PROPERTY 1108 MIDTERM EXAM

PROFESSORS CAMERON, DE BEER & MORSE

MONDAY, 27 OCTOBER 2008

4:00– 5:30 (**1.5 HOURS**)

THIS EXAM **BEGINS WITH A MANDATORY 30-MINUTE READING PERIOD**, DURING WHICH YOU **MAY** MAKE NOTES ON THIS EXAM QUESTIONAIRE & PUT YOUR STUDENT ID NUMBER ON EACH EXAM BOOKLET COVER, BUT YOU **MAY NOT** WRITE ANYTHING INSIDE YOUR ANSWER BOOKLETS.

IN **PART I**, YOU MUST **ANSWER 2 OF 3** MULTIPLE CHOICE QUESTIONS. PART I IS **WORTH 20%** OF YOUR GRADE FOR THIS EXAM (10% PER QUESTION: ANSWER = 5%, REASON = 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 20% OF YOUR FINAL GRADE.

I. ANSWER 2 OF 3 QUESTIONS IN THIS PART, WHICH IS WORTH 20% OF THIS EXAM, OR 10% PER QUESTION. BRIEFLY EXPLAIN YOUR ANSWERS (ANSWER = 5%, REASON/AUTHORITY = 5%)

1. Which of the following statements about the concepts and materials covered in this course is the most accurate?

a. The case of *Nanabush v. Deer* demonstrates that the Anishinabek have an unsophisticated legal system.
b. The law in most of Canada governing ownership of riverbeds is based on the test of navigability, which was received as part of English law held to be applicable in Canada because the land was perceived as *terra nullius*.
c. *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 68 L.C.R. 1 (N.S. C.A.), is a strong authority for the proposition that land regulation in Canada can constitute a *de facto* expropriation if it removes the owner's rights to all reasonable uses of the property and the government acquires an interest in the property.
d. Both *Didow v. Alberta Power Ltd.*, 60 Alta. L.R. (2d) 212 (C.A.), and *Edwards v. Sims*, 24 S.W.2d 619 (KY C.A., 1929), affirmed that an owner of land on the surface of the earth has the rights to control all uses of land below and airspace above the surface of the property at common law.

The correct answer is "C." *Nanabush v. Deer* illustrates that the Anishinabek have a distinct legal system, not an unsophisticated one. English law concerning ownership of riverbeds was not received into Canada because the navigability issue was unsuited for local conditions in much of the country. Didow was denied the right to control all uses of airspace above his land; his rights were limited to airspace he was or could be using. Though *CPR v. Vancouver* is perhaps a stronger authority for the proposition stated in "C," *Mariner* is nonetheless strong. Most students answered this question correctly. Partial marks were given to students who selected "D" because *Mariner's* authoritativeness is weakened by the result in that case (Mariner lost, but Didow won). However, "D" is not the correct answer.

2. Which of the following judgments most strongly reflects the labour/reward theory as a normative underpinning of property rights?

a. *International News Service v. Associated Press*, 248 U.S. 215 (1918), *per* Pitney J..
b. *Victoria Park Racing and Recreation Grounds Ltd. v. Taylor* (1937), 58 C.L.R. 479 (H.C.), *per* Latham C.J..
c. *Edwards v. Sims*, 24 S.W.2d 619 (KY C.A., 1929), *per* Stanley J..
d. *Popov v. Hayashi*, 2002 WL 31833731 (Cal. Sup. Ct.), *per* McCarthy J..

The correct answer is "A." Latham C.J. refused to legally protect Victoria Park's investment of labour in creating a spectacle, suggesting instead that the plaintiff build a higher fence. Logan J. (dissenting) would have protected Edward's labour in exploring the cave and establishing a tourist attraction, but that is not the approach taken by Stanley J. Both Popov and Hayashi worked to possess the baseball, but neither was rewarded with a proprietary right over the other

on that basis. Pitney J.'s decision in *INS* was so blatantly influenced by the labour/reward theory, few if any students did not respond correctly to this question.

