PROPERTY 1108 MIDTERM EXAM - PROFESSOR DE BEER

MONDAY, 26 OCTOBER 2009, 16:00–17:00 (**60 MINUTES**)

I SUGGEST THAT YOU FIRST SPEND **10 MINUTES READING** THE EXAM, TO CHOOSE WHICH QUESTIONS TO ATTEMPT AND PLAN YOUR ANSWERS.

IN **PART I**, YOU MUST **ANSWER 1 OF 2 MULTIPLE CHOICE QUESTIONS**. THIS ANSWER IS **WORTH 20%** OF YOUR EXAM SCORE (ANSWER = 10%, REASON = 10%). I RECOMMEND THAT YOU SPEND ABOUT **10 MINUTES** TOTAL ON THIS PART OF THE EXAM.

IN **PART II** YOU MUST **ANSWER 1 OF 2 ANALYTICAL PROBLEMS**. THIS ANSWER IS **WORTH 40%** OF YOUR EXAM SCORE. I RECOMMEND THAT YOU SPEND ABOUT **20 MINUTES** ON THIS PART OF THE EXAM.

IN **PART III** YOU MUST **ANSWER 1 OF 2 ESSAY QUESTIONS**. THIS ANSWER IS **WORTH 40%** OF YOUR EXAM SCORE. I RECOMMEND THAT YOU SPEND ABOUT **20 MINUTES** ON THIS PART OF THE EXAM.

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

YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

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

THIS EXAM WILL BE SELF-EVALUATED, BUT WILL NOT COUNT TOWARD YOUR OFFICIAL GRADE IN THE COURSE.

STUDENT # _____

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+	66-69	5	Good
C	60-65	4	Good
D+	55-59	3	Passable
D	50-54	2	Passable
F	0-49	0	Failure

Part I

Correct choice of responses				
0				5
Explanation (i.e. correct rationale for chosen answer, relative strengths to other possibilities)				
1	2	3	4	5

Part II

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

Part III

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

	/100

I. ANSWER 1 OF 2 QUESTIONS IN THIS PART, WHICH IS WORTH 20% OF THIS EXAM. BRIEFLY EXPLAIN YOUR ANSWER (ANSWER = 10%, REASON = 10%)

1. **Which of the following statements is the most accurate?**
    a. The *Théberge* case supports the principle that a technological method of transferring ink from paper to canvas is a patentable invention.
    b. The *Schmeiser* case supports the principle that the ROUNDUP READY brand of genetically modified canola is entitled to extensive trade-mark protection.
    c. The *Intel* case supports the principle that causing harm to computer systems through spam emails could constitute a cyber trespass.
    d. The *Mattel* case supports the principle that the author of the artistic work depicted on the right does not have the right to prevent it from being copied.

'C' is the best response. The majority in the California Supreme Court decision denied Intel's claim for relief because Hamidi's harm was done not to its computer systems but to its employees' productivity. The implication, supported by other cases referenced in *Intel v. Hamidi*, is that causing harm to computer systems could constitute a cyber trespass. 'A' is inaccurate because *Théberge* was about copyright not patent law. 'B' is inaccurate because *Schmeiser* was about patent not trade-mark law. 'D' is inaccurate because *Mattel* was about trade-mark not copyright law.

*******OR*******

2. **Watson owns a beachfront property. For the past year, he has been plagued by gliders who descend from the top of a nearby escarpment and land on the beach, near or directly in front of his lot. He is concerned that some may land in his backyard, where his children play. At least one glider has landed in his yard in the past. What additional facts would be most needed in order to recommend to Watson the best path of future recourse?**
    a. The nature and extent of damage caused by the glider that previously landed in Watson's yard.
    b. The altitude at which gliders fly over Watson's yard.
    c. The identity of the owners of the escarpment launching area and/or the beach landing area.
    d. The nature and extent of Watson's use of his yard.

