PROPERTY 1108(D) FINAL EXAM

PROFESSOR DE BEER

MONDAY, 11 NOVEMBER 2013, 16:10 – 17:40 (**90 MINUTES**)

IN **PART I**, YOU MUST **ANSWER 1 OF 2 QUESTIONS (150-250 WORDS)**.

THE ONE ANSWER IN PART I IS **WORTH 20%** OF YOUR SCORE.

IN **PART II** YOU MUST **ANSWER 2 OF 3 QUESTIONS (500-750 WORDS)**.

THE TWO ANSWERS IN PART II ARE **WORTH 80%** 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 SELF/PEER-EVALUATED** AND NOT CALCULATED IN YOUR FINAL GRADE.

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STUDENT # _____

SCORE ____ /100

(INSTRUCTOR USE ONLY)

Letter Grade	Percentage	Grade 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 statement and application of the law				
1	2	3	4	5
Clarity, concision, and persuasiveness of explanation				
1	2	3	4	5
Option 2				
Correct statement and application of the law				
1	2	3	4	5
Clarity, concision, and persuasiveness of explanation				
1	2	3	4	5
Option 3				
Correct statement and application of the law				
1	2	3	4	5
Clarity, concision, and persuasiveness of explanation				
1	2	3	4	5
Total Score Part I (x2) **/20**				

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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 **/80**												

Overall Exam Impression												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
/10												

I. ANSWER 1 OF 2 QUESTIONS IN THIS PART, WHICH IS WORTH 20% OF THIS EXAM. BRIEFLY EXPLAIN (150-250 WORDS) YOUR ANSWER.

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1. **On October 19, 2013, a news agency in the United Arab Emirates reported the following:**

Teacher's 'finders keepers' lesson: Pawns student's gold found in school

A teacher who found a gold pendant of a student at school, admitted to pawning the pendant to a bank for Rs10,500.

The incident took place in Kebethigollawa, Anuradhapura district.

According to media reports, a grade six student had come to school with her gold pendant, after wearing it to a function the previous day.

When she was in class, the gold chain fell and one of the teacher's daughters, also studying in the school saw a fellow student pick up the pendant.

The teacher's daughter claimed the pendant as her's and then gave it to her teacher mother.

The teacher then allegedly rushed to the bank and pawned.

When the student complained that she lost her gold pendant, the news spread in the school and the student who first picked was revealed.

The police came in and …

If this had happened in Canada, which of the following legal outcomes would the police most likely enforce:

a. Return the pendant to its first finder, based on *Trachuk v. Olinek*.
b. Return the pendant to the teacher's daughter, based on *Bird v. Fort Frances*.
c. Allow the teacher to pawn the pendant, because her daughter's gift of it was perfected by actual delivery.
d. Return the pendant to the sixth-grader, based on *Parker v. British Airways*.
e. Return the pendant to the sixth-grader, based on *Trackuk v. Olinek*.

The correct answer is D. The true owner's (the sixth-grader's) rights trump all other claimants' rights, including the finder's. Although, in *Trachcuk*, the money was awarded to the finders, in that case is distinguishable because the true owner was unknown, making A an incorrect answer. The lack of a true owner claiming in *Trachuk* also makes E an incorrect answer. Although *Parker* likewise involved a finder and an occupant, not a true owner, the factual similarity of that case to this one—involving gold jewellery lost in a public space—makes D the better answer. The teacher's daughter has a weak claim, not only because she is a wrongdoer, but also because she wasn't the finder. The *Bird* case is therefore distinguishable, and B is incorrect. While it is

correct that the daughter's gift to her mother the teacher was perfected, one cannot give something one does not own or rightfully possess. C is, therefore, incorrect.

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2. On January 12, 2013, the *Daily Mail* published the following report:

Widow leaves £100,000 to pet charity - then it immediately puts down her loyal dog found lying beside her body

When widow Lynda Hill drew up her will, she left £100,000 to her favourite animal charity and expressed a hope that its staff would find a new home for her faithful dog, Henry.