3. **Which of the following authorities best demonstrates a reluctance to create a potential tragedy of the anti-commons?**
    a. *Yanner v Eaton* (1999) 166 A.L.R. (H.C.) *per* McHugh J. (dissenting).
    b. *Moore v Regents of California* 793 P.2d 479 (Cal. S.C., 1990) *per* Pinelli J..
    c. *Safe Streets Act* S.O. 1999, C-8.
    d. T.W. Merill, "Property and the Right to Exclude," 77 *Neb. L. Rev.* 730 (1998).
    e. *Didow v. Alberta Power Ltd.* 60 Alta. L.R. (2d) 212 *per* Haddad J.A..

The correct answer is "B." The issue in *Yanner* concerned the meaning of the term "property," not the consequences of recognizing too many proprietary rights. The *Safe Streets Act* attempts to regulate to avoid a tragedy of the commons, if anything. Merill's article, like *Yanner*, is about what property is, not the reasons for recognizing or not recognizing it. An argument could be made that one of the reasons for limiting landowers' rights to airspace is to avoid a tragedy of the anti-commons, so partial marks were given for selecting "E," but "B" is the far better answer.

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

1. Assume that you are a legal intern at the City Solicitor's office for the City of Ottawa. Your manager sends you an email message outlining the following facts and asking you to evaluate the strength of the city's legal position. Provide your opinion.

"… Landlord A owned a warehouse, which it rented to a tenant – Gary's Maple Emporium (GMP). GMP collects maple sap, and makes it into maple syrup. The syrup-making process is complex, but a crucial step is heating the sap in an industrial-sized boiler. Without a boiler, it would be impossible to make the syrup.

GMP purchased its boiler second-hand from another maple syrup producer. The name of that producer, who originally had the boiler custom-made, remains engraved in large letters on the side of the unit.

It took five people and heavy equipment to move the huge boiler into the warehouse, where it now rests on the floor primarily on its own weight. In order for the boiler to function properly, however, it has been attached by two small brackets screwed into the ground, near where a large pipe enters the boiler, bringing the sap in from the collection buckets outside. This helps to ensure that the pipe stays in place in relation to the boiler. The boiler is also connected to incoming and outgoing water pipes, an electrical panel and a control unit.

Landlord A sold the warehouse to Landlord B, which kept GMP as its tenant. The contract for purchase and sale of the warehouse listed the boiler as a chattel belonging to GMP, and not as part of the realty. Landlord B's mortgage agreement with its bank, however, listed the boiler as a fixture, which helped to increase the capital value of the warehouse for financing purposes.

Despite repeated promises not to do so, Mayor Larry O'Brien is raising property taxes, and to generate additional revenues, is conducting city-wide reassessments. Landlord B's reassessment

resulted in a massive tax increase, in part because the reassessment characterized the boiler as a recent improvement to the realty.

Landlord B has objected to the City's determination that the boiler is a fixture. …"

[Please ignore any issues surrounding the City's capacity to conduct the reassessment and levy property taxes.]

This question was answered well by many but not all students. If there was a problem, it was usually a lack of depth of analysis or a failure to address some of the nuances of sub-issues. To do well, it was essential to reference and (far more importantly) apply the law from *LaSalle* and *Diamond Neon*, at least. Students who merely stated the 2-step test for determining whether an item is chattel or fixture did poorly; more engagement with the particular facts was required. (The boiler was annexed to the ground with bolts and connected to pipes, electricity and a control unit. The boiler was essential to the syrup-making process, not the warehouse itself. There is a second-hand market for boilers. This boiler was engraved with the name of another producer. And so on.) Analogies to or distinctions with carpets (*LaSalle*), signs (*Diamond Neon*) and objects in a classroom (our exercise) were rewarded. Some students were mistaken about the significance of various contracts—like in *Diamond Neon*, these are binding on 3rd parties such as the City—and were penalized for that. The best students wrote also about tenants' fixtures by indicating that even if the boiler was a fixture, it could be recaptured as a chattel by the tenant under particular circumstances. However, some students' analyses of that sub-issue were a bit confused, which led to lower scores for them on the clarity and organization criteria.

