *Pearson v Post*, *Clifton v Kane*, and possibly even *Popov v Hayashi* and/or *Nakhuda* (the Ikea monkey case). It is also necessary to assess, if rockweed is a plant, on whose land it grows. There is little doubt plants are fixtures, although a very brief analysis of, and agreement with, that argument by the homeowners is useful. The more difficult question is: who owns the land, or more accurately, the land underwater, where rockweed "grows"? The analysis of the *ad medium filum aque* maxim in *R v Nikal* is relevant to that question. The best students grappled with the differences between tidal and navigable waters, and the dicta of Justice Cory in *Nikal* about the historical development and application of the maxim in England, Atlantic Canada, and British Columbia.

The question of land/water ownership, especially in light of *Nikal*, segues naturally into the second part of the question, Aboriginal title. There are sparse facts in the report on which to base a full analysis of Aboriginal title, which is why the question encourages students indicate missing facts or necessary assumptions. Only students who are very familiar with *Tsilqhot'in*, *Delgamuukw*, and *Bernard* and *Marshall* have the depth of knowledge to do this well. High-performing students realize the latter of these cases are most relevant geographically, and for ruling title was not established, while the other cases establish the fundamental framework and offer opportunities to contrast facts. Merely describing the legal test in vague terms is inadequate. To provide useful analysis and client advice, the best students would compare and contrast details, especially around occupancy, giving insight into the facts that would matter most to the client. The question also asks about strategies to mitigate legal risks, which was an invitation to explore the duty to consult with Aboriginal Peoples. Negotiation and benefit sharing around rockweed harvesting could, if done well, promote reconciliation and pre-empt serious legal problems for the client.

AND/OR

6. **You are a summer student in a law firm from Maine. A senior partner explains that Acadian Seaplants is preparing contingency plans if it loses the case reported on above.**

   The governments of Maine and Nova Scotia have both told Acadian that the harvesting licenses may be cancelled if Acadian wins the lawsuit. The state/provincial cabinet ministers are worried about political pushback from the would-be unsuccessful riparian property owners. Environmental protection laws in both jurisdictions permit ministers to unilaterally revoke harvesting licenses if deemed necessary to preserve maritime ecosystems. The client believes harvesting licenses are its most valuable property.

   Prepare a memorandum briefing the senior partner about the client's legal rights in both the United States and Canada. In your legal analysis, indicate any missing factual information material to your conclusions, and specify any factual assumptions you make. Your analysis should also include strategies to protect the client's rights.

This question also requires an answer in the form of a memorandum, but from the comparative perspective of both Canadian and American law. The core issue is whether the revocation of harvesting licences would be an expropriation of property.

A preliminary question is whether harvesting licences are property, as the client believes. In that analysis, students could compare licences to other kinds of novel claims we covered in class, for example in respect of domain names (*Tucows*), news *(INS*), or body parts (*Moore*). The degree to which harvesting licences are similar to, or different from, such other objects/resources provides fodder for analysis. The strongest and most attentive students noticed that the reasons in *Tucows* explicitly discussed the proprietary status of fishing licences (*Saulnier*). Also useful is the application of policy considerations that were raised in those cases.

Once licences are established as property, it is necessary to analysis whether the extent to which they are regulated or revoked could constitute a *de facto* or direct expropriation. Students could assess how this scenario is similar to or different from the introduction of environmental protection legislation in South Carolina (*Lucas*), or even the interference with mining rights in Pennsylvania (*Penn Coal v Mahon*). In the United States, the strategy would be to attack the constitutionality of the legislative/policy measure on the grounds of the 5th Amendment. Students could then compare how this scenario is similar to or different from the denial of a building permit in *Mariner* or development freeze in *Vancouver v CPR*. In Canada, the strategy would be to seek compensation under the applicable provincial expropriation statute. Any discussion of NAFTA or international trade law was a bonus; that topic was in the readings but not discussed during class, and expectations were adjusted accordingly.

A note for students who attempted either one or both of these questions. There was some overlap, although I tried to phrase the questions to avoid this as much as possible. The most common overlap was students who discussed licenses as a novel claim in response to question 5 instead of question 6. That was fine; it was not penalized but came with an opportunity cost for students who then had less time/space to discuss the more relevant issues. It was common for students who did *not* attempt question 6 to discuss the comparative expropriation issues in the answer to question 5. That was also fine, and generally had a neutral impact on grades.

AND/OR

7. On November 27, 2017, the *New York Times* reported the following:

Who Owns Art From Guantánamo Bay? Not Prisoners, U.S. Says

A painting by Muhammad Ahmad Abdallah al Ansi, a former prisoner at Guantánamo Bay, is part of an exhibit in New York of artwork by men who have been held at the prison. (Muhammad Ansi, via John Jay College of Criminal Justice)

By Jacey Fortin

If a prisoner at Guantánamo Bay paints a picture of a teapot or a stormy sea, does the art belong to him? After an ocean-themed art exhibition in New York City made waves that reached the Pentagon, the answer would seem to be no.

