PROPERTY 1108(B) FINAL EXAM WITH ANSWERS

PROFESSOR DE BEER

WEDNESDAY, 14 DECEMBER 2011, 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 # _____

SCORE ____ /100

(INSTRUCTOR USE ONLY)

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. On December 1, 2011 ABC News reported:

> **Cash Spills onto Highway …**
>
> Pennsylvania cops are searching for two men who were last seen heading toward their car hugging bags of cash that spilled from a bank courier van onto a busy highway.
>
> The missing bags are believed to have contained almost $100,000.
>
> Drivers thought they had hit the jackpot on Wednesday when the door of a Fidelity Courier Services van accidentally flew open, bags containing cash "well into the six figure" fell onto the road, according to police. At least one of the bags burst open, and drivers pulled over to grab some of the flying $10, $20 and $50 bills.
>
> Police called the scene "total confusion." …

Whom among the following has the better claim to the money:

a. The men who picked up the money.
b. The driver of the Fidelity Courier Services van.
c. The Upper St. Clair Police Department.
d. The municipal government that maintains the highway.

The general legal principle is that a finder of property has rights against everyone except its true owner, but several issues can complicate a finders' scenario. One is if an occupant of land or buildings on/in which property is found makes a competing claim against a finder (*e.g. Trachuk v. Olinek*, *Parker v. British Airways*). Although the municipal government (d) might attempt a claim on the basis of such authorities, its claim would be very weak unless it could establish the clear intention to possess objects found on its land, and even then, its claim would not be strong. So (d) is not the best answer. Another complicating issue is the distinction between property that is hidden, lost or abandoned. If this money were abandoned, a reasonable argument could have been made that the men who picked it up have the best claim. But the money was almost certainly not abandoned. So, much like the "finder" of buried Tunica artefacts in *Charrier v. Bell*, the men who picked up the money do not likely have a compelling claim to keep the money, despite the fact they may be in physical possession of it at the moment. Therefore, (a) is not the best answer. In circumstances like these, the overriding objective of the legal solution is to reunite the lost property with its true owner. The driver of the van from which the money spilled is best positioned to do that, as an employee or agent of the true owners (*Parker v. British Airways*), and therefore has the best claim. The best answer is, therefore, (b). However, in the rare circumstances where students gave (c), the police department, as the best answer, for the reasons explained above, near-full marks were awarded. Most students chose the correct answer, (b) to this question. Those students who chose (a), the finders, received only partial marks.

2. **Which of the following is most likely to have the legal status of a fixture belonging to the owner of land?**
    a. A flat-screen television that is hanging on a mounting bracket that is bolted to a wall of a rented apartment.
    b. A sign reading, "Century 21 Real Estate: House For Sale," planted 18 inches deep in the front lawn of a residential home.
    c. A remote control that operates an automatic garage door opener that is securely bolted to the ceiling of a garage.
    d. A tarp-covered storage tent resting on grass in a residential back yard.

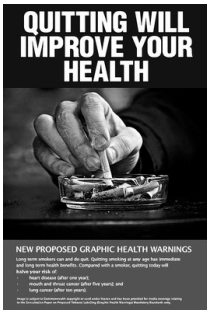
Most students who attempted this question answered it, and justified their answers, correctly by choosing (c), the remote control for the garage door opener. Although in legal practice, this is often listed specifically as an included chattel in an agreement of purchase and sale of real estate, a similar result would likely be achieved by the application of common law principles. Answer (a), the television, is not correct for at least two reasons. First, it is presumed a chattel since it is hanging on a bracket, not affixed to the wall, and furthermore the nature of the object and purpose of the annexation would not seem to rebut this presumption. Second, if it were a fixture, it would be a tenant's fixture, and subject to removal by the tenant prior to the end of the tenancy agreement (or within a reasonable time thereafter). Answer (b) is not the correct answer because, although the sign is presumptively a fixture, being planted in the ground, this presumption would be easily rebutted. The sign is only moderated fixed, unlike the signs at issue in *Diamond Neon*, which were set in concrete foundations or firmly affixed to a building. And, as noted by the dissenting judge in *Diamond Neon*, the nature of a sign can have a significant impact on its characterization. It is difficult to imagine many signs less likely to characterized as chattels than real estate "for sale" signs, especially signs with a particular realtors' trade name (unlike, *e.g.* a generic "for sale" sign). The storage tent, answer (d), is presumptively a chattel, given it is not affixed to the land at all. Without more information about the nature of the tarp-covered tent, it is not reasonable to infer that it is more likely to be a fixture than the remote control to the garage door opener. Although the remote control is also, presumptively, a chattel because it is not affixed to the building, it operates a device that is firmly affixed. About the only way in which the remote control might be characterized as a chattel is if it were a universal remote control, an assumption not justified on the facts of the question.