2. The following story was reported this summer in Australia regarding Olympic swimming star Ian Thorpe.

Mon Aug 4, 2008 11:03pm BST

CANBERRA (Reuters) - Australian Olympic swimming champion Ian Thorpe is suing a French newspaper over reports he used performance enhancing drugs during his five-time gold medal-winning career, his lawyer said on Monday.

A story written by Damien Ressiot and published by the French daily sports newspaper L'Equipe in March 2007 said Thorpe gave a May 2006 urine sample showing "abnormal levels" of testosterone and a second banned substance: leutenising hormone.

Both testosterone and leutenising hormone are on the sporting banned substance list, but are naturally produced by the body.

Thorpe's lawyer Tony O'Reilly said his client, who is attending the Beijing Games as a spectator, wanted to repair damage to his reputation resulting from the report, according to Australian Associated Press.

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Since the Olympic Gold medal sweep of Australia's Ian Thorpe in 2004, competitive swimming has become an extremely popular sport, followed by millions of fans worldwide. Swimtech, a Canadian company, has developed and marketed a device that will automatically transmit 'real time' results from swimming events. Results from swimming events are registered digitally when a swimmer's foot or hand touches an electronic pad at either end of the pool after each lap.

Swimtech electronically collects and collates this data on site, and then transmits the respective times and places of each competitor at each lap. They have invested millions of dollars in developing the technology.

Due to the lucrative nature of these sporting events, those who own large pools where these events are held have begun to charge for admission, and have signed a contract with Swimtech to allow Swimtech to transmit this real-time data exclusively. Swimtech also occasionally transmits 'fun facts' on its wireless device - describing the physical dimensions or eating habits of popular swimmers, recently broken records, or quotations from victorious athletes.

Ian Thorpe received the news of his positive drugs tests from his coach next to the pool at the end of an important race. This was overheard by a trainer from another team, who immediately ran out of the pool, and called the media - earning ten thousand dollars for this bit of 'hot news'. The Swimtech representative, who was present in order to oversee the Swimtech electronic equipment, and generate 'fun facts' for transmission, also overheard the news about the positive test. By the time Swimtech had prepared a 'fun fact' on the test for public release, the story had been broken by other media, based on the tip by the trainer.

Based on the concepts and materials studied in this property law course, advise the trainer on his legal rights and liabilities.

Very few students chose to attempt to answer this question, but those who tried generally did well. I was surprised to see references to the analytical frameworks from *NBA v. Motorola* and/or *PGA v. Morris*, cases that were covered in previous years but not this year (and covered this year by Professor Cameron, but not me). The dangers of relying too much on other students' notes were evident when some students misstated or misapplied the law from these cases, which led to penalties for inaccuracy. A far better approach, taken by some students, was to simply rely on the materials covered in the 2nd edition of the casebook and in our class this year. Students who took this approach did well by citing the key distinction between these facts and cases we studied, which is that the trainer was not in competition with Swimtech or anyone else. This realization allowed students to apply the proposition from *INS v. AP* that news can only be quasi-property between competitors. Students also benefits from discussing the applicability of the Australian case of *Victoria Park*, which declined to offer any protection to the organizers of a sports spectacle. The difference on these facts, of course, was that the trainer was inside rather than outside of the sporting venue. Students could have done very well by enquiring what legal relevance, if any, that factual distinction might have. Several students erroneously identified issues like whether Thorpe has property rights in his body samples as relevant for discussion. The opportunity cost of doing so was to leave less time for analysis of more important matters.

