PROPERTY 1208 B&C

MIDYEAR EXAM REPORT

2005-2006

This report is meant to summarize and provide feedback on students' performance on the 2005-2006 midyear exam for Property 1208 B&C. If you wish to receive further individualized feedback, you must email me prior to Tuesday, 28 February 2006 with a revised answer to any question you wish to discuss. I will compare that revised answer with the response you provided on the exam, evaluate them both and offer you suggestions for improvement. Although this procedure is far more time-intensive for both you and me, I strongly believe that it is worthwhile to facilitate active learning. For most of you, I suspect the following general commentary will sufficiently answer any questions you might have.

Overall, I was quite pleased with your performance on this exam. First of all, remember that a C is "good" and a B is "very good"! Even a D is "passable". You are all accustomed to getting A grades, but that is simply not the reality of law school. The median grade for this midyear exam was a B and students' combined GPA was a 5.65. That is at the bottom of the range suggested in the Faculty's Academic Guidelines (5.6 – 6.4). There were no statistically significant differences between the two sections. A detailed table of individual grades appears at the end of this report.

I suspect that the slightly low class average is due to two factors. First, there were probably some students who obtained relatively low grades because they did not make a genuine effort, given that the exam was failsafe. Second, it is likely that some students are just getting adjusted to law school exam writing. As a result of these factors, there was an unusually high number of D grades and an unusually low number of A grades. It was extremely surprising to me that, when I assimilated the grades for both classes the result was a near perfectly symmetrical bell curve—it is usually close, but not that close.

I am quite confident that nearly all students will perform better on the final exam in April, as you increase your effort level and/or gain experience in legal methodology. For those of you who already put a high degree of effort into the midyear exam, and did not perform to your expectations, take comfort in the fact that your dedication will almost certainly be rewarded as you become more comfortable writing exams. For those of you who did as well as or better than you expected, don't be cocky—it could have been a fluke. Everyone should bear in mind that whenever anyone else is evaluating your law school grades, they will discount outliers. The odd A or D is neither helpful nor harmful; trends and averages are far more significant.

I thought that the exam was extremely fair. Each question contained a bit of a twist, but there was nothing new or unexpected. All of the questions contained aspects that were somewhat straightforward as well as issues that were relatively more difficult to identify and analyze. This allowed most students to obtain a good or very good grade, while providing ample opportunity to excel.

You were marked on the 6 criteria that were expressly mentioned on the exam itself. You were given a letter grade for thoroughness & responsiveness (to what extent did you analyze all of the issues you should have and none of the issues you shouldn't have?), accuracy and insightfulness (were your answers technically correct and supported by or distinguished from legal authorities, and how did you incorporate the class materials and discussions into your response?) and conciseness and organization (how clearly and well structured was your answer, and was it too wordy or, to the contrary, too brief). These grades were then combined to give you a grade for the question based upon "overall impression". The grade for each question was then weighted equally and resulted in a total grade for the exam. Because letter grades can be averaged if converted into grade points this exercise was mostly mathematical, although I did occasionally round with discretion, to your advantage, where it was clearly appropriate to do so.

Surprisingly, a nearly equal number of students attempted each question (I would have thought more students would attempt the first question, for reasons discussed below). I did not detect any patterns in terms of higher or lower grades obtained on any particular question, nor did I perceive a difference overall between the quality of responses to "doctrinal" versus "theoretical" questions.

As you read the following remarks, bear in mind that nobody touched upon all of the points mentioned below. It would be unrealistic to expect you to do so in the time allotted. (Although if you were efficient, it was possible to come close.) Especially for the essay questions, some of the best marks were given to students who analyzed just a couple of the many possible points, but did so extraordinarily clearly and carefully. In general, the more thorough, responsive, accurate, insightful, concise and organized your answers were, the better grade you obtained.

