PROPERTY 1108(D) FINAL EXAM

PROFESSORS DE BEER AND BROWN

MONDAY, 3 NOVEMBER 2014 ~~3~~, 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 WORTH 20%** OF 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 Answer									
.5	1	1.5	2	2.5	3	3.5	4	4.5	5
Clarity, concision, and persuasiveness of explanation									
.5	1	1.5	2	2.5	3	3.5	4	4.5	5
Option 2									
Correct Answer									
.5	1	1.5	2	2.5	3	3.5	4	4.5	5
Clarity, concision, and persuasiveness of explanation									
.5	1	1.5	2	2.5	3	3.5	4	4.5	5
Option 3									
Correct Answer									
.5	1	1.5	2	2.5	3	3.5	4	4.5	5
Clarity, concision, and persuasiveness of explanation									
.5	1	1.5	2	2.5	3	3.5	4	4.5	5
Total Score Part I ~~(x2)~~ /10									

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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 June 5, 2013, a Vancouver news agency reported the following:

'Law of property,' not love, dictates Ikea monkey case

The case of the darling little monkey named Darwin, who captured more than his share of hearts last Dec. 9 when he was caught on camera wearing a faux shearling coat and wandering a Toronto Ikea parking lot after a daring break- out, is being argued as a bloodless matter of, God help us, property law. "This is not about who loves Darwin the most," lawyer Kevin Toyne, who represents the primate sanctuary where Darwin now resides, told Ontario Superior Court Judge Mary Vallee at the start of the case.

"It is not about who's better able to care for him," Toyne continued. "It's about the law of property."

On the day of Darwin's escape Nakhuda argues she did not intend to abandon him. "I explained that to Darwin," she said, because he understands some things, "that we would be in and out." She gave him some treats, locked the crate, put a comforter on it, and then locked the car.

There are other issues in the case - Nakhuda's credibility is being challenged by Toyne on a number of points, and the judge must decide if Darwin is a wild animal, because if he is, with wild animals, "possession is 10/10ths of the law." As Toyne put it, "if possession is lost, so is the ownership."

In ensuing litigation, *Nakhuda v. Story Book Farm Primate Sanctuary*, 2013 ONSC 5761, the court had to answer the following question: Assuming the monkey is ferae naturae, does Nakhuda have a possessory interest? Which of the following rulings would be most consistent with law studied in our course?

a. Return the monkey to Nakhuda based on *Pierson v. Post.*
b. Return the monkey to Nakhuda, based on *Yanner v. Eaton*.
c. Order the sale of the monkey and split the profits between its owner and the Story Book Farm Primate Sanctuary ~~keep the monkey~~, based on *Clift v. Kane*.
d. Allow the Story Book Farm Primate Sanctuary keep the monkey, based on *Pierson v. Post.*
e. Allow the Story Book Farm Primate Sanctuary keep the monkey, based on *Popov v. Hayashi.*

The correct answer is D. The case of *Pierson v Post*, a longstanding and leading precedent, dealt specifically with the possession/ownership of a wild animal (ferae naturae). Story Book Farm Primary Sanctuary is now in sufficient physical control of the monkey and intends to possess the monkey. Therefore, unless and until the monkey escapes, it has the best legal right to continued possession.

Answer A is incorrect. Although Nakuda arguably had control of the monkey at one point, she failed to make escape impossible (demonstrating insufficient control), as *Pierson v Post* held the law of capture requires.

Answer B is incorrect for the same reason, plus the additional reason that *Yanner v Eaton* is a less persuasive authority since the High Court of Australia was not directly addressing ownership of wild animals, but rather a different question about the meaning of the word property.

Answer C is incorrect because, even if equitable division of proceeds were a likely or appropriate result, the relevant authority for that proposition would be *Popov v Hayashi* not *Clift v Kane*.

Answer E is incorrect because the result in *Popov v Hayashi* was not to award possession to either party, as the answer suggests, but rather to order equitable division of proceeds.

2. **The following question was asked of a legal advice column printed in a British news agency:**

"Can the seller remove the bathtub after we've exchanged?"

My husband and I bought a house in Telford for £530,000 in June. After paying a deposit and exchanging contracts, the seller asked us to pay £5,000 for the bathtub,

The legal advice column explains: Sellers sometimes try to boost their sale price by charging extra for fittings and fixtures. It is wise for buyers to discuss what is – and is not – included in the price before making an offer.