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

1. In a report from Johannesburg, Reuters recently explained that plans for redistributing South African farmland from white to black citizens to undo some of the effects of apartheid are not going smoothly. South Africa's Constitution states:

…

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application:
    a. for a public purpose or in the public interest; and
    b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

…

4. For the purposes of this section -
    a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
    b. property is not limited to land.

…

In your opinion, based on the following report and on the concepts and materials studied in this course, does this constitutional provision help or hinder the South African Government's efforts to remedy the inequities caused by apartheid?

STAKES HIGH FOR SOUTH AFRICAN LAND REFORM

WED 8 OCT 2008

JOHANNESBURG (Reuters) - For those seeking to redistribute South Africa's rich farmland among landless, poor blacks, there is an uncomfortably close reminder of the dangers of getting this sensitive task wrong: Zimbabwe.

More than a decade after the end of apartheid, poor blacks in South Africa are still waiting for farms promised to them by the ruling African National Congress (ANC), which sees land redistribution as a cornerstone of black majority rule.

Farmers' groups say the delays are slowing investment in agriculture, stunting the sector's growth and hampering efforts to improve the lives of poor blacks, millions of whom still live in grim townships lacking basic services.

"It's a big issue, very serious, in other countries people have even died over these issues," said Motsepe Matlala, president of the National African Farmers' Union.

In Zimbabwe, about a dozen white farmers were shot dead and many others were beaten as war veterans violently seized white-owned commercial farms in 2000 as part of President Robert Mugabe's policy of land redistribution.

Critics say this policy ruined farming as many of the landless blacks had little or no experience in agriculture.

South Africa's target is ambitious: to hand over 30 percent of commercial farmland to blacks by 2014. With just six years to go, only 4 percent has been redistributed.

In August, the government shelved a controversial land bill, which would have given authorities wider powers to seize white-owned farms, after civic and farmers' groups branded it unconstitutional and a threat to farm investment.

...

The government has long said the [land redistribution] programme to give land back to people dispossessed under apartheid will be done in an orderly, legal and transparent manner.

"We have not moved in the way that the injured parties, the blacks, would have wanted us to move," Matlala said. "But we do appreciate that those who own the land may not let go of it willingly."

Many white farmers fear the kind of violence seen in Zimbabwe, while government officials say redistribution is being held up by soaring land costs that make it expensive to buy land from white owners under willing-buyer, willing-seller deals.

They also accuse white farmers of deliberately inflating prices, while landowners blame bureaucratic shortcomings for the slow progress in redistribution.

...

Fewer students attempted this essay question than the other alternative. But like in Part II, those students who did chose this question tended to do well, with a few notable exceptions. The common flaw in relatively poor answers was a failure to reference course materials at all, or discussion of irrelevant issues like "what is property." This question centred on the political justifications for and implications of property rights, the allocation and reallocation of wealth in society, and the various competing conceptions of a human right to property. I was looking for some discussion of all of those issues, though students were nonetheless rewarded for thorough and insightful discussions of some but not all of them. Issues of race and class were obviously intertwined with this question, and the best students address such matters head on. Insightful comparisons with the constitutional protections for property in other jurisdictions, such as Canada and the United States, were also rewarded.

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2. The following story was reported in the Globe and Mail earlier this month. Making specific reference to the concepts and materials studied in this property law course, respond to this report about Justice Ross' ruling and its potential application in Ontario.

BAN ON PUBLIC TENTING BY HOMELESS STRUCK DOWN

OCTOBER 15, 2008

VANCOUVER -- Homeless people in Victoria have the right to set up tents and other temporary shelters in public areas, the B.C. Supreme Court ruled yesterday.

Madam Justice Carol Ross struck down City of Victoria bylaws that applied to setting up structures in public areas "insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter."

She found bylaws prohibiting temporary shelters contravene Section 7 of the Charter of Rights and Freedoms, guaranteeing "life, liberty and security of the person."

