PROPERTY 1108(B) FINAL EXAM

PROFESSOR DE BEER

WEDNESDAY, 12 DECEMBER 2018, 10H00 – 16H00 (**6 HOURS**)

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

THE **3 ANSWERS** IN PART I ARE **WORTH 30%** OF YOUR SCORE.

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

THE **3 ANSWERS** IN PART II ARE **WORTH 60%** OF YOUR SCORE.

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

ANSWERS MUST BE SUBMITTED ELECTRONICALLY VIA BRIGHTSPACE IN .PDF, .DOC(X), .PAGES OR A SIMILAR FILE FORMAT.

THERE ARE NO RESTRICTIONS ON THE WRITTEN REFERENCE MATERIALS YOU MAY USE TO PREPARE YOUR ANSWERS. YOU MAY NOT COLLABORATE WITH OR CONSULT ANY OTHER PERSON.

YOU MUST INCLUDE WITH YOUR ANSWERS A DECLARATION OF ACADEMIC INTEGRITY, AND YOUR TOTAL WORD COUNT.

THIS EXAM IS WORTH 60% OF YOUR FINAL GRADE.

You must include with your answers the total document word count, including footnotes:

"The total word count of this document is: #,### words."

The total document word count should not exceed 4,000 words (plus or minus 10%).

You must include with your answers the following declaration of academic integrity:

"I declare my academic integrity and awareness of the sanctions for academic fraud."

Academic integrity means being responsible for the quality of your work, preparing it honestly and respecting the intellectual community you are part of as a student. It is a core value in all scholarly work.

Academic fraud refers to "an act by a student that may result in a false academic evaluation of that student or of another student". Here are some examples:

- Submitting work prepared by someone else or for someone else
- Using work you have previously submitted for another course, without permission
- Falsifying or making up information or data
- Falsifying an academic evaluation
- Submitting work you have purchased on the Internet
- Plagiarizing ideas or facts from others

For this examination, collaboration or consultation with another student or any other person *during the 6-hour examination window* will be deemed to be academic fraud. You are encouraged to collaborate and consult during your preparations before the examination and may discuss the examination with others afterwards.

Academic fraud, including plagiarism, will be dealt with according to Regulation 14 - Academic Fraud. Students who commit or attempt to commit academic fraud, or who are a party to academic fraud, are subject to one or more of the sanctions listed in the Regulation. Also, the Law Society of Ontario and/or other professional licensing bodies may be made aware of the results of an investigation regarding academic fraud.

A. ANSWER 3 OF 4 QUESTIONS, WHICH IS WORTH 30% OF THIS EXAM.

1. Last summer, the Globe and Mail published the following column:

Joint ownership of a cottage can pose a host of unexpected problems

Tim Cestnick,
Special to the Globe and Mail
July 28, 2018

At our cottage north of Toronto, we have a neighbour – Ruth. We can all learn from her story. Ruth has five adult children: Paul, Judy, Ron, Kathie and Peter. A few years ago, she put the cottage into joint ownership with her oldest son, Paul. The reason? To avoid probate fees and facilitate a quick and easy transfer upon her death.

While Ruth is at the cottage all summer, the kids aren't using the cottage much. Judy, Ron and Kathie live outside of Ontario and rarely visit. Peter isn't interested in the cottage and Paul's work doesn't allow him to make it to the cottage more than two or three weekends each year. Paul wants to sell the cottage given the capital improvements that will be required in the next couple of years.

There's a potpourri of problems Ruth is facing. …

Loss of Control
Ruth doesn't want to sell the cottage. As a joint owner, Paul can't simply sell the cottage without her consent. But if there was a sale, Ruth has always assumed that she'd be entitled to the sale proceeds. This intention wasn't made clear to anyone. There's no written agreement between Ruth and Paul. Paul believes that his mother was giving him half the cottage when she put it into joint names. So, if they do sell, it's not certain that Ruth will end up with all of the sale proceeds. Paul may have a right to keep his half.

Ruth lost control over the cottage when she put it into joint names. Fortunately, there's no squabble over access, shared use, using the property as collateral, or payment of expenses related to the cottage. If these were issues, Ruth wouldn't have control of the property to resolve them on her own.

As for Paul, he's going through a divorce, which is causing him much financial stress and his ex-wife is claiming that she should be entitled to half the value of the cottage. … So he may try to sell his half or give it to his ex-wife – perhaps to help settle the claims in his divorce. Ruth could end up owning half the cottage with some other person she doesn't even know, or Paul's ex-wife.

Exposure to Creditors
Placing an asset into joint names will expose that asset to the claim of creditors of the new joint owner. In Ruth's case, Paul is not facing the claims of creditors – fortunately. But he's going through his divorce and his ex-wife is

claiming that his half of the cottage should form part of the property that should be split between them. …

Unequal treatment of heirs

It's always been Ruth's intention that, when she's gone, the cottage would be either shared by the kids, or sold and the proceeds would be split equally among them. This intention was never documented. If the cottage isn't sold during Ruth's lifetime, there's no assurance that Paul will share the property with his siblings, or that he'll divvy up the money if he sells. And so, Ruth's kids could be treated unequally when she's gone. A legal battle could ensue as a result.

To add insult to injury, any tax owing on the cottage on Ruth's death will have to be paid from her estate, which will exclude the cottage. Paul will receive ownership of the cottage automatically, leaving the other kids to pay the tax bill from their share of Ruth's estate.

If Ruth had wanted to ensure that, after she dies, the cottage would be shared by all of her kids, she should have done which of the following:

a. Transferred life estates to Paul, Judy, Ron, Kathie and Peter, with the remainder to their children, with the remainder to their children's children, and so on.
b. Transferred title to Paul with the condition that all of her family can make use of the cottage at any time without costs provided that they share in the upkeep.
c. Established an express trust with her children as trustees and herself as beneficiary.
d. Said to Paul, "I am giving you the cottage to share with your siblings", and handed him a set of keys.
e. Bequeathed one-fifth ownership shares of the cottage to Paul, Judy, Ron, Kathie, Peter and their successors and assignees as joint tenants.

The best action would have been E. The bequeath "as joint tenants" creates equal co-ownership with rights of survivorship shared by each sibling. There are no words to indicate anything less than fee simple transfer, which under section 26 of Ontario's *Succession Law Reform Act* transfers a fee simple or the greatest interest Ruth has (compare *Thomas v Murphy*). While the fee simple transfer of co-ownership ensures the cottage would be shared by all of her kids, and whether the cottage *stays* in the family may depend on other statutes like the *Family Law Act* (in the event of Paul's divorce, for example), making sure the cottage stays in the family beyond "all of her kids" was not specified as her main intent. A is incorrect. We often discussed this strategy to keep property in a family inter-generationally, concluding however that even if that were the goal here (which it is not) there are more effective ways to do that, such as conditional transfers. Legally, there is no more "remainder" after the gift-over of the first remainder following a life estate (i.e. the remaining fee simple). Every subsequent transfer is repugnant to the transfer of that fee simple, as per *Walker*. B is incorrect because, based on cases like *Hayes v Meade* and *Fennel v Fennel*, the language of that transfer is too uncertain to be upheld; it is an invalid condition subsequent. C is incorrect because making herself the beneficiary and her children trustees achieves the inverse of her goal. D is incorrect because, as discussed in *Nolan v Nolan*, transfer of a set of keys would not constitute sufficient delivery for an *inter vivos* gift, and as in *Bayoff Estate*, the requirement for a *donation mortis causa* are not met here.

