PROPERTY 1208C

PROFESSOR J.F. DEBEER

FINAL EXAM

26 APRIL 2005

9:30 – 11:30 (2 HOURS)

DO NOT TURN OVER THIS PAGE UNTIL INSTRUCTED TO DO SO

THIS EXAM IS WORTH 66% OF YOUR FINAL GRADE

ALL 4 (FOUR) QUESTIONS ARE WEIGHTED EQUALLY

(1/4 OR 30 MINUTES EACH)

YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

(E.G. BOOKS OR NOTES, BUT NOT LAPTOPS, MOBILE PHONES OR PDAS)

YOU MUST HAND IN BOTH THE

EXAM SHEET AND THE ANSWER BOOKLET

YOU MUST PUT YOUR STUDENT NUMBER ON BOTH THE

EXAM SHEET AND THE ANSWER BOOKLET

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STUDENT NUMBER

I. PROBLEMS

1. Evaluate the strength of the legal claim described below.

30 minutes

On December 23, 2003, The Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation (the "Saugeen Ojibway Nations" or "S.O.N.") filed an extensive claim with the Ontario Superior Court asserting aboriginal title to their traditional territories under the waters of Lake Huron and Georgian Bay, in a specified area around the Bruce Peninsula (the "claimed area").

In essence, the claim is about aboriginal title not in dry lands, but in submerged lakebeds. The Chief of the Nawash has remarked: "The land itself is important, but the lakebed is perhaps of even greater importance to us. From the waters we derived our livelihood by fishing, an activity we have pursued for thousands of years and one that reaches into the core of our culture."

Oral evidence confirms that the S.O.N. have used these waters, primarily to engage in fishing for thousands of years. Fishing was done in relatively shallow water, and using islands as bases. Even islands a significant distance from the mainland were used for fishing purposes. The waters in the area are between 60 and 200 metres deep.

Ancestors of the S.O.N. were able to control key access points to Lake Huron and Georgian Bay, such as the Colpoy's Bay portage. However, other closely related and allied First Nations controlled other key access points, such as the St Clair and the Nottawasaga Rivers.

Ancestors of the S.O.N. exercised their use of their territory in accordance with their custom, which provided that a person from outside their territory was expected to seek permission (perhaps informally) to be present in the area. It was also customary that permission, if requested, would normally be granted to other friendly Aboriginal persons to travel through or to temporarily stay in the territory and to hunt and fish to feed themselves while doing so.

European individuals arrived in approximately 1615, when Samuel de Champlain traveled to the region. At various times between 1615 and 1760, to various extents, French missionaries and traders were present in or near the claimed area. In 1760, the British defeated the French in North America. The British had a military presence in parts of the Upper Great Lakes from about 1760, but it was not until the 1830s that there was any practical and effective British governmental presence within the claimed area.

On first encountering British troops in the Upper Great Lakes, members of the S.O.N. asserted their rights forcefully by means of open warfare. In 1761, Ojibwa Chief Minewehweh spoke to British troops and asserted ownership of the land, including water. Members of the S.O.N. continued to make such assertions subsequently. In the early 1800s, members of the S.O.N. demonstrated their beliefs and customs about their ownership of their territory by taking a number of actions involving territory and resources in the claimed area, which non-Aboriginal individuals sought to use. For example, they issued a lease to the Huron Fishing Company to fishing islands in 1834.

Since the early 19th Century, the S.O.N. have continued to use the claimed area. However, since that time non-Aboriginals have also used the waters for various purposes, including fishing, transporting goods and engaging in recreational activities.

In the mid 19th Century, the S.O.N. entered into many treaties with the Crown. Although submerged lands were clearly the subject of other Treaties (notably in the U.S.), they were not mentioned in any of the Treaties the Crown signed with the S.O.N.. That is, the S.O.N. never signed any treaties that dealt with the lakebed under the waters of Lake Huron and Georgian Bay.

