

PROPERTY 1108(D) FINAL EXAM

PROFESSOR DE BEER

WEDNESDAY, 12 DECEMBER 2012, 09:00 – 12:00 (**180 MINUTES**)

IN **PART I**, YOU MUST ANSWER 3 OF 5 MULTIPLE CHOICE WITH BRIEF EXPLANATION QUESTIONS.

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

IN **PART II** YOU MUST ANSWER 3 OF 5 ANALYTICAL PROBLEMS OR ESSAY 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 MUST WRITE LEGIBLY AND DOUBLE-SPACE ANSWERS IN INK.

YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

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

THIS EXAM IS **WORTH 75%** OF YOUR FINAL GRADE IN THE COURSE.

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STUDENT # _____

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

Part I

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

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Part II

Option 1												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 2												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 3												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Total Score Part II (÷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 5 QUESTIONS IN THIS PART, WHICH IS WORTH 30% OF THIS EXAM. BRIEFLY EXPLAIN YOUR ANSWERS.

1. Section 2 of *The Water Rights Act*, C.C.S.M., c. W80, states:

Except as otherwise provided in this Act, all property in, and all rights to the use, diversion and control of, all water in the province, insofar as the legislative jurisdiction of the Legislature extends thereto, are vested in the Crown in right of Manitoba.

Which of the following legal conclusions based on this provision is most accurate, and why?

- a. The maxim *ad medium filum aquae* does not apply in Manitoba.
 - b. The Crown's "property" rights in water include no more than the various rights of regulatory control established by legislation.
 - c. Bottled water cannot be owned in Manitoba.
 - d. The Crown has extinguished common law Aboriginal title to waterways in Manitoba.
-

2. A client, Floyd, currently resides in the Ukraine and contacts you for legal advice regarding the following clause from his late father's will. His father resided in Ontario, and owned property in Ontario.

"... to my son Stewart all my estate, real and personal, of whatsoever nature and kind and wheresoever situate to be his absolutely subject only that should my son Floyd decide to return to live here, that a lot of land of three acres along highway No. 2 be transferred to him."

Which statement best reflects the legally correct interpretation of this clause, and why?

- a. On the basis of *Unger v. Gossen*, the portion of this clause pertaining to Floyd is impossible, and therefore unenforceable. Stewart's contingent interest is also void.
 - b. On the basis of *Hayes v. Meade*, the portion of this clause pertaining to Floyd is too uncertain to be enforceable. Stewart's vested interest is therefore absolute.
 - c. On the basis of *Caroline v. Roper*, the portion of this clause pertaining to Floyd creates a determinable limitation, which violates the common law rule against perpetuities.
 - d. On the basis of *Thomas v. Murphy*, Stewart would receive only a life estate because the clause fails to include the magic words "and his heirs".
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3. Justice Ross' decision of British Columbia Supreme Court's in *Victoria (City) v. Adams* is most consistent with which of the following, and why?

- a. Professor Ellickson's proposed prohibition on causing a chronic nuisance anywhere but "red zones".
 - b. Justice Teitelbaum's reasons in *Michelin v. C.A.W.*
 - c. Professor Waldron's argument that everyone must "be" somewhere.
 - d. Justice Dickson's reasons in *Harrison v. Carswell*.
-

4. Which of the following strategies would you recommend to a terminally ill client who wants to give \$50,000, currently deposited in a bank account, to an adult child for the child's immediate use, and why?

