Property 1108C
Professor de Beer
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I declare my academic integrity and awareness of the sanctions for academic fraud.

PART A:

Question 1

The CORRECT answer is E.
The Hospital fulfilled its duty to Arthur's family because it would have had to "take such measures as in all the circumstances are reasonable" to return the chattel to the true owner (*Parker v British Airways*, UK CA 1982). Because Arthur died, the Hospital would have to try to return it to Arthur's family. The Hospital decided to let it sit in the parking lot out of respect for Arthur's family, showing it did not want to move it yet in case someone returned. As the finder (working on behalf of the Hospital), Francesco spent time trying to contact people and search for any remaining family. It was obvious that it was hard to find family members, so the length of time it took doesn't mean the duty was not fulfilled.
The answer is **NOT A** because abandonment occurs when someone physically loses control of the object, *and* has the intent to abandon it (*Stewart v Gustafson* 1999). It is clear Arthur physically lost control of the vehicle as he left it idling in the parking lot. However, his intent to leave it is not clear because he drove himself to the hospital and ran into the emergency room. For all we know, he may have hoped to get the help he needed, then return to the car. His intent was to get to the hospital as fast as possible, not to abandon his car.
The answer is **NOT B**. Francesco Barbera is the finder of the chattel because he was the security guard who first noticed the car left idling in the parking lot. However, he is an *employee* of the hospital and according to *Parker v British Airways* (UK CA 1982), an employee finds on behalf of the employer. It is evident that he is an employee of the *hospital* and not a third party security company because the "hospital gave him a green light" to try to find the relatives, thus signifying his employer-employee relationship.
The answer is **NOT C** because according to the Ontario *Succession Law Reform Act*, if Arthur died intestate, and he is not survived by his spouse, his property is distributed among next of kin. Bruce is Arthur's son therefore he would receive the property *not* Darryl.
The answer is **NOT D.** This answer would require an assumption that Arthur died intestate based on the *Succession Law Reform Act*. If Arthur did not have a will and property was transferred absolutely to Betty, *then* her will would determine everything. However, if Arthur did have a will then it is a very real possibility that the car was not left to Betty or Bruce.

Question 2

The CORRECT answer is D.
Aboriginal title would **not** assist in stopping cultural misappropriation. Aboriginal title is a right to the land itself. If this occurred in Canada, the Inuit peoples could try to assert an Aboriginal ***right*** based on the test from *R v Van der Peet* [1996] SCC. Aboriginal right could help protect traditions or practices that are "integral to the distinctive culture of the Aboriginal group".
The answer is **NOT A** because Anne Lájla Utsi was part of the group rounded up by the Sámi people to act as "cultural consultants". Thus, she was placed in a fiduciary role to represent the Sámi community since she was obligated to act in the best interests of the community. This is like the fiduciary duty the Crown holds for Aboriginal people in Canada (*Tsilhqot'in v BC* (2014, SCC), or even the fiduciary duty Justice von Doussa found was evident between Bulun Bulun and the Ganalbingu people, regarding their traditional artwork (*Bulun Bulun v R & T*

Textiles Pty Ltd, 1998 FCA). Bulun Bulun was placed in a position of trust so he had a duty to the community. Utsi was placed in an analogous situation.
The answer is **NOT B.** Fjellheim's musical composition *would* be protected by copyright. *Théberge v Galerie d'Art du Petit Champlain* [2002] SCC outlines how copyright protects "original expression" and the protection begins at the moment of the expression, with no registration required. Fjellheim's composition *was* an original expression, even if it resembled a *style* of music. Copyright does *not* protect the style of expression.
The answer is **NOT C.** Disney would not be infringing copyright because, assuming the copyright laws are similar to Canada's, it's difficult to apply copyright statute to Aboriginal customary law since there is no such thing as "community authorship" (*Bulun Bulun v R & T Textiles Pty Ltd* (1998 FCA)). The whole Sámi community could not claim authorship of their community's garments. This is also not the correct answer because Disney's depiction of the garments in the film is a *style* of expression, which is NOT protected by copyright.
The answer is **NOT E.** This answer is completely accurate, so it accomplishes the opposite of what the question asks. It is analogous to the idea that if the Canadian government respects and includes Indigenous legal order when hearing land claim disputes or cases in court, it would lead to less confusion, be less paternalistic and make decisions easier (*Tsilhqot'in v BC* (2014, SCC)).

Question 3:

The CORRECT answer is C.

In *Delgamuukw v British Columbia* [1997] SCC, and then in *Tsilhqot'in v BC* (2014, SCC), the claim to Aboriginal title includes;" sufficient occupation of the land prior to sovereignty, continuity of occupation where present occupation is relied on, and exclusive occupation. According to Loring, the Secwepemc have evidence of their existence (which could be sufficient to show their occupation). The fact that the neighbouring Ktunaxa First Nation has also occupied from time-to-time on that land does NOT negate exclusivity. If the Secwepemc can prove this neighbouring community needed permission to be on the land, or can prove they had trespass laws, then it can be sufficient to prove exclusivity.
The answer is **NOT A**. This answer resembles Justice Logan's dissent in *Edwards v Sims* (1929, Ky CA). Pollack's labour to find and explore the cave is John Locke's labour theory (if you put labour into something, it is your property) and does not help an Aboriginal title claim.
The answer is **NOT B**. The article states that the cave sits in Secwepemc Territory, on unceded and un-surrendered aboriginal title lands. Thus, s.35 of the *Constitution* would protect this land as they have a right to it. If the Provincial legislation wanted to infringe or extinguish the right, they would need to follow the test from *Tsilhqot'in v BC* (2014, SCC) which is a duty to consult/accommodate, the government must have a compelling and substantial objective, and they must act within their fiduciary duty. This does not help the *assertion* of an Aboriginal title claim.
The answer is **NOT E**. BC's implementation of UN Declaration of Indigenous Rights through Bill C-4 states that the government "shall consult…in good faith with the indigenous peoples…to obtain their free and informed consent prior to approval of any project" (Article 32(2)). This would help in terms of protecting a land claim, but would not help assert one.
The answer is **NOT D.** Spiritual ceremonies taking place *around* the cave could mean they are establishing an Aboriginal right to that area/activity in that area. However, the occupation and use of the land where an Aboriginal right is taking place is not sufficient to support a claim of title to the land.

PART B:

Question 1

To: Clients
Re: Property Rights in regards to your Land

I have analyzed your requests for minor variances and have made some conclusions regarding your properties and the rights thereby related to them. It is necessary to explain some misunderstandings.

As a property owner, you may be under the impression that your private rights allow you to build whatever you like on your property. But as Justice Cromwell states in *Mariner Real Estate Ltd. v Nova Scotia (AG),* (1999, NSCA), the "bundle of rights associated with ownership carries with it the possibility of land use regulation". Private property rights do *not provide* absolute ownership; they are "quasi-ownership interests" (*Tucows.Com Co v Lojas Renner (2011, ON CA)).* Quasi-ownership, as Justice Pitney in *INS v AP (1981, USSC)*, explains does not give you an **absolute** right to exclude. The facts in that case are distinguished from yours as the judgement in *INS* held news is quasi-property and you can exercise that right to exclude against competitors. However, your neighbours are not competitors; they are