But just hours after Mrs Hill's body was discovered in her home, a vet from the charity recommended that the golden retriever be put down, and he was destroyed the following day. …

Devoted: Lynda Hill, seen posing with one of her previous golden retrievers in her younger days, would have been 'devastated' by the shelter's actions, friends say.

Police broke into Mrs Hill's home in Peterborough after being contacted by worried neighbours who had not seen the 85-year-old walking Henry for several days. Inside, they found the loyal retriever lying beside his owner's body.

The police also discovered Mrs Hill's will, which left nearly all her estate to the Wood Green Animal Shelter in Godmanchester, Cambridgeshire.

She also left Henry to the charity, adding: "I express the hope that they will look after him." …

But after examining Henry, a Wood Green vet said the dog – which had been without food, water and medication to treat his mild arthritis for up to five days – should be put down. …

A legal expert said Mrs Hill's will placed no legal burden on Wood Green because she was only 'expressing a hope' the dog would be looked after.

Assuming that the words "look after" are too uncertain to be enforceable, and that Lynda Hill would not have wanted the Shelter to have the £100,000 bequest if her dog was euthanized, which clause would best achieve her aims?

a. “I bequeath £100,000 to the Wood Green Animal Shelter if they look after my pet retriever.”
b. “I bequeath £100,000 to the Wood Green Animal Shelter while they look after my pet retriever.”
c. “I bequeath £100,000 to the Wood Green Animal Shelter on the condition that they look after my pet retriever.”
d. “I bequeath £100,000, for life, to the Wood Green Animal Shelter provided that they look after my pet retriever.”
e. “I bequeath £100,000 to my executor and her heirs for the benefit of the Wood Green Animal Shelter, unless they fail to look after my pet retriever.”

The correct answer is B. The clause “while they look after” creates a determinable limitation, a fence that delineates the extent of the beneficiary’s interest. If such a clause is invalid, the entire bequest fails. The clause in A seemingly creates a condition precedent, which if invalid, also likely causes the bequest to fail. That the judge in *Unger v. Gossen* rectified such a flaw does not establish this as best practice. C is incorrect because an invalid condition subsequent would be ignored, as in *Hayes v Meade*. That is not the result the testatrix intended (and moreover, raises further complexities regarding the standard of invalidity for uncertainty for conditions precedent/subsequent). D creates a life estate, which could conceivably accomplish the testatrix’s objectives if drafted for the life of the dog (a curious, and perhaps impossible measuring life in any case), but the D clause is problematically unclear on that point. E creates a condition subsequent, and the only difference from C is that this impliedly creates a trust. For similar reasons as C, this answer is incorrect.

II. ANSWER 2 OF 3 QUESTIONS IN THIS PART, WHICH IS WORTH 80% OF THIS EXAM.

1. On September 6, 2013, the *Toronto Star* published the following article:

Court dismisses landmark Charter challenge on behalf of homeless Canadians

Timothy Schmalz's sculpture, Jesus the Homeless, outside Regis College at the University of Toronto.

A judge ruled on Friday that Queen's Park and Parliament are the best places to address homelessness, not the courts.

Homeless people have been denied their day in court in the wake of an Ontario Superior Court decision that dismisses a landmark Charter case, say lawyers who vow to appeal.

"This case is about the fundamental principle of access to justice in our society," said Tracy Heffernan, of the Advocacy Centre for Tenants Ontario, which is representing the applicants.

"By denying them the chance to present their evidence, the court suggests that poor people cannot rely on Charter protection," she added.

The Centre for Equality Rights in Accommodation (CERA) and four Toronto individuals launched the Charter challenge in May 2010.

They claimed that homelessness and inadequate housing violate human rights under sections of the Charter that guarantee "security of the person" and the right to equality.

They argued that Ottawa and Queen's Park are violating the Charter by failing to implement policies that would reduce and eventually eliminate homelessness and substandard housing.