Question 1

The first question, you should have noticed, bore uncanny resemblance to the two practice problems I assigned and reviewed for you during the term. You will recall that I took the time to carefully prepare suggestions as to the substantive issues one should address in questions such as this. I was shocked at how few students had apparently paid attention to my advice. The core issue was one of accession. As I indicated in my earlier memo to you, I was looking for discussion of some of the following points:

- What is (are) the test(s) for accession and how does it (they) apply here? Some students stated incorrectly that there is a single 4-step test from *Cavalier Yachts*, although those students who read and understood that case did not make this mistake. It is true, however, that there are at least four possible tests, which may or may not yield different results. I would have thought that at least some of these chattels (perhaps the fuel pump, for example) had not lost their separate existence, could be removed without injury and might still be useful. Granted, the object and purpose of annexation may suggest the opposite. Other chattels (such as the trunk and chrome for example) had almost certainly acceded to the steel frame.
- Which are the principal and minor chattels in these circumstances, and why? There are several approaches one could take, based on the authorities we've studied. Most students thought that this case was exactly analogous to *Cavalier Yachts*, believing that the parts were added over several years. Very few students paid close attention to the fact that Johnny "put it all together one night". When that fact is combined with the likely value of

the parts versus the frame (the whole car was worth "at least a hundred grand"), I would have argued that GM is the owner of the principal chattel or chattels.

- Normally the owner of the principal chattel would be awarded the new object, but there may be special considerations. Here, the car may have had sentimental value to Rosanne but not for GM, like the yacht in *Cavalier Yachts*. On the other hand, Johnny was a thief, and the maxim of *ex turpi causa* might apply. In that context, students were rewarded for citing *Glencore* or other cases indicating a wrongdoer is not always unable to make a claim for chattels that have been combined with those belonging to other innocent parties. Of course, in those cases, it was possible to apportion the goods (*e.g.* oil) between claimants. That may not be possible here. There were also further suggestions in the readings as to how to resolve this issue, which some students appropriately referenced.
- Assuming that GM is awarded the vehicle (a similar analysis could have been done if you reached the conclusion that Rosanne is entitled to it), what compensation, if any, would be appropriate for Johnny's contributions of the frame and his labour? Almost all students analyzed the test for unjust enrichment from *Gidney v. Shank*, which is actually very complicated in these circumstances, so high marks for trying. (We'll study the doctrine of unjust enrichment further next term.) But only some also addressed the equally important test of "incontrovertible benefit" that was applied in *Cavalier Yachts*.
- There is a final related consideration here, in that Rosanne Cash obtained possession of the car via testamentary gift. I did not expect you to analyze the issue of gifts in any detail, but this point was perhaps relevant to the "juristic reason" branch of the unjust enrichment analysis. Students could also have mentioned the principle of *nemo dat* to explain that Johnny could not have given what he did not rightfully have.
- Although you were expressly instructed to ignore any issues concerning statutes of limitations, some students addressed adverse possession of chattels. This indicated that either the student could not follow instructions, or did not understand the relationship between statutes of limitations and the doctrine of adverse possession. Either way, this was penalized.
- There was nothing in the question that even hinted at the need to discuss copyright or other IP issues.
- Neither Johnny nor Rosanne were "finders", and the parts were not abandoned. These issues were completely irrelevant.
- The Coase theorem was not relevant to this particular question, nor was Locke's labour theory of property rights.

Question 2

This question was generally answered well, although some students did not have enough depth to their analysis. The main issue concerned a claim for adverse possession, but there were also ancillary points to be made about improver legislation and/or boundary doctrines. In that context, I was looking for discussion of some of the following topics:

- The relevant statute in Ontario (not Canada—this is provincial jurisdiction) is the *Real Property Limitations Act*, which sets out the 10-year limitation period and extinguishes the paper-title-holder's title after that time. Many students mistakenly felt that they did not have the necessary facts to know these details, but really this question of law is the basic starting point for the whole analysis.

