Property 1108(C) Final Exam

Dec 6, 2019

Student #[redacted]

"I declare my academic integrity and awareness of the sanctions for academic fraud."

Word Count: 4500

Part A: Question # 1

E is the likely best answer. A relational constructive trust arose from the Hospital's fiduciary duty to Arthur. This means that the law imposed upon the hospital an obligation to hold the car for Arthur, and then for his beneficiary. We do not know who his beneficiary is, but it is likely his family, as his son Bruce apparently handled his parents' personal items when they died, and is thus likely an executor and/or benefactor, or if Arthur died intestate, his closest living relative would get the car (Bruce, if he is still alive).

A is not the best answer. Arthur did not abandon the vehicle. Although he fulfilled the first element of abandonment (relinquishment of physical control), he did not fulfill the second (intention to abandon) (***Charrier v Bell***,496 So(2d) 601 (La SC, 1986)). He parked his car, and we can assume that he intended to drive it home, or have someone else drive him, when he got out. Moreover, the items such as walking canes left by Arthur in the car demonstrate that he intended to go back. **B is not the best answer**. As the finder, Francesco was a quasi-bailee of the car, and evidence would require abandonment of the car, which we know isn't the case as per A (***Trachuk v Olinek***,(1995) 177 AR 225, 1995 CarswellAlta 802 (QB). **C is not the best answer.** If Arthur died intestate, the intestate succession rules would apply (under the ***Ontario Succession Law Reform Act, RSO 1990***) and the closest living relative would get the car. Derryl is not the closest living relative (Bruce is Arthur's son, and the facts imply that a number of other relatives may still be alive). **D is not the best answer.** The terms of Betty's will are unknown here. If the car was given to Betty, it would have been as an *inter vivos* gift, and as we know from ***Nolan v Nolan Anor (***[2003] VSC 121), a requirement for delivery of a gift is required. The car was in the parking lot, and thus not delivered. This may be proven wrong if a set of keys was given to Betty via constructive delivery. It is unlikely that it was a *donation mortis causa* as there was no impending death from existing peril that lasted long enough for Arthur to gift the car to Betty (as can be gathered from the facts) (***Re Bayoff Estate***, [2000] 3 WWR 455, 2000 CarswellSask 25 (QB)).

Part A: Question # 2

D is the least accurate answer. Aboriginal title only applies to land (***Delgamuukw v British Columbia***, [1997] 3 SCR 1010, 1997 CarswellBC 2358), and thus could not be used to stop the misappropriation of their culture.

A could be correct. As we know form ***Bulun Bulun v R & T Textiles Pty Ltd.*** ((1998) 157 ALR 193 (FCA)), a fiduciary duty can arise from relational constructive trust**.** Anne Lájla Utsi may

have a fiduciary duty to the Sámi people as a respected member, and the films she makes may be held in a relational constructive trust. Her part in the creation of the films may be too limited however, as many people are involved in such projects, and they are not a sacred or traditional work (I assume). **B is likely correct** because copyright is an original expression which is automatically covered (***Théberge v Galerie d'Art du Petit Champlain Inc***, [2002] 2 SCR 336, 2002 CarswellQue 306). Frode Fjellheim's piece is a musical composition made for the film, and thus fulfills those elements. **C is likely correct.** ***Bulun Bulun*** illustrates how Aboriginal customary law often doesn't protect copyright, as it is too different from custom/practice of community itself. Moreover, copyright is for a distinct author (whether individual or corporation) (***Théberge)***, and it would be difficult to pin-point how that would work amongst the Aboriginal group. **E is correct.** Respect for Indigenous legal principles would help to the protect aspects of Sámi culture, as such principles stress the significance of intersectional relationships, and are an integral part of defining Indigenous identities and communities (**J Borrows**, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto 2002)).

Part A: Question # 3

D is likely the most helpful. According to the facts, the Simpcw First Nation's claims are on un-ceded and un-surrendered aboriginal title lands, and the responsibility and stewardship over the cave are Simpcw First Nation. This means that the Aboriginal title claim is on the entire territory, not just the cave itself. The fact that the Ancestors of the Secwepemc people performed spiritual ceremonies around and above the cave, but never entered the cave is important the first element which must be proven in order to gain Aboriginal title- that the land must have been occupied prior to (Crown) declaration of sovereignty. This is proven through physical occupation, including regular use of the land, and the claim to title made out when group can demonstrate that their connection with the piece of land was of central sig to their distinctive culture (**Delgamuukw v British Columbia**, [1997] 3 SCR 1010, 1997 CarswellBC 2358 [**Delgamuukw**]). If it can be demonstrated through oral and expert testimony, and written evidence, that the Ancestors of the Secwepemc people performed spiritual ceremonies since time immemorial (as implied by the evidence), and that the ceremonies were a regular use of land, then the element of physical occupation will likely be proven. In that case, the cave will be under Aborigianal title along with the rest of the territory claimed.