AND/OR

2. CBC news reported the following on November 28, 2018:

Province's new trespassing laws unconstitutional, show 'deep disrespect' for treaty rights: FSIN

The Federation of Sovereign Indigenous Nations says the province's new rules around trespassing are unconstitutional.

Saskatoon, SK – Justice Minister Don Morgan tabled amendments on Tuesday to three pieces of legislation — The Trespass to Property Act, The Snowmobile Act and The Wildlife Act — to indicate members of the public need to seek permission from a rural property owner before entering their land. The changes to the legislation are being heavily criticized by the FSIN.

"I think there is a deep disrespect here for treaty and inherent rights," said FSIN Vice-Chief Heather Bear. "They need to take a look at their own constitution."

Bear argues the changes could interfere with Indigenous people exercising their treaty rights.

"Can the province pass legislation that really undermines the constitutionally protected rights to hunt, fish, trap and gather?" Bear asked.

Morgan said existing legislation unfairly places the onus on rural land owners to post signs on their land to legally deny access. "[FSIN] have taken the position that they don't believe the legislation applies to them — that they should have a right to hunt or travel wherever they want," Morgan said Tuesday.

He said the province's position is that landowners have the right to determine who can be on their property.

But Bear said the FSIN is just affirming what the courts have already stated.

The province is considering changes to the legislation surrounding trespassing on rural properties. (Matt Garand/CBC News)

"In Minister Morgan's comments, he seems to be saying that the FSIN is saying First Nations can hunt on private land. But it is, in fact, the courts that said that," she said.

"That is what's troubling when we talk about passing this type of legislation that seems to undermine what the court says." Earlier this month, the Supreme Court said it won't hear a case involving an Indigenous hunter and questions around his ability to hunt on unmarked, privately owned lands. …

The government's review of its trespassing rules comes after concerns were raised from rural property owners on the issue, which is also related to rural crime.

An online survey, which ran on the province's website from Aug. 9 to Oct. 2, found the majority of respondents were in favour of switching the onus from property owners to the public.

"There are better ways to deal with rural crime rather than infringing on a treaty inherent right," Bear said.

She says the FSIN is in consultations about its next move. "We may have to take a legal position on this," said Bear.

with files from Stephanie Taylor and Emily Pasiuk

If Saskatchewan's proposed legislation is enacted, which of the following arguments would be most relevant in a constitutional challenge?

a. Land throughout Saskatchewan was occupied by various Aboriginal Peoples prior to the assertion of Crown sovereignty, giving Aboriginal Peoples the right to use the land for purposes including but not limited to hunting, fishing, trapping, and gathering.
b. Amendments to Saskatchewan's *Trespass to Property Act*—which would remove the onus on rural property owners to post "No trespassing" or similar signage and require members of the public to seek permission before entering land—extinguish Aboriginal rights to hunt, fish, trap, and gather.
c. Section 91(24) of the *Constitution Act, 1867* does not give the provincial government jurisdiction to determine whether trespass laws apply to the Aboriginal Peoples of Canada.
d. Saskatchewan's reforms are an irrational reaction to racist stereotypes about rural crime in the aftermath of the acquittal of Gerald Stanley, the farmer who fatally shot Colten Boushie after he and four other Aboriginal youth from the Red Pheasant First Nation drove onto Stanley's farm.
e. The Province of Saskatchewan's online survey was inadequate to satisfy the Crown's obligations to Aboriginal Peoples of Canada.

The most relevant argument is E. As discussed in cases we studied, including *Haida Nation, Tsilhqot'in* and others, existing and treaty rights of Aboriginal Peoples can be infringed. However, the survey as described is unlikely to meet the duty to consult and accommodate. There is little evidence in the report of a compelling and substantial objective. And it is unclear how, if at all, the action is consistent with the Crown's fiduciary obligation. D is, arguably, also correct. Students were awarded good marks for selecting this answer, but only if framed within the relevant legal analysis, *i.e.* the lack of rational connection between the proposed action and a compelling and substantial objective (part of the more general, better response, which was E). A

is not the best answer, because it states the specific test for Aboriginal title to land, as opposed to the treaty and other rights specifically described in the report. As you know, from repeated emphasis of this point during class, that in the Prairie provinces land rights are addressed in the numbered treaties not under the *sui generis* Aboriginal title test. B is incorrect for several reasons. Even if provincial legislation could "extinguish" as opposed to infringe Aboriginal rights (doubtful), there is no plain and clear intention to do so, as in *Yanner v Eaton* (distinguishable on several nuanced points, but broadly persuasive). C is incorrect. While a similar issue was raised in *R v Nikal*, that is not the most relevant issue here.

AND/OR

3. Earlier this year, the website TVO.org published the following:

It's not the location, it's the approach, say opponents of Ottawa homeless 'mega-shelter'

An artist's rendering of the proposed new Salvation Army homes shelter in Vanier. (333montrealroad.ca)

OTTAWA — An online petition referring to three homeless shelters in Ottawa's ByWard Market as a "cancer" in the area quickly went viral last week.

"The shelters, in their current configuration, must be diagnosed for what they are — a cancer which is now terminal for those residents and businesses in their vicinity," wrote Patrick O'Shaughnessy, the business owner who started the petition on a website called Save the Market.

The petition (which he has now taken down) collected more than 2,500 signatures within days, and it meanwhile opened the floodgates on Reddit, where users shared stories about fraught encounters with homeless people in the Ottawa region. …

Homeless shelters have become a contentious subject in Ottawa, with residents hotly debating where they should be built — if anywhere at all. One of ByWard Market's three major shelters, the Salvation Army Booth Centre, is slated to move to a proposed $50-million, 350-bed facility in Vanier, a neighbourhood in the city's east end that already struggles with poverty and homelessness.

When the Salvation Army unveiled its plans last June, reaction was swift. A community group calling itself SOS Vanier immediately sprang up, pledging to stop the shelter from being built in the community. Opponents say their opposition is not a simple case of NIMBYism — the old "not in my backyard" mentality. They oppose the shelter, in part, because they believe there are better ways to combat homelessness in Ottawa.

The current view at 333 Montreal Road, Ottawa. (David Rockne Corrigan)

The Alliance to End Homelessness in Ottawa, which releases an annual progress report on homelessness, reported that 7,170 individuals used the city's emergency shelters in 2016, an increase of 5.2 per cent from 2015. …
The proposed Vanier facility got the green light when city council voted last November to allow an exception to zoning bylaws that prohibited a shelter from being built on Montreal Road. … Members of SOS Vanier worry about the size of the shelter (some refer to it as a "mega-shelter"), and fear it could harm a community that already struggles with poverty, homelessness, and addiction. "Vanier in general is a disadvantaged community," said Drew Dobson, founder of SOS Vanier and owner of Finnigan's Pub, located a stone's throw from the proposed shelter site. …

With the support of Dobson and SOS Vanier, area business owners have filed an appeal to the Ontario Municipal Board in the hopes of overturning the city's decision. That process could take up to two years, and ground will not be broken on a new shelter until it's completed.