- Students could (and did) present the "test" for adverse possession in several different ways: as a list of considerations or a 3-step process. Either way, a few points needed to be addressed. No marks whatsoever were awarded for transcribing the test from your notes onto the exam. Instead you were required to analyze whether Rivers' possession was:
    - Open. Some students suggested that this might depend, for example, on whether a few golf balls simply rolled onto the 6-acre parcel or whether conspicuous structures were built there. This is an example of an area where more facts would be helpful.
    - Continuous. Many students reasonably assumed that the land was not used during the winter. It was appropriate to cite the *Keefer* and/or *Teis* cases, which say that seasonal occupation by a squatter is not problematic. There was also a transfer in paper title during the 25-year period of Rivers' possession, and a question arises as to the relevance of this fact. Some students referenced cases regarding adverse possession of chattels that could help to resolve this question.
    - Peaceful. We know that the city "made no fuss" about Rivers' possession, and there is no indication this was anything other than peaceful.
    - Actual. Rivers' had no colour of right (this was not a case of an error in the title documents) so possession had to be actual instead of constructive. Some students pointed out that the significance of this distinction is somewhat unclear. Nevertheless, we don't know how much of the 6-acre parcel Rivers was actually using, so the distinction might be relevant.
    - Adverse/inconsistent. Most students appropriately spent substantial time analyzing this criterion. Reference to the facts of *Keefer*, contrasting the driveway area with the garage area, was warranted. Here, we simply don't know what the city intended to do with the property. That it "made no fuss" until recently suggests perhaps it was content to have Rivers use the land in a way that was compatible with its intentions. That Rivers "hoped to buy" the land implies he knew it belonged to the city and that this was not a case of mutual mistake. As such, the exception to the inconsistent use set out in the *Teis* case is inapplicable. An argument that Rivers need not meet this requirement can be made based on the *Pye* case, although that is a British authority.
- Some of the best responses explained how the policies and principles underlying the doctrine of adverse possession might be relevant here. For example, Rivers was an intentional squatter, which may lead a court to view his claim sceptically. On the other hand, the city sat on its rights and it may be efficient to quiet title to this land. Students who simply spewed out a bunch of theories without pinpointing their relevance were not rewarded at all, and wasted their time.
- Several students also noted the suggestion in *Teis* that the issue of adverse possession might possibly be viewed differently where the dispute is between a private individual and a municipality representing public interests, as compared to a dispute between two or more private citizens. In some jurisdictions, such as Alberta, there is legislation to this effect. Students were also rewarded for noting that it is important to know whether this land is registered under Ontario's land titles system.
- Many students analyzed the reference in the article to Rivers' desire for "improvements he's made to the land over the years." Innocent improver legislation does not apply here,

because Rivers was not innocent. This could possibly be a case of unjust enrichment, but students were not expected to explore that issue (nor were they penalized for doing so).

- Some students considered whether the conventional boundary line doctrine might apply in these circumstances. That is an interesting thought, and showed creativity, although it was certainly not meant to be a key issue.
- A number of students addressed this is as an expropriation question, which was simply wrong. (Conceivably, if the city had lost the land by virtue of adverse possession, it might eventually have expropriated the property. There is no mention whatsoever of this possibility in the facts you were given, and therefore the issue is far too speculative to warrant analysis).

Question 3

This question, like the other "essay—type" question, offered students the chance to discuss a wide range of topics. A premium was placed on accuracy when explaining any legal theory or doctrine. Also, very few marks were awarded for answers that simply described theories or doctrines. It was essential that students critically analyzed the materials. It was also absolutely crucial that students relate the points they were discussing to the quotation provided, and did so in a clear, focussed and structured manner. There was no single correct answer. Although there was considerable flexibility for students to explore various issues, I was looking for a couple of key points to be made:

- Almost all students highlighted the factual differences in terms of the inherent characteristics of things and ideas. Ideas are not rivalrous, possessable or scarce. This is directly related to Brown's remark about the difference between ideas and things being obvious when you're hit over the head with an idea, and was therefore a natural and necessary point for students to raise in their response.
- Many students also built on these distinctions by explaining how exactly they are relevant to the theoretical justifications underlying property rights in things versus ideas. There are a couple of important points to be made here, relating to each of the various theories we studied. It was popular, although far from sufficient, to simply reiterate Fisher's description of these theories in your readings.
- Brown suggests things could have owners but ideas could not, and that that is changing. It was appropriate to comment on whether or not you believe this is true. That was often done by reference to the IP doctrines we studied, including copyrights, patents and trade-marks. Again, it was not at all sufficient to simply describe the nature of these rights, although many students did just this. The best students selected one or two specific aspects of these doctrines and related them to Brown's quote, or to the theories they were discussing. For example, some students noted that copyrights only protect expression not ideas. Other students explained that patents do not really leave enough and as good ideas for others because independent creation is still an infringement.
- Much could be (and sometimes was) made of Brown's suggestion about what property is. He says ideas are being treated as things that have owners who can decide who gets to use them and on what terms. Is that a "property" right? Some students referred to various definitions of the term in order to evaluate whether intellectual property, or property in ideas, was property at all. In this context, reference to the *INS* case and the notion of "quasi-property" was very helpful.