- a. Add the child's name as a joint owner of the bank account.
 - b. Give the child your ATM card.
 - c. Establish an express testamentary trust for the benefit of the child.
 - d. Withdraw cash from the account, and deliver the cash to the child.
-

5. Which of the following statements best reflects Canadian property law, and why?

- a. Based the "finders keepers" principle applied in *Trachuk v. Olinek*, a finder of lost property has better rights than anyone in the world except the owner of land on which the property was lost.
- b. Based on the interpretation of the maxim *cujus est solum* in *Didow v. Alberta Power Ltd*, a landowner's property rights extend into airspace at any height that the owner has a reasonable possibility of licensing.
- c. Based on the doctrine of tenants' fixtures and the court's ruling *Diamond Neon*, chattels attached to land or buildings become the property of the landlord a reasonable time after the end of a lease agreement.
- d. Based on the Supreme Court of Canada's ruling in *R. v. Bernard* and *R. v. Marshall* Aboriginal Peoples whose ancestors were nomadic cannot successfully prove the existing of common law aboriginal title.

II. ANSWER 3 OF 5 QUESTIONS IN THIS PART, WHICH IS WORTH 60% OF THIS EXAM.

1. On December 4, 2012, The Huffinton Post republished the following article:

Could Selling A Used Book Be Illegal?



Most of us have probably sold an old book at a yard sale, on eBay, given it to a library, or some such thing. We probably never gave it a second thought. Maybe we need to. Maybe we are criminals.... A case has come before the Supreme Court that could turn some of our assumptions upside down....

This issue arose from the brainchild of Supap Kirtsaeng, a student from Thailand attending college in America. He noticed textbooks are very expensive in America, and he was not a wealthy young man. However, he recalled that textbooks were much cheaper in Thailand, so he wrote to his family and asked them to see if they could find cheaper versions of the school books he needed back home. Indeed they could. American book publishers frequently print identical or very similar editions of the books they publish in America and sell them for much lower prices overseas.

Mr. Kirtsaeng saw the light. Not only was he struggling with the high cost of books, but so were his fellow students. So, he asked his family to send him a whole bunch of books from Thailand. He began selling them in

America, posting the books on eBay. He could sell them to American students for a lot less than they could buy them at the student bookstore, while still making a tidy profit for himself. Mr. Kirtsaeng was happy. Students were happy. John Wiley and Sons (publishers) was not. They sued Mr. Kirtsaeng.

... Wiley sued and won. Mr. Kirtsaeng was ordered to pay \$600,000. ...

Now, this case has made its way up to the Supreme Court, and there are many parties looking to overturn the verdict. The consequences are wide-ranging. One such group is called the "Owners' Rights Initiative," and its motto is "if you bought it, you own it." ... There are also many technology vendors, as the same issue arises with high-tech gadgets purchased overseas. ...

The Owners' Right Initiative describes the potential consequences this way: "If the Court rules in favor of Wiley, libraries may be unable to lend books, individuals could be restricted from donating items to charities, and businesses and consumers could be prevented from selling a variety of products, from electronics, to books, to jewelry, to used cars."

Could selling your used Mercedes or Toyota be a copyright violation? ...

For its part, Wiley argues that there is a good reason for textbooks to be sold at lower prices in certain foreign markets. The reality, they say, is that students in poorer countries simply cannot afford American textbook prices, which would deny these students access to books. ...

Based on the cases and materials studied in our property law course, what would the legal outcome of the case described above be in Canada? How might your legal analysis change if Mr. Kirtsaeng used the publisher's name, John Wiley and Sons, in his advertisements on eBay? How might your legal analysis change if the objects at issue were not books but were instead high-tech gadgets or automobiles? Be sure to address all three questions posed, and specify any other factual assumptions relevant to your legal analysis.

2. The following opinion was published in the National Post in August 2012:

The time is ripe for First Nations land reform



Ryerson University professor Dr. Pam Palmater: “The quickest way to get that Enbridge pipeline through our territory would be to divide up those lands into individual parcels because it would be a lot quicker to pick off individuals.”

