PROPERTY 1208B MIDYEAR EXAM

PROFESSOR J. DE BEER

14 DECEMBER 2006, 9:30 – 11:30 (2 HOURS)

THERE ARE **4 (FOUR) POSSIBLE QUESTIONS** TO CHOOSE FROM.

YOU MUST **ANSWER ONLY 3 (THREE)** QUESTIONS.

ALL 3 (THREE) ANSWERS ARE WEIGHTED EQUALLY

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 PDAS).

THIS EXAM IS WORTH EITHER 33% OR 66% OF YOUR FINAL GRADE.

Once your time begins, you might want to first read the entire exam, choose which questions you will attempt and thoughtfully plan your answers. The suggested time allocation (30 minutes for each your three answers) takes account of a 30-minute "digestion" period at the outset. Feel free to write a brief outline in your exam booklet—I'd consider it for marks only if it helps your grade.

MEMORANDUM

To: **Students-at-Law**

From: **Lionel Hutz, Senior Partner, I Can't Believe It's a Law Firm! LLP**

Re: **Three Urgent Tasks**

Date: **14 December 2006**

Well, I'm pleased to welcome a new batch of students to my firm, "I Can't Believe it's a Law Firm" LLP. You know our motto: "Cases won in 30 minutes or your pizza's free."

Although this is technically your first day on the job, I'm sure you can handle the following urgent matters. There are **4 (four) tasks listed** below – you **must choose 3 (three)** of them to do. I need responses within the next two hours. Your answers should be thorough and responsive, accurate and insightful, concise and organized and impressive overall. Your performance evaluation will be based on those criteria.

First, a good friend named Tiger has contacted me about a lawsuit that he's considering. Last time he was playing golf in Canada he unintentionally shot several balls into a lake at the Mayfair Lakes Golf Course. Those golf balls, always marked with "Tiger", could be quite valuable. Even ordinary balls can be resold as "experienced." Tiger recently learned that a young person was criminally charged with stealing golf balls from the bottom of a lake on that course. (The case is attached as **Appendix A** to this memo.) The facts stated by the judge are not in dispute, but I am not convinced that the judge's conclusions about the criminal law accurately reflect the applicable rules in a civil context. So before starting a risky and expensive civil lawsuit, I need you to rank the interests of all parties who might possibly come forward to claim the golf balls taken from the lake.

It proved to be more difficult than I expected for students to score very well on this question. Most students adequately identified and appraised the key issues, including the claims of Tiger (was the ball abandoned?), the course owners or operators (did they manifest an intent to possess things found on/in their land?) and the finder (what is the impact of the finder's wrongdoing?). Grades depended in large part on the depth with which students evaluated these issues by applying materials we studied to the facts of this case. The best students also discussed other possible issues, including for example, the claim of the finder's accomplice and/or the extent to which title to the balls might be affected by the law on commingling. Overall, almost

everyone did fine, but only those students with exceptionally thorough, deep and well-organized responses were awarded "A" level grades.

Second, our firm has been retained by the City of Ottawa, which would like to appeal a recent court ruling against it. The case was brought by a land developer who sued to obtain compensation for losses caused by the City Council's decision to change zoning regulations in association with new plans for Ottawa's Light Rail Transit (LRT) system. A trial took place based upon an agreed statement of facts, which is attached as **Appendix B** to this memo. Given those facts, the judge awarded Eugene Melnyk damages of $5,000 per acre of land he purchased. We have been asked to advise whether an appellate court would be likely to reverse the lower court's decision. If not, are there any other legal concerns our client might need to be aware of? I want your opinion on those questions, based on the policies and legal materials studied in your first year property class.

Many students provided superficial and incomplete answers to this question, resulting in generally low grades on this question. Students often reached conclusions that were likely correct, but their analyses lacked rigour or depth. Good responses compared the reasons for the results in Mariner and Lucas, and analyzed these facts in detail in light of such cases. It is debateable whether constitutional differences between Canada and the U.S. are determinative on these particular facts, yet some students took it as given that they are. Some students did not bother to respond at all to the part of the question regarding "other legal concerns." Those who did raised usually issues about a potential expropriation claim by Bryden, for example in respect of the moratorium on development. Students ought to have also identified uncertainty on the facts concerning the nationality of the investors for the purposes of a possible claim under the NAFTA, which most but not all did. Melnyk was not unjustly enriched, and students were not rewarded for analysing this non-issue. Similarly, the City may have acted unethically or perhaps even fraudulently, but misrepresentation and other contractual issues were not relevant here.