In the meantime, Dobson said he hopes for a broader discussion about the city's approach to homelessness. Councillor Mathieu Fleury, who represents the Rideau-Vanier ward and chairs the Ottawa Community Housing board, voted against the zoning change, and believes the creation of a 350-bed shelter is the wrong strategy altogether.

Fleury and Dobson are both proponents of what is known as the "housing first" approach to homelessness. Instead of the treatment-first support that shelters have traditionally provided, housing-first programs aim to place homeless people in stable housing immediately, while still providing them with the supports and services they require…. The Salvation Army, for its part, says it has employed a housing-first approach since 2008.

On the issue of location, Glenn van Gulik, a spokesperson for the Salvation Army, says the Montreal Road site was chosen based on a set of criteria that included access to outdoor space, proximity to other health and social services, and public transit and pedestrian access to and from the downtown core. "We spoke to real estate consultants and evaluated several locations. Some were good locations, but not the right size ... Some properties we looked at would be perfect but were nabbed up. Others were simply too costly." …

Which of the following is the best argument for building the shelter as planned?

a. Additional shelter spaces are constitutionally required as a result of the decision in *Victoria (City) v Adams*.
b. Concentrating chronic public nuisances in "red zones" is preferable to spreading homeless shelters throughout the city.

c. It would be unconstitutional to prohibit poor and/or homeless people from gathering in Vanier, based on the decision in *R v Banks*.
d. The law must evolve with social circumstances, as stated by Chief Justice Laskin in *Harrison v Carswell*.
e. New, larger, multi-use facilities serving homeless and under-housed people are urgently required, given examples such as shown in the documentary film No Place Called Home.

The best argument is E, although several other options were scored well if accompanied by the right reasoning. No Place Called Home draws attention to the complex and changing nature of "homelessness", and strongly rebuts shelter opponents' biases described in the article. Admittedly, this film could also support the "housing-first" arguments made by Fleury and Dobson, *i.e.* an argument against the mega-shelter (anywhere, not just in Vanier), and students were rewarded for pointing that out. A is not the best answer. *Victoria v Adams* does not require additional shelter beds; it prohibits restrictions on life, liberty and security of the person in public parks when there are insufficient shelter beds. B is not the best argument for building the shelter as planned, not necessarily because it is necessarily incorrect but rather because it is controversial. Many students persuasively (but reluctantly, it seems) argued in favour of Ellickson's proposal, or even disagreed with Ellickson but noted that his idea could support "mega-shelters". Students who made a coherent case for this option were recognized for their effort with a very good or excellent score. C is not the best answer either. While *R v Banks* was a freedom of expression/assembly case, the defendant lost the argument that a prohibition on gathering to offer squeegee services was unjustifiable violation of section 2 of the *Charter*. D is not entirely incorrect. However, whether and how the law must evolve with social circumstances is debatable. Moreover, *Harrison v Carswell* did not address homelessness, but rather trespass. Students who understood and conveyed that distinction were rewarded with good scores.

AND/OR

4. In September 2018, The Economist published the following report:

A controversial new copyright law moves a step closer to approval

The new rules are another example of the EU's assertiveness on tech

LUDWIG VAN BEETHOVEN has been dead for nearly 200 years. The copyright on his music is long expired. But when Ulrich Kaiser, an academic at the University of Music and Performing Arts Munich, recently tried to upload a public-domain recording of his Fifth Symphony to YouTube, he was thwarted by Content ID, an automated copyright filter. Mr Kaiser tried again with recordings of music by Schubert, Puccini and Wagner. Despite being in the public domain, all were flagged for copyright violations by the algorithm.

YouTube built Content ID a decade ago, under pressure from copyright-holders worried that users were uploading commercial music and videos without permission. Ever since users have complained that the algorithm is too aggressive. Now YouTube and other big internet firms may be obliged by European law to employ similar methods there. On September 12th members of the European Parliament approved, by 438 votes to 226, a draft of a new copyright law designed to update the EU's copyright legislation, which predates the rise of big internet gatekeepers such as Google and Facebook. The rules sparked death threats against MEPs and a million-signature petition against the proposals.

Two provisions are particularly contentious. The first is Article 13, which compels internet firms, whose users upload large quantities of video, music, text and the like, to work with copyright-holders to ensure that anything that breaches copyright can be detected as soon as it is posted. That probably means they will have to deploy many more content filters like Content ID, which are worryingly imprecise.

Technology companies, and those who advocate an open internet, say the effect will be dire. In the quest to give more protection to copyrighted work, everything from political-protest videos to citizen journalism and viral memes, they argue, risks being squashed by overzealous enforcers. …

Whose internet is it anyway?

The second fight was over Article 11, which pits tech firms against publishers. It requires social networks and aggregators such as Google's "News" search engine to obtain a licence from publishers before displaying snippets of news reports to their users. Firms such as Google and Twitter profit from the attention generated by news that is gathered by others, note Article 11's advocates, and should therefore share the revenues that result. But critics decry it as a "link tax" that would also radically limit the freedom of internet users.

Article 11 is a Europe-wide version of similar rules introduced in Germany and Spain in 2013 and 2014 respectively. Google's response in Spain was to pull the plug on its news service, to the detriment of publishers that relied on it for traffic. By making a similar law apply across the entire European market, the hope is that Google (and other companies) will be forced to keep services running and share some of their revenues.

Predicting the exact consequences of all these new rules is difficult, says Jim Killock of the Open Rights Group, a British organisation that opposed the changes. They must be approved by both the European Commission and the EU's 28 member states before they can be finalised. But the planned legislation is another example of rising European assertiveness when it comes to regulating the internet—in May the EU brought into force the General Data Protection Regulation (GDPR), a far-reaching privacy law. One result could be yet more "geo-fencing", whereby the internet becomes fragmented along geographical lines. After the GDPR came into force, some American websites decided to block Europe-based visitors rather than comply….

Which of the following arguments would be most relevant to Parliamentarians considering whether to enact similar measures in Canadian intellectual property law?

a. Articles 11 and 13 are unjustified, based on the arguments in the Appellant's factum in *Keatley Surveying Ltd v Teranet Inc*.
b. Article 13 is justified, based on the purpose of intellectual property law, which is to ensure that rights owners are not deprived of "full enjoyment of the monopoly conferred by law."
c. Article 13 is unjustified, based on the decisions in *Committee for the Commonwealth of Canada v Canada* and *Director of Public Prosecutions v Jones (Margaret)*.
d. Article 11 is justified, based on the dissenting judgments in *International News Service v Associated Press*.
e. Article 11 is unjustified, based on the policy arguments canvassed in the majority judgment in *Intel v Hamidi*.

The most relevant argument for Parliament to consider is E. The majority judgment of the California Supreme Court in *Intel*, authored by Werdegar J., notes the controversies over extending property rights over internet linking. While noting Professor Epstein's argument that rule requiring permission to access others' servers (hosting websites) will create a market, it highlighted other policy concerns about the propertization of the internet and a tragedy of the digital anticommons. A is not the most relevant argument, because it concerns control over property-related data under the doctrine of Crown copyright. B is not the most relevant argument. Although that proposition would support expanding copyright protection as Article 13 does, the quoted passage is from *Monsanto v Schmeiser*, and is not consistent with the purposes of copyright law as articulated by the Supreme Court of Canada in cases such as *Théberge*. C is a tempting option if properly nuanced, but not *the most* relevant. The cases of *Cte for the Commonwealth* and *Jones* are about access to public spaces for the purposes of assembly and expression. While a metaphor could be extended to cyberspace and YouTube as a platform for expression, Article 13 is a more complicated attempt to protect private (intellectual) property. D is not the most relevant argument because the dissenting judgments in *INS v AP* (of Homes J and Brandeis J) support the position that news is not property. However, students who noted that the EU Parliamentarians are doing as Justice Brandeis suggested (He wrote that the courts are "ill-equipped", but not legislators), or that the news *per se* is distinct from links to specific stories reporting it, were rewarded with good scores.