This week, the federal government confirmed that it is working on legislation to allow the ownership of private property on First Nations reserves. Some aboriginal leaders, such as former chief Manny Jules, who heads the First Nations Tax Commission, applauded the move. But others see ulterior, sinister motivations at work, as Dr. Pam Palmater, a Mi'kmaw professor in the Indigenous Studies department at Ryerson University in Toronto, told Postmedia News' Teresa Smith. “The quickest way to get that Enbridge pipeline

through our territory would be to divide up those lands into individual parcels because it would be a lot quicker to pick off individuals — especially the impoverished ones. And then, if one neighbour sees that an individual gets \$100,000 for his property, then what's someone else, a single mom, with three kids, living on welfare gonna do?”

One can scoff at Ms. Palmater's comments as a fear-mongering conspiracy theory, or one can look at the sum total of many incremental decisions by the Conservative government — streamlining environmental approvals, betting Canada's economic future on resource extraction, increasing the House of Commons seat count in the West — and say: Wait, maybe she's actually on to something.

To be fair, granting full property rights to residents of First Nations reserves is not a new issue in small-c conservative circles. For over a decade, advocacy groups such as the Canadian Taxpayers Federation have been calling for change. Former Conservative campaign manager Tom Flanagan co-wrote an award-winning book on the subject in 2010. Right-leaning newspapers such as this one have taken up the cause on its editorial pages. And within First Nations communities, native leaders such as Mr. Jules also support the concept.

There is also no doubt that granting First Nations people full property rights — the right

to buy, sell, mortgage, use and develop land – is a worthy cause. It would create an ownership culture, instead of the current system (in which reserve land is owned by the federal government, in trust for its Indian residents), which fosters dependency. It would free individual aboriginals from the too-often self-serving grip of band councils. At the same time, it would create responsible government, should those bands seek to tax property, by making them accountable to the property taxpayers they would then serve.

... In this case, the political will for change on the aboriginal file is being driven by a Western agenda, one focused on resource extraction, economic expansion, and the consequent increase of the West's political power.

The first motivation is resources. From a myriad of smaller mining and petroleum projects, to the mother of all deals, the Northern Gateway pipeline, industry wants easier, faster access. On Northern Gateway, Enbridge is facing opposition from First Nations despite offering a 10% ownership stake to bands whose land would be affected. Currently, a third of the 40 bands involved

have refused the offer. This would effectively block the pipeline, or create the needs for costly rerouting – unless the company could, for example, negotiate one on one with individuals who had property rights to their land, for the rights to run the pipeline through it.

The second motivation is demographics. ...

Which brings us to the third motivation: politics. The Conservatives know the NDP is going to fight them tooth and nail on aboriginal private property legislation, or anything seen to run contrary to the traditional aboriginal way of life. The file forms yet another element of the political divide – left-right, East-West, environmentalist-industry, Quebec-ROC – that is serving both the Conservatives and the NDP's interests (while leaving the Liberals out in the cold).

All of this is part of the long-term political game, which Prime Minister Stephen Harper plays so well. ... [S]ince the issue of aboriginal empowerment is tailor-made both for the West and the Tories, expect this government to pursue it with vigour.

In your opinion, are current debates about First Nations land reform driven more by political opportunity or principles of property law? In this or other contexts, do you believe there is much difference between the laws of property and politics?

3. Two years from you now, you have accepted a position as law clerk to a judge of the Supreme Court of Canada. She has asked you to prepare a legal memorandum analysing and commenting on the issues that arise from the following facts described in the judgment under appeal.

In April 1993, the respondent asked the appellant to come and live with him. That same month, the appellant together with her four children moved into the respondent's home near Perth, Ontario. At the time, two children of the respondent were living in the home. The parties continued to live together in a common law relationship for over 12 years, separating in June 2005. During this entire time the appellant acted as the wife of the respondent. She was a

stepmother to his children until 1997 while they remained in the home. As well, she cared for her own children, the last one leaving in 2000.