A is not the best answer. (it was funny though, thanks) Mr. Pollack's excursion of the cave will doubtfully be unhelpful to the Aboriginal title claim, unless he can be qualified as an expert and contribute to evidence demonstrating the occupation of the Simpcw First Nation (**Delgamuukw**). **B would be very unhelpful.** Provincial legislation establishing Wells Gray Provincial Park states that the territory is the property of the Crown could extinguish Aboriginal title, as it appears to be a clear and plain legislative intention to do so ([**Delgamuukw; Yanner v Eaton** (1999) 166 ALR 258 (HCA)). **C may be unhelpful.** An element to be proven by the party seeking Aboriginal title is exclusive occupation at sovereignty, meaning that the community held the ability to exclude others from lands, or at least the intention and capacity to retain exclusive control (**Delgamuukw**). If the Ktunaxa First Nation has also occupied the area from time-to-time, and did so with the permission or invitation of the Simpcw First Nation, then this would not

create an issue for their claim. However, it could be detrimental if it can be demonstrated that the Ktunaxa First Nation occupied the area against the Simpcw First Nation's wishes, or that the Simpcw First Nation did not have the capacity to retain control. **E helpful, but is not the most helpful.** The implementation of UNDRIP will likely be helpful in the Simpcw First Nation's efforts to develop a culturally appropriate response that is guided by our traditional laws, as article 2(2) imposes obligatory consultation and gaining of free, prior, informed consent from Aboriginal groups before approval of project affecting land, territories, and resources. However, UNDRIP reinforces the ruling in **Delgamuukw** recognizing pre-existing government and culture, it does not eliminate the burden on Aboriginal communities to prove Aborigianl title.

Part B: Question # 6

Memorandum

To: The City of Ottawa and National Capital Commission
Re: Tent City
Short answer: *Enforcing the trespass order would be constitutionally invalid*, but it will likely be saved under s 1 of the *Charter*.

Issue statements

1) Would enforcement of a trespass order be constitutionally valid in these circumstances?
2) What should the City and NCC's key talking points be to sensitively communicate but defend their legal position to the people of Ottawa?

Analysis: Issue Statement 1

The Tent Community behind Bayview station is situated on land belonging to both the city and the National Capital Commission (NCC). This means that the City and NCC's rights as property owners of the land being used include the ability to regulate or exclude, much like a private owner (***Batty v Toronto (city)*** ,2011 ONSC 6862, 2011 CarswellOnt 12581 [***Batty***]). However, the City and NCC are subject to certain duties and obligations under the *Canadian Charter of Rights and Freedoms* (***Batty***), and the enforcement of the Trespass Notice must thus be analyzed through a constitutional lense.

The Trespass Notice

The Trespass Notice resembles the one given to protestors in an encampment at St James Park in the City of Toronto, treated in the case of ***Batty***. According to the *Trespass to Property Act (*RSO 1990, c. T. 21) (the *Act*) which regulates Ontario parks, and was applied in ***Batty***, protestors are prohibited from engaging in a) installing, erecting or maintaining a tent or other structure in park; and b) using, entering or gathering in park between 12:01 am-5:30 am. In ***Batty***, it was found that the Trespass Notice was a justifiable infringement under s 1 of the

Charter. Two important distinctions must be made here however. The first is that the land in question in ***Batty*** was a municipal park, and the provision in the *Act* focuses on parks, whereas the Tent City is on land behind the LRT station. The land behind the LRT station may be treated as a park however, if it is found that it is used frequently by the public. No evidence has been supplied to substantiate this, but the fact that the land is behind an LRT station, and thus likely often frequented by the public, may make the land equivalent to a park, and thus treated similarly under the *Act.* Second, the inhabitants of the Tent City are not protestors at the moment, as their main purpose for staying on the land is to inhabit it in the context of survival. However, if they were to begin outwardly protesting the Trespass Notice in a way which would make the main characteristic of their presence on the land that of protest, rather than inhabitance for survival, the *Act* would apply directly. In that case, a court may find that the *Charter* does not sanction unilateral occupation of the land because of the importance of a message and the way it is conveyed, and that the Trespass Notice would be found as a justifiable infringement under s 1 of the *Charter* as per the court in ***Batty***. This analysis may be relevant in the future, if the occupation does take on an air of protest as mentioned above.