Jeremy Raj, a partner in residential property at law firm Wedlake Bell, said there are some clear principles and procedures that clarify the legal position between the parties after an offer has been accepted.

Sellers normally complete a "Fittings and Contents Form," stating which items are included in the sale, which are to be removed from the property, and which will cost extra. A copy of the form is supplied for review prior to the exchange of contracts, and should be attached to the parts of the contract signed by the seller and the buyer immediately before exchange.

Here, the husband and wife purchasers did not obtain a fittings and contents form. Assume the above picture is of the bathtub in question. Based on the law studied in our property course, which of the following statements about the bathtub is most accurate?

a. It is a chattel based on subsection 34(1) of the *Personal Property Security Act.*
b. It is a fixture based on *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.*
c. It is a chattel based on Robertson J.A.s' ruling in *Diamond Neon (Manufacturing) Ltd. v. Toronto-Dominion Realty Co.*
d. It is a fixture based on Carrother J. A.s' ruling in *Diamond Neon (Manufacturing) Ltd. v. Toronto-Dominion Realty Co.*
e. It is a fixture based on *Frank Georges Island Investments Ltd. v. Ocean Farmers Ltd.*

The correct answer is B. The case of *La Salle Recreations* explained the applicable legal test, and framework for analysis. Because the bathtub is attached to the home's plumbing, it is presumed from the degree of annexation to be a fixture. Although some factors might support an argument that the tub is a chattel, the nature and object of annexation are overall insufficient to rebut this presumption, as in *La Salle*.

Even if a student believed that the tub was a chattel not a fixture (a hard argument to make), none of the other answers provide appropriate authority for that position. Subsection 34(1) of the *PPSA* describes priority interests based on the time at which a security interest attaches to a good. It does not determine whether an item is a chattel or fixture. Answer A is, therefore, wrong.

Diamond Neon was a tenant's fixtures case that also turned on the issue of timing and, moreover, held the signs to be fixtures not chattels as the answer indicates. Answer C is, therefore, incorrect.

Answer D is incorrect because Justice Carrothers in dissent would have held the signs to be chattels, not fixtures, as the answer suggests. Answer D is also incorrect because, like answer C, *Diamond Neon* is not the most relevant authority.

Answer E is also incorrect, since the *Frank Georges* decision also relates to the special category of tenant's fixtures, which does not arise on the facts of this question.

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

1. In 2014 Professor Geist of the University of Ottawa provided the following editorial for Toronto newsprint:

"Can anyone own a national domain name?"

The legal status of a country-code domain name extension is unclear. It is not property in the physical sense and within the ICANN world it amounts to little more than an entry into a database.

Earlier this year, a group of U.S. litigants launched an unusual domain name lawsuit. The group consisted of family members of victims of terror attacks they claim were sponsored by the governments of Iran, Syria, and North Korea. The group had succeeded in winning over a billion dollars in damages in several lawsuits filed in U.S. courts.

Unable to collect, they sued the Internet Corporation for Assigned Names and Numbers (ICANN), the body that administers the Internet's domain name system. Their goal: seize the dot-ir, dot-sy, and dot-kp domain name extensions (the respective country-code domains) by ordering ICANN to transfer them as compensation.

The notion of seizing a country's domain name extension may sound implausible, but the case is proceeding through the U.S. court system with ICANN filing a brief late summer. ICANN is unsurprisingly seeking to dismiss the case, arguing that the domain name extensions are not property that is capable of seizure.

ICANN relies on three key claims: domain names are not property, governments do not "own" their country-code domain, and the U.S. does not have jurisdiction over a foreign country-code domain.

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You are council acting for ICANN. Using your knowledge based our property law course materials, prepare a legal opinion to advise your clients on the strength of the first legal argument outlined above.

This question builds on assignment question number 1, which was: do you think that there is an innate, genetic, or primordial need for property? In this exam, however, the question provides you with additional tools to ground your discussion in the more specific facts of a live case. Your clear instructions—prepare a legal opinion advising a particular client—indicates that your answer must focus on practical legal and strategic issues, not pure theory.

Good or very good answers, therefore, relied heavily on relevant cases. The leading case on point is *Tucows v Renner* (page 279 casebook), in which the Ontario Court of Appeal addressed whether a domain name is property, and if so, where the property is located. Many students usefully analogized the facts of this problem to *Tucows*, which held that a domain name can be property located in Ontario, on the basis of a 3-fold legal test (capable of precise definition; exclusive possession; and a legitimate claim for exclusivity).
Excellent and exceptional answers went a step further. Some of the very best students queried the relevance of a subtle but important factual distinction between ownership of a specific domain

name (renner.com) versus ownership of a high level country code for domain names (___.ir, ___.sy, ___.kp).