B. ANSWER 3 OF 4 QUESTIONS, WHICH IS WORTH 60% OF THIS EXAM.

5. In November 2018, the Associated Press circulated the following report:

Fight over dinosaur fossils comes down to what's a mineral

HELENA, Mont. (AP) — About 66 million years after two dinosaurs died apparently locked in battle on the plains of modern-day Montana, an unusual fight over who owns the entangled fossils has become a multimillion-dollar issue that hinges on the legal definition of "mineral."

The 9th U.S. Circuit Court of Appeals ruled last week that the "Dueling Dinosaurs" located on private land are minerals both scientifically and under mineral rights laws. The fossils belong both to the owners of the property where they were found and two brothers who kept two-thirds of the mineral rights to the land once owned by their father, a three-judge panel said in a split decision.

Eric Edward Nord, an attorney for the property owners, said the case is complex in dealing with who owns what's on top of land vs. the soil that makes it up ….

His clients own part of a ranch in the Hell Creek Formation of eastern Montana that's rich with prehistoric fossils, including the Dueling Dinosaurs whose value had been appraised at $7 million to $9 million.

In 1983, George Severson began leasing a home on the Ranch to Lige and Mary Ann Murray, who worked there as ranchers. George Severson later transferred a portion of his property interest in the Ranch to his sons, Jerry and Robert Severson, and sold the remainder of his interest to the Murrays. The Severson brothers and the Murrays jointly owned and operated the Ranch until 2005.

In 2005, the brothers sold their surface rights to the Murrays, but retained the mineral rights, court documents said. The purchase agreement for the 2005 transaction was concluded "with the condition that" the parties "inform all of the other parties of any material event which may affect the mineral interests and share all communications and contracts with all other Parties."

At the time, neither side suspected valuable dinosaur fossils were buried on the ranch, court records said. A few months later, amateur paleontologist Clayton Phipps discovered the carnivore and herbivore apparently locked in battle. Imprints of the dinosaurs' skin were also in the sediment.

A dispute arose in 2008 when the Seversons learned about the fossils — a 22-foot-long (7-meter-long) theropod and a 28-foot-long (9-meter-long) ceratopsian.

The Murrays sought a court order saying they owned the Dueling Dinosaurs, while the Seversons asked a judge to find that fossils are part of the property's mineral estate and that they were entitled to partial ownership.

It had wider implications because the ranch is in an area that has numerous prehistoric creatures preserved in layers of clay and sandstone. Paleontologists have unearthed thousands of specimens now housed in museums and used for research.

But fossils discovered on private land can be privately owned, frustrating paleontologists who say valuable scientific information is being lost.

During the court case, the Dueling Dinosaurs were put up for auction in New York in November 2013. Bidding topped out at $5.5 million, less than the reserve price of $6 million.

A nearly complete Tyrannosaurus rex found on the property was sold to a Dutch museum for several million dollars in 2014, with the proceeds being held in escrow pending the outcome of the court case.

Other fossils found on the ranch also have been sold, including a triceratops skull that brought in more than $200,000, court records said.

The 9th Circuit decision on Nov. 6 overturned a federal judge's 2016 opinion that fossils were not included in the ordinary definition of "mineral" because not all fossils with the same mineral composition are considered valuable.

"The composition of minerals found in the fossils does not make them valuable or worthless," U.S. District Judge Susan Watters of Billings wrote. "Instead, the value turns on characteristics other than mineral composition, such as the completeness of the specimen, the species of dinosaur and how well it is preserved."

The Seversons won their appeal. But Attorneys for the Murrays asked the 9th Circuit this week for an extension of a Nov. 21 deadline to petition the judges to reconsider or for a hearing before an 11-judge panel.

Soon after, the Associated Press circulated a follow-up report, with more information:

'Montana Dueling Dinosaurs' fails to sell at N.Y. auction

NEW YORK — Two fossilized dinosaur skeletons, dubbed the "Montana Dueling Dinosaurs" because they appear forever locked in mortal combat, failed to sell Tuesday at a New York City auction.

A pre-sale estimate had predicted that the skeletons, offered as a single lot, could fetch between $7 million and $9 million — a price out of the reach of most museums. There were hopes that a wealthy buyer would donate the skeletons to a public institution, similar to how The Field Museum came to own Sue, a Tyrannosaurus rex discovered in South Dakota in 1990.

But the skeletons did not make the reserve at the Bonhams auction; the highest offer was $5.5 million. Auction officials said they remained hopeful that they'd find a buyer, possibly among institutions that had previously expressed interest.

The discovery began with a dinosaur pelvis protruding through rock at a Montana ranch. Three more months of chiseling and digging revealed a remarkable discovery: two nearly complete, fossilized dinosaur skeletons of a carnivore and herbivore, their tails touching.

A pushed-in skull and teeth of one dinosaur embedded in the other suggested a deadly confrontation between them. Clayton Phipps, a fossil hunter who made the discovery on his neighbor's land in 2006 in the fossil-rich Hell Creek Formation, gave the fossils their name. "I am just the lucky guy that happened to stumble out there and find this dinosaur," Phipps said. …

They were found fully articulated with pockets of skin tissue attached. They have been separated into four large blocks because of their total 40-ton weight and are on display in a plaza adjacent to Bonhams.

Kirk Johnson, director of the Smithsonian's National Museum of Natural History, called the dinosaurs "a significant discovery."

"They are a superb pair of specimens and are certainly of great scientific and display value," he said. "This pair is certainly a unique find" for the Hell Creek Formation. …

But Jack Horner, a paleontologist at Montana State University who led the expert team that chiselled and dug out the fossil, called the promoters' claims a means "to enhance the price of the specimen."

"These fossils are not worth anything because they were collected to sell and not specifically for their science," he said.

Unhappy with their former counsel, the Murrays have now retained our firm to act in their hearing before the full 11-judge panel of the 9th Circuit Court of Appeals. Our motion seeking an extension of time has been granted. I need your help preparing for the hearing.

Please **write me a 1000-word memo** that **identifies, analyses, and prioritises the legal positions of any parties who could reasonably claim ownership** of the fossils. **Explain the doctrinal basis, legal authorities, and policy arguments** that might support such claims. Given your time constraints, you do not need to conduct research beyond the materials and readings assigned in your recent property law course.

Organization was one of the keys to successfully answering this question. Some students organized it by issue (*e.g.* finders, minerals, subsurface rights, conditional transfer, etc.), but

most organized it by claimant (*e.g.* Seversons, Murrays, Phipps, etc.). Either worked, but the latter was more responsive to the memo requested. The most common problem with students' answers was a lack of thoroughness; most students missed at least one or more of the major nuances to this problem.