Enforcing the trespass order would be constitutionally invalid

The *Charter* right in question is likely one of s 7, which protects individuals' life, liberty and security of the person. In ***Victoria (City) v Adams*** ((2008) 299 DLR (4th) 193, 2008 CarswellBC 2156 (SC) [***Victoria***]), the British Columbia Supreme Court found that a prohibition of taking a temporary abode constitutes a violation of s 7 Charter, essentially reading a right to shelter into s 7 under certain circumstances. In this case, the issue was one of bylaws, not a trespass notice. However, a strong similarity exists between the two, as they both have the objective of restricting homeless peoples' ability to set up shelter for their survival. In ***Victoria,*** the Court reasserted that a government or municipality cannot prohibit certain activities on public property based on its ownership of that property if it involves a deprivation of fundamental human right not to be deprived of the ability to protect one's own bodily integrity (***Committee for the Republic of Canada v Canada*** [1991] 1 SCR (SCC)). The Court found that the Defendants (a group of homeless individuals) were not asserting private property rights as they did not claim that the homeless could exclude anyone from any city property, or determine the use of the property; it was about the right to be free from violation to right to security of person. The individuals inhabiting the Tent City are doing a similar thing. According to them, they have nowhere else to go, and the community gives them the support needed in recovering from their addictions. No evidence exists that they wish to exclude others or are asserting property rights. If they were, the Trespass Notice would likely be constitutionally valid. In ***Victoria,*** it was emphasized that government action that prevents the establishment of the most rudimentary shelter when there are far more homeless individuals than can be accomodate is a violation of s 7. The individuals of the Tent City have said that they have nowhere else to go, and the interview with the City Councilors indicate that almost 100 people sleep outside each night in the Ottawa region. Although the process of finding shelter and re-housing these individuals has begun, we do not know how long it will take to do so. The facts indicate that the City has already taken a significant amount of time to do so, and did not act quickly enough after the fires

occurred that destroyed some of the shelters. A court will thus likely find the Trespass Notice to be constitutionally invalid.

The Trespass Notice will likely be saved under s 1

As it is likely that a Court finds the Trespass Order to be constitutionally invalid, a section 1 analysis will be applied. The Notice in which a) infringement is in furtherance of pressing and substantial objective, b) there is a rational connection between the state action and the objective, and c) the chosen mode of infringement was a reasonable and proportionate measure that produces minimal impairment of the *Charter* right is a justifiable infringement under s 1 of the *Charter (**Batty**).* The infringement here will likely be found in furtherance of pressing and substantial objective if the land around the LRT station is one which is frequented by the public in their daily commutes, and that those living around the area are negatively affected, like the Park in ***Batty***. We do not have facts about the community surrounding the Tent City, but we can assume that the area is frequented by the public if it is so close to an LRT station. Even more importantly, the safety of those in the Tent City and surrounding it will further the pressing and substantial objective. This is because City Officials have identified the lack of safety in the Tent City; the police, first responders are often present on the site, and a number of fires have already created issues. There is a rational connection between the state action and the objective, because the City seeks to balance the understandable reasons for the inhabitants of the Tent City's wish to stay there (community, support) with health and safety, which have already been identified as an issue. This may be countered with the fact that the inhabitants' safety will also be at risk if they are removed from their community, as they rely on it in their recovery from addiction. However, this may be avoided if the re-housing is done efficiently, and support is offered to those individuals who need it. Lastly, the chosen mode of infringement will likely be a reasonable and proportionate measure that produces minimal impairment of the *Charter* right, as the City is working on re-housing the inhabitants. It is therefore likely that the Trespass Notice will be saved under s 1.

<u>Issue Statement 2: The City and NCC's key talking points</u>

1) **The Trespass Notice is important for the health and wellbeing of the community**

   The City and and the NCC work hard to ensure the community stays safe. This includes those living in the Tent City, and those living in the community around it. The City seeks to balance the understandable reasons for the inhabitants of the Tent City's wish to stay there (community, support) with health and safety. The frequent visits by police, and first responders, as well as a the safety risks on the site (such as propane tanks) demonstrate a need to ensure that safety and health standards are met. Our society aims to ensure these standards through regulations, and ensuring that public property is safe and can be enjoyable and accessible to all are important. The land around the LRT

station is public property, and we must ensure that it is available to the community at large, whilst ensuring that those in need are given support.

