PROPERTY 1108B MIDTERM EXAM - PROFESSOR DE BEER

FRIDAY, 18 NOVEMBER 2011, 11:30–12:45 (**75 MINUTES**)

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%).

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

IN **PART III** YOU MUST **ANSWER 1 OF 2 ESSAY QUESTIONS**. THIS ANSWER IS **WORTH 40%** OF YOUR EXAM 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 WILL BE SELF-EVALUATED, BUT WILL NOT COUNT TOWARD YOUR OFFICIAL GRADE IN THE COURSE.

This page is for the professor's use only. Do not write on this page.

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+	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

Correct choice of responses				
0				5
Explanation (*i.e.* correct rationale for chosen answer, relative 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. A person who must wait for a prior event to occur, such as the death of the owner of a life estate, before inheriting a fee simple interest has a contingent interest subject to a condition precedent.
    b. A condition subsequent is invalid if a court cannot see precisely from the outset what events will divest the owner of her interest.
    c. Words such as "while", "until", "provided that" and "as long as" generally indicate that a determinable interest has been created.
    d. The rule against perpetuities, as modified by statute in Ontario, is concerned with the theoretical possibility that an interest might vest, if at all, outside of the perpetuity period measured by lives in being plus 21 years.

The correct answer is B, supported by the New Brunswick Court of Queen's Bench 1987 decision in *Hayes v. Meade*. While A might be generally accurate, the specific example referring to the death of the owner of a prior life estate is inconsistent with the ruling in *Stuartburn v. Kiansky*. Answer C confuses the words indicating a determinable interest; "provided that" indicates a condition subsequent. D is incorrect because the statutory scheme is concerned with actual events, not theoretical possibilities.

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

2. **In *Mariner Real Estate Ltd.*, 1999 CarswellNS 254 (C.A.), which of the following would have made the most significant difference to the outcome of the Nova Scotia Court of Appeal's decision?**
    a. If Mariner Real Estate Ltd. had been an American, not Canadian, company.
    b. If Justice Cromwell had been appointed to the Supreme Court of Canada in 1998, not 2008.
    c. If Mariner Real Estate Ltd. had applied for and been denied permits for recreational use of the property.
    d. If Canada's *Charter of Rights and Freedoms* provided constitutional protection for private property like the 5th Amendment to the United States Constitution.

The correct answer is C. The fact that Mariner had not even applied for, let alone been denied, permits for any uses other than constructing single family dwellings was key to Justice Cromwell's decision. A is not the best answer. While it is possible that an American company could bring a claim under NAFTA's chapter 11 expropriation provisions, this would have led to separate arbitration proceedings (like *Metalclad*) and not changed the outcome of the civil proceedings in Nova Scotia. B is not the best answer because there is no basis to infer that a different judge would have decided the *Mariner* case differently. D is not the best answer because this was not a constitutional case; it was simply about the interpretation of the provincial *Expropriation Act* and the requirement of compensation for regulatory takings under that statute.

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

1. The following news article was recently published in the Telegraph-Journal, a leading New Brunswick newspaper. Describe the arguments you would make if Mr. White retained you to act as his legal counsel in an appeal of Judge Mahoney's decision.

Telegraph Journal, 5 Oct 2010

Capital cabbies clash in courtroom

FREDERICTON - A dispute over prime taxi territory spilled over into a courtroom Monday where a Fredericton cab driver argued that an exclusive contract for a rival cab company at the Regent Mall isn't fair.

Trevor White, a driver with Checker Cab, stood trial in Fredericton provincial court Monday on March 30 and March 31 counts under the provincial Trespass Act.

The case arises as a result of an exclusive contract between ABC Taxi and the mall. As of March 1, only ABC cabs can park at the mall and wait for fares. Other cabs can drop off customers and pick them up at the Regent Mall, but they're not supposed to linger in the hope that others will flag them down.

Two women who worked as security officers at the mall at the time testified that White kept lingering around the mall after he'd been told he wasn't allowed to wait to get fares there. White was issued a trespass notice, one of the women testified. Evidence at trial indicated it was ABC Taxi owner Mike Bacon who was calling mall security officers to advise them of the presence of unauthorized competing cabs at the mall and to get them to shoo them away.

The cab driver admitted in his closing arguments before Judge Geri Mahoney that he ignored the trespass notice.

"Your honour, I believe this very much to be unconstitutional," White said.

"I believe it's just wrong to stop people from going there."

He said about 25 per cent of his business as a cab driver comes from fares at the Regent Mall.

"If I can't go up in there, I might as well stop driving taxi," White said.

"I was informed by my owners to ignore trespass notices."

Mahoney said the issue isn't whether it's right or wrong that ABC has an exclusive contract with the mall but whether White ignored a proper trespass notice.

"You don't have a right to be at the Regent Mall," the judge said, noting there was no constitutional argument to be made in the case.

"They have the right to tell you not to go on the property."