Relatively strong answers from students also engaged in discussion of cases that, at first glace, seem less directly relevant to domain names specifically, but address the broader issue of virtual property, or the general question, "what is property." *Intel v Hamidi* is an example of a relevant virtual property case, while *Yanner v Eaton* fits in the latter category. Student who raised *Intel* were expected to note the contextual difference between trespass to chattels and the seizure of domain names. Discussion of cases such as *INS v AP* (regarding quasi-property) and *Victoria Park Racing* could also have been brought to bear on this question. Students who did that, and did it well, wrote very specifically about principled/policy arguments in favour of or against the recognition of property rights in domain names. Economic considerations were especially important.

Some of the students who performed less well on this question tended to present ideas in an unstructured, disorganized manner. Students were also penalized for random or irrelevant reference to various theories or theorists. While principled, theoretical discussion was useful in answering this question, it was only rewarded if properly focussed on the client's core problem, and if presented in support of practical advice.

Finally, it was pleasant to note that all students followed the instruction to provide advise regarding only the first question mentioned at the end of the article; not all three arguments.

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2. In 2014 Toronto newsprint reported the following:

"Human tissue removed for medical tests is 'personal property' of institution, not person it came from."

In a precedent-setting decision that could eventually affect everything from stem cell research to billions in pharmaceutical spending, an Ontario court has ruled that excised human tissue is private property and that it belongs not to the person from whom it came but to the institution that holds it.

The ruling, which came in the preliminary phase of a medical malpractice case, is the first "clear, definitive statement about tissue being property in Canada," said Tim Caulfield, a Canada Research Chair in health law and policy at the University of Alberta. If held up by other courts, it could eventually limit the ability Canadians have to decide what's done with their own blood samples, tissue biopsies and genetic data.

The ruling centres on a small block of liver tissue taken from a woman named Snezana Piljak in a biopsy at Toronto's Sunnybrook Hospital in 2009. Ms. Piljak was diagnosed with colorectal cancer that year. She died in 2011.

After her death, Ms. Piljak's estate sued a doctor who had performed a colonoscopy on her in 2008, and found her cancer free, for negligence. As part of that suit, the doctor, Tharaikattu Easo Abraham, and a co-defendant, Dr. Branimir Brcic, petitioned the court for the right to examine the liver biopsy taken in 2009.

The two doctors were hoping the biopsy would show Ms. Piljak had something called hereditary non-polyposis colorectal cancer, which can develop extremely quickly and is often missed by colonoscopies. Under the rules of evidence governing their case, though, the doctors needed the court to rule the liver counted as "personal property" of the hospital before they could get access to the sample.

In a ruling handed down June 4, Ontario Superior Court Master Ronald Dash did just that. "Is a tissue sample taken from a human being for the purpose of diagnostic testing 'personal property?' he asked. "In my view this is not a simple question."

In the end, though, he came to a relatively straightforward answer. "Ms. Piljak's excised tissue is ... owned by Sunnybrook hospital, whose pathology department performed the diagnostic tests and in whose archives the tissue is kept," he wrote. "As the excised tissue is subject to the rights of ownership... I conclude that it is personal property."

This ruling could also have important commercial ramifications in the long term. With the rise of stem cells and genetic pharmaceuticals, personal medical data is becoming more and more of a commodity. "You have all these cell lines that are going to become increasingly valuable," Mr. Caulfield said. "And there's going to be increasing interest in who controls" them.

The decision this report discusses is *Piljak Estate v. Abraham,* 2014 ONSC 2893. You are acting as council for the Piljak Estate, which is now appealing the Superior Court decision to the Ontario Court of Appeal.

The rules of civil procedure detail the format of a Factum. The relevant section is outlined below:

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Courts of Justice Act, R.R.O. 1990, REGULATION 194
RULES OF CIVIL PROCEDURE

APPELLANT'S FACTUM

61.11 (1) The appellant's factum shall be signed by the appellant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

(a) Part I, containing a statement identifying the appellant and the court or tribunal appealed from and stating the result in that court or tribunal;
(b) Part II, containing a concise overview statement describing the nature of the case and of the issues;
(c) Part III, containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the transcript of evidence and the exhibits as is necessary;
(d) Part IV, containing a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

……

Draft a factum for your clients, based on our class material.