3. **If you were retained by a client to draft a legal document establishing a testamentary trust of a parcel of real estate in Ontario for that client's grandchildren who graduate from university, which of the following clauses in a will would be best to include?**
    a. My real estate in Ontario to whichever of my grandchildren graduate from university.
    b. My real estate in Ontario to trustees in fee simple to hold in trust for the benefit of my wife and her heirs, and then for my grandchildren who graduate from university.
    c. My real estate in Ontario to my grandchildren in fee simple on the condition that, to be an eligible beneficiary of this grant, a grandchild must complete university.
    d. My real estate in Ontario to trustees and their heirs to hold in trust for the benefit of whichever of my grandchildren graduates from university.

Relatively few students attempted this question (unsurprisingly to me). Of those students who attempted it, most chose the correct answer, but few chose the correct answer for all of the right

reasons. Answer (a) is wrong, most obviously because it does not create a trust at all. Answer (b) is wrong because the initial beneficiary of the trust is the testator's "wife and her heirs," which language conveys the beneficial fee simple interest to her (see *e.g. Thomas v. Murphy*). Any purported gift-over after that, such as to grandchildren who graduate from university, is redundant. It might have been open for a student to argue differently on the basis of s. 26 of Ontario's *Succession Law Reform Act*, *Re: Walker*, *Re: Taylor*, or *Christensen v. Martini Estate*, but to my recollection, no one did. Answer (c) is wrong because, like answer (a) it does not create a trust, but rather a conditional interest. Answer (d) is clearly the correct answer, if for no other reason than that all other options are clearly wrong. Note that the reference to the trustees' heirs are "words of limitation" indicating the scope of the interest, not the trustees' heirs' entitlement to anything. That point was explicitly discussed in class, and at pages 351-353 of the casebook. Whether the condition of graduation from university is a condition precedent or a condition subsequent or a determinable limitation, whether it is sufficiently certain to withstand challenge, or whether it violates the rule against perpetuities, are, quite frankly, secondary issues. Students who dealt with these issues reasonably (though unnecessarily in my view) were rewarded only if their analyses were correct.

4. On November 21, 2011 the Wall Street Journal reported:

> **Australia Cigarette-Packaging Curbs Prompt Suit.**
>
> SYDNEY—A legal showdown over advertising has broken out between the Australian government and the world's big tobacco companies.
>
> Tobacco giant Philip Morris International Inc. on Monday said it is suing Canberra for billions of dollars in damages over its world-first plan to wipe all marketing off of cigarette packs.
>
> 
>
>
> A handout image released by the Australian Government Department for Health and Ageing shows proposed health warnings for tobacco products on cigarette and other tobacco packaging.
>
> The new laws passed by Parliament on Monday will make Australia the first country to restrict logos, branding, colors and promotional text on tobacco packets. Beginning December 2012, product names will appear in standard colors and positions in a plain font and size on packets colored a dark olive-brown, which government research has found holds the lowest appeal to smokers. Health warnings with graphic images of the harmful effects of smoking will have to make up 75% of the front of the packaging and 90% of the back.

Which of the following arguments would be the strongest for tobacco companies to advance if Canadian regulators did the same?

a. The government has infringed tobacco companies' trade-marks, based on any applicable intellectual property legislation.
b. The government has expropriated tobacco companies' property, based on any applicable expropriation statutes.

c. The government has violated tobacco companies' property rights, based on the Canadian Constitution.
d. The government has interfered with tobacco companies' investments, based on applicable international treaties.

Many students attempted this question, with mixed results. A very common mistake was to select answer (a). But that is wrong. The government's actions no doubt impact the companies' trade-marks, but the actions do not "infringe" any trade-marks, because no similar mark is adopted to cause confusion in the marketplace (*Mattel*). Most students realized that expropriation statutes in Canada (such as those in Nova Scotia cited in *Mariner* and *Vancouver v. CPR*) apply only to land, not to intellectual property, and that the common law test for a *de facto* expropriation would not have been satisfied in these circumstances anyways. For those reasons, few if any students chose (b) as their answer. Most students also cited the absence of protection for private property in the Canadian constitution as the reason that (c) is not the best answer. The best answer, which many but not all students identified, is (d). This argument is based on the provisions of NAFTA, specifically Article 1110, as described and interpreted in materials such as the Ziff article and *Metalclad* cases included in the casebook. It was not a stretch at all to assume that "Philip Morris International Inc." would have operations in the United States (or Mexico) to use as the basis for such a claim against a Canadian government's possible regulatory interference with its investments. Indeed, the casebook makes specific mention (page 155) of similar actions threatened by U.S. tobacco companies in 1994 and 2001. And, if you read the newspapers, you'll see that this is in fact precisely what happened in the context of the Australian regulations.