"The City's Bylaws prohibit those homeless persons from erecting even the most rudimentary form of shelter to protect them from the elements," Judge Ross wrote.

The court challenge began October, 2005, when about 70 people set up a tent city in Cridge Park, which included more than 20 tents and a cooking area supplied with electrical power from the exterior outlet of a nearby church.

When the city took legal action to take down the tent city a group of nine defendants challenged the constitutionality of the bylaw.

Judge Ross based her decision on homelessness statistics and found that "the number of homeless people in Victoria substantially exceeds available shelter space."

"Adequate shelter for those sleeping outside in the West Coast climate requires both ground insulation and appropriate overhead protection in the form of a tent or tent-like shelter," she wrote.

The B.C. Civil Liberties Association intervened in the case, represented by lawyer Ron Skolrood.

"It is, as far as I know, the first of its kind in Canada where the courts have had to take a look at the rights of the homeless and the rights of shelter, so I think it's a very helpful and important precedent from that perspective," he said, adding the ruling does not guarantee the right for people to set up tent cities or have any bearing on the tent city in Victoria that sparked the court challenge.

"It's about the right of individuals who find themselves on the streets to be able to protect themselves from the elements."

The Victoria Chamber of Commerce panned the decision.

"How are our families and children, who pay taxes to maintain parks, supposed to get full enjoyment from parks when the homeless are given leave to camp in the playground?" chief executive officer Bruce Carter asked in a statement.

Bill Naughton, acting chief of the Victoria Police Department, said the ruling means the city's parks will become hubs for criminal activity, drawing more illegal drugs and prostitution to the area.

A professor could hardly ask for better timing of a real-world application of the materials and concepts studied in the classroom. As expected, most students chose to attempt this question. To do well, students had to explicitly reference materials studied in our course, which should not have been difficult to do. Almost everyone referred to Waldron's work on homelessness, which was central to the question. Ellickson's ideas about green, yellow and red zones of permitted activities also drew significant commentary from most students. Many but not all students went deeper, discussing the lack of express constitutional protection for property in Canada (and what

such protection would probably accomplish or fail to accomplish), the perspectives of Collins & Bramley on panhandling laws, or the documentary film "No Place Called Home," for example. Some students were penalized for failing to respond to the entire question, which explicitly asked about the application of this ruling in Ontario. In that context, I was looking for discussion of the *Safe Streets Act* and *R v. Banks*, which the best students did not merely cite but critically evaluated. The best students also used the aforementioned materials to evaluate comments in the newspaper report, such as the quotes from Mr. Skolrood, Mr. Carter and Mr. Naughton.

THE END.

This was a relatively easy exam. The coverage was predictable, and the questions were fairly straightforward (especially in Part I). Informal student feedback after taking the exam but before receiving grades tended to confirm my impression. The danger in such an exam is that some students don't provide the depth of analysis necessary to make their responses stand out, which is the most common flaw I observed in responses to Part II. There, I would have liked to see more robust applications of the materials studied to the questions asked, rather than mere mention of the relevant case law. For an open-book exam, no marks whatsoever are given for transcribing legal rules or authorities from your notes; students are rewarded for *applying* the materials to the particular question asked. This is a skill all of you will no doubt improve on over the coming months and years. Another skill you will improve is writing clearly and persuasively, which not all students did in Part III.

I hope that my constructive feedback is not taken too harshly. It is intended to help the class improve on what was already an above-average performance. Many students did extremely well on this exam. It was clear to me that the vast majority of students were well prepared, having evidently read the materials assigned throughout the course and taken their studies seriously so far. This bodes well for the class as a whole. Students' preparedness was reflected in the GPA of 6.29. (Faculty guidelines permit a range from 5.6 to 6.4, though note that requirement is for final grades only. Note also that our section's final grades at the end of the course will align more closely with grades in other property sections). Please also bear in mind that in law school, "B" is described as "very good," and even "C" is "good." The grade distribution is shown below.