As a remedy, they wanted the court to order the governments to develop national and provincial housing strategies to address the crisis.

But in May 2012, federal and provincial lawyers filed a motion to stop the case.

In a hearing before Justice Thomas R. Lederer in Toronto last spring, they said the Charter does not include a general right to housing, nor oblige governments to provide social assistance and housing support.

In addition, economic and social policies are political matters beyond the scope of the court, they argued.

In his 52-page decision Friday, Justice Lederer sided with Ottawa and Queen's Park and agreed the case is "misconceived" and "cannot succeed."

"Who could not be sympathetic to any proper effort to confront the issue of inadequate

housing in all Canadian communities?" Lederer wrote in the ruling.

"The question is whether the courtroom is the proper place to resolve the issues involved. It is not; at least as it is being attempted on the application," he concluded.

But without hearing the evidence, how can the court know the case is misconceived, wonders Leilani Farha, of CERA.

"This decision, if allowed to stand, denies any protection under the Charter to the most vulnerable groups in Canada — those devastated by homelessness and inadequate housing," she said. "We welcome the opportunity to have these critical issues considered on appeal."

The federal and provincial governments were reluctant to comment on the decision as it is still subject to appeal. …

Based on your knowledge of Canadian property law precedents, is an appeal is likely to succeed? Why or why not? What factual evidence or legal circumstances could influence the outcome of the case?

An appeal of this decision is not likely to succeed, unless it could be established that governmental action deprived homeless people of rights protected by the *Charter*. While property *per se* is not a recognized constitutional right in Canada, several cases have protected individuals from "the most vulnerable groups in Canada." Most notably, *Adams*, held that municipal bylaws regulating behaviour in public places were unconstitutional interferences with homeless individuals' "section 7" right to life, liberty, and security. Some discussion of the nature of the interference, and its lack of justification—including limited shelter space available (key factual evidence that the plaintiffs in this case were not able to present)—was necessary to score to obtain high marks on this question. The best students would have realized that the government had two possible responses to the ruling in *Adams*: either repeal or change the bylaw regulating public spaces (which it did), or provide more housing or shelter space that reduces homeless persons' need to use public spaces (which it did not do). A key challenge in this particular case is that the alleged *Charter* violation is "failing to implement policies." That contrasts with all of the other cases we studied, and is a point worth exploring briefly, as this is one of the key "legal circumstances" that might influence the outcome.

Students might have discussed any or all of three further points. The degree to which this was done concisely and persuasively would distinguish the highest grades. One point is whether the cases related to freedom of expression or assembly are relevant here. They likely are not, as the factual issue and legal arguments here are distinguishable from those of the "Occupy" movement, labour picketers, or other groups claiming the right to assemble and speak in public or quasi-public places. A second point is whether the outcome of this case would be any different is there was constitutional protection for property in Canada (different "legal circumstances"). Here, comparisons with the nature of constitutional protections for property in the United States or other countries would help to demonstrate the answer is no. Constitutional protection may

indeed exacerbate homeless peoples' plight, by protecting the rights of those who already have property against redistribution through regulation or social programs. Third and finally, students might have attempted to frame arguments in terms of principle, as opposed to precedent. To win an appeal, the plaintiffs would have to successfully convince a court that it must intervene, and cannot defer to legislators or policymakers, because the matter of homeless is about "the fundamental principle of access to justice in our society." The best student would be able to support that argument with specific reference to our course materials, including authors such as Waldron.