5. **In *Star Energy Weald Basin Ltd. v. Bocardo SA*, [2010] UKSC 35, the United Kingdom Supreme Court dealt with the issue of subsurface ownership.** Star Energy had diagonally drilled wells from the surface of its own land but running underneath adjacent land owned by Bocardo, at depths from 800 to 3000 feet below the surface. Their Lordships unanimously decided that this was a trespass, ruling that: "*the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there*," going down as far as "*the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about*." **Which of the following statements is most accurate?**
   a. This decision is inconsistent with Justice Haddad's opinion in *Didow*.
   b. This decision is inconsistent with the Latin maxim, *cujus est solum*.
   c. This decision is inconsistent with Justice Stanley's opinion in *Edwards v. Sims*.
   d. This decision is inconsistent with Justice Logan's opinion in *Edwards v. Sims*.

Like question #4, this question was popular. But answering it correctly required a close reading and clear explanation of the cases we studied in our course. Most obviously, the ruling in *Star Energy* is inconsistent with Justice Logan's opinion in *Edwards v. Sims*. The correct answer is, without much doubt, (d). Justice Logan, writing in dissent, would have denied Lee (the applicant) permission to enter Edward's property on which the cave entrance was located, because, in Justice Logan's opinion, Lee's proprietary claim to the subsurface (based on the *cujus est solum* maxim) was much less compelling than Edward's claim (based on labour and exploitation). Had the UK Supreme Court adopted this perspective, it probably would have ruled

that Star Energy was not trespassing under Bocardo's land because Star Energy, not Bocardo, had taken the initiative to exploit the subsurface resources. The UK Supreme Court's decision is consistent with the Latin maxim, which was applied in Justice Stanley's majority opinion in *Edwards v. Sims*, making choices (b) and (c) poor answers to this question. There is a plausible cargument that the *Star Energy* decision isn't perfectly consistent with the literal maxim, because, technically, the maxim might suggest completely unlimited ownership rights, while *Star Energy* places the limits the surface owner's rights at the point of absurdity. This is a far-fetched, tenuous reason to select answer (b), and certainly not compelling enough to make (b) a better answer than (d). Finally, the limitations on the Latin maxim applied in *Star Energy* (up to the point at which the concept of ownership is so "absurd as to be not worth arguing about") and *Didow* (up to the point at which others "impinge on the actual or potential use and enjoyment of his land") are perhaps different, but they are not inconsistent, especially given the factual distinctions in the cases—one was about airspace, the other about the subsurface. So (a) is not the best answer.

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

1. *The Guardian* recently reported on a significant decision of the United Kingdom Supreme Court about the division of property upon the breakdown of non-marital relationships. Based on the facts that you can discern from this report, how might the case have been resolved in Canada, and on what legal grounds? Clearly indicate how more facts or assumptions would affect your answer.

> **Supreme court rules on property rights for unmarried couples**
>
> *Judgment giving 90% of house to woman who paid mortgage for 13 years has implications for millions of unmarried couples*
>
> Owen Bowcott, legal affairs correspondent. Wednesday, 9 November 2011.
>
> A supreme court judgment awarding a female hairdresser the overwhelming share of an Essex bungalow has redefined the property rights of unmarried couples and triggered calls for legal reform.
>
> The unexpected ruling in the long-running case of *Kernott v Jones* overturns previous, strict interpretations of property titles and exposes the inadequacies of what one legal expert described as a "fairly incomprehensible" area of the law. …
>
> The unanimous decision by five supreme court justices makes it clear that even though the home was registered in the names of both the man and the woman, judges are permitted to substitute a fairer division of possessions. …
>
> Leonard Kernott and Patricia Jones separated in 1993 after living together in their property in Thundersley, Essex, for eight years. The supreme court was asked whether the assets should be shared 50/50 or predominantly allocated to the woman, who has paid all of the mortgage for the past 13 years.

Kernott, 51, an ice cream salesman, moved out after the breakup, leaving Jones, 56, a hairdresser, to pay the mortgage, maintain the house – valued at £245,000 in 2008 – and raise the couple's two children, the court was told.

