PROPERTY 1208B FINAL EXAM

PROFESSOR J. DE BEER

FRIDAY, 25 APRIL 2008

9:00 – 11:00 (**2 HOURS**)

IN **PART I**, YOU MUST **ANSWER 4 OF 6** MULTIPLE CHOICE OR TRUE/FALSE QUESTIONS. PART I IS **WORTH 20%** OF YOUR GRADE FOR THIS EXAM (5% PER QUESTION: ANSWER = 2.5%, REASON = 2.5%).

IN **PART II** YOU MUST **ANSWER 1 OF 2** ANALYTICAL PROBLEMS. PART II IS **WORTH 40%** OF YOUR GRADE FOR THIS EXAM.

IN **PART III** YOU MUST **ANSWER 1 OF 2** ESSAY QUESTIONS. PART III IS **WORTH 40%** OF YOUR GRADE FOR THIS EXAM.

YOU MUST WRITE **LEGIBLY** AND **DOUBLE-SPACE** ANSWERS IN **INK.**

YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

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

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

I. ANSWER 4 OF 6 QUESTIONS IN THIS PART, WHICH IS WORTH 20% OF THIS EXAM, OR 5% PER QUESTION. BRIEFLY EXPLAIN YOUR ANSWERS (ANSWER = 2.5%, REASON/AUTHORITY = 2.5%)

1. Which of the following statements most accurately reflects the law in Canada?
    a. The common law presumption of advancement does not apply between mothers and their children.
    b. A bequest to establish a scholarship available only to protestant students and not to students of other religions is contrary to public policy.
    c. Nomadic or semi-nomadic Aboriginal peoples can prove physical occupation of land in order to establish Aboriginal title.
    d. A registered owner of an estate in remainder expectant on the termination of a prior life estate has a contingent interest.
    e. A head bailor can be bound by a sub-bailee's exculpatory clause despite a lack of privity of contract between the parties.

The presumption of advancement does apply between mothers and minor children (*Pecore*). A scholarship for protestant students only was held valid in *Ramsden Estate*. *Stuartburn v. Kiansky* held that an estate in remainder on the expiration of a life estate is vested. *Punch v. Savoy* held that a head bailor isn't bound by a sub-bailee's exculpatory clause. The correct answer is "C." Both *Delgamuukw* and *Bernard and Marshall* held that nomadic Aboriginal peoples are able to establish title by proving occupation in the right circumstances. Though it wasn't my intention drafting the question, I also accepted "E" as a correct answer but only if it was explained that a bailor might be bound in circumstances where he/she knew of and agreed to the exculpatory clause.

2. Which of the following cases best supports the proposition that a residency requirement imposed on a potential beneficiary under a will is a condition subsequent?
    a. *Unger v. Gossen*, 1996 CarswellBC 1248 (S.C.)
    b. *Sifton v. Sifton*, [1938] A.C. 656 (P.C.)
    c. *Kotsar v. Shattock,* [1981] V.R. 13 (S.C. Full Ct.)
    d. *Carolyn (Village) v. Roper*, 1987 CarswellAlta 363 (Q.B.)
    e. *Trinity College School v. Lyons*, 1995 CarswellOnt 403 (Gen. Div.)

The correct answer is "C." Though *Kotsar*, *Unger* and *Sifton* all dealt with residency conditions in a will, only *Kotsar* held that such a condition was a condition subsequent. *Unger* concluded the residency requirement was a condition precedent. The ruling of the *Sifton* case on this point was not specified in your casebook, but there was an indication that *Sifton* involved the words, "so long as," which suggest a determinable limitation. *Carolyn v. Roper* and *Trinity College School* were not cases about residency requirements.