The claim of George Severson—the *former* lessor to the Murrays, and then vendor of the property to his sons Jerry and Robert Severson jointly with Lige and Mary Ann Murray—is weak. He is analogous to Canadian Pacific Railway Company in *Trachuk v Olinek*. Jerry and Robert Severson's claims are not possible to assess separately from each other without more information, such as the nature or proportions of their joint ownership interests. Having sold the surface rights to the Murray's their claim depends on establishing that the bones are minerals. Students should have applied (not just described) the vernacular test, the purposes and intentions test, or the exceptional occurrences test.

The Murrays' claim, similarly inseparable, may be the most complex. First, they must establish valid ownership of the surface. That depends on whether the transfer of title—conditional on information sharing—was valid. The best students identified this as a condition subsequent, as opposed to a condition precedent or determinable limitation. A full analysis of all possible grounds of invalidity was not needed; strong students realized that if a condition subsequent is invalid, it is ignored and the Murray's take the surface rights absolutely. However, the Murray's claim to the bones also depends on the bones being soil not minerals. Furthermore, the Murrays would need to further establish not just ownership but possession of the area where the bones were found. While sufficient facts to make that determination are not provided, students were rewarded for knowing which specific facts *would* matter. For example: was there a fence separating the Murray's homestead from the rest of the property, or other indicia that the Murray's did not intend to possess (or intended not to possess, like in *Trachuk*) the area where the bones were found? Yet another issue is whether the bones were found at a depth that falls within the surface owners' rights, *i.e.* pursuant to the *cujus es solum* maxim. Under any interpretation, even a non-literal one, this seems indisputable. The bones were found "protruding through rock", so based on *Didow* (and *Edwards v Sims*), there's little doubt that the subsurface at this depth is within the "actual or potential use and enjoyment" of the land.

Two finders might make a claim. Phipps "made the discovery" but Horner "led the expert team that chiselled and dug". Students should have applied cases such as *Perry v Gregory*, as well as *Bird v Fort Francis* and *Baird v BC*. An analogy to Olinek's crew could also have been drawn. Students should have also noted that Horner would likely be a finder for his employer, Montana State University, based on the rules stated in *Parker v British Airways*.

There are possible grounds on which the public, or a public institution might make a claim. Dinosaur bones are not like human bones and artefacts at issue in *Charrier v Bell*. However, bones could be considered historical resources; it would be necessary to investigate whether Montana has legislation similar to Ontario's *Heritage Act*, and if so, whether and how it applies.

A strong policy argument could also be made that these bones should not be privately owned at all. This argument would be based on concerns as expressed by Smithsonian director Kirk Johnson, potentially drawing on Justice Logan's dissent in *Edwards v Sims*. Expropriation of property rights by the government could, I suppose, have been an option to promote public access to them. But expropriation and/or the constitutional protection of property was not one of the real issues that students should have spent time discussing. It's also irrelevant whether dinosaurs are patentable "higher life forms".

AND/OR

6. On November 27, 2018, the House of Commons Standing Committee on Canadian Heritage (CHPC) continued its hearings into "Remuneration Models for Artists and Creative Industries". The study is part of an ongoing Parliamentary review of the *Copyright Act*, considering whether and, if so, how copyright law should be updated.

Scott Robertson, President of the Indigenous Bar Association (IBA), was one of the witnesses who testified during the November 27 Committee meeting. The 7-minute audio recording of Mr. Robertson's testimony can be heard ~~by double-clicking the icon on the left, or~~ by visiting this link to the Committee hearing, starting at 12:39:11. (Or you can type the link https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/meeting-133/minutes into a web browser, and click the link "Listen on ParlVu" in the green box on the top right of the minutes.) The recording captures his speaking notes almost verbatim:

INDIGENOUS BAR ASSOCIATION
ASSOCIATION DU BARREAU AUTOCHTONE

Thank you, Madam Chair and members of the committee, for the opportunity to speak with you today. I would like to begin by acknowledging the Algonquins' unceeded territory on which we gather and call upon their laws and teachings to guide us in our discussions.

My name is Scott Robertson and I am a Haudenosaunee from Six Nations of the Grand River. I am a practicing lawyer and the president of the Indigenous Bar Association. The IBA represents a membership of Indigenous lawyers, scholars, law clerks, judges and elders from across Canada. Our mandate is to promote the advancement of legal and social justice for Indigenous Peoples in Canada in addition to promoting the reform of policies and laws affecting Indigenous peoples. It is on this basis that I will address the remuneration of artists specifically those issue relevant to Indigenous artists.

One of the overarching principles of the Canadian Copyright Act, is to ensure that creators receive a just reward for the use of their works. Many of the interveners who have appeared before your Committee have eloquently expressed the need to fairly compensate artists for their efforts. As we have heard there are many good reasons for doing so and Canada has much to learn from the rest of the world to assist in accomplishing this goal.

Copyright emphasizes a Western legal tradition of protecting individual property rights and frames those rights as artistic endeavors. Not all Indigenous nations share in this fundamental concept of intellectual property rights.

It is important to be clear Indigenous artists and creators are entitled to the same protections as all other artists. However, there is a further complexity to be considered when examining the endeavors of Indigenous artists.

What may seem to be a purely Indigenous artistic endeavor may actually be a form of medicine, astronomy, ecology or geography. These essential teachings are sometimes recorded in story, dance, painting and other so-called creative forms. Canadian law needs to create space to ensure these teachings are protected not just for the creative and artistic pursuits/purposes but also for the knowledge and laws that are passed on.

Canada was founded on three legal traditions: common law, civil law, and Indigenous law. Despite this multijuridical founding, Indigenous legal traditions have been largely ignored in many areas of Canadian law and in some cases Indigenous peoples have been prosecuted for living their laws.

Missionaries, government agents, anthropologists, art historians, art collectors and others have all played a role in first defining, subjugating and then appropriating the tangible and intangible cultural heritage of Indigenous peoples.

As set out by Robin R. Gray, while some form of appropriation between cultures occurs at a basic level, appropriation of Indigenous cultural heritage in the context of settler colonialism has almost always been about power—the power to produce knowledge about Indigenous cultures, the power to control the means of knowledge production and the power to set the terms of its use-value within society.

On the west coast of Canada, the appropriation of totem poles in the market economy occurred at the same time that government agents and others were confiscating Indigenous cultural heritage. Between 1884 and 1951, the Potlatch

Ban in Canada created the conditions to support the mass expropriation of Indigenous cultural heritage.

While Indigenous peoples were being prosecuted for practicing their laws, non-Indigenous peoples were commodifying their cultural heritage, like the totem pole, for monetary gain. In so doing, the totem pole has been taken out of context through displacement, through the Western curatorial practice of preservation and through the misrepresentation of its image as a symbol of primitive and universal Indigeneity or as an icon of Canadian identity.

Residential schools have also had a devastating impact on impairing the intergenerational transfer of cultural expression within Indigenous communities further reducing the power to produce knowledge. Professor Heidi Bohaker, an ethnohistorian from the University of Toronto shares her experiences of Anishinaabe women crying when they see for the first time the repatriated items of their ancestors and an acknowledgment of their diminished knowledge and skills.

All Parliamentarians and this Committee in particular, have a role to play in ensuring that those laws which may potentially impact Indigenous peoples and their cultural expressions are fully canvassed and resolved, with a view to advancing reconciliation and further ensuring the power balance to control the means of knowledge is restored.