Third, I'm scheduled to participate in an upcoming conference on documentary films about property law. My panel will discuss the National Film Board of Canada's documentary, "No Place Called Home." I was asked to comment on a very specific issue raised in that film—the link between property and identity. **Appendix C** contains several lines of seemingly contradictory dialogue from the film. In one scene, Kay Rice seems to suggest that property (or a lack thereof) does not define "who we are." Yet in another scene, an aid worker refused to allow the Rice family to sell the few things they own because: "[You] can't be selling off your part of life." In light of these specific remarks, and based on the theoretical materials covered in your first year property course, I want you to help me prepare to discuss whether and how a person's possessions are linked with his/her identity. What implications might such statements and theories have for the design or implementation of Canadian property laws?

This was a question about property and identity. It was not an excuse to offer a general overview of theoretical issues in property law. Most students were able to link the quotes from the film to specific materials studied in class, but those who failed to do so received relatively lower grades. The perspectives of Hegel and Radin (by the way, Margaret Jane is a "she") were especially relevant. Almost all students discussed Waldron's work regarding property, freedom and homelessness. However, that was rewarded only if and insofar as those topics were linked to

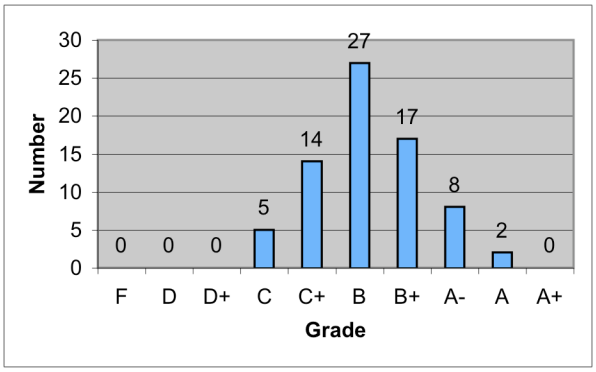
identity. The same was true of discussions about the Charter *and its lack of reference to property rights. A handful of students did very well by including comments on materials such as Harris' "Whiteness as Property" or issues such as copyright and moral rights. The best essays did not only relate the film to materials studied in class, but also offered critical evaluation and persuasive argumentation.*

Fourth, I've been invited to guest blog on "The Becker-Posner Blog" <http://www.becker-posner-blog.com/>. As you may know, Professor Gary Becker is a Professor in the Department of Economics and Sociology and the Graduate School of Business at the University of Chicago. Judge Richard Posner of the United States Seventh Circuit Court of Appeals is perhaps the most influential scholar in the field of law and economics ever. They've asked me to comment on a passage from an article by Professor Richard Epstein (of the University of Chicago Law School) entitled, "Cybertrespass." That passage is attached to this memo as **Appendix D**. I'd like you to prepare for me a blog posting that responds specifically to the questions raised in this passage. Obviously, given the forum, my commentary must demonstrate deep understanding of (although not *necessarily* agreement with) law and economics discourse relevant to Epstein's comments.

It surprised me how few students actually said anything meaningful about law and economics, especially given the explicit instruction to do so. Many students went on a diatribe citing clichés about the challenges of modern technology, and the need for the common law to adapt. Such responses basically just restated the question. Good answers made clear arguments about how the ought to respond to these changes, and why. Often this included reference to the characteristics that cyberspace shares with all intangible or ideational resources. The students who did well also discussed some or all of the following issues: the symmetric tragedies of the commons and anticommons; the application of the Coase theorem (I would have thought this to be an obvious topic for discussion, given that we raised Coase in the context of airspace and subsurface rights, which the question expressly refers to); de Soto's theory of property and development; Posner's requirements of an efficient property system. Many students did mention cases such as Intel v. Hamidi, which was good.

Remember, that you only need to **do 3 (three) out of these 4 (four) tasks!** I will finish the other remaining task myself during lunch today.

Overall, students did rather well on this exam. The GPA for the class was 6.21. The breakdown of grades is as follows:



Thank you,

Lionel Hutz

Lionel Hutz,
I Can't Belive It's a Law Firm! LLP.

Marge: So, Mr. Hutz, does my husband have a case?
Hutz: I'm sorry Mrs. Simpson, but you can't copyright a drink.
Homer: [whines] Oh!
Hutz: This all goes back to the Frank Wallbanger case of '78. How about that! I looked something up! These books behind me don't just make the office look good; they're filled with useful legal tidbits just like that!
Homer: [grumbles] Stupid Moe, non-inventing, recipe-stealing, pug-nosed...