'D' is the best response to this question, based on question 4 on page 165 of the casebook. The Alberta Court of Appeal held in *Didow* that a landowner is entitled to freedom from interferences that "in any way impinge on the actual or potential use of" the land. To advise Watson on available legal recourse, therefore, it is necessary to know more facts about the nature and extent of his use of his yard. The facts mentioned in 'A', 'B' and 'C' are less relevant. It is the nature of Watson's actual or potential use, not the nature of the past damage that matters (harms that 'in any way impinge' are enough). The precise altitude of the gliders' flight is not determinative, as the legal result depends on other contextual factors. Watson's action would be against the gliders

directly (or conceivably the occupiers of the launching/landing areas) not the owners of the launching/landing areas.

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

1. On September 4, 2009 *The Ottawa Citizen* reported the following story about objections to residential development taking place in and near Gatineau Park. Subsequent to publication of this story, the National Capital Commission has frozen all further developments pending public hearings into the matter. It has not yet taken the formal step of expropriating the property. Nevertheless, the Ottawa-based builder of the home already under construction, and the American owner of the lots on which three more homes were to eventually be built, have threatened to sue. How seriously should the NCC take this threat?

NCC blamed for failing to protect park land; New housing encroaching on Gatineau Park, critic says

Continued construction in the eastern part of Gatineau Park shows that the National Capital Commission has neglected its duty to protect the park from development, a park advocate said Thursday.

Jean-Paul Murray said one house is under construction on Carman Road off Highway 105 in Chelsea and three more homes will eventually be built on adjacent lots.

Murray said the work is shocking because the NCC purchased more than 35 hectares of land on the same road to stop a planned development that caused an uproar in 2008.

The purchase came after the NCC announced in April 2008 that it would buy up to $385 million worth of private property to stop further development in the park.

Murray said the NCC should have purchased all private land on the eastern edge of the park.

"It is utter nonsense to say that the NCC can't acquire the land even though it is subdivided," Murray said. "The commission could have offered a market-value price and, if that failed, it could have decreed a freeze on development under Section 19 of the National Capital Act.

"The NCC could also expropriate because it has a 1988 mandate from the government to acquire all private land in the park. It is not fulfilling its commitments under the Gatineau Park master plan or respecting a cabinet directive to acquire park land."

Murray added it will cost taxpayers more money to buy the land when the houses are completed.

"They keep saying it is the capital's conservation park and the main focus of the master plan is conservation. In what way is building houses in the park conservation?"

The park includes about 570 hectares of private land. The NCC has been trying to buy as much as it can, when the owners choose to sell. Development opponents say hundreds of houses could be built on 2,000 acres of private land in two per cent of the park, fragmenting natural areas. Gatineau Park is home to at least 141 endangered species.

[The following is a framework for an adequate response, but lacks sufficient detail to make it a model answer. Students would be rewarded for more elaborate application (not description) of the case law and statutes. Note that this question is minimally adapted from the real newspaper article.]

The NCC should take the threat from the American investor more seriously than the threat from the Ottawa home builder. Both of the would-be plaintiffs' cases turn on the law of expropriation. In Canada, there is no constitutional protection for private property, so the NCC's action could not be challenged as an unconstitutional taking. Provincial expropriation statutes are, however, applicable. No direct, explicit act of expropriation has taken place (formal expropriation would provide procedural due process and financial compensation). The issue is whether an indirect, regulatory or *de facto* taking has nevertheless occurred. The Canadian law of regulatory takings was explained in *Mariner* and affirmed by the Supreme Court in *CPR*. The plaintiffs in this case would have difficulty establishing the two criteria required by the courts. First, it might be difficult to show that the government "acquired a beneficial interest in the property or flowing from it." An argument that the government has acquired a *de facto* park is likely to fail, as it did in CPR. Second, not all reasonable uses of the property have been removed. Only residential development has been temporarily halted, while access for many other kinds of activities is still permitted. Moreover, it is necessary to wait until the results of the public hearing, like the results of the environmental application in *Mariner*, to assess the facts as they are, not as hypothetical possibilities. An American investor, however, may make a claim under Article 1110 of NAFTA, which requires only proof of "a measure tantamount to … expropriation." If this provision were interpreted consistently with U.S. cases such as *Lucas*, it would unnecessary to show government acquisition of an interest, and sufficient to demonstrate deprivation of "all economically beneficial use" of the land in question.