This question also builds on an assignment question. Assignment question number two was:

> "Public policy considerations, including socially useful activities, such as medical research, should take precedence over private property rights."
> Discuss with reference to *Moore v. The Regents of the University of California.*

Note the difference, however, in the framing of the assignment question as a broad invitation to consider the normative issues (*i.e.* "should" medical research policy take precedence over property rights), and this exam question as a specific instruction to draft a legal argument. The most outstanding students, in the excellent and exceptional categories, understood this difference and responded accordingly.

Students who followed the instruction to draft their answer as a factum, as they had been introduced to during class, performed better than students who failed to follow instructions. That said, the penalty for providing what was otherwise a good or very good answer, in a different format, was not severe.

The strongest answers in the class began with statement required in Part I. Then the best answers framed the issue of the case as one about the property rights of the individual Piljak, not about property and body parts generally, in Part II (arguably the most important part). Three issues should have been recognised: Is the liver sample property? If so, to whom does it belong? And finally, what over-riding policy considerations might be relevant. Strong answers summarized the relevant facts without merely regurgitating them (Part III of the factum). Excellent and exceptional answers organised the arguments in Part IV of the factum based on the arguments in the Moore case.

Excellent answers included a sophisticated analysis of *Moore*, paying particular attention to the arguments of the majority and dissenting arguments. Answers also contained some comments on the policy considerations of property rights in the body, including economic rationale of property, and tragedy of the anti-commons. Some very good answers also tied in principled arguments from elsewhere in the course, such as referencing the *Intel v Hamidi*. The best answers from students correctly identified policy considerations relevant to the specific facts of this case, while relatively weaker answers recited various policies or theoretical principles without tying them to this case in particular. Some weak answers also dwelled on the issue of patents and intellectual property, which although relevant in *Moore*, was not relevant here. Excellent answers specifically referenced this fact in distinguishing this case from *Moore*. Some students mentioned abandonment, which if done correctly and concisely was useful, but sometimes proved to be a distraction from the more important issues.

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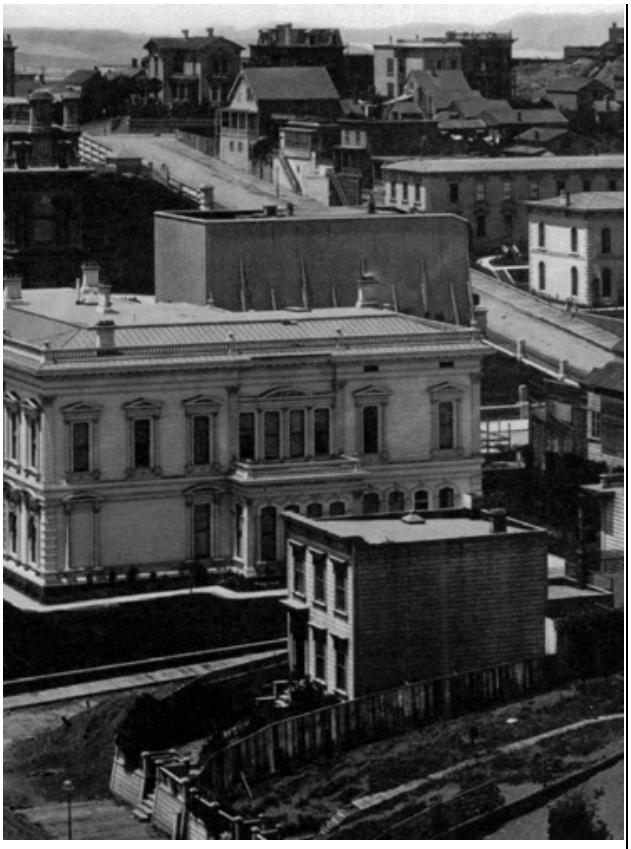
3. “Crocker’s Spite Fence”



The Spite Fence is just behind the large white building in the center, partly blocking the street; it's held up with wooden beams.

Charles Crocker was a man who was used to getting what he wanted. A former dry-goods merchant, he had made his fortune by overseeing and financing the Central Pacific Railroad. He acquired the land on which to lay the tracks by simply buying the right-of-way at the appraised value with or without the consent of the owner.