The court heard Kernott, now of Benfleet, Essex, waited until his children were grown before making a claim on his old home in 2006. In 2008, a county court judge sitting in Southend ruled that Jones should get 90% of the value of the house and her former partner 10%. That decision was upheld by the high court in London in 2009.

But last year the court of appeal overturned the lower courts' rulings, deciding that Kernott was entitled to half the value of the house because the couple owned equal shares when they separated and neither had since done anything to change the situation.

In restoring the county court order for sharing the assets, Lord Walker and Lady Hale said it was a "… logical inference that [the couple] intended [Kernott's] interest in Badger Hall Avenue should crystallise" in 1995, when they took the house off the market and cashed in an insurance policy, so that Kernott was able to buy a house in his own name.

The presumption of joint beneficial ownership could be rebutted by evidence that it was not, or ceased to be, the common intention of the parties to hold the property jointly, the justices said. …

Lord Kerr said that the split of 90% and 10% originally imposed by a county court judge was "a fair one as between the parties".

Speaking after the ruling, Kernott said he accepted the judgment and hoped to move on with his life. "I never wanted 50%," he said. "I thought 25% would be a fair reflection of what I had put into the property.

"When I lived there, I paid for everything and I completely refurbished the place. I have been painted as this ogre who walked out on his family. I love my family. I didn't want to leave but it was made unbearable for me to stay. It's a sad day for men who are left in a similar position to me and it feels like the law will always side with the woman." …

Many solicitors, who had been expecting the court of appeal ruling to be ratified, welcomed the judgment as a fairer distribution of property. Victoria Francis, a solicitor at the law firm Speechly Bircham, said: "The supreme court's decision may go some way to addressing the injustices inherent in the current law affecting cohabitees but it does so at the cost of certainty and will surely lead to more litigation, as co-owners attempt to unscramble what is really a fairly incomprehensible area of the law unless you are a specialist in it. …"

"Couples should not assume that the legal pieces of paper that show co-ownership of a property are the end of the story. If one of them goes on to make a different arrangement, for example moving out or not paying the mortgage, then the court can and will adjust the original shares," said Alison Hawes, at the solicitors Irwin Mitchell. …

Full marks on this question required discussion of the applicability (or inapplicability) of provincial statues governing the equitable division of property on dissolution of this type of relationship, the common law of unjust enrichment and the corresponding proprietary remedy of the constructive trust, and, ideally, reference to the law of resulting trusts. First, it matters where in Canada a case like this arises, as provincial law varies from jurisdiction to jurisdiction. Many students who identified that issue mentioned *Walsh v. Bona*, and then proceeded with their analysis on the basis of the law in Ontario, where there are no statutory provisions for the equitable division of property when non-marital, conjugal relationships break down. The heart of this question required students to apply the Canadian law of unjust enrichment, as developed in cases like *Peter v. Beblow* and, most recently, *Kerr v. Baranow*. The central flaw in answers receiving average or below-average scores was the failure to apply rather than describe the law. Many students tended to simply transcribe the legal test, its history, and some generic questions about it. Students who performed well on this question, however, thoroughly and accurately applied that test to relevant information, reasonable assumptions and hypothetical facts drawn from the report provided. Yet, even among these students, a common mistake was the erroneous belief that Mr. Kernott would be the plaintiff, suing Ms. Jones for unjust enrichment resulting from her 90% ownership stake in the home. That assessment was wrong. Any action in these circumstances would have been brought Ms. Jones against Mr. Kernott, claiming, in essence, that his 50% co-ownership stake was too much, unjustly enriching him with a proprietary interest in the home that she mostly paid for. It is in that context that issues of Mr. Kernott's own past financial or non-financial contributions might be relevant. (All of which should have been analyzed specifically, not abstractly, within the 3-step legal test for unjust enrichment, of course.) It is also in that context in which a discussion of the doctrine of resulting trusts was necessary, including mention of *Pecore v. Pecore*. Under this doctrine, anything Ms. Jones paid for Mr. Kernott's proprietary interest in the home would be presumptively considered a resulting trust held by Mr. Kernott for the benefit of Ms. Jones, given that this situation does not fall within any of the limited circumstances in which the alternative presumption of advancement applies. Students might have tried (probably unsuccessfully) to identify circumstances of this case that would rebut the presumption of resulting trust, but very few attempted to do so. Finally, some students appropriately discussed the gender dynamics of this case, but some clarity was lacking in most of these analysis. Many students noted that it is, arguably, somewhat exceptional that this scenario involves a female partner making the bulk of financial contributions to purchase property, as opposed to other kinds of contributions toward a joint family enterprise (which are the more typically litigated cases and reported decisions). On the other hand, fewer students recognized that the scenario of a woman seeking to prevent or remedy the unjust enrichment of her former partner is all too familiar.