*******OR*******

2. You are an intern at the University of Ottawa's community legal clinic. A client has come to meet you with a problem. When she took possession of the home she'd recently purchased, she was upset to learn that the seller had taken with him several items she expected would remain with the home: specifically, a closet organizer manufactured by the company California Closets, an antique chandelier that had belonged to the seller's grandparents, and the universal remote controls that had been used to open the garage door. She brought with her to your meeting the following column that ran in the October 16, 2009 edition of the *The Toronto Star*. What advice would you give to her now about her legal rights?

Nail your chattels down in the agreement

Closet organizers. We can spend hundreds, even thousands of dollars on these contraptions to make maximum use of our closet spaces. However, who gets the closet organizer when the house is sold? Can the seller take it with them, or must it be left behind for the buyer?

The answer, unfortunately, is not clear, based on the law of chattels and fixtures.

Under the terms of the standard agreement of purchase and sale form, all fixtures must remain with the property unless excluded by the seller and all chattels can be taken by the seller, unless included by the buyer.

What is a chattel and what is a fixture? A wise man once said to me, "If it takes a tool, that's the rule." In other words, if the item is so attached to the home or the property that it requires a tool to remove it, then it is presumed to be a fixture. If it is not attached at all, or only attached by, for example, a plug or a hook on a wall, then it is a chattel. However, while some closet organizers can be removed by hand, others are built into the wall itself. As you can see, it starts to get confusing, and when there is confusion, lawyers start coming to court to figure it all out.

Over the years, I have heard about sellers taking mirrors, broadloom, drapes, light bulbs, garage door openers, swimming pool equipment, garden sheds and even rose bushes. A garage-door opener looks like a chattel because you can hold the remote in your hand, but it's a fixture because it's part of the built-in garage-door assembly. But the answer may be different if the garage unit is only resting on a wooden beam and is not actually attached.

If you're a seller and you want to keep the dining room chandelier, the gold-plated faucets in your bathroom, or any other items you may have an emotional attachment to, take them out of your house before you list it. Replace the chandelier with a cheaper version, or make it very clear in the agreement that you're taking the chandelier with you.

Buyers, if you agree to the seller taking the chandelier, insist that they install a cheaper version before closing, or you may find the house completely dark when you move in.

When you're a buyer, there is no such thing as too much detail regarding the chattels or fixtures that you expect to receive on closing. My best advice is to list the make and model (and serial numbers, if available) of all appliances that are being included, and also note the colour and location of all drapes, carpeting, pool equipment, satellite dishes, barbecues, sheds, bushes, and anything else you expect to be on the property when you move in. Leave nothing to chance.

During any home inspection, ask permission and then take photographs of all of the chattels and fixtures that you have included, so you'll know if they've been replaced before closing.

Insert a clause in your agreement that permits a pre-closing visit so you can satisfy yourself that all the chattels and fixtures that are supposed to remain on the property are still there.

In my view, most closet organizers would legally be considered chattels. Still, if your agreement is specific as to who gets the closet organizer, then both the seller and the buyer will not be confused or disappointed after closing. That is the real lesson to remember.

[The following is a framework for an adequate response, but lacks sufficient detail to make it a model answer. Students would be rewarded for more elaborate application (not description) of

the case law and statutes. Note that this question is also minimally adapted from the real newspaper article.]