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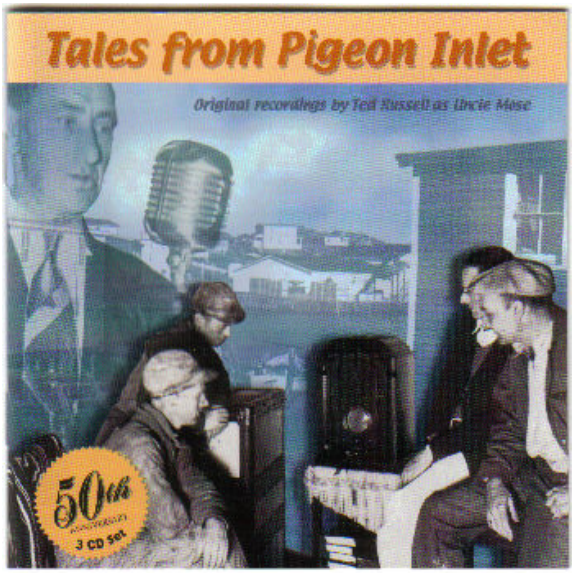
2. The late Ted Russell (1904 –1977) wrote and narrated (on CBC radio) stories set in a fictional Newfoundland outport, Pigeon Inlet. One of those stories—about the alleged theft of an ice-fishing hole—is presented below:

Stealin' the Holes, by Ted Russell



In all the years that Skipper Bob Killick was Magistrate along this shore, the shrewdest piece of courtwork he had to handle was the time when Uncle Sol Noddy stole the two holes from Skipper Lige Bartle.

Now what good, you might say, is two holes? … [W]ell how else can a man set a herring net under the ice? You cut two holes, eight or ten feet apart, tie a rope to one end of a [pole], poke it down through one hole and hook it up through the other with a hand gaff. Oh yes, if you want to set a bigger net, you cut three holes, or even four.

But two holes was enough to serve Skipper Lige Bartle's purpose that evening…. He chopped his two holes, then hurried home to get his net and a [pole] so as to have it set and home again before night overtook him. He didn't even stop for a bite to eat. Just grabbed a pair of dry cuffs and was off again, a spry man.

But spry as he was, Uncle Sol Noddy was spryer. Uncle Sol was already there and had just finished setting his net in Lige's holes. Well, Lige ordered Sol to take that net out of his holes. Sol said they was his 'cause he'd found them. Lige said they was his 'cause he chopped them. Well, Sol said, be that as it might, he owned them now 'cause possession was nine points of the law.

Skipper Lige was a younger man than Uncle Sol, and a bigger man. And if he hadn't been a church going man besides, he said after as how he'd a tied Uncle Sol to his own rope and reeved him down one hole and up through the

other. As it was, he went home and he wired Skipper Bob Killick, the Magistrate, to come immediately, or a bit quicker than that if 'twas possible. Skipper Bob wired back that he'd come and have courtwork in May, when navigation opened.

Public opinion was one-sided. Skipper Lige was a respectable man whereas Uncle Sol was the worse miserable hangashore on the coast. …

Well, Pigeon Inlet School was packed for courtwork when Skipper Bob Killick come on his rounds in May and he read out the charge how Uncle Sol had stolen the property of Skipper Lige: namely and to wit, two holes.

Then Uncle Sol, instead of having the common decency to confess what he done and take what was coming, had the impudence to look the Magistrate right square in the face and say he didn't know whether he was guilty or not, and what he would like to know was, "What was the law concerning holes?"

Well, Skipper Bob was took right aback for a minute and he said he allowed the law concerning holes was like the law concerning anything else: you mustn't steal them. Then Uncle Sol, brazener than ever, asked, "How could you steal a hole anyway?" And when Skipper Bob said what did he mean how could you steal a hole, Uncle Sol said 'cause a hole, well a hole was nothing, only a hole.

All this time poor Skipper Lige was sitting there saying nothing but swelling up like a gurnet, ready to bust. Then he said as how a hole might be nothing to the hangashore that stole it but 'twas something to the man that had to chop it. But Skipper Bob called him to order so Lige kept quiet but he swelled bigger, if that was possible, until Skipper Bob ruled that on his first point, Uncle Sol had lost out and a hole was something.

"Alright then," said Uncle Sol, "I only borrowed the use of his holes, never intending to keep them, and now he can have them back again." Skipper Lige said the holes was drove out the Bay when the ice went out, but Sol maintained that holes was only fresh air and water and they were still up there in the Arm and Lige could have them and ten thousand welcomes.