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2. The *Vancouver Sun* ran the following report about an agreement between Enbridge Inc. and the Gitxsan First Nation about a proposed oil pipeline from the Alberta oil sands to the Pacific Ocean for transport to Asia.

> **Gitxsan First Nation take ownership stake in Northern Gateway pipeline project**
>
> By PETER O'NEIL, Vancouver Sun December 2, 2011

Enbridge Inc.'s embattled Northern Gateway pipeline proposal found an island of first-nations support in a sea of opposition to the $5.5-billion project on Friday with the Gitxsan First Nation's announcement it has signed on as an equity partner.

The Gitxsan First Nation, one of B.C.'s best-known aboriginal communities due to its role in the landmark Delgamuukw Supreme Court of Canada land rights court ruling, said it expects to generate at least $7 million in net profits from the equity agreement, which includes financing from Enbridge.

The community also expects to see job training, employment and contract opportunities in procurement for the project construction, said Hereditary Chief Elmer Derrick. The decision, made by the Gitxsan's 60 or so hereditary chiefs, is important for a community suffering 90-per-cent unemployment and a high rate of suicide, Derrick said.

"On the ground, we are very mindful of the need to protect the environment," he added.

"We don't compromise that. At the same time, we're also mindful of the need to pursue development activities that make sense to our community."

The Gitxsan gave the Enbridge proposal careful scrutiny before making a decision, including scientific work by the Gitxsan Watershed Authority to examine streams within the 33,000-square-kilometre land-claim area that would be impacted by the Enbridge project, Derrick said.

The Northern Gateway route is south of the southern border of the Hazelton-based first nation's claim area, but Derrick said it crosses five streams that flow into Babine Lake, an important resource to the Gitxsan.

He added that the Gitxsan wants to be "at the same table" with Enbridge to have a say in how the pipeline is built.

Derrick said the Gitxsan has another interest in participating — known potential oil and gas reserves in the Bowser and Sustut basins within its territory.

The announcement put a wrinkle in the debate over the project, a sign of support in the face of what has been up until now massive first nations opposition.

On Thursday in Vancouver, a coalition of B.C. first nations representing 130 groups vowed to present an "unbroken wall" to block construction of the project. Earlier in the week environmental groups issued a damning report saying bitumen is too heavy and corrosive to be sent safely by pipeline.

Is this a permitted use of Gitxsan territory according to property law in Canada? Could the governments of Canada, British Columbia or Alberta require other First Nations to do the same with their lands?

This question involved conceptual or theoretical issues regarding aboriginal title in Canada only tangentially. It was primarily a technical, legal question about how that title can be economically exploited and potentially infringed. Some students began with the question of whether the Gitxsan or other First Nations had actually established proof of title to the lands at issue, which was rewarded but not necessary. Students who made the reasonable assumption, preferably

explicitly, that title had been or could be established were not penalized for skipping that step. Other students queried whether there was an aspect of aboriginal self-government underlying this question. Although that was an insightful point to make, given the political and geographic context in which this issue arose, it was beyond the scope of the course materials and, therefore, not expected or required to be dealt with. The starting point really had to be a discussion – again, not merely a description – of the key features of aboriginal title identified in *Delgamuukw*. As a *sui generis* interest in land, aboriginal title cannot be used in a manner irreconcilable with the nature of the community's attachment to that land. Ample facts that were given, or could be assumed or hypothesized, facilitated analysis of this issue. The key factual ambiguity surrounded the extent to which the Gitxsan decision would impact its own lands, or others' lands around it, which the best students made note of in their answers. Students were also rewarded for discussing the decision-making process for managing the land, which was in accordance with the communal nature of aboriginal title. The further, and perhaps most important, point is land held pursuant to aboriginal title is cannot be alienated except to the Crown. Whether the agreement mentioned in the article contravened that limitation or not was unclear, and thus necessary to explore. The other aspect of this question required engagement with the constitutionally protected nature of aboriginal title, under section 35. This is one of the key considerations (but by no means the only one) affecting the governments' ability to infringe or extinguish aboriginal title, which is at the heart of whether Canada, British Columbia or Alberta could legally require other First Nations to cooperate with Enbridge. (The moral, political, and practical – as opposed to legal – issues were another matter altogether, which some students usefully described.) Students who received high marks on this question did so because they grappled meaningfully with the complexities of infringement versus extinguishment, and the powers of the federal versus provincial governments to do either. These well-performing students also discussed the duty to consult and other aspects of the Crown's fiduciary duty with aboriginal peoples, discussed in *Haida Nation*, among other cases. (As a post-script, students might be interested to know that subsequent to the drafting of this exam, the story continued to make headlines as questions arose over the degree to which the Gitxsan decision was consultative and reflective of the interests and perspectives of other aboriginal peoples.)