One might inform the client that the column is generally accurate. The "if it takes a tool" rule closely resembles half of the statement of the law in *La Salle*: the degree of annexation. However, it lacks detail regarding the circumstances in which the presumption established by the "if it takes a tool" rule might be rebutted: the object of annexation. With respect to the closet organizer, antique chandelier and universal remotes, those circumstances are very important. It is probable that the closet organizer is more than "slightly" affixed to the closet with screws or nails, establishing a presumption of a fixture. Rebutting this presumption might depend on various factors, such as for example, whether it was a custom-fit or standard-fit model. The chandelier is also attached, presuming it a fixture. With this object, however, its antique nature might help rebut that presumption. The fact that it belonged to the vendor's grandparents is probably not patent for all to see, and thus, unlikely to be a persuasive factor. The garage door remote controls were probably left loose, and thus presumed chattels. The article explains that garage door remote controls are an integral part of opener units, which are normally attached, and these objects would thus be fixtures. These remotes, however, are universal, which may affect help sustain the presumption of chattels. In respect of each of these fixtures/chattels, one might explore various other factors outlined in *La Salle*, such as whether the primary purpose of the annexation is to benefit the object or the land/building, or whether a used market exists for such objects. The law of tenants' fixtures, referenced in *Diamond Neon*, is not relevant to these facts, though the signage analogies discussed in the dissenting opinion in that case might be.

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

1. The French philosopher Jean-Jacques Rousseau wrote in *Discourse on the Origin and Basis of Inequality Among Men*:

> "The first man who, having enclosed a piece of land, though of saying 'This is mine' and found people simple enough to believe him, was the true founder of civil society. How many crimes, wars, murders; how much misery and horror the human race would have been spared if someone had pulled up the stakes and filled in the ditch and cried out to his fellow men: 'Beware of listening to this imposter. You are lost if you forget that the fruits of the earth belong to everyone and that the earth itself belongs to no one!'"

On what theoretical basis would you agree or disagree with Rousseau's sentiments about private property?

Note that this question was adapted from a students' posting in the class discussion forum (a common practice of mine). It requires first interpreting the quoted passage, and then defending your agreement/disagreement with it. Rousseau is referring less to the nature of what property is than why society protects it: he's dealing with the justifications for property, and private property in particular. Clearly, he would reject all or most of the justifications we studied in our course.

Agreeing with Rousseau in your essay response required canvassing at least some of these justifications and explaining why you also would reject them as insufficient. Disagreeing required highlighting one or more justifications that you believe is/are compelling, and explaining why you are convinced. In either cases, students were required to grapple meaningfully with issues of utilitarian theory, law and economics discourse, and general or special natural rights, including labour/reward, first occupancy, freedom-facilitating, and personhood-based theories. Generic, descriptive restatements of these theories were insufficient; engagement with them in the context of a clear argument or thesis was required. Linking Rousseau's remarks and the theoretical justifications for private property to inequality (the title of Rousseau's manifesto) was a welcomed elaboration, but not strictly necessary to adequately engage the specific passage quoted.

*******OR*******

2. In *Intel v. Hamidi* the California Supreme Court cited an argument submitted by Professor Richard Epstein, Director of the University of Chicago's Law and Economics program, that the rules of trespass to real property should apply equally in cyberspace. He believed that "[w]hen a Web site owner does deny access to a particular sending, searching or linking computer, a system of 'simple one-on-one negotiations' will arise to provide the necessary individual licences." **Based on the materials studied in our property law course, why would you agree or disagree with Professor Epstein's hypothesis?**

Note that this question does not ask whether you believe property rights should or should not be recognized in cyberspace. It is not, therefore, quite the same as the policy question facing the court, and opined on by not only Epstein but also other *amicus curiae* warning of a tragic anticommons risk. Students would be rewarded for appreciating this nuance in the question, and directing attention specifically to the quotation from Epstein. Whether a system of one-on-one negotiations will arise to provide necessary licences is related closely to the Coase Theorem. The best response would explain this theorem, its origins and its limitations. The most relevant limitation, of course, would be the reality of transaction costs. It is in that particular context that the anticommons issue might be raised in a way directly relevant to this question. To the extent students would be able to discuss concrete exampled of the application of the Coase Theorem (to airspace or subsurface rights, for example) and draw analogies to cyberspace, this would be rewarded. (That last point is the essence of question 7 on page 271.)

THE END.