Well, Skipper Bob had to call a fifteen minute recess on that, but after it was over he come back and he ruled as how Uncle Sol was wrong on account of how, in what he called the common law, a hole couldn't be a hole unless there was an edge around it.

Then Uncle Sol tried his last dodge. He said as how a man couldn't steal anything without shifting it from where he'd found it in the first place and that he hadn't shifted these holes an inch. Skipper Lige said no, Sol hadn't shifted 'em, not 'cause he wouldn't but 'cause he couldn't and if he could've he'd a slung the two holes over his back quick enough and gone off with them. Sol said be that as it might, the fact was he hadn't shifted them and on that point, Skipper Bob Killick the Magistrate had to agree with him.

He give his verdict that, although Uncle Sol hadn't actually stolen the holes, he had trespassed on them and he asked Uncle Sol what he had to say before sentence was passed. …

Based on cases, concepts and principles of property law that we have studied in our course, did the judge in Ted Russell's story reach the right result: Can a hole be stole?

This case requires students to consider both the "what" and the "why" conceptual principles of property. Whether a hole "can be stole" depends on whether it is property—did Bartle have a right to possession that Sol interfered with? What is property, which would establish such a right? Does a hole meet any of the usual criteria we associate with property, based on cases like *Yanner v Eaton*, or *INS v AP*? Students might have discussed its ephemeral (seasonal) nature, perhaps drawing reference to our materials on property rights in intangibles. Students might also have referenced contextual factors, explaining for example how the law of possession might apply differently in cases like *Clift v Kane* than in other possession cases. This brings us to the "why" question that animated numerous majority and dissenting judgements throughout the course. Since this particular case concerns a putative right to possession, one might begin with *Pierson v Post*. This could segue into natural rights (labour-based or first-occupancy) perspectives, or instrumentalist perspectives. Which rule—that holes are property or not—would best serve which objectives? Students had wide latitude to discuss many of the cases we covered during the first few weeks of our course. Grades would be distinguished by the degree to which students were appropriately selective in these cases, and persuasive in their application of the issues and arguments to the facts at hand.

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3. On July 25, 2013, the *National Post* published the following opinion editorial:

Jesse Kline on property rights: When environmental inspectors attack

We're from the government and we're here to help. Ted Jacob/Postmedia News

The idea that a man's home is his castle is a longstanding legal tradition dating back to ancient Rome. "What more sacred, what more strongly guarded by every holy feeling, than a man's own home?" asked Cicero, the great Roman politician and philosopher. The principle, which prevents the state from entering a private residence without proper cause, was enshrined in British common law in 1604. In recent times, however, it has been eroded by courts and governments that are all too eager to intrude upon the lives of private citizens.

One of the few exceptions was Nova Scotia Provincial Court Judge Paul B. Scovil, who ruled last year that Garth Hicks had every right not to let a Department of Environment inspector enter his yard to investigate a complaint from a nosy neighbour that Hicks had burnt garbage in a barrel.

The case hinged on whether Hicks' yard could be considered a "private dwelling place." The judge quite reasonably argued that this is defined as, "a residence, temporary or permanent, to which the public does not have access and includes the lands and structures attached thereto." He, therefore, concluded the inspector "required either permission from Mr. Hicks, a warrant or an order ... in order to enter on Mr. Hicks' property."

Indeed, if police need a warrant to search a property as part of a murder investigation, surely environmental inspectors and bylaw officers, who investigate crimes nowhere near as serious in nature, should be required to do the same. But this was not enough for the province's highest court, which overturned the decision Monday, on the grounds that Judge Scovil had erred in his interpretation of a "private dwelling."

"[I]t could never have been the intention of the Legislature to oblige inspectors carrying out their duties in accordance with the Act to be prohibited from entering and inspecting the yards and outlying lands of a property owner without first obtaining the owner or occupants consent or, failing that, a court order," wrote Justice Jamie Saunders in his decision. "I do not accept [Mr. Hicks'] submission at the hearing before us that allowing the Crown's appeal in this case would lead to an 'open season' of provincial inspectors 'leaping fences' to shut down family barbecues or cottage picnics."