3. An oil company and a service station operator form an agreement concerning premises to be used as a service station. Which of the following provisions in the agreement best indicates the existence of a lease, as opposed to a licence?
    a. The landlord covenants with the tenant for quiet enjoyment of the demised premises.

b. The tenant promises not to use the premises for the storage or parking of motor vehicles nor will he permit the same, unless herein otherwise expressly authorized.
c. The tenant agrees to indicate by signs, notices and such other methods as are satisfactory to the landlord that the tenant is the sole proprietor of the business carried on on the demised premises.
d. The tenant covenants not to erect any building or other structure on the said lands, and will not make any additions to or changes in the present buildings or equipment without the consent of the landlord in writing.
e. The parties agree that the lease shall remain in force for 10 years from the date on the agreement; and shall renew itself automatically from year to year thereafter unless written notice of termination is given by either party to the other at least 90 days prior to the expiration of the said term or of any renewal period.

The question is based roughly on the case of *Re B.A. Oil Co. & Halpert*, [1960] O.R. 71 (C.A.). Answers "B," "C" and "D" all deal with the limitations on the tenant's rights and indicate the existence of a licence, not a lease. Answer "E" deals with term, and uses the word 'lease,' so was the response chosen by some students. But Answer "A" gives the tenant a right to undisturbed exclusive possession – the essence of a leasehold interest in land. "A" is correct as the best answer.

4. A golfer's will states: "I leave my green jacket to my widow for life. On her death, my jacket shall go to my first grandchild to reach 30 years of age." When the golfer dies, he is survived by a wife, 2 children and 4 young grandchildren. Is it true or false that the bequest violates the common law rule against perpetuities?

Because it is unknown which, if any, grandchild will reach age 30 first, the bequest creates a contingent interest, which is subject to the RAP. The perpetuity period begins to run from the date the interest is created, which is the date of the death of the testator. The period of lives in being is measured by reference to the golfer's wife and/or children, because they are human, living and, regarding the children, members of a group that is now by definition closed. The group of grandchildren are not lives in being because the group could increase in size subsequent to the date of the death of testator. If both children died immediately, the first grandchild to turn 30 might do so more than 21 years after the death of the measuring lives in being. It is "TRUE," therefore, that the bequest violates that common law RAP. Note that the question asked about the common law RAP, not statutory amendments.

5. A landlord agrees with a tenant to provide parking spaces adjacent to leased premises. In exchange, the tenant agrees not to sublease the premises without the landlord's consent, which shall not be unreasonably withheld. Is it true or false that these agreements are binding on assignees of the landlord and the tenant?

Merger Restaurants suggests that an agreement regarding parking spaces does touch and concern the land (as required by *Spencer's Case*), and is seemingly better authority that *Kontogonis*. The agreement regarding the ability to sublease, by contrast, depends on the consent of the landlord. Especially in light of the landlord's promise not to unreasonably withhold consent, it is more likely than not that this promise is a personal one, depending more on the parties to the contract

than touching and concerning the land. It is "FALSE," therefore, that the agreements are binding on assignees. Partial marks were awarded if students convincingly argued that the agreement regarding consent to sublease touched and concerned the land.

6. Is it true or false that Aboriginal peoples' property rights in land are *sui generis* only because they are protected under section 35 of the *Constitution Act 1982*?

Aboriginal peoples' property rights are not *sui generis* only because of section 35, so the answer to this question is "FALSE." Aboriginal peoples' property rights in land are also *sui generis* in that their source lies in a mix of Aboriginal occupancy of land prior to Crown sovereignty and common law perspectives, they are inalienable except to the Crown, they are held communally, they entail open-ended use rights subject to limitations regarding uses irreconcilable with historical and future occupation, and they are constitutionally protected.

II. ANSWER 1 OF 2 QUESTIONS IN THIS PART, WHICH IS WORTH 40% OF THIS EXAM.

1. Last September the *Deseret Morning News*, a Utah newspaper, ran the following story. If the same events had occurred in Ontario, based on your analysis of the law studied in this course, **could the heirs of Ed Loose have won their case instead of settling it? Why or why not?** Specify any relevant assumptions or additional facts required in your analysis.