She found him guilty of both trespass charges and fined him $336. …

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

Appellate counsel would do best to submit that Judge Mahoney erred in holding that there was no constitutional argument to be made. The strongest arguments would emphasize that private property (like a shopping mall) is not constitutionally protected in Canada, while several countervailing rights are. These include the fundamental freedom of peaceful assembly, as well as the right to life, liberty and security of the person. The difficult parts of the argument for appellate counsel would be to analogize or distinguish these particular facts with other important cases where such issues have arisen in the courts. It would be important for appellate counsel to establish that a shopping mall is a place where the public is invited and expected to gather, and therefore more like a public park or university campus than a private residence. Discussion of the Supreme Court decisions in *Harrison v. Carswell*, *Committee for the Commonwealth v. Canada* and the many related cases discussed during class would be useful to explore this issue. Furthermore, it would important for appellate counsel to emphasize the constitutional basis of the activity taxi drivers are engaged in at the mall, *i.e.* soliciting business. This argument is certainly not as strong as homeless persons' right to shelter in *Victoria v. Adams*, and probably not as a strong as the "occupy" protestors either, but nevertheless, an attempt to analogize these would be necessary. Comparisons with the picketing cases would almost certainly be more convincing.

2. The Globe and Mail recently reported on a decision of the British Columbia Supreme Court, *Century 21 Limited Partnership v. Rogers Communications, Inc.*, 2011 BCSC 1196 (CanLII). Describe the arguments based on property law that you would make if Rogers retained you to act as its legal counsel in an appeal of this decision.

September 20, 2011

Why reading a website's fine print matters

By JEFF GRAY Globe and Mail Update

… In a ruling observers say has important implications for online commerce, a B.C. judge has sided with Century 21 Canada in its fight with Zoocasa …, a website owned by Rogers Communications Inc., over the unauthorized use or "scraping" of online real estate listings.

In the decision, released earlier this month, Mr. Justice Robert Punnett issued an injunction banning Zoocasa from using photos and descriptions of houses for sale from Century 21's online listings and posting them on Zoocasa's website, where it added other information about the neighbourhood or nearby schools or stores. …

The judge only awarded $1,000 in punitive damages, saying that Zoocasa's conduct was not "particularly egregious." …

The ruling is being hailed as an important recognition that companies must be able to control the way information they put online is used.

"They were taking data and putting in on their site, even though we have rules on our site ... the same as Rogers has on their site," said Don Lawby, president of Century 21 Canada. "We have a responsibility to protect that data."

A Rogers spokeswoman, Patricia Trott, said the company is still reviewing the decision. But she added that last year, Zoocasa stopped using data from Century 21's site and "has operated since then in full compliance with the various real estate boards across Canada."

The judgment in the case brings an old concept in the law into the Internet age, said Marko Vesely, a partner with Lawson Lundell LLP in Vancouver who represented Century 21. …

Century 21's battle with Zoocasa goes right back to the website's launch in August, 2008, when Rogers representatives pitched the idea to Century 21 in hopes the real estate giant would give Zoocasa access to online house listings. Century 21 refused to play ball. But according to the judgment, Zoocasa went ahead and started taking listings from Century 21's website anyway, despite warnings from Century 21's lawyers.

By November of 2008, Zoocasa had started posting only "truncated" listings. Century 21 filed its lawsuit a month later, alleging that Zoocasa had violated the Century 21 website's terms of use, and copyright laws. It wasn't until March, 2010, that Zoocasa stopped using the Century 21 site's listings, except in cases where it had permission from individual real estate agents. …

The Web is crawling with sites similar to Zoocasa, which take data from multiple websites - such as car rental or hotel sites - and make them more easily searchable and comparable. But the Century 21 decision says companies in this business cannot use data over the objections of the owners of information, said Barry Sookman, a partner with McCarthy Tétrault LLP who blogs on technology and intellectual property law.

Appellate counsel could address several key issues related to the property law principles we studied: copyright, news reporting, and cyber-trespass. On the first issue, counsel for Rogers on appeal would need to establish that there is no copyright protection in the "photos and descriptions of houses" taken from Century 21's website. It would be very difficult to argue that photographs are not original works protected by copyright, like Claude Théberge's paintings. Whether or not descriptions of houses (and other "data") are original would depend significantly on the nature of such descriptions and data, and counsel might be expected to pose contrasting hypothetical facts to emphasize this point. Even if there were copyright protection in the specific language used to describe the houses, Rogers probably cannot be stopped from reporting on the basic facts that a particular house is for sale, with particular features, in a particular neighbourhood, unless this qualified as "hot news." So counsel would have to distinguish *INS v. AP*, perhaps by arguing that Rogers and Century 21 are not competitors like INS and AP were (a difficult argument to win), or perhaps by arguing that the temporary period in which news of a house for sale is "hot," and therefore "quasi-property," is short. Finally, Rogers would have to establish that it had not cyber-trespassed. Discussion of *Intel v. Hamidi*, and especially the "scraping" cases (not the spamming cases) referenced therein would be essential. Counsel would need to establish that Rogers did not cause damage to Century 21's chattels by scraping data from its site. [Note that the actual decision in this case focussed extensively on whether simply visiting a website constituted contractual agreement to abide by its terms and conditions. While that's a fascinating issue, I would expect you to deal with it in contracts but not property class.]