During the 12 years, the appellant cooked, cleaned, washed clothes and looked after the garden. As well, she worked on the Perth property, undertaking such projects as painting the fence, planting a cedar hedge, buying flowers and shrubs for the property and building a rock garden. She built a pig pen. She kept chickens for a few years, butchering and cooking them for the family. During the winters, the appellant shovelled snow, chopped wood and made kindling. The respondent did not pay the appellant for any of her work. Both the appellant and the respondent contributed to the purchase of groceries and household supplies, although the respondent contributed a greater share.

In the first year of the relationship the appellant did not undertake outside work and spent eight hours a day doing housework and work on the Perth property. In subsequent years, she took part-time work as a cook from June to October. During these months she worked some six hours a day at a rate of \$14.50 per hour. Except for one winter when she worked at a bakery, the appellant received unemployment insurance benefits in the winter months.

Throughout the relationship, the respondent worked on a more or less full-time basis as a grader operator. His work frequently took him out of town to various locations in Ontario.

Before he met the appellant, the respondent had lived in a common law relationship with another woman for five years. When she left his home he hired housekeepers. The last housekeeper he had before the appellant came to his home was paid at a rate of \$850 per month.

The trial judge accepted the appellant's testimony that the respondent had asked her to live with him because he needed someone to care for his two children. This need arose when the welfare authorities expressed some concern that the respondent left the children alone when he was working away from home.

When the parties met, the appellant had savings of \$1,000. In 1996, she used an inheritance from her father to purchase a property in Saskatchewan for \$120,000. She sold this property in 2000 for \$180,000 and purchased a property in Ontario for \$160,000. She used the remainder of the sale proceeds for a trip to Reno. At the time of trial, the appellant still owned Ontario property.

The respondent had purchased the Perth property in 1991 for \$80,000. Some \$9,000 was paid in cash and the balance of \$71,000 was secured by a mortgage. The respondent was able to pay off the mortgage in 1995. The estimated market value of the Perth property as of 2007 was \$230,000.

With the passage of time, the respondent began to drink heavily and became verbally and physically abusive to the appellant. As a result, the appellant moved out of the Perth home on June 7, 2005. At the time of the trial, she was on welfare and lived in a trailer court in Perth. The respondent by that time had retired and was living on a houseboat in the Niagara region. The Perth house was vacant.

The appellant has brought an action claiming that the respondent had been unjustly enriched over the years of the relationship as a result of the work which she performed in his home without payment of any kind. She sought to have a trust imposed on her behalf in respect of the Perth property or in the alternative, monetary damages as compensation for the labour and services she provided to the respondent.

Prepare your legal memorandum to the judge based on the facts above.

4. *Wired* magazine's blog "Threat Level" published the following report in April 2012:

Code Not Physical Property, Court Rules in Goldman Sachs Espionage Case



Sergey Aleynikov, wearing a baseball cap, leaves Manhattan federal court in February after his conviction for stealing Goldman Sachs' high-speed trading code was reversed. Photo: AP

Former Goldman Sachs programmer Sergey Aleynikov, who downloaded source code for the investment firm's high-speed trading system from the company's computers, was wrongly charged with theft of property because the code did not qualify as a physical object under a federal theft statute, according to a court opinion published Wednesday.

"Because Aleynikov did not 'assume physical control' over anything when he took the source code, and because he did not thereby 'deprive [Goldman] of its use,' Aleynikov did

not violate the [National Stolen Property Act]," the 2nd Circuit Court of Appeals wrote in its opinion. ...

Aleynikov had acknowledged that he violated the bank's confidentiality policy in downloading the source code from the company's computers, but he'd asserted that what he'd done was not a criminal act....

The judges ... addressed the government's argument that the code was physical property under a 1988 amendment to the NSPA. Prosecutors had asserted that the amendment reflected an intent by Congress to include the transfer and transmission of non-physical forms of stolen property in the law, thereby covering the theft of source code. But the judges rejected this claim, stating that the 20-year-old amendment clearly had been meant to cover the transfer and transmission of money, not the theft of source code in the computer age.