Maeser School crisis over –

The wacky, 109-year-old tale of the overlooked 1898 deed has a happy ending, with a settlement that averts a potential crisis for the award-winning renovation of central Provo's historic Maeser School.

The heirs of Ed Loose dropped their claim to about 1 acre of land given a century ago by Loose to the Provo School District. In exchange, the title companies that failed to uncover Loose's two forgotten, handwritten deeds, will pay for a memorial outside the school.

Loose donated the land on one condition — it always remain a playground for the elementary school or be returned to his family.

The two title companies will pay $20,000 — up to $10,000 for the memorial to Loose and $10,000 for a scholarship fund and attorney fees.

Loose donated the land in two parts, one in 1898 and the other in 1910, with deeds both apparently in his own hand.

The school district closed Maeser Elementary School five years ago and nearly demolished the historic building. The nonprofit Provo Housing Authority rescued it from the wrecking ball three years ago by buying it and launching a drive to renovate it as affordable senior housing.

The creative mix of 14 grants and loans worth $5.2 million that financed the project could have unraveled when the deeds surfaced.

The funding came with conditions, too — not only would the renovation have to be completed, but a dozen homes had to be built around the school and sold to first-time homebuyers through a self-help affordable housing program.

Construction was under way when Loose's great-grandson, Ed Peterson, learned of the deeds, which didn't turn up in four separate searches conducted by First American Title Insurance Co. and Fidelity Title Insurance Co. The news stunned housing authority executive director Doug Carlson.

"It was a surprise and shock," Carlson said. "This came totally out of the blue. For a brief moment, I was fearful three years of hard work and several million dollars were in jeopardy." Peterson, named for his great-grandfather, said the heirs wanted to protect what he called a "classy" renovation that has won six major awards for beauty, historic rehabilitation and city planning.

"I'm tickled pink by what they've done there," he said. "It's a marvelous public project. My great-grandfather would be proud of it."

Peterson said the .95 acres may have been worth up to $250,000. The nonprofit housing authority didn't have the money to buy it and had been told by the title insurance companies the land was clear of any encumbrances.

"This is why you buy title insurance," Carlson said. "The money we spent in title insurance policies was money well spent." The Maeser School Apartments opened in November and now has clear title. So do Jose and Meagan Sanchez, whose new home sits on a corner of the land Loose donated.

Construction on the final seven homes around the former school can now begin. They must be completed by next summer to meet a deadline for funding all of the projects.

The Charles Edwin Loose and Mary Jane Loose Memorial at Maeser School will be a plaza with a sandstone plaque bearing the images of the colorful Loose, present as a 12-year-old when the Golden Spike was driven in Utah, and his wife.

Peterson said $5,000 will go to a scholarship fund in his father's name, Edwin L. Peterson, at Utah State University. The scholarship is presented each year to a student who wants to teach geography, as Loose's grandson did at USU.

The final $5,000 goes to one of the heirs to cover attorney's fees.

First American Title and Fidelity Title will each contribute $10,000, according to a copy of the settlement obtained by the Deseret Morning News. First American Title officials declined to talk about the Maeser/Loose deed specifically, but it isn't unusual for a title search to stop short of exploring back 100 years, company vice-president and regional counsel Blake Heiner said.

Loose's condition that if the playground was removed the property would be returned to his family — called a right of reverter — is extremely rare.

"I would have to say, in my 30 years in this business, this is the first time I've seen a right of reverter anywhere but in a law school exam," Heiner said. "These type of things don't happen in today's world."

Many neighbors were angry to lose the school park, but efforts to build the required new homes elsewhere failed. Major Provo parks sit three and four blocks away from the former school.

Carlson said the public is invited to enjoy the Loose Plaza.