There is a concern amongst some Indigenous communities that intellectual property rights in themselves may cause harm to Indigenous peoples. As stated by Tirso Gonzales:

“Intellectual property rights (IPRs) are a product of the logic and the interests of the states and corporations, which have historically been responsible for the cultural, economic, political, and physical violence visited upon indigenous peoples. The question of IPRs has its origins outside indigenous culture and it arises as but one element of the renewed assault against indigenous peoples represented by the promulgation of new economic regimes... the possibilities and prospects for the persistence of social collectivities based on ethnic and cultural affinities in a modern world in which states and corporations seek to homogenize or destroy them.”

In order to address these historical wrongs and to foster support for Indigenous artists that respects and honors their laws and concepts of intellectual property this committee should undertake a wide meaningful consultation with Indigenous peoples. Artists who generate creative works need to be consulted

> to determine the kinds of protections and amendments needed to ensure they have the power to control their knowledge. Failing to do so may lead to untoward and inappropriate taking of knowledge under the guise of artistic reinterpretation.
>
> In closing, I would like to draw upon the teachings of Professor John Borrows who in considering whether western Intellectual property rights may actually provide protection of Indigenous knowledge stated the following:
>
> "In the end, what may simplify the challenge is that the debate that must occur is not about the validity of the norms currently advanced by intellectual property law; it is about whether they should be the exclusive values brought to bear on the protection of Indigenous knowledge and cultural expression. In the context of the traditional knowledge protection debate, adopting a methodology that does not discount Indigenous values from the outset is surely the first step in avoiding procrustean outcomes that will neither avoid unfair appropriation nor help to protect Indigenous cultures."
>
> There is much work to be done by this Committee to reconcile Indigenous laws and to give voice and expression to those Indigenous principles that protect the transfer of knowledge and art in a loving and respectful manner.
>
> We have a path forward, we just need the courage to walk it.
>
> The IBA would like to thank the committee for the opportunity to speak with you today and would be pleased to answer any questions you may have on this important initiative.

Following the Committee meeting, the IBA has sought our firm's help to strategically develop its policy position on the protection of Indigenous Peoples' rights to traditional knowledge and cultural expressions.

Please prepare the first draft of a **1000-word position paper** setting out arguments on two property-related aspects of this matter. You may find it more efficient to address the two aspects simultaneously, or sequentially; it is up to you. **First, what property-related theories, concepts, and policies best justify** the protection of Indigenous Peoples' traditional knowledge and cultural expressions. Are there counter-arguments and, if so, how can they be rebutted? **Second, what property-related legal doctrines are best suited to implement** appropriate protections? How, if at all, could (or should) specific property rules for various kinds of rights or title be reformed to suit traditional knowledge and cultural expressions?

Most students organized their answers to the question's two parts sequentially, clearly separating the conceptual and doctrinal issues. It was, in my opinion, more difficult (but not impossible) to organize an excellent answer by conflating the two parts of the question. Even where the issues were treated separately, however, the best students benefited from a clear introduction and an integrated conclusion. The best students also took seriously the instruction to prepare a draft of a position paper; students who did not do as well tended to spill out an exam answer not in the form of a draft paper.

A differentiator between the strongest and weakest answers was the depth of analysis. While some students merely described general theories supporting private property rights, others tested those theories specifically against the perspectives of Aboriginal Peoples and Indigenous law (as explained, for example, in *Nanabush v Deer*). It was obvious to mention natural rights-based personhood theories such as Hegel's and Radin's, explaining how cultural expressions can define Indigenous communities. Ideally, however, students also compared and contrasted aspects labour/reward theories—but specifically not in the abstract (that is what was meant by responding to counter-arguments). There was ample fodder to base that analysis on, for example comparing cases like *INS v AP* and *Théberge* to *Delgamuukw* and *BulunBulun*. Some students astutely discussed variants of economic theory as well, contrasting work by Posner and Ostrom for example. As well as theories and concepts of what property is, some students mentioned the policy objective of reconciliation for historical injustices done to Indigenous Peoples as a justification for better protecting traditional knowledge.

Depth of analysis also differentiated students on the doctrinal aspect of the problem. At minimum it was necessary to explain how particular rules of intellectual property fit, or don't fit, Aboriginal perspectives on traditional knowledge and cultural expression. Reference to the relevant statutes (the *Copyright Act*, the *Patent Act*, the *Trade-Marks Act*) and case law (*Théberge*, *Schmeiser*, *Mattel*) was an easy way to add depth, which unfortunately not all students did. Applying those statutes and cases specifically to the different kinds of knowledge and expressions (medicine, astronomy, ecology, geography, story, dance, painting, totems, etc.) that Mr. Robertson discussed took a few students up to the next level. Doctrinal rules that could've been discussed included term, formalities (*i.e.* automatic or application), authorship/inventorship, protected rights, and infringement/defenses. The challenge in the question, however, was to not stop there, but to attempt to integrate those doctrinal rules with the rules of governing section 35 Aboriginal rights. The best students considered whether and, if so, how the *Van der Peet* or *Tsilhquot'in* tests for protecting Aboriginal rights generally, or title specifically, might already protect traditional knowledge and cultural expression.

If you did not do well on this question, the chances are you didn't thoroughly or accurately explore many of the nuances mentioned above.

AND/OR

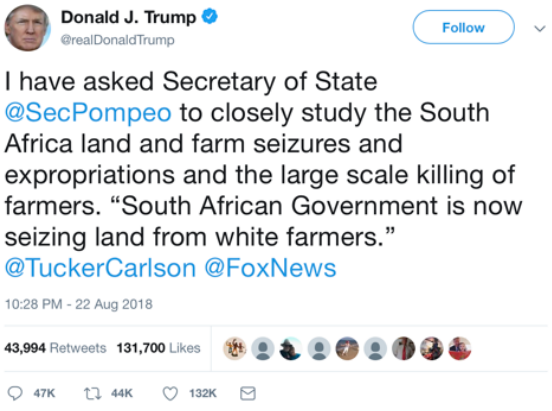
7. In August 2018, the news and analysis site Foreign Policy published the following:

Trump Angers South Africa With Missive on Land Redistribution

Vincent Smith, the chair of South Africa's parliamentary committee on proposed constitutional amendments regulating land expropriation, speaks in Cape Town on Aug. 4. (Rodger Bosch/AFP/Getty Images)

By Robbie Gramer

President Donald Trump barreled into one of South Africa's most racially charged political debates with a tweet late Wednesday, drawing a rebuke from the government there and leaving the U.S. State Department to deal with the consequences.



Trump was referring to an announcement by South Africa's ruling African National Congress that it sought to change the constitution in order to redistribute land and bridge deep inequalities stemming from decades of white minority rule.

It was one of Trump's first tweets on Africa since he took office. It quickly posed a challenge for the State Department's new top diplomat on Africa, Tibor Nagy, who took up the position of assistant secretary of state for African affairs several weeks ago after it had sat empty since Trump entered the White House. Trump also has yet to nominate an ambassador to South Africa.

On Thursday, the South African government criticized Trump's tweet, saying in a statement that it "totally rejects this narrow perception which only seeks to divide our nation and reminds us of our colonial past."

State Department spokeswoman Heather Nauert said Secretary of State Mike Pompeo had discussed the issue with the president, but she offered no additional details on what action Pompeo would take next.