This question was based on a real claim (you can google for more information or see volume 37(2) of the UBC L.R. for two excellent articles on point). It produced many average answers, with few students entirely missing the point and few students excelling. Some students began their answers with an historical narrative of Aboriginal property rights internationally and/or a diatribe about the content of Aboriginal title; this was unnecessary and went completely unrewarded; it had nothing to do with the question asked. Those who described the sui generis nature and source of Aboriginal title did receive some credit, but only by somehow applying that to the claim in this question. It was essential to discuss the three-step test from Delgamuukw. Many students apparently just transcribed this test from their notes without paying attention to the twists in this particular question; this was reflected in the grades. On the first branch of the test, one needed to point out the contextual nature of occupation—these were underwater lands, incapable of supporting dwellings for example (could Aboriginals "occupy" the lakebed without ever seeing or touching it?). Ideally, students would have questioned whether the Delgamuukw test is really appropriate in such circumstances, perhaps suggesting the need for jurisprudential evolution. Some students discussed the date that sovereignty was established, which was good. The second branch of the test was not applicable on these facts: because the oral evidence in this case is clearly admissible, it is unnecessary to rely upon present occupation. Few students bothered to think about this, blindly following their notes instead. However, those who noted this nuance, discussing it as an alternative, were rewarded. Almost all students correctly mentioned that the granting of permission actually reinforced exclusivity, and that exclusivity need not have been sole or absolute. As for extinguishment, it was necessary to point to the silence in the treaties and mention the impact of s. 35. Some students also considered other means of extinguishment (e.g. the third-party lease) or infringement. In short, almost everyone saw the broad issue, but only some students evaluated the specific claim in the question thoroughly and accurately.

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2. Provide your advice in the following circumstances.

30 minutes

Edna, the plaintiff, is getting on in years. She is well over 70 and an old age pensioner. In 1997 she had a little house in Ottawa that was in a very dilapidated condition. It was condemned. So she sold it for $110,000.

She had a daughter who was married to Chris, the defendant. Chris and her daughter had two children and lived at Chris' home in Nepean. When Edna sold her little house, the young couple invited her to live with them. But there was not much room for them all. So they built on a bedroom as an extension for the old lady. She paid $6,700 for it, directly to the builder. Nobody said anything about repayment. No doubt they all thought that Edna would live there, using the bedroom, for the rest of her days.

For a few months, all went well. Edna even gave her daughter money if she was short of money for household bills, clothes or food. But then differences arose. Mothers and daughters do not always get on when they are living in the same house. They could not live in harmony. So, in 1999, Edna went to live elsewhere.

After a year or so, Edna wrote to Chris and said she was very hard up. She asked if he could manage a few hundred dollars a month to help her out. He did not do it. He did not even reply. So she wrote again to ask for the $6,700 that she had paid for the extension. Chris refused. Not surprisingly, he is broke. Edna contacted the University of Ottawa Community Legal Clinic, where you are a summer intern. She wants advice.

This question was taken almost verbatim from Lord Denning's judgment in Hussey v. Palmer, [1972] 3 All E.R. 744 (CA). It was answered well by most students, although some students missed the issue altogether and did poorly as a result. This was not a question about joint ownership—Edna did not have legal title, joint or otherwise (Students who quickly discussed the "unities" were given some credit; students who omitted this were not penalized.) This was a question about discretionary equitable remedies, in particular constructive or resulting trusts. Students needed to set out the test for unjust enrichment, and more importantly, apply it to the facts at hand. The first two steps are simply undisputable mathematical calculations. The third step required a discussion of the established categories and switching burden from Garland. There was clearly no contract, and presumably no legal obligation to make the payment. There was, however, a significant issue about donative intent. Here, the best students brought in (or referred back to their earlier discussion of) the presumptions of advancement or resulting trust, citing cases such as Cooper. The next step was to consider what sort of remedy would be sought or available. Some students overlooked the fact that Chris was broke—precisely the reason that proprietary restitution would be sought (as in Peter v. Beblow). I was also looking here for a comparison between the "special link" on these facts and in other cases (e.g. monetary contributions vs. domestic labour). There was then a question of proportionality of Edna's contribution to the value of the house, and how to value her potential interest. This provided an opportunity to discuss the possibility of a constructive trust to create a joint ownership situation. If you look at the actual case, you'll see how Lord Denning came up with a somewhat novel solution to this problem.

II. INTERPRETATION

3. <u>Briefly</u> describe the legal consequences of the following clauses.

30 minutes

A.

In 2004, Phil devised his land in Ottawa's south end as follows: "*to the Ottawa Hunt and Golf Club so long as the property is used as a golf course for young Australian couples only*." In 2005, the Club began to admit Dutch senior citizens.

B.