———

These circumstances bear a striking resemblance to the case of *Carolyn (Village) v. Roper*. Recognizing and applying the parallels (and possible distinctions) was necessary, but not sufficient, to do well on this question. It was also important to actually answer the question, which was to assess whether Loose's heirs could have won a case on these facts. Some students did poorly for merely referring to select issues in the abstract. Much of the news report contains irrelevant or immaterial facts. Part of the challenge for students was separating important from unimportant facts, which some students did better than others. This was reflected in grades.

Absent any reference in the news report to a will or testamentary transfer, it is safe to assume that this donation was an attempted *inter vivos* gift. The report describes a condition of the gift as being that "it [the land] always remain a playground for the elementary school or it be returned to his family." The heirs have a reversionary interest that could be triggered upon violation. To determine the precise nature of the donee's and heirs' interests, and therefore conduct a proper analysis of the heirs' chance of success, it was necessary to make some assumptions or explore possible different scenarios regarding the precise language used. That was fine, indeed expected, so long as students' answers followed correctly from their assumptions or analysis of various possibilities. Students who stated assumptions but failed to correctly follow those assumptions to their legal and logical conclusion were penalized, and tended to do poorly on this question. The best students fully analyzed: the legal effect different drafting language would have had on characterizing the parties' interests, the possible application and consequence of different presumptions, and the possible paradox of framing the condition from the donee's versus heirs' perspectives.

A separate but equally important set of issues to explore revolved around the validity of the condition, and the possible consequences of invalidity. Students did well by analyzing the legal risk that a court would invalid the condition for uncertainty or as a restraint on alienation. Impossibility and public policy were not crucial issues on these facts, but students were required to determine whether a perpetuities problem exists here, and why. *Carolyn v. Roper* was instructive in this regard.

2. The following story appeared in January 10, 2008 edition of *The Toronto Star*. If Justice Turnbull's decision were appealed, **do you think his conclusions on the application of the legal principles governing resulting and constructive trusts would be upheld? Why or why not?** Specify any relevant assumptions or additional facts required in your analysis.

Judge's ruling allows man to gain share of home –

A man who separated from his wife in 2005 has won a share of the value of a home where he once lived - a house that was owned by his wife's parents.

Gloria and Peter Jackman held legal title to a house on Metcaffe Street in Cambridge during the six years their daughter Denise Davis-Gains lived with Paul Gains and their three children.

But a judge has now ruled the house was the matrimonial home of the younger couple, and that Gains should share in the net proceeds from a sale.

Unfortunately for all concerned, there is only about $60,000 at stake. That's not a lot for a family to employ lawyers and a judge to determine an equitable resolution, especially when the interests of children are at stake.

Justice James Turnbull of the Ontario Superior Court of Justice has ruled Davis-Gains's mother and stepfather were the registered owners of the house as a matter of convenience. So he has decided they should only recover what they provided to help with a roof repair and a botched bathroom renovation, or about $19,000 with the interest. Other help is to be classed a gift.

In concluding the bulk of the $60,000 should go elsewhere, he preferred the testimony and evidence from Gains, a freelance writer. The judge rejected testimony from Gains's estranged wife, who operated a yoga studio from their home, and from Gloria Jackman, whom he called a "wonderful mother" for trying to help a financially strapped daughter.

"They were prepared to say and do whatever was necessary to defeat Paul (Gains) from having any interest in the matrimonial home," he chided in a judgment released after a two-day hearing held in early December.

Gains had contended that his parents-in-law were just doing a favour in helping to buy the house in 1999.

He and his wife had recently been discharged from bankruptcy and had failed to qualify for a mortgage to buy another home in Cambridge.

He testified that he and his wife had put up a small down payment and paid the mortgage and property taxes, even though the home was registered to the Jackmans. He also paid for some renovations.

According to the judge's ruling, Davis-Gains testified her mother had agreed to buy the house for the benefit of the grandchildren, and was charging her and Gains rent.

But Turnbull noted there was no lease agreement, and no testimony from unrelated witnesses to back this up. Also, Gains presented copies of cheques given to his wife with a note about mortgage payments, rather than rent.