"We continue to encourage a peaceful and transparent public debate about what we could consider to be a very important issue in South Africa," Nauert added.

One of the legacies of the Apartheid system is a profound inequality in land ownership. White South Africans comprise less than 10 percent of the country's population but own some 72 percent of its agricultural land, according to data from the farm research group Agri SA.

The prospect of land redistribution and the specter of violence against white farmers have become rallying cries for far-right political groups and white nationalists in South Africa and the United States. Multiple studies have ruled out the suggestion that white farmers in South Africa would face mass violence in the process.

The State Department's 2017 annual human rights report makes no mention of land seizures but does highlight racially motivated violence as an issue in the country.

Nauert, the State Department spokeswoman, said expropriation without compensation "would risk sending South Africa down the wrong path."

The South African government insists that its land redistribution measures are not about invading and seizing land but about expanding opportunities for black South Africans to take over agricultural land that is currently lying fallow.

But critics of the policy look warily toward the example of neighboring Zimbabwe. In 2000, Zimbabwean President Robert Mugabe sent the national economy into a tailspin when he forcibly expropriated land from white Zimbabwean farmers and handed it to his political allies, sparking food shortages, long-term economic strife, and historic levels of hyperinflation.

"This is a super complex and evocative and difficult issue ... for South Africa," said Joshua Meservey, an Africa expert at the Heritage Foundation, a Washington-based think tank. "There clearly needs to be land reform in South Africa, but it needs to be done in a responsible and fair manner."

Jennifer Cooke, the director of George Washington University's Institute for African Studies, said Trump's tweet will only exacerbate racial and political tensions in South Africa. "It will fuel the populist elements that are looking for much faster redistribution of land, and it will fuel the white extremists" energized by attention from the U.S. president, she said.

This is the second Africa-related controversy Trump has stirred up. In January, he reportedly referred to African nations as "shithole countries" in an Oval Office outburst. African leaders widely condemned Trump for the remark.

The tweet added to a growing perception in Washington that Trump gives little thought or attention to the continent.

But Meservey said that would be nothing new. "Africa is never really a priority for any administration. That's just a reality of American foreign policy," he said

In case you can't recall, the roughly 7-minute Tucker Carlson tonight clip that provoked President Trump's tweet can be viewed by clicking on the screenshot to the left or entering this URL into a web browser: https://youtu.be/EThwj4NtnvU.

One of our firm's clients is the Managing Director (MD) of a right-wing policy think tank operating in Canada and the United States. The MD is having difficulty explaining to her think tank's audiences—including multinational corporations, moderate conservative politicians, and centre/right-leaning members of the generally informed public—the nuances behind Tucker Carlson's reporting and President Trump's tweet. She has sought our firm's help articulating for her audiences a less inflammatory explanation of the applicable property laws and principles.

Please prepare the first draft of a **1000-word report comparing the South African, American, and Canadian legal contexts** surrounding this issue. The report should **explain the relevant constitutional provisions** governing property rights, connect those with **prevailing political ideologies** about property, and discuss property-related **social and economic challenges** associated with each system. Bear in mind the client's intended purpose and audience for this report, and tailor the tone and content accordingly.

Specificity of analysis and responsiveness to this question separated students' performance. It was not sufficient to merely describe the sections (or lack thereof) relating to property rights in constitutions of the three countries named. Anyone could do that by transcribing content from the casebook and notes. The question required students to explain the provisions. Explaining, as opposed to describing, the provisions means putting them in context. It was necessary to provide some analysis of why certain countries take certain approaches.

On that point, the question specifically asked for commentary on property and political ideology, which invited discussion of the role of property rights in the relationship between the state and individuals. Some of the strongest students discussed, for example, the ideological belief that property is the basis of individual liberty, which raises difficult problems of (in)equality and the (re)distribution of wealth. That led strong students into a discussion of social and economic challenges. I was, frankly, disappointed by how few students tackled the intersection of property and race. That's the issue addressed (rightly or wrongly) at the heart of Tucker Carlson's reporting. I thought it would've been impossible for students to ignore that dimension of the question, but I was proven wrong after reading some of the weaker answers.

Many (too many) students took this question as an invitation to describe the law of regulatory (*de facto*) takings. While the contrasting American and Canadian case law could help to explain the different attitudes and ideologies, students were not rewarded for merely reciting the cases. I was also disappointed by students who failed to write a report for the specific audiences this client needed to reach. The best students stood out by doing what was asked.

AND/OR

8. In March 2018, the Canadian Press reported the following:

Custody battle over dog turns on legal definition of pets as personal property

Newfoundland couple David Baker and Kelsey Harmina began a custody dispute over their Bernese mountain dog-poodle mix after their breakup in a case that ended up in the province's Court of Appeal.

By The Canadian Press

ST. JOHN'S, N.L.—In a case that divided Newfoundland and Labrador's top court over what constitutes pet ownership, a man has been awarded sole custody of a dog following a breakup with his girlfriend.

David Baker and Kelsey Harmina of St. John's purchased Mya, a Bernese mountain dog-poodle mix, in October 2014.

After the couple split, they fought over custody of Mya in a case that eventually made its way to the province's Court of Appeal.

First, a small claims court judge determined that Baker was Mya's sole owner, saying that the law considers dogs personal property and that Baker paid for Mya.

Harmina appealed that decision, and a provincial Supreme Court judge found the small claims judge didn't consider the full context of the relationship, concluding Mya should be owned jointly.

Baker then appealed that decision, and in a recently released ruling two of three Appeal Court judges agreed that the man is the dog's sole owner, saying the small claims judge was right to rely on the traditional approach to determine ownership.

Two of three judges agreed that the dog in a custody dispute should go to just one of its original owners, saying a small claims judge was right to rely on the traditional approach to determine ownership. (DREAMSTIME)

"In the eyes of the law a dog is an item of personal property," Justice Charles White said in the panel's written decision, which was supported by Justice Michael Harrington.

"That doesn't mean dogs aren't important. It means that when two people disagree about who should get a dog, the question is not who has the most affection for the dog or treats it better (so long as both parties treat the dog humanely). The question is who owns it."

But the third judge dissented, saying the pair should have joint custody, because people often form strong emotional relationships with their pets.

Justice Lois Hoegg said she believes ownership of a dog involves much more than a determination of who paid for it.

"Ownership of a dog is more complicated to decide than, say, a car, or a piece of furniture, for ... it is not as though animate property, like a dog, is a divisible asset," she wrote.

"Dogs are possessive of traits normally associated with people, like personality, affection, loyalty, intelligence, the ability to communicate and follow orders, and so on. As such, many people are bonded with their dogs and suffer great grief when they lose them."

Mya came to Newfoundland from an Ontario kennel in 2014 and was greeted at the airport by Harmina. Baker was in Alberta and worked 14 days out of every 21, and Harmina took care of Mya during those times.

Hoegg noted the couple made decisions about the dog together, and that the woman signed for the dog at the airport, took care of the dog and contributed to other expenses.

"The ownership of a dog is a more complex and nuanced question than the ownership of, say, a bicycle," she said. "People acquire personal property all the time, usually solely but sometimes jointly, with others, and in doing so, pay little attention to legal rules respecting exactly who is acquiring title to the property."

White wrote that if the couple was given joint ownership, it could create more problems.

"An order for sharing does not end the conflict," he said. "Instead, it creates a regularly scheduled opportunity for conflict that recurs for the rest of the dog's life."