"Ode to the Sea," the exhibition at the John Jay College of Criminal Justice in Manhattan, features 36 paintings, drawings and sculptures made by eight men who were being held at the Guantánamo Bay detention center in Cuba. …

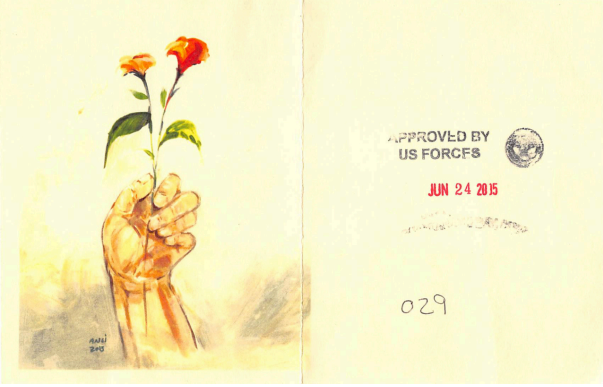
The exhibition received international news coverage after it went up last month. Now, the Pentagon is reviewing the way it handles prisoners' art, and lawyers say they have not been able to transport detainees' paintings out of Guantánamo Bay in recent weeks.

"My clients were told that their art would no longer be processed for release," said Ramzi Kassem, a professor at the City University of New York School of Law whose legal clinic represents three men being held at Guantánamo Bay. "And then one of my clients was told that, even if he were ever to be released, that he would not be able to take his art with him, and that it would be incinerated."

The 41 men still held at Guantánamo Bay have been accused of having links to terrorists or of participating in terrorist plots, including the Sept. 11, 2001, attacks. Only 10 have been charged or convicted in the military commissions system.

Maj. Ben Sakrisson, a Pentagon spokesman, said in an email on Sunday that "items produced by detainees at Guantánamo Bay remain the property of the U.S. government." He added that the Department of Defense had suspended transfers of art from the prison, pending a policy review, but did not intend to pursue art that was already released.

Asked why the policy came up for review and whether it had anything to do with the exhibition at John Jay College, Major Sakrisson said that "media reporting brought it to the attention of the Department of Defense." He also told The Miami Herald that "questions remain on where the money for the sales was going," apparently referring to a line on the exhibition's website that says the detainees' art is available for purchase.



Muhammad Ansi, Hand Holding Red Flowers, 2015 (color photocopy of original and reverse, showing stamps indicating approval for release from Guantánamo).

Erin L. Thompson, a curator of the exhibition, said the only paintings for sale were the ones whose artists had been cleared and released from Guantánamo. …
At Guantánamo Bay, art classes have been available for nearly a decade. The detainees were allowed to give their creations to their lawyers, often as thank you gifts or for safekeeping.

One lawyer, Beth D. Jacob, said her client showed her his paintings when they first met. "I was impressed by it, and he told me that the art teacher there had complimented him," she said. So last year, she reached out to Ms. Thompson about putting them on display. Several other detainees agreed to participate, and the exhibition was unveiled last month.

The exhibition includes a painting of the Statue of Liberty in front of an electric-blue sea. That work is by Ms. Jacob's client, Muhammad Ahmad Abdallah al Ansi, a Yemeni citizen. American officials suspected him of working as a bodyguard for Osama bin Laden, but he was cleared by a tribunal last year and transferred to Oman in January.

Also on display are intricate models of ships, their white sails stamped with the words "APPROVED BY U.S. FORCES" to show that they were inspected by military officials on their way out of the prison. …

You are a summer student working at the Canadian Internet Policy and Public Interest Clinic (CIPPIC) at uOttawa. Ms. Erin Thompson is considering an exhibition of the artwork, and has asked for the clinic's advice. She has asked about the legal implications in Canada of transferring the artwork into digital form for online display. She is also worried that the Statute of Liberty – Ellis Island Foundation, Inc. could assert its registered rights, but she is not clear what those might be. Her backup plan is to show all the original artworks in Ottawa. She has permission from Ms. Beth Jacob to exhibit the artworks that Ms. Jacob claims to have been given. Title to other artworks has been registered by the artists in Ms. Thompson's name to facilitate approval for release from the prison. Write a memo for CIPPIC's staff lawyer addressing all relevant legal issues.

This question also requires an answer in the form of a memorandum. It raises issues related to intellectual property, gifts, and resulting trusts. Students were rewarded for remaining focussed on these issues, and not straying into the constitutional, criminal, and/or human rights aspects of the article.

The most obvious intellectual property issue concerns copyright. Citation and application of *Théberge* is essential, in particular in respect of the factual differences between modifying the physical medium and digitization of artwork. Almost everyone discussed both economic and moral rights. I was impressed more with students who *applied* that distinction than I was with students who *described* that distinction. Students were also rewarded for pointing out that it is more likely the Ellis Island Foundation would assert trademark rights than patent rights. Considering whether trademarks rights exist or could be enforced in this context turns mainly on distinctiveness and the likelihood of confusion, as in *Mattel*. (In fact, there are no trademark rights in the Statute of Liberty itself; it is in the public domain. But that doesn't change the analysis that was expected.)