2) **Re-housing individuals is a priority**

The City is currently working on re-housing individuals. The encampment is not a dignified place to live, and the cold weather makes it even more problematic. It is essential that the individuals in the encampment are supported for their safety and security, as well as the safety of the community at large. Offers have been made to the individuals in the Tent City to be re-housed in hotel rooms, and we will continue to strive to find more permanent accommodation. We understand that the Tent City community provides access to support networks. However, we must prioritize general public safety, and the enjoyment of public property. Support and resources are available throughout the city, and the city and community partners are here to lend their support

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Part B: Question # 8

The UK legal panel (headed by the Chancellor of the High Court, Sir Geoffrey Vos)'s statement classifying crypto-assets as property in the U.K. is a welcome position. This is because of the legal importance of developing what "property" is as society evolves, and that it clears a path for more efficient economic interactions.

The concept of property must evolve with society; as technology advances, it is important to protect those inventions (Justice Brown, ***Intel v Hamidi,*** 71 P (3d) 296 (Cal SC, 2003)). As Sir Geoffry stated, classifying crypto-assets as property is a reflection of current law, not the Courts taking on a legislative role. This would be applauded by the majority in ***Monsanto Canada Inc v Schmeiser*** **(**[2004] 1 SCR 902, 2004 CarswellNat 1391), and Justice Panelli in ***Moore v Regents of the University of California (***793 P (2d) 479 (Cl Sup Ct 1990)). Sir Geoffrey and the Legal Panel make it clear that crypto-assets have all of the indicia of property, and that the novel or distinctive features possessed by some crypto-assets do not disqualify them from being property. This is reflected in the Court's ruling in *Tucows.Com Co v Renner*, which considers property as ownership or quasi-ownership in things both tangible and ideational, including domain names *(SA,* 2011 ONCA 54). This reflects the situation of crypto-assets, which cannot be physically possessed, but virtually possessed, much like domain names. This ruling, in favour of economically sound decisions, classifies things as property with the aim of protecting economic interests. This is in line with the classification of crypto-assets as property, as discussed below.

The classification of crypto-assets as property clears the path for more efficient economic interactions. It is clear that clearing the path for businesses to use digital assets on a blockchain is an economically sound choice, illustrated by the UK Jurisdiction Task Force's prediction that the classification will increase revenues and increase legal jurisdiction. This is

economically sound. As stated by Justice Pitney, who reflected the Lockean labour theory in *International News Services v Associated Press (*248 US 215 (1918) [*INS*]), individuals who have fairly worked for, and paid a price for a product, should have the beneficial use of that property. Moreover, the recognition of crypto-assets as property means that businesses will have greater control over such assets, and thus incentivize further exchange, production, and technological advancement. This is also reflected in Justice Brown's descent in ***Intel v Hamidi***, who argues that social utility is damaged when creative individuals are less inclined to develop intellectual property when they cannot limit or control it. Justice Pitney's affirmation that interference with legitimate business creates unfair competition, decline in profit, and thus de-incentivizes private business also adds to this argument (***INS****).* These reflect Posner's teachings on property as an institution which creates more efficient markets. Indeed, this is reflected in the statement by the Panel which talks about blockchain smart contracts to "create more secure and more efficient ways of implementing — and automating the performance of — contracts between parties." Moreover, the classification of crypto-assets as property means that such assets may be protected by patents or trademarks. Crypto-assets that are novel, useful and inventive, perhaps such as Bitcoin, and are accepted as patents will allow for the full enjoyment of the creator's rights (***Monsanto Canada Inc v Schmeiser,*** [2004] 1 SCR 902, 2004 CarswellNat 139). This large scope of the patent owners' rights, including the right to make, use, and sell the invention thus add to the economic incentive referred to by Justice Pitney (***INS****)*. What is more, the ability to trademark crypto-assets would add to this economic argument. A registered, distinctive mark would be beneficial to both private companies and consumers, as regulations around trademarks would allow for well-informed decisions, and thus advance public interests, while allowing for the potentially perpetual recognition of the company's trademark (***Mattel Inc v 3894207 Canada Inc***,[2006] 1 SCR 772; *Black v Molson Canada,* 2002 CarswellOnt 2414 (SCJ); ***Tucows.Com Co v Renner*** *SA,* 2011 ONCA 54).

A likely challenge to this decision is that of the anticommons-that recognizing property rights in something would create too many rights, thus inhibiting efficiency. This was stated by Justice Pinteny in ***International News Services v Associated Press*** *(*248 US 215 (2018) [***INS***]), and by Justice Panelli in ***Moore v Regents of the University of California (****7*93 P (2d) 479 (Cl Sup Ct 1990) [***Moore***]). Although ***INS*** regards the news, and ***Moore*** is about the human body, both refer to economic issues. However, as indicated by the dissenting Justice Mosk in ***Moore***, regulation of property by the state is inherent in our society, and the application of the law does not necessitate restrictions on efficiency. The classification of crypto-assets as property in the U.K. will thus not necessitate an issue of the anticommons, and indeed may be very beneficial to society as a whole, considering the economic advantages, and new property rights such as in cases of fraud, theft or breach of trust for example.