Independent witnesses confirmed the former spouses had spoken of having bought the house together, although one witness said Davis-Gains had once complained her husband was not contributing sufficient money to pay the mortgage regularly.

Turnbull decided Gains had met the "heavy onus" of establishing the Jackmans owned the house in the manner of a "constructive trust" for the benefit of their daughter's family.

Judges have applied the term constructive trust for many decades to protect the rights of family members, friends and business partners who contribute to buying or maintaining property, without being the registered owners. Provincial family law legislation calls for an equalization of net family property after a breakup.

It's only right that such protection should apply equally to men and to women. But it's sad when couples become so stressed and angry they choose war over peace, and then have to negotiate who pays the legal bills.

———

Like question 1, this was a difficult question because the story does not provide all of the material information, particularly regarding the judge's ruling. It was necessary, therefore, to piece together the likely legal conclusions from the bits provided. Only once students were able to more clearly ascertain what must have been the legal questions were they able to assess the likelihood of a successful appeal. Some students did this remarkably well, but some students really struggled to sort out the issues.

We know that Gloria and Peter Jackman had legal title registered in their names. Paul Gains and Denise Davis-Gains, however, apparently paid the down payment, mortgage and taxes. One issue, therefore, is whether the money contributed by Paul and Denise was a gift to Denise's parents, or whether a resulting trust was created. To resolve this issue, students were required to cite *Pecore v. Pecore* and/or *Madsen Estate* dealing with the presumption of advancement. Some students did very well by realizing that these facts are the inverse of a typical resulting trust problem because the money was transferred from the children to the parents, not *visa versa*, and exploring the implications of that fact. More students, however, interpreted the story differently, by assuming (often implicitly) that the Jacksons paid for the home, and then asking whether they had given a gift or established a trust. The problem with that interpretation is that title was registered in the Jackman's names, not Paul and Denise's. So it wouldn't make sense to analyze the question by assessing whether the Jackman's retained beneficial title under a resulting trust. If anything, the Jackman's were the trustees, not the beneficiaries. Given the facts in the news report, including Paul and Denise's bankruptcy, it is hard to imagine the presumption of resulting trust that would apply in this case could be rebutted. Thus, the Judge was probably correct that the Jackmans held legal title to the property as trustees for the benefit of Paul and Denise. Students received credit for suggesting that the reporter might have inaccurately reported the judgment (or the Judge made a mistake) by calling this a constructive rather than resulting trust.

A similar issue arises concerning the $19,000 provided by the Jackmans for renovations. This issue is more analogous to the typical resulting trust scenario involving transfers from parents to adult children. After *Pecore*, these are presumed to create trusts, so the again the Judge's ruling was probably correct regarding the $19k. The result of this reasoning is conceptually confusing because the Jackmans would be holding legal title to whole property, with most of the equitable interest owned beneficially by Paul and Denise (for their down payment and mortgage contributions), except for a proportionate value ($19k/total value) owned beneficially and legally by the Jackmans. I was especially proud of the students who wrapped their heads around this complexity—well done!

There might also have been an issue of constructive trusts to be decided, but that issue would have probably concerned Paul and Denise's contributions to the down payment, mortgage and taxes vis-à-vis each other, not the Jackmans. There is evidence reported in the story that Paul may not have been sufficiently contributing to the mortgage payments, but there is no evidence regarding his non-financial contributions to the home. Nevertheless, many students appropriately speculated about the possible application of constructive trust cases like *Peter v. Beblow*. Paul might have been the beneficiary of a constructive trust if he could establish an unjust enrichment (enrichment, deprivation and lack of juristic reason) *and* the appropriateness of this remedy based on his contribution to the property and the inadequateness of monetary damages. Of course, given the couple was married (unlike *Peter v. Beblow*), this doesn't seem to have been necessary. Students who briefly explored the atypical gender issues arising in this case were rewarded if their comments were insightful.