If only this were the case. Unfortunately, otherwise law-abiding Canadians are bullied by provincial and municipal inspectors all the time, often resulting in considerable financial losses.

Take the case of Mark Barnfield from Welland, Ont. In 2005, Barnfield purchased a chunk of land near Niagara Falls. In 2009, after losing his job, he decided to open a paintball range on the property. Barnfield conducted an environmental assessment, obtained all the necessary permits from the province and the municipality, and proceeded to clear rusting cars and other junk from the property and build a dirt path to provide access for future customers.

Ontario could certainly use more entrepreneurs like Barnfield, but instead of giving him a pat on the back and allowing him to earn an honest living, the government sent inspectors from the Niagara Peninsula Conservation Authority (NPCA) to trespass on his property. After one of them found a dead turtle, the land was reclassified from an industrial zone to a Provincially Significant Wetland.

The NPCA has dragged Barnfield through successive court battles for over three years now, continually appealing lower court decisions, despite the fact that, save one dead turtle, none of the protected species claimed to live on the property have ever been found. Nor would having a paintball range be all that damaging to the ecosystem, and Barnfield has already removed large scraps of metal from the property, reverting it to a more natural state than when he found it. The NPCA has also willfully trampled on Barnfield's private property rights and thrown the rule of law right out the window by changing the rules on whether a business can be setup on the land in the middle of the game.

All this will be decided by a Superior Court judge who heard the case in February. In the meantime, Barnfield has been prevented from

opening his small business, faces a possible $30,000 fine and will likely have to spend tens of thousands of dollars to cover legal costs and the removal of the dirt path.

While stories such as these rarely make front-page news, they are all too common across this country. Years of enacting silly municipal bylaws and nit-picky federal and provincial regulations have created a whole host of rules that government inspectors can use to harass property owners who are just trying to enjoy their property or earn a living.

At the very least, environmental inspectors and bylaw officers should be held to the same standard as law enforcement officers: They should be required to obtain a warrant before trespassing on private property, even if they are confining themselves to the yard. Yet, in Ontario, the Municipal Act gives city employees the right to walk into anyone's backyard "at any reasonable time."

Changing provincial laws, such as this, would be a good first step. But Canadians won't truly be secure from government agents trampling on their land, until property rights are enshrined in the Charter.

What other legal options do Garth Hicks or Mark Barnfield they have in the absence of a *Charter* claim? Based on precedents we have studied in our property law course, would enshrining property rights in the *Charter* make their legal cases stronger? Why or why not?

The first part of the question required students to consider the question of expropriation in relation the municipal authorities' entering and attempting to regulate both Hicks and Barnfield's property. Students should have discussed the findings in *Mariner Real Estate v Nova Scotia* and *CPR v Vancouver*, and how the facts in both those cases are similar or dissimilar to the facts of both Hicks and Barnfield. In particular, astute students would have made connections between the environmental concerns underlying government regulation of land use in *Mariner* with both Hicks' and Barnfield's circumstances. The core of the legal issue is the distinction and relationship between ordinary provincial statutes governing expropriation and the Constitution, which is the supreme law of the land. To do well, students must understand and have explained the impact of each. The second question requires students to consider and compare the outcomes in *Mariner* and *CPR* with the outcome in the US expropriation cases, *Lucas* and *Penn Coal*, where property is enshrined in the US constitution. Here students would have found that in the US context, constitutional protection of private property affords property owners greater protection against state intrusion. The "why" or "why not" question requires discussion of the differences between US and Canadian constitutional structures. Here, a nuanced analysis would include specific reference to cases where limitations on *Charter* protected rights were justified under section 1, and an exploration of how *Charter* protection does not guarantee an absolute right, such as in *Harrison v Carswell, Michelin v CAW* and *Batty v City of Toronto*.

The End.