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3. The *National Post* recently featured the following report:

> **"Attawapiskat: A 'homeland' at the crossroads."**
>
> Kathryn Blaze Carlson – Dec. 3, 2011
>
> "Despite our challenges, the bulk of us will say we don't want to be anywhere else," said Stan Louttit, the Grand Chief representing seven Cree communities in Northern Ontario, including Attawapiskat. "We're close to our rivers, close to our fish, close to our moose, close to our geese, close to the burial grounds where our grandparents were buried."
>
> But the community is also far from a hospital with a full-time doctor, far from a school not built of temporary portables, far from a supermarket where milk and potatoes cost a third of the price charged at the local general store and, perhaps most important, it is far from economic centres and the jobs they offer.
>
> And so it is far from prosperity, far from wealth and the security many Canadians take for granted. The images emerging from far-flung Attawapiskat, where the band

council announced a state of emergency more than a month ago, show a desperate community in need of immediate attention. But even if the housing crisis is somehow solved in the short term, will this community, and the dozens of remote reserves struggling just the same, ever be truly viable in the long term? …

On Wednesday, the federal government ordered Attawapiskat under third-party management amid speculation of financial disarray. But to band members, the one thing neither the government, nor anyone else, can ever take from them is their land. …

But should an attachment to that particular parcel of geography — one apportioned through an artificial reserve system created long ago by a federal government seeking to warehouse aboriginals before assimilating them — trump the provision of the basic needs of children? The sick? The elderly? Can a remote, fly-in community like Attawapiskat really be expected to maintain its traditional land-base but still manage a decent quality of life, let alone the modern conveniences other Canadians enjoy? …

"Those communities really shouldn't exist," said Frances Widdowson, author of Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation. "These remote communities are seen as homelands, where economies can be built to support the population. But that's just not possible, and it's not going to happen. You can't say, 'They should continue to exist because they've always existed.'" …

But ask Grand Chief Louttit or Grand Chief David Harper, who represents 30 northern Manitoba communities, and such suggestions are met with contempt and suspicion.

"Our kids were taken from their land, forced to lose their culture and languages," Grand Chief Harper said. "We're not the problem. We sustain ourselves, we've lived for generations, and we'll live for the next hundreds of years."

"[Relocation] is a ridiculous idea," Grand Chief Louttit said. "It's saying, 'Let's move these people to somewhere near Timmins and get them off their territory, and in the meantime let the mining companies lay claim to all that.'" …

Not only do discussions of relocation or urbanization reflexively alarm many aboriginals, but First Nations have developed a strong kinship with their reserve land — even if historically they, like many non-natives, moved around in pursuit of economic opportunity. …

Based on the principles studied in our course, what role, if any, should property law play in addressing the challenges facing Attawapiskat?

This question, unlike question #3, called for a more conceptual legal analysis than a technical one. It required in-depth engagement with the principles underlying Chief Justice Lamer's lengthy discussion in *Delgamuukw* about the basis for aboriginal title in Canada. Almost everyone who attempted to answer the question also dealt extensively with the extract from Flanagan's work, "First Nations? Second Thoughts." Most students were skeptical of Flanagan's arguments, but grades were not determined on this basis. Grades were determined on the extent to which a student's opinions were objectively formulated and convincingly justified. References

to De Soto, Posner and others working in the field of law and economics was also common, and rewarded appropriately. References to many other commentators were less appropriate, and it sometimes seemed that students were name-dropping with the hope that one of their references would be the right one. This tactic did not help students who used it; more typically it hurt them. Moreover, mere reference to a principle or its proponent was not enough. Students had to connect this to the themes in the article. I was very pleased to see how students integrated this article, and in general the challenges in Attawapiskat, with historical injustices and the mistreatment of aboriginal peoples. The relocation of children and communities connected with residential schooling policies is one example. The delays and other frustrations portrayed in the film, Honour of the Crown, is another. More than a few students who went beyond the course materials to bring their own opinions about the recent conversation among commentators and policymakers (of which this article is just one example) about the extent to which the *Indian Act* is part of the problem or the solution to these issues were rewarded with high marks for their insights and creativity. By the way, Attawapiskat is place not a people, being home to the Mushkego or Omushkego James Bay Cree. Students were not penalized for this mistake.