Appendix A: *Regina v. K.A. (minor)*, [1993] B.C.J. No. 2314 (QL)

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1 **DAVIS PROV. CT. J.**:-- Chi Chi Rodriguez; Mildred 'Babe' Zaharias; Jimmy Demaret; Betsy Rawls; Arnold Palmer; Lee Trevino. These are names that even non-golfers recognize.

2 One can safely say that these players have each lost at least one golf ball in their careers.

3 If K.A., while walking along a golf course, found those lost balls, put them into his pocket and went home, would he be a thief? Would he be stealing from those people? Would he be stealing from the golf course? From anybody? 'Oh yes!' says the Crown.

4 In this case, the representative of her Majesty makes this statement in answer to these questions: "I would think that any reasonable person walking along a golf course that picked up a golf ball and put it in (their) pocket would believe (they) were a thief."

5 The lawyer for K.A. says "Au contraire." He says, because the charge against K. is that he stole golf balls from the golf course and since the golf course did not own the golf balls, K. is not guilty of this charge. K.'s lawyer says that those balls were either abandoned by some long gone golfer or if not abandoned, then the balls belonged to that long gone golfer and not the Club.

6 The Crown comes to the conclusion that K. is a thief and stole from the golf course from the evidence of Mr. R.G. May. Mr. May is the general manager of Mayfair Lakes Management Corp. which does business as Mayfair Lakes Golf Course. He says it is a course upon which the public at large are invited to play if they pay, otherwise they can come on the grounds to use the facilities - driving range, club house, restaurant, banquet rooms, pro shop and other retail services. There is, he says, really only one way into the area, and that is only available during business hours; certainly not in the darkest of night wearing a wet suit as K. was. Also Mr. May is of the firm opinion that the golf balls are the property of the golf course because he says;

> "In my opinion, and in the opinion of the people in the Professional Golf Association, as far as the golf balls, once the golfer who has dropped his second ball and played on, the golf balls are the property of the golf course if in fact they are on the property of the golf course. ... My understanding ... is that when playing the game of golf, a person does not admit until a certain point in time that he has lost a golf ball . . .and in that case with a golfer it's the exact golf ball he was using. And at that point, which is usually in the rules of golf, ten minutes, he then makes a decision that that ball in fact is lost, and then brings out another ball of his own possession and puts that ball into play and then carries on."

7 I gather that players, from time to time, lose a ball or two in the artificial lakes that were made by the golf course designers because this golf course has, according to Mr. May:

> "… a contract with a commercial scuba diving company that comes on a regular basis from about early April until the end of September or mid-October to recover the balls. … They then take them back, wash and clean them, sort out any unsaleable balls, … and return them to us, at which point they are paid by us…. The majority of them are sold through our retail outlet in the pro shop…."

Mr. May's position is that possession of golf balls is 9/10ths of the law; he says in response to the question 'is it his company's view that the golf balls in the lake are now his property?';

> "That would be our assumption I guess, if we possess the lake, we possess what's in the lake. That would be our opinion."

It is interesting to note that other property that turns up in the lake is treated differently than golf balls. Somehow it appears that golf clubs end up in these lakes (I wonder how that happens - it was never fully explained) and when it was suggested to Mr. May that, "you wouldn't consider that [golf club] to be the golf course's, you'd try to find an owner for it?", he replied;

> "A limited amount of try, yes. I don't have a method of trying to ascertain the ownership. If someone inquires about a lost club, and I could match the one club with the inquiry, then I would make every effort to get it back to that person."

8 The Crown says that this is a clear case of theft if there ever was one. K. was caught red-handed with a bucket of balls, standing in a lake on the golf course in the early hours of the morning wearing a wet suit with his accomplice diving for the balls. What could be more culpable?

9 I have some problems with Crown's so clear cut case. The law is clear I believe - that the taking into possession of another's property and intending to deprive the owner of his property is theft. Does this case fall anywhere close to that definition?

10 Well, who owned the balls in the bucket? The golf course owned one, and that we know because it had a red stripe around it and that Mr. May says is a range ball! But what about all the others? The Crown went to the case law for the answer!

…

13 … There is no evidence that the balls were, at the time the young person was apprehended, in the possession of the golf course because, the evidence indicates, they don't take possession until the scuba divers turn the balls over to the club and are paid for them! There were no posted notices and there were no warnings of any kind that effect this young person. Is he a thief? He may be. But he did not steal from the golf club. Did he trespass? He may have. But that is not the charge before me.