Nolan is an obvious case for discussion, given its facts involved artwork. But the strongest students were able to distinguish *Nolan* and other "common establishment" cases from the facts here. Whether Ms. Jacob was legally given certain artworks turns on the application of the three legal requirements for gift-giving: intention to give, intention to receive, and delivery (transfer of possession). As for the artworks that were registered in Ms. Thompson's name, the relevant issue is whether there are resulting trusts. While the facts of *Pecore v Pecore* are much different from the facts here, the legal principles are the same. Students were rewarded for knowing and applying the correct presumption (trust, not advancement here), and discussing whether there are facts to rebut that presumption.

AND/OR

8. On April 17, 2017, the *National Post* published the following opinion editorial:

Money and property aren't petty obsessions. They're our freedom given form

Even the King of England cannot by force enter this cabin.

By John Robson

Let me insist that any talk of "mere things" or "mere money" is profoundly confused. The core of property rights is ownership of ourselves.

Canadians generally regard their governments as unwieldy, distant, callous, expensive,

arrogant and inept. Even those most enthusiastic about entrusting everything important to the state are dismayed by its current performance. But many people keep looking for exciting new powers it could wield. They should instead ponder Calvin Coolidge's aphorism that "property rights and personal rights are the same thing."

This claim might seem odd, even demented or dishonest. We may concede that protecting property is necessary for economic growth. But surely it undermines fairness by fencing in privilege.

Not at all. As I argued at a town hall meeting of the Ontario Progressive Conservative Party Blue Ribbon Property Rights Panel, the reverse is true. Property rights fence privilege out. In William Pitt's once-famous declaration: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter, the rain may enter — but the King of England cannot enter — all his force dare not cross the threshold of the ruined tenement!"

Property rights are not the rights of things. They are the rights of people to make their own decisions. Oh yes, one might sneer, the rich and poor man may decide where to park a yacht and which marble to install in the third spare bathroom. But to say so is to misunderstand what property rights are and where they came from.

John Locke says we have a natural right to our lives, liberties and estates "which I call by the general Name, Property." But why would he do such a thing? What have our precious lives and freedom to do with mere things?

Stifling the retort that if mere things are unimportant you shouldn't be obsessed with getting hold of mine, let me insist that any talk of "mere things" … is profoundly confused. The core of property rights is ownership of ourselves. It is because we own ourselves, including our bodies, that we own our time and effort. Would anyone deny it, and make us slaves? But if we own our labour, then we own those things we make by the sweat of our brow provided we do not use force or fraud. What else can freedom mean?

A Christmas Carol/Postmedia News

Still, is it not narrow-minded to accumulate stuff in the employ of Scrooge and Marley while Tiny Tim's bright eye clouds over? Not at all. His spirit, like everyone's, was housed in a physical body subject to the arrow of time within a material world. Without "mere" food he would sicken and die, while without a "mere" house we are homeless. Hence the redeemed Scrooge gives Bob Crachit a raise, not a lecture about money being worthless.

Now consider my neighbour as a kid who toiled every summer expanding a small cottage as his family grew. Can one claim that to expropriate it after three decades or force him to demolish it would be no real injury to him, merely an affair of inert bits of wood and glass, tile and screen? No. To steal the physical incarnation of his dreams would be to steal part of his soul, to deny his humanity.

From this perspective it is also clear why political and property rights are inseparable. We cannot be killed or imprisoned arbitrarily because each of us is the unique, precious possessor of our own body. We have free speech because we own our own tongues, ears and brains and may decide what to say or listen to, though we may neither compel others to speak to nor to heed us. And we are free from arbitrary search and seizure because we own those things we made with our scarce, fleeting time and effort.

It is not the owner of a mansion who is protected by Pitt's doctrine that, as Coke put it earlier and John Adams later, a man's home is his castle. In societies where property rights are trampled, the politically powerful live obscenely well anyway. Only where the rule of law holds sway can even the peasant in his damp hovel not be disturbed or robbed. …

Our individuality is inseparable from our ownership of ourselves, our labour and its fruits. …

In response, write your own opinion editorial for submission to the *Post*.

This question is the most conventional and, frankly, predictable on the exam. It asks for a response in the form of a commentary; a clear opinion with well-justified reasoning is essential. It invites a critical review (not merely a description) by students of the various positive law and natural rights justificatory theories of property. The strongest students identified which political and ideological perspectives are reflected in Robson's opinion, and responded directly to those. It made no difference whatsoever to students' grades whether they support or reject those opinions, as long as positions were articulated clearly and defensibly. Strong students were also able to support their arguments with specific examples from throughout the course. The materials related homelessness/poverty and Aboriginal perspectives on ownership are easily applicable. There are excellent opportunities in the question also to tie in constitutional rights, including specific cases dealing with: life, liberty, and security of the person; freedom of expression or assembly; equality; and/or limitations on constitutional rights. Students who did not perform as well on this question generally wrote more about the "what" of property (e.g. the bundle of rights; or the subject-matter of novel claims) than the "why" of property (e.g. the justifications and/or the social, political, and economic implications).

THE END.