While the aspects of the case regarding property rights in animals received the lion's share of media attention, the case also raised other property issues. The reported judicial decision in *Baker v Harmina*, 2018 NLCA 15 (CanLII), <http://canlii.ca/t/hqtpk> includes the following:

> [5] Finally Mr. Baker sued Ms. Harmina in small claims court, seeking an order that she return Mya to him. He said he owned Mya outright: he'd made the arrangements with the breeder, he's paid for her purchase and most of her expenses, and he'd never given Ms. Harmina a share of the dog.
>
> [6] Ms. Harmina's position was that Mya was jointly owned. The decision to buy a dog was a joint one and depended on her availability. Mr. Baker did not pay for Mya alone. There were a number of e-transfers back and forth between them around the time of the purchase, for example in relation to a couch for the new apartment. She had spent more time with Mya, had acted more like a primary owner, and had also paid for some ongoing expenses.

[7] After fully considering and weighing all the evidence, the small claims judge concluded that Mr. Baker bought Mya alone and for himself. While Ms. Harmina advanced part of the purchase price, she did that on Mr. Baker's behalf, as he was having difficulty with his on line account. She was fully reimbursed the funds she advanced. Later Ms. Harmina took care of Mya and became close to her but she never acquired a property interest in her by gift or purchase. Mr. Baker remained Mya's sole owner.

[8] Ms. Harmina appealed to the Supreme Court Trial Division. The appeal judge found that the small claims judge had erred in deciding ownership without having regard to the full context of the parties' relationship. She concluded that the parties owned Mya jointly and ordered that Mr. Baker should keep her while he was in town and Ms. Harmina the rest of the time. …

[17] At first glance, this case seems to pit traditional legal doctrine against social realities. The small claims judge's approach reflects the traditional theory that property only changes hands through deliberate transactions, particularly gifts or purchases. The appeal judge's approach seems more sensitive to the way in which, over the course of a romantic and domestic partnership, "my" dog can become "our" dog, without any explicit moment of gift or purchase.

[18] The appeal judge's approach significantly loosens the traditional requirement that a party who claims joint ownership should point to a particular transaction where ownership changed hands. The Court should be open to modifying legal doctrines to reflect social realities, but it should not do so without considering the practical implications of the change. …

[27] The small claims judge was right to rely on the narrower traditional approach to determining ownership. I would uphold his conclusion that Mr. Baker is the sole owner of Mya. …

[29] This case was presented as a dispute about pet ownership, but it can equally be seen as a dispute about the fair division of assets among unmarried partners. …

[30] The appeal judge approached the problem of fair distribution by taking a flexible approach to the legal ownership of particular assets within cohabiting relationships. The currently accepted approach is quite different. The legal ownership of individual assets is determined by the traditional narrow legal rules: the couch I bought is mine, and the money in

> your chequing account is yours. But afterwards the courts look broadly at the whole picture through the lens of unjust enrichment. If one party is capturing an undue share of assets, the court orders compensation; if one party is walking away with individual assets that ought to be jointly owned, the court orders a constructive trust. …
>
> [31] The substance of Ms. Harmina's claim fits neatly within the unjust enrichment framework. Mya was originally bought by Mr. Baker, but Ms. Harmina cared for her, fed her, walked her, trained her, and gave her affection. This work conferred a benefit on Mr. Baker at Ms. Harmina's expense. It is at least arguable that this constitutes unjust enrichment and that the basic requirements for a constructive trust are met. …
>
> [32] Nevertheless, assuming that a case for unjust enrichment is made out, I would not impose a constructive trust on Mya in this case. (I do not want to decide this issue, for reasons that will appear below). A constructive trust remains a discretionary remedy, and for the reasons above it would not be appropriate to exercise the court's discretion to force Mr. Baker and Ms. Harmina to share a dog.

The NLCA declined to decide whether there was any unjust enrichment because it held that, regardless, a small claims court does not have jurisdiction to award equitable remedies such as a constructive trust.

Although the deadline for an application for leave to appeal the NLCA's decision to the Supreme Court of Canada has passed, Ms. Harmina has approached our firm for advice. I have assigned a second-year student to research the rules of civil procedure to determine whether the leave application deadline can be extended somehow, and to research the issue of the jurisdiction of small claims courts. Meanwhile, I need your help with the property-related aspects of this case.

Please **write me a 1000-word memo** that covers two broad issues. **First, on what conceptual, theoretical, and policy grounds can we argue on Ms. Harmina's behalf that Mya cannot be owned**, i.e. the object of a property right? Are there legal authorities we can analogize or distinguish on that issue? **Second**, assuming that we fail in our argument that Mya cannot be owned, **analyze the strength of our claim for a constructive trust**. (To repeat: ignore the jurisdictional issues that I have another student researching for me.)

The analysis of the first issue – could/should a dog be "owned" involved a combination of "what" and "why" questions. It was unhelpful to rehash the single-variable, multi-variable, nominal conceptions of the concept of property in the abstract. It was also unhelpful to cite, in the abstract, various justifications for private property. The best students applied those concepts and justifications to animals in particular, and more specifically family pets. In exploring moral,

economic, or other arguments that pets should or shouldn't be owned as property, students who did well drew analogies or distinctions with body parts, news, domain names and other cases involving novel property claims.

Some students wisely noted that pets already are treated as property, so the question is really about whether courts or legislators ought, or ought not, change the law on that point. In exploring the status quo of property rights in animals, strong students also clearly distinguished ownership from possession, and pets from wild animals, as discussed in cases including *Yanner v Eaton*, *Pierson v Post*, and *Nakhuda*, to name just a few. Students who did not do as well tended to conflate those topics and/or inaccurately discuss the relevant legal doctrine.

The second part of the question required a full analysis of the law of unjust enrichment and the remedy of constructive trusts. That meant starting by identifying the common law and equitable principles governing this case, *i.e.* not the *Family Law Act*, because these two partners were not married spouses. Students who did poorly on this question merely stated the three-step test for unjust enrichment, without actually applying that test. Applying the test was not simple because there are many facts we simply don't know from the report or the judgment. The trick in that situation, which the best students used, is to give examples and counter-examples. Hypothetically, what additional facts would support a finding of enrichment? Deprivation? What facts would change that conclusion? It is not enough to simply transcribe the requirement that there be a lack of juristic reason, e.g. contract, gift, statute, etc.. The best students applied the law to determine, for example, whether or not there was a gift in these circumstances (*i.e.* as you know: intention to give, intention to receive, delivery).

The cause of action (unjust enrichment) was only half the problem. The next issue is whether the remedy should be monetary or proprietary, and in either case whether the value should be *quantum meruit* or a proportionate sharing of the wealth gained through a joint family venture. As with the cause of action, students were required to not just state but actually apply these doctrinal rules.

THE END.

Some final remarks: you have individualized feedback on your exam via the detailed marking rubric, which is now released on Brightspace. I would like to elaborate on that rubric to more fully describe the criteria associated with different levels of performance. For example: "accuracy" involves not only an assessment of errors but of errors and also omissions. Similarly, "responsiveness" requires not only avoiding irrelevant materials, but also engaging with sufficient details of the issues you identified. Being "concise" and "organized" requires appropriate succinctness and structure, *i.e.* answers scored low were often too concise or organized too simplistically.