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

1. The United States recently passed a patent law reform bill called the *America Invents Act*. Rob Wheeler and James Allworth commented on the legislation in a blog posting for the Harvard Business Review. An edited version is reproduced on the next page. Without

knowing (or needing to know) the specific details of the statute, do you agree with their opinion? Specifically, what analogies and lessons can be drawn from the concepts and topics we have addressed throughout our property law course?

U.S. Patent Overhaul Won't Help Innovators

9:38 AM Thursday September 15, 2011 by Rob Wheeler and James Allworth

On Friday, President Obama will sign the America Invents Act, resulting in the largest overhaul of the U.S. patent system in over half a century. … Supporters of the new measure argue that it will streamline the patent application process and harmonize America's system with the rest of the world, and it will allow for more rapid approval and increased certainty in the validity of patents. But this misses the point entirely: the fundamental problem with current patent law has nothing to do with the process for obtaining a patent. The biggest problem is that nobody can tell what a patent covers until they've spent months or years working it out, often in the courts. …

The existence of clear boundaries is a hallmark of all effective property systems. With physical property, it is easy to understand what is mine, what is yours, what belongs to the community, and what belongs to someone else. This is why real property systems provide such good incentives for improving upon what is ours and why there is relatively little in the way of litigation to determine who has rights to a given piece of property. …

The last few decades have seen an explosion in abstract patents that make a mockery of our system. Software, biomedical, and business process patents result in extensive and costly litigation precisely because these patents do not function like property. … Rather than try to more tightly define the boundaries, the filer has an incentive to make the boundaries as blurry as possible in hopes that it will be deemed broadly applicable. Even expert patent attorneys and judges have trouble discerning the scope of today's increasingly complex and abstract patents.

No property system, intellectual or otherwise, can function effectively this way. When the boundaries of what is owned are indiscernible, the concept of property ceases to have meaning. …

This essay question permitted discussion of the rationale for granting property rights, and more specifically, how that rationale informs the characteristics that such rights should have. It was not an open invitation to discuss several competing justifications for private property, but rather focussed specifically on the economic functions of property law. That includes providing an incentive to invent and improve on inventions, but much more importantly, emphasizes the importance of making the property system economically efficient. Reference to the work of Hernando de Soto on clearly defining and registering property rights, and Richard Posner on promoting exclusivity, universality and transferability, is valuable here. The principle of universality would reinforce Wheeler and Allworth's arguments that patents should function like real property rights insofar as possible. The principle of transferability invites discussion of the role of uncertainty in increasing transaction costs, and the applicability of the Coase theorem in this context. Some creativity in responding to this question might have been rewarded if, for example, students linked the concerns about the ambiguous boundaries of patent rights to Flannigan's concerns about the economic impact of the uncertain nature of Aboriginal title. Importantly, this question asked "do you agree," which meant mere description of these issues

was insufficient and would lead to a poor grade. Students were required to express their own opinions about the issues and arguments.

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

2. In *Moore v. The Regents of the University of California*, 793 P.2d 479 (Cal. S.C. 1990), Justice Mosk dissented because, among other reasons:

> [W]hatever merit the majority's single policy consideration may have is outweighed by two contrary considerations, i.e. policies that are promoted by recognizing that every individual has a legally protectable property interest in his own body and its products. First, our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. … A second policy consideration adds notions of equity to those of ethics. Our society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another.

Do you find the policies cited by Justice Mosk compelling justifications for the ways in which courts and legislators have addressed issues of property and the human body?

This question also required students to express specific, personal opinions—but those opinions must of course be based on the materials covered during our course. Students had to explore how, if at all, property law *does* or *should* acknowledge a "profound ethical imperative to respect the human body." One might argue that refusing to recognize property rights in the body, as opposed to commodifying the body, accomplishes precisely that objective. Or, one might relate this ethical imperative to the rules governing organ donation, discussed by Dr. Shemie. Creatively, one might even go further and connect this imperative to non-human animals also, as Professor Deckha did in her lecture. Discussion of at least one of those lines of argument, or another very closely related topic would be necessary to score well on this question. There was another possibility students might have alluded to, which is that "personhood" is sometimes acknowledged as a principled justification for the ownership of objects, but not (in *Moore* at least) for the ownership of the person him/herself. Is this inconsistent? On the second policy consideration—equity and the prevention of unjust enrichment—students were invited to confront (*i.e.* agree or disagree with) the majority decision acknowledging the patentees' rights but denying Mr. Moore's recognition of the benefits. While Dr. Golde's fiduciary duty (itself based in equity) may be enough to ensure respect for Moore's dignity by requiring consent, it does not prohibit Golde's enrichment nor require any benefit sharing. Creative students might have queried whether the remedial constructive trust developed in the family law setting could be more or less convincingly deployed in this context.

THE END.