- Many students looked at the relationship between classic and intellectual property rights in the same resource. The number of students who cited my own work on that issue flattered me, but flattery did not equate with high marks. Actually, I think I held students to higher standards of accuracy than I ordinarily would have. Students received no credit for simply referencing these materials, but were rewarded for their critical insights. Those students who related these issues to other cases we studies, such as the *Moore*, *Théberge* or *Schmeiser* cases were also rewarded.
- Almost all students made reference in one way or another to the notion of balance, and the tension between providing incentives to create and facilitating the dissemination of ideas. This was a good point to make, although much depended on how the point tied into the rest of the student's answer.

Question 4

The fourth question called for students to bring a variety of practical and theoretical points into their responses. All of my general comments made in the context of the third question apply here. Marks were awarded for critical analysis and commentary, not at all for description. It was also essential to avoid the temptation to simply explain different theories in support of private property. Answers needed to be tailored to respond to the specific context you were asked about, and comparisons and contrasts with the Canadian situation were indispensable. Clarity and structure was crucial. Again, there was no right or wrong answer, and students had substantial discretion to raise various relevant issues. Students appropriately discussed some or all of the following points:

- Iraq's new Constitution contains two articles that deserve comment. (There is also a third provision that I did not include on the exam because, frankly, even I could not really figure out its significance!)
- The first article references "personal property", which confused some students. I was (am) also confused by this, and assume it must be a translation issue. I don't think that it was meant to reference personalty and not realty. Most students seemed to agree. This isn't something I expected anyone to resolve, or even explore at length. More important was what this provision means. Many students thought that this represented a "bundle of rights" view of property. The reference to exercising rights "within the limits of the law" seems to be an express acknowledgement that owners may not do absolutely anything they want with their property.
- The second article offers much more scope for practical and theoretical discussion. The best students were able to explain the importance of this provision from social, environmental, political and economic perspectives, and ideally discussed points related to some or all of the above.
    - Students pointed out that the social ramifications of constitutionally entrenching property are significant, particularly in terms of equality and wealth redistribution. Many students discussed homelessness, which is an issue but not the fundamental issue. This is a question of social justice and human rights. Most students were able to analyze the Iraqi provisions in light of different conceptions of property as a human right, citing authors such as Waldron for example.
    - Entrenching private property also places significant limits on the Iraqi government's ability to enact environmental legislation without triggering a right to

compensation. Some students noted the relevance of this issue in an oil-rich country such as Iraq.

- In terms of political theory, many students were able to refer to Locke's view of the relationship between individuals and the state. Some students accurately explained that constitutional prohibitions on expropriation without compensation flow from a view of property as a natural right independent of the state. On this view, property is not a result of positive law, contrary to the argument of Bentham. The best students linked this point to the history of the 5th amendment to the United States' Constitution.
- Economic perspectives were perhaps most important to mention. It was not really appropriate to explain the tragedy of the commons in this context, although it was fine to highlight the possibility of an anti-commons situation, as occurred following the collapse of the former Soviet Union. More appropriately, many students cited the work of Posner and/or deSoto for the proposition that secure property rights are essential to facilitate economic investment. This is especially true in Iraq, where the government is new and relatively unstable. Foreign investors in particular will be highly reluctant to invest money in Iraq unless there is a fundamental guarantee that their property will not be expropriated without compensation. Without Article 23 there would otherwise be no such protection. Some students contrasted this with the Canadian situation, where despite the lack of *Charter* protection, NAFTA offers significant protection to foreign investors.