The classification of crypto-assets as property in the U.K. is thus a welcome position. This is because of the legal importance of developing what "property" is as society evolves, and what it means for more efficient economic interactions.

Property 1108(C) Final Exam Student #300055098

Part B: Question # 5

LEGAL LETTER OF OPINION
To: Property owners requesting variances from the committee of adjustment

In order to clarify things for you, I will begin with a short explanation of property rights in Canada vs the US. The 5th Amendment in the US Constitution protects property rights, stating that folks cannot be deprived of their property without just compensation. In the US, the law recognizes that property may be regulated to a certain extent (such as through laws or regulations), and if regulation goes too far it will be recognized as a " taking," meaning that what you have left is relatively meaningless (***Pennsylvania Coal C v Mahon,*** 260 US 393 (1922). "Goes too far" has been understood to mean when the owner is denied all economically beneficial or productive use of land (***Lucas v South Carolina Coastal Council,*** 112 S Ct 2886 (1992)). It is unlikely that your situation goes so far as to deny all economically beneficial or productive use of land, but I will go into more depth with this when I explain your situation here in Canada.

Private property is not constitutionally protected for non-Aboriginal folks in Canada. We will assume that you are not Aboriginal individuals, and will thus proceed on this assumption. The *Canadian Bill of Rights (1960)* recognizes a right to "enjoyment of property, and the right not to be deprived thereof except by due process of law," but this only applies at the Federal Level, and thus not useful to us, as we are dealing with the Toronto Region Conservation Authority (TRCA). What this means, is that government regulations can limit what you do on your property.

If the applications for bylaw variances are denied and/or the TRCA coastal hazard assessments are reversed, we could seek a declaration that your land has been "*de facto*" expropriated, so that you can get compensation for loss of land. Basically, this means that, based on statute (an *Expropriation Act*), if the government's actions affect your property so drastically that it should be seen as the government effectively taking your land, you can be compensated. Unfortunately, demonstrating that a *de facto* expropriation has occurred is difficult, and I don't believe your claim would have much merit. The court would consider actual (not possible) impacts of the regulation on your property. This would mean demonstrating three elements (***Mariner Real Estate Ltd v Nova Scotia (AG);*** (1999) 68 LCR 1, 1999 CarsewellNS 254 (CA)). The first is economic loss or decline in value of land that is not a loss of an interest in the land. The building of new homes may be a decline in the value of your land, but it is not a loss of an interest in it. Secondly, you essentially would need to have all reasonable uses of the property removed. This isn't the case, here; you can still use the property for other things which are within the regulations, or lease the land out. Lastly, there would need to be a corresponding acquisition by the government, which isn't the case here either-the government won't be using your land (***CPR v Vancouver,*** [2006] 1 SCR 277). Unfortunately, this means that the merits of a legal claim against the municipal government if the applications for bylaw variances are denied and/or the TRCA coastal hazard assessments are reversed would be quite low.

I also understand that some of your neighbours are concerned about the potential intrusion on the enjoyment of their properties with significant overlook and privacy issues given the length of the building and its position on the lot. Your neighbours may argue that a trespass has occurred, but that argument will likely fail. In your situation, a trespass exists in the air space above someone's land when permanent structures are installed which in any way impinge upon the actual or potential (reasonable) use or enjoyment of land (***Didow v Alberta Power Ltd***,1988 ABCA 257, 1988 CarswellAlta 109). However, your home would not be creating a permanent structure in their air space (unless you build something such as a deck which extends onto it). There could potentially be a nuisance claim here if the home is too high or long in a way which is so intrusive that it interferes with your neighbours' use and enjoyment of their property (***Victoria Park Racing and Recreation Grounds Ltd v Taylor,*** (1937)58 CLR 479 (HCA) [***Victoria***]), but your neighbours could just build a higher fence (***Victoria***). Moreover, even if you could see onto your neighbours' property, there aren't any laws that prevent your from describing what you see as long as you do not make defamatory statements, breach a contract, or wrongfully reveal confidential information (***Victoria***). I would thus not be particularly concerned about your neighbours.

Based on your situation and the case law, the merits of a legal claim against the municipal government if the applications for bylaw variances are denied and/or the TRCA coastal hazard assessments are reversed would be quite low. However, your neighbours' concerns about privacy issues should not worry you, as they unlikely have a legal claim.