Nicholas Yung was a native of Germany who had arrived in the U.S. in 1848. He established himself in the mortuary business and in 1855 he and his wife bought a corner lot at the top of the California Street Hill and built a modest home. The location offered Yung and his family a stunning view of San Francisco. All around the house was a great flood of fresh air and sunlight.

In April, 1878 the California Street Line Cable Cars commenced operations. The newfound accessibility turned the once remote California Street Hill into San Francisco's most exclusive real estate area. Charles Crocker planned to build his house even higher up the hill than his rivals. Money was no object to Crocker -- but Nicholas Yung (who owned the northeast corner of Crocker's block) was. Crocker made several offers to buy out Yung at the market price but Yung refused. As progress on the mansion continued, Crocker became more and more desperate to have Yung and his house removed. When dynamite was used to level the craggy hilltop for his home, Crocker apparently ordered his workmen to aim the flying debris towards Yung's house.

With the mansion just about completed, Crocker made one final attempt to buy Yung's property, doubling his original offer. Yung however refused. This time the Railroad Baron had a plan: he ordered his workmen to construct a three-sided wood fence around Yung's house. The fence rose forty feet into the sky and the view, the sunshine, and the fresh air that the Yung's had enjoyed were all but completely taken away. With only northern exposure left to them, the Yungs felt as if they were living at the bottom of a well.

Crocker's Spite Fence, as it was known, became one of The City's most popular sight-seeing attractions. People would ride the cable car to the top of Nob Hill to stare at and to talk about this symbol of Capitalist power over the "little man."

Mr. Yung now wants to begin legal proceedings against Mr. Crocker. You have been hired to provide a legal opinion to Mr. Yung on the legality of the "Spite Fence." Using your knowledge acquired during our property law course, prepare a legal opinion advising Mr. Yung on the strengths of possible claims for nuisance and trespass.

This question requires that students demonstrate their knowledge of the laws of nuisance and trespass. It is the most doctrinally, as opposed to conceptually, oriented question in this part of the exam. Students could not prepare a good answer without referencing at least two of the leading cases on these issues: *Victoria Park Racing* and *Didow v Alberta Power*. This question also lent itself to clear analysis and organisation, which was evident in the excellent and exceptional answers.

Most students explained that nuisance is the impairment of the rights flowing from occupation and ownership of the land. Very good answers highlighted how the High Court of Australia in *Victoria Park Racing* addressed similar issues as are raised in the exam fact pattern. The Chief Justice considered whether a "spectacle" could be owned, concluding that any notion of a property right in a spectacle is metaphorical in nature only, and so can not be regulated based on any legal principle. One key aspect of the ruling, relevant to this question, was that a property owner is able to build a fence in order to prevent excursions of others onto an owner's property. This was an acceptable way of addressing the case, even though the nuisance issues specifically were raised more in the opinion of Justice Dixon than the Chief Justice: "English law is…clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers and of other persons who enable themselves to overlook the premises." In dissent Rich J. argues that the nuisance action should have been successful (and the appeal allowed) due to the economic right of property ownership. Few students picked up on the opportunity to distinguish among these various concurring/dissenting judgments, which was a missed opportunity. Crucially, no marks at all were awarded for simply stating these points of law. It was necessary to apply them to the specific facts facing Mr. Yung.

Regarding trespass, the case most commonly (and properly) cited by students was *Didow v Alberta Power*, regarding the maxim *cujus est solum*. *Harrison v Carswell* provides further guidance on what constitutes a trespass, although as the best answers recognized that was in a factual context not directly relevant here. Excellent answers recognized that trespass requires a physical intrusion onto the land of another, and may have noted the *obiter dicta* that passing or temporary intrusions (like airplanes) might be better dealt with via nuisance. Applying the law to the facts—which was essential to do well on this question—many students pointed out that the height of the fence restricts the view of Mr. Yung, but we do not know whether or not the fence was on Mr. Yung's property. The facts suggest not. Some students recommended a survey.

The best answers also considered the status of the pieces of dirt thrown onto the land by workmen acting for Mr. Crocker. This, however, is most likely to support a claim in nuisance, not trespass. In general, the key to success on this question was to avoid simply stating the law, but rather to apply the law to the facts of this problem.

The End.

Overall, students performed well on this exam. The GPA was 6.3, which is above expectations but within range of the Faculty guidelines. The distribution of grades was relatively narrow (*i.e.* many B grades, with few C/D or A grades), which indicates an easy exam. The final exam is sure to be more difficult, providing an opportunity for the best and most prepared students to distinguish themselves, and producing a wider range of grades.