…

15 Oh yes, as to the one ball with the red stripe? There is nothing to suggest that K. intended to deprive the golf club of their ball. Did a golfer use that ball and did that golfer steal the ball from the club? Is K. stealing from a thief? He may be, but that gives him no better title to that ball then the person who put it into the lake. At best, I would think that K. could be said to be in possession of stolen property, but that is not the charge before me.

16 I should say that from the little evidence that was lead by the Crown, custom and usage may be important in deciding who owns abandoned golf balls and when title/ownership changes, if at all. Not being a golfer, and there being no evidence of custom, I do not know what a long standing member of the Royal and Ancient Club of St. Andrews would have to say about this or even if that may be important. …

…

18 The charge before me is dismissed.

Appendix B: Agreed Statement of Facts

1. Rod Bryden is an experienced land developer. He was interested in buying a 200-acre parcel of vacant land in Ottawa.
2. The property's zoning allowed it to be developed for single-family residences on lots of 10,000 square feet.
3. He signed a purchase contract with the seller for $2,500 per acre, which allowed him to cancel the contract if the City was considering any zoning changes.
4. Because of the amount of land Bryden purchased, he received a very good price for this land. The property was actually worth $10,000 per acre.
5. Before completing the sale, he met several times with the City Manager, the Mayor and various City officials to investigate all city regulations and restrictions affecting the property.
6. All of them informed him that no plan existed to change the zoning.
7. In fact, a rezoning was secretly being considered in association with possible amendments to the City's plans for the Light Rail Transit (LRT) system. These plans have been in flux for several years. The City officials were not being truthful.
8. Shortly thereafter, the City officials met to discuss rezoning the property, but they did not tell Bryden of these meetings for fear that he would quickly complete the purchase, file a development plan, and thus vest his right to develop under the filed plan.
9. Relying on untruthful assertions of the City officials, Bryden purchased the property.
10. The City Council met three days later in executive session to impose a moratorium on the development of Bryden's newly purchased property.
11. The moratorium lasted 18 months, during which time Bryden could not develop the property.
12. After 18 months, the City introduced a bylaw to rezone the property at issue. The new minimum lot size was 20,000 square feet.
13. After the rezoning, the property was worth $5,000 per acre.
14. Bryden specializes in building middle-class housing and neither has the interest nor the experience to build houses on lots larger than 10,000 square feet.
15. Bryden therefore sold the parcel to Eugene Melnyk for the price that he originally paid for it.
16. Melnyk was aware of the new zoning rules, but believed they were vulnerable to legal challenge.
17. Shortly after Melnyk purchased the property he sued the City, claiming the City's actions constituted an expropriation.

Appendix C: National Film Board of Canada, "No Place Called Home" (2004)

…

[Kay is walking down the street with her children, speaking to the camera.]

Kay: We're people. So we're poor. It's what we are, not who we are.
…

[An aid worker in an office of the Salvation Army is interviewing Kay.]

Aid worker: If they only lend you part of the debt, how would you obtain the remaining money?

Kay: Well, like I said, the child tax. That's going to be part of it. I have $300 in my purse right now. I can show you $300. We're going to have a yard sale and sell everything that's not necessity. I would never sell beds, or basics or things like that.

Aid worker: No. You're not going to sell basics.

Kay: I wouldn't sell basics. No I wouldn't sell that. But I would sell movies and anything extra we have in the house.

Aid Worker: Well, really, I would just put, … impossible. It's impossible. Can't be selling off your part of life. You can't be selling. That is your part of life. That is your history for your children. You can't be doing that. So I'm just going to write impossible.

…

Appendix D: Richard A. Epstein, "Cybertrespass" (2003) 70 U. Chi. L. Rev. 73 at 75-6

…

With cyberspace, the hard question is whether technological changes could ever lead us to abandon the presumption that a deliberate trespass counts as a private wrong. The evolution of legal doctrine provides us with excellent examples of just how that shift takes place. One of the central rules of the common (and Roman) law is embedded in the maxim *cujus est solum, ejust est usque ad coelum et ad inferos*. … One look to the heavens shows that, literally taken, the maxim is absurd, given the rotation of the earth: It's nice to own Orion for a second. But this error seemed harmless enough because no one could put the maxim to the test by taking possession of outer space. …

This strong rule on possession had to respond, however, to technological and production requirements. …

The end of the twentieth century has given rise to new technologies that are every bit as profound and beneficial in their operation as broadcast, air transportation or power transmission. The internet is the ultimate network industry, which allows the near-instantaneous transmission of information from one person to another. … The question then arises whether the rise of the internet and web requires a rethinking of the property relations governed by the common law of trespass.

…