III. ANSWER 1 OF 2 QUESTIONS IN THIS PART, WHICH IS WORTH 40% OF THIS EXAM.

1. The following statement was made by Mary Jane Mossman in "Toward 'New Property' and 'New Scholarship'," (1985) *23 Osgoode Hall Law Journal* 633 at 651: **"[S]ocietal changes external to the legal system now make the property concept less and less a matter of only 'private law'." Do you agree or disagree?** Support your position with references to materials studied in this course.

There were at least 3 (probably more) topics that students could have and did explore in response to this question. The first was the link between property law and constitutional law manifested in protection for the rights of Aboriginal Peoples under section 35 of the Constitution. I don't know if this is what Mossman had in mind, but the constitutional protection of some property rights is probably the most direct way in which property has become 'public' instead of merely 'private' law. Most students, however, focussed instead on the way in which various constitutional rights might limit (rather than entrench) protection for private property rights. This included exploring the impact of equality on property, as discussed for example in *Re Leonard Foundation*, *Fox Estate*, *Ramsden Esatate* and the materials following that case in the Reader. The questionable public-private dichotomy was especially pronounced in this context. The third topic students addressed is the impact of freedoms of expression and public assembly on private property rights, as dealt with in cases like *Michelin*, *Harrison v. Carswell*, *Albertsons* (and *Pruneyard*) and *Sky City*. Students did well by focussing on 1 or 2 of these topics in detail, or by dealing with all 3 (or more) and interconnecting the themes. Whichever approach students took, it was necessary to discuss the specific "societal changes" that are making property less private law and more public law. Those changes could include (just for example): the evolving relationship between the Government, Aboriginal peoples and other Canadians; evolving social attitudes about race, religion, gender, class and issues such as affirmative action; or economic changes like how and where people shop or the technological transformation of the internet into the functional equivalent of a traditional public forum. Students who were most responsive to this question did best, while students who discussed tangential or irrelevant issues (such as the justifications for property rights) did less well. Because there was so much room for students to explore these different topics in their response, grades often depended on the depth and insightfulness of students' answers.

2. Chief Justice Lamer concluded his reasons for judgment in *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, by recognizing the need to reconcile the pre-existence of aboriginal societies with the sovereignty of the Crown. He wrote, "Let us face it, we are all here to stay." **Are Canadian governments (*not* courts) adequately meeting their legal obligations toward the Aboriginal peoples of Canada, particularly in relation to rights to land?** In your essay, refer specifically to materials studied in this course.

Responding to this question required 2 steps, which most but not all students managed to follow. First, students had to explain what governments' legal obligations toward Aboriginal peoples are.

Second, they had to evaluate whether those obligations are being met. The first aspect to this question required students to describe the source and nature of the government' duties. Section 35 of the Constitution is a logical place to start, but references to the Royal Proclamation and other historical developments were also useful. The obligation is, of course, a fiduciary one. This is made abundantly clear by the cases we studied, including *Delgamuukw* and *Haida Nation*. Those cases also do a good job of explaining *which* governments (i.e. federal or provincial) have such an obligation, and *when*. The judicial decisions also elaborate on *how* the obligation may be fulfilled. Students who did well managed to analyze multiple aspects of the governments' behaviours against these obligations. References to materials studied throughout the course, including cases, articles and statutes, were appropriate. The film, "Honour of the Crown" was especially relevant to this question, some students pointed out. I also rewarded references to current events going on outside of the classroom, which were mentioned occasionally by students.

THE END.

The class did well on this exam. The average was 71%, which is a B, though marks ranged right from D to A+.

All students benefited from the grade-weighting scheme that made whichever exam each student performed better on worth 66% of their final mark while the other counted for just 33%. Still, I bumped all students' grades up by 1.4% after this weighting, making the average GPA for the class 6.41 in the end. Technically, that's 0.01 higher than the average GPA I'm allowed to have under the Faculty regulations, but of course it wasn't a problem.

Here's the distribution of final grades (not grades on the final):