- Iraq's property provisions are starkly different from the Canadian approach, and remarkably similar to that of the United States. Accurate comparisons with other constitutional-type documents were also highly rewarded. When addressing the Canadian context, it was very helpful to comment on the non-constitutional protection provided in the *Bill of Rights* and provincial legislation that mandates compensation for direct expropriation (like the Nova Scotia legislation referred to in *Mariner Real Estate*). Unfortunately, that was often done inaccurately. It was also good to relate property protection with constitutional protection for other *Charter* provisions, such as those dealing with search and seizure or life, liberty and security of the person. Assigned readings from authors including Bauman were particularly relevant here. Some students insightfully argued that there are important differences between the established system of rights in Canada and the emerging Iraqi democracy, which may warrant different approaches toward property issues in the two countries.

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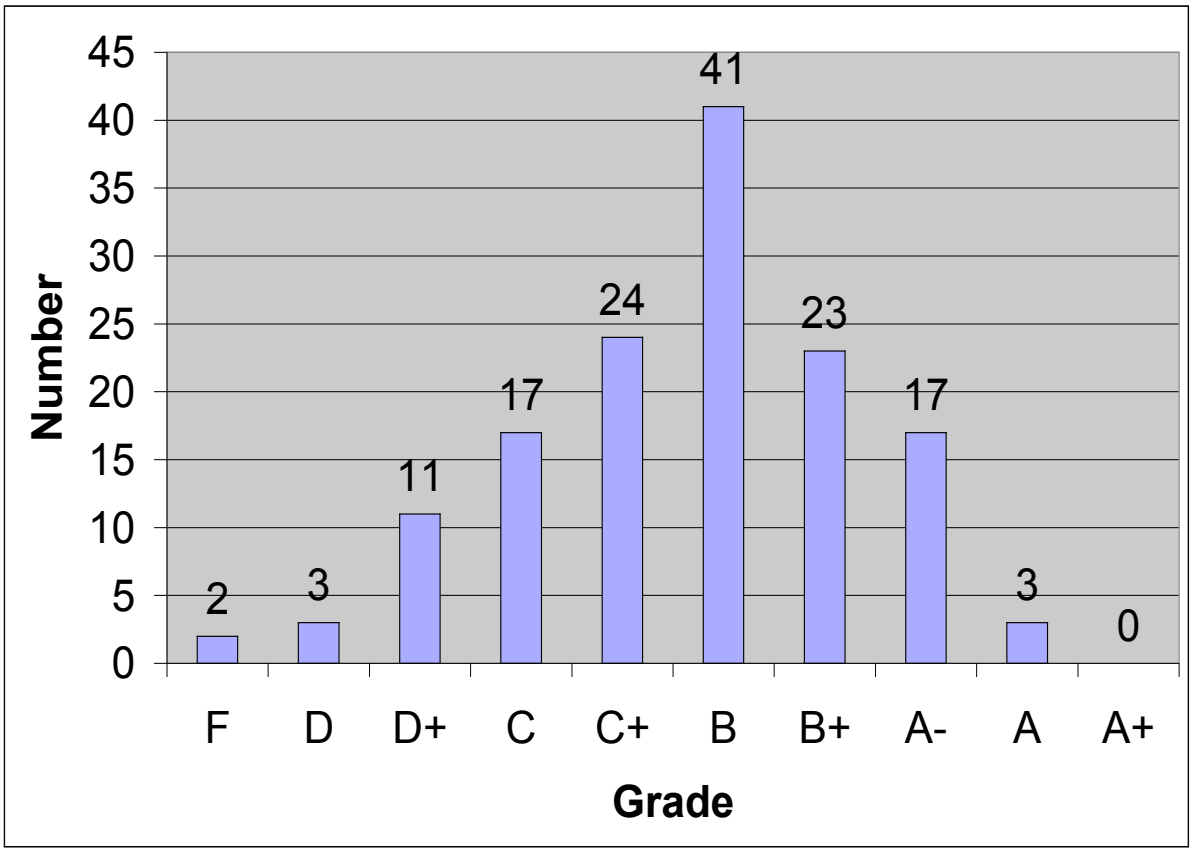

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