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4. In a video commentary about the Occupy Wall Street protests in privately owned Zuccati Park, Judge Andrew Napolitano, Fox News Senior Judicial Analyst, said:

> "… That's the setting: Private ownership, public control, political activism, all clashing at one time and in one place. Surely the owner of private property must enjoy the power to exercise the right to exclude those whom he does not wish to be on his private property. That is the essence of the right to private property—the right to exclude. And surely anyone can say anything at a reasonable time on public property. That's the essence of the freedom of speech. So if the … officials of New York City let private property be private, we'd have no issues about who can camp where and when. The owner of private property would decide."

Do you agree? What legal factors, if any, complicate this question in respect of the "occupy" protests in other cities?

Well, this question was nothing if not predictable. My only surprise was that not every student in the class attempted to answer it. To be honest, I almost considered it a kind of bonus question, given our class discussions and the presence of a somewhat similar question on the practice exam. It is one of the reasons that I gave students a choice of among 5 different questions, which is more discretion than I've provided in previous years. Anyways, if there was a flaw in some students' answers to this question, it was that it was somewhat too generic, equivocal and unconvincing. Some students wrote about the protests in general, as opposed to Judge Napolitano's remarks about the protests. Other students tried too hard to saddle the fence, and never really explained where they stood on the issue at the end of the day. The best students reached a clear conclusion, like Ontario Superior Court Justice Brown did in the "Occupy

Toronto" case. (The best students also demonstrated their familiarity with the current events, for example by referencing and sometimes even discussing legal developments like that decision, or like University of Ottawa law professor Mathen's op-ed on the issue.) For students to do reasonably well on this question, at minimum they had to do several things. They needed to identify the crux of the problem as the tension between private property and other important rights, such as freedom of association and freedom of expression. Students had to situate that within the context of Canada's constitution, which protects those other rights, but not property. Property is a very important legal right, nevertheless, and many of the cases covered during our course support its protection. Discussion of those cases that balance property against other social values was necessary. Some students went beyond the expected references to the several cases about picketing, protesting or leafleting and integrated discussion of the balance between property and the right to life, liberty and security of the person. Specifically naming or, at least, applying those cases was very important, as was analogizing or distinguishing the "Occupy" protests on that spectrum. The best students did even more, for example by connecting the protests to Elickson's notion of a chronic nuisance (which some students felt the protesters had become, while others disagreed – your position didn't matter, as long as you took one). One interesting observation made by students receiving high grades was that the semi-permanent duration of the protests was, in part at least, key to the protesters' message, and therefore relevant in the legal analysis. It was rare that students who answered this question did not deal with the other fundamental point that needed discussion. That was a comparison between the quasi-public nature of Zuccati Park and other places like shopping malls, universities, city halls and personal residences.

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5. Cuba recently announced that its citizens would soon be able to buy and sell property. The *New York Times* report describes the change as follows:

> **Cuba to Allow Buying and Selling of Property, With Few Restrictions**
>
> By Damien Cave, November 3, 2011
>
> MEXICO CITY — Cuba announced a new property law Thursday that promises to allow citizens and permanent residents to buy and sell real estate — the most significant market-oriented change yet approved by the government of Raúl Castro, and one that will probably reshape Cuba's cities and conceptions of class.
>
> The new rules go into effect on Nov. 10, according to Cuba's state-run newspaper, and while some of the fine print is still being written, the law published on Thursday amounts to a major break from decades of socialist housing. For the first time since the early days of the revolution, buyers and sellers will be allowed to set home prices and move when they want. Transactions of various kinds, including sales, trades and gifts to relatives by Cubans who are emigrating, will no longer be subject to government approval, the new law says.
>
> "To say that it's huge is an understatement," said Pedro Freyre, an expert in Cuban-American legal relations who teaches at Columbia Law School. "This is the foundation, this is how you build capitalism, by allowing the free trade of property."
>
> Cuban officials would disagree; they argue that they are carefully protecting socialism as they move toward economic reform, and the new law includes some provisions that seem aimed at controlling both speculation and the concentration of

wealth. Owners will be limited to two homes (a residence and a vacation property) and financing must go through Cuba's Central Bank, which will charge fees, which have not been determined. And a tax of 8 percent will be split by the buyer and seller.