"We decline to stretch or update statutory words of plain and ordinary meaning in order to better accommodate the digital age," the judges wrote. ...

The Russian-born Aleynikov worked for Goldman Sachs until June 2009, when authorities said he siphoned source code for the company's valuable software on his way out the door to take a new job with another company.

Aleynikov, a naturalized U.S. citizen who emigrated from the disintegrating Soviet Union in 1991, earned nearly \$400,000 a year as a vice president with Goldman Sachs. He was arrested in July 2009 at the Newark Airport in New Jersey as he returned from a trip to Chicago to meet his new employers.

Authorities said he stole “hundreds of thousands of lines” of source code from Goldman Sachs in the days before he left the company, downloading various software from the Goldman Sachs network and transferring it to a storage website hosted in Germany, before trying to erase his tracks from Goldman Sachs’ network.

The software is used to make sophisticated, high-speed, high-volume stock and com-

modities trades and had earned the company “many millions of dollars in profits” each year, according to prosecutors. ...

Goldman Sachs only uncovered the theft after it began monitoring HTTPS transfers and saw a large volume of data leaving its network, according to court documents. The company initiated the monitoring after noticing suspicious activity on the network.

At the time of his arrest, Aleynikov acknowledged taking the code, but told FBI agents he only intended to collect open source software files on which he had worked, and that his collection of proprietary files on his last day of work had been inadvertent.

Based on the principles, cases and other legal materials studied in our property law course, would the outcome of a civil action by Goldman Sachs against Aleynikov be different than the criminal proceedings described in the article?

5. On November 12, 2012 *The Economist* published the following article:

Newspapers versus Google: Taxing Times



In 2009 Rupert Murdoch called Google and other search engines “content kleptomaniacs”. Now cash-strapped newspapers want to put legal pressure on what they see as parasitical news aggregators.

In Germany politicians are considering a bill to extend copyright protection to excerpts of newspaper articles appearing in search engines’ results, thus enabling publishers to collect payment for them. Google is the main target: some German newspaper executives say it benefits from showcasing their material in search results on its news aggregator, Google News. A similar bill has been proposed in Italy. French newspapers want the same. ... Austrian and Swiss publishers are thinking along similar lines.

Giving away the headline and first sentence of an article supposedly dissuades readers from clicking through to the newspaper’s website to read the entire story. Critics also say that lifting even snippets of articles means Google can sell advertisements alongside them on its

search platform (though Google News carries no ads).

But the benefit goes the other way, too. Google says it directs 4 billion clicks to news websites every month; perhaps as much as three-quarters of Google News users go on to read the full article. And newspapers can add a tag to their pages so that they do not appear in Google News. ...

Google has said that having to pay for articles could “threaten its very existence”. But its most likely response would be to remove pages from newspaper sites in the countries concerned from its search results. ...

The real issue behind all this, however, is the decline of traditional media. ... Google can hardly be blamed for the recession, declining readership, and slumping advertising revenue. ...

Even if some countries do get Google to pay up for using their headlines and some text from articles, it will hardly plug the holes in their newspapers’ revenues, or speed their

restructuring. Jan Malinowski, a media expert at the Council of Europe, says trying to get Google to pay for articles “is like trying to ban Gutenberg’s printing press in order to protect the scribes”.

The legal pressure may in any case be overtaken by changes in business models. Newspapers have mostly avoided charging users for reading articles in the hope of boosting visitor numbers to their websites. But thinking is shifting. Many of the Brazilian papers that opted out of Google News will launch paywalls next year, says Carlos Fernando Lindenberg Neto, president of the Brazilian newspapers’ association.

The emerging business model is now the metered paywall: a few free articles entice readers, but they must pay if they want more (a model used by The Economist and the New York Times, among others). Paywalls have doubled in America this year. ... Such ideas may work better than hoping for a cheque from Google.

Based on relevant principles, cases and other materials studied in our course, how should property law evolve, if at all, to address this issue?

The End.