Mike transferred his interest in an apartment in Sandy Hill to Ernie. Mike's agreement with Ryan, the landlord, includes the following clauses: "*The Landlord promises to repay to the Tenant any security deposit paid;*" and "*The Tenant is not responsible for loss of any of the Landlord's personal property on the premises*." The Landlord had lent Mike a hammer, which Mike left behind when he moved out. Ernie's friend Luke has apparently stolen it since Ernie moved in. Ryan is threatening to keep Ernie's security deposit.

These questions were both answered poorly by most students; they brought down the marks considerably. The first clause was a determinable limitation ("so long as") where Phil's estate ("devised") retained a possibility of reverter. Under Canadian common law, the estate's interest is vested so no perpetuities problem arises. However, s. 15 of the Perpetuities Act makes it necessary to consider the RAP (there are no lives in being so the period is 21 years, and it is conceivable that the interest could vest outside the perpetuities period; that the interest may actually have "re-vested" in Phil's estate for breach of the condition in 2005 is irrelevant at common law, but important under the wait & see statutory provisions). Those who lamented (given their painful study of the issue) the absence of a RAP problem on the exam apparently missed this aspect of the question. The limitation is also void for uncertainty—how young is "young", who is is "Australian" and what is a "couple"? Almost everyone discussed public policy (most did so exclusively), although this is clearly distinguishable from Re Leonard Foundation. One might also have considered this clause as a restrain on alienation, or asked whether it was an impossible condition. Finally, I would have liked to see a reference to the paradoxes arising from the fact that to the golf course, this was a determinable limitation, but to Phil's estate, it was a condition precedent. This has numerous implications. The second question involved the transfer of a lease, which required brief discussion of the distinctions between assignment and sublease. Students were required to (and most did) talk about covenants that run with or touch and concern land. The other issue, which some students did not pick up on, was a bailment problem with the hammer. This required consideration of the applicability of the exclusion clause to the sub-bailee. I'd hoped the theft point would be a hint to discuss Punch v. Savoy, but many students completely overlooked this aspect of the question.

III. ESSAY

4. Does the following passage accurately reflect the law in Canada? Based upon the roles of property in our society, should this be the law?

30 minutes

> "It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. … If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons."
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> *Fox v. Fox Estate*, (1996) 28 O.R. (3d) 496 at paras. 16-17 *per* Galligan J.A. (holding that a mother/trustee could not intentionally exhaust the remainder of an estate that her son was entitled to, simply because she disapproved of his wife's faith).

I was generally very impressed with the answers to this question: they were much more responsive than the midyear essay questions, and that was rewarded. Although there was considerable leeway given to discuss students' own perspectives, ideally I wanted to see three things. First, I was looking for some mention of the ambiguous ratio of Re Leonard Foundation—how far did that actually go, why, and how relatively "abhorrent" was the discrimination in the Fox case? Second, I wanted students to highlight the tenuous distinction between public and private, given that private trusts are enforced by a publicly sanctioned legal system. Third, I hoped students would weigh in on the competing end/exogenous values at play here: freedom, efficiency and various conceptions of equality. These topics were all mentioned in the Casebook and during class. Most students focussed on one or two of those potential discussion points, which was fine. It was certainly not necessary to discuss all three points to receive full marks. Indeed, appropriate creativity was rewarded. Long, rambling or unresponsive "pre-fabricated" essays were easy to spot.

THE END.

Overall, I don't think anyone can say they were surprised by the content of this exam. It was designed to be challenging in order to students a chance to shine, which some did. For those students who felt it was too long, I suspect the problem was their own inaccuracy rather than the exam itself; most students had no trouble touching upon all the major issues within the time allotted. Of course, almost all students did get bogged down or distracted by red herrings in some spots; that is natural. Note that one certainly need not have discussed all of the points in the answers above to obtain a "A", and that doing so did not necessarily guarantee an "A". Much of the grading is on the nuances of the analysis, which usually demonstrate students' depth of understanding. The average for the exam was a "C+", or 67% (the median was exactly the same), due in large part to students' problems with question 3.

The raw average for the course was, therefore, 69% (the median was 69.5%). I would have liked to "curve" the grades (forcing those at the very bottom of each grade bracket down, and students at the very top of each grade bracket up), but I did <u>not</u> do so. Instead, I "bumped" every student up by 2 percentage points, making the average for the class exactly what it should be: 71%, or a "B". The average GPA was 5.80, which is also well within the guideline range. There were no "A+"s or "F"s. The final grade distribution appears in below.