Nonetheless, experts and Cuban residents — who have been expecting the law for months — say the law's implications are likely to be far-reaching. In a country defined by limited change and pent-up demand for freedom of all kinds, they argue, the law will probably open a Pandora's box of benefits and risks.

On one hand, billions of dollars in property assets that have been essentially unvalued or undervalued and locked in place for decades would be available for sale.

Economists on the island favoring economic liberalization have said the country's other changes — making room for small businesses, and private agriculture — have been limited by lack of internal demand. Some experts say home sales could free up the capital needed to jumpstart the island's economy. At the very least, they argue, it will probably lead to a boom in renovation.

"With a housing market, suddenly people have some wealth and that's a stake in the economy that generates activity," said Ted Henken, a professor at Baruch College in New York.

Yet on the other hand, there are also significant social concerns. Mario Coyula, Havana's director of urbanism and architecture in the 1970s and '80s, said that wide-scale buying and selling would lead to a "huge rearrangement" in Havana and other cities as the wealthy move to better areas. He and others said it would inevitably exacerbate class conflict.

And because the island has a shortage of housing — with many families and even divorced couples continuing to live together for lack of a better option — critics say that any displacement could raise the prospect of homelessness. For example, if two families are sharing a home and one holds what currently amounts to Cuban title with limited rights, the new law says that the titleholder can sell and the tenant family will eventually have to move.

Many Cubans say they are afraid that the market system will leave them in the lurch.
…

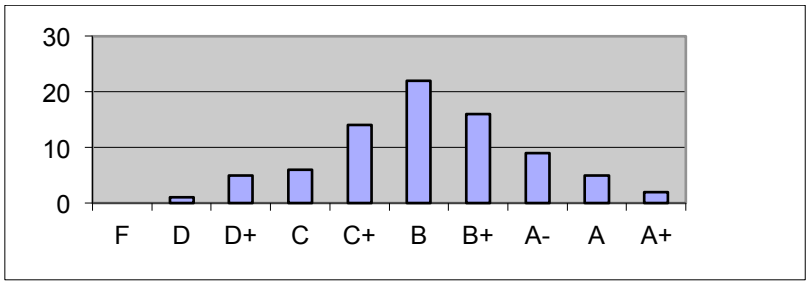
Do you believe that Cuba's reforms are more likely to have negative or positive effects? Do they go too far, or not far enough? In your predictions, refer to specific examples from our course of the social and economic implications of a predominantly private property system.

This question was somewhat similar to question #3, although the context is admittedly very different. The similarity stems from the need in both questions to discuss the justificatory rationales for the legal institution of private property in society. Both questions also facilitated students' discussion of economic, social and cultural considerations. While most of the justifications supporting the institution of private property are economic (see *e.g.* Posner, De Soto, and others). While the issue of wealth distribution, or rather, concentration, might also be seen as an economic issue, there is relatively more room within that context to discuss social and cultural concerns, such as poverty and homelessness. Many students took on this topic by

making insightful arguments to justify their opinion about whether or not Cuba's reforms are, on balance, a good or bad thing. Also like question #3, it was not nearly enough in answers to this question to merely recite references and boilerplate discussions about theoretical arguments. So, for instance, it was not very clear to me how the Coase theorem was relevant to question #3, although not surprisingly, some students felt name-dropping would help their grade. But the Coase theorem is directly relevant to this question, especially given the discussion in the NYT article about the transaction costs and limits on ownership that will apply under Cuba's new rules. Another example that some of the best students provided in response to this question explains the difference between satisfactory and outstanding answers: A lot of students (almost everyone, in fact) mentioned the tragedy of the commons as one the main justifications for private property in society. But the highest grades were reserved for students who connected this to concrete issues mentioned in the article. There is a clear and specific relationship between the tragedy of the commons and the observation in the article that the introduction of private property "will probably lead to a boom in renovation." Do you see the why? The best students did, and some even connected this to other less obvious parts of the course, such as Elickson's article in chapter 5, discussing the rationale for the perpetual duration of the fee simple estate in land, and indeed, the specific movie theatre example used in that piece. That is just one small illustration of the many things that distinguished average from above-average grades.

Overall, students performed well on this exam. I was very pleased to see how well many students were able to not only understand but also apply the key rules and principles we covered in the course. It is very rewarding to read exam answers written by students who were clearly engaged with the materials and discussions we enjoyed together.

The distribution of exam grades was as follows, with a GPA of 6.15:



Combined with the responses and integrated dispute resolution quiz, our final GPA was 6.50. Although this technically outside of the Faculty's brackets, it was only negligibly different (very slightly higher) than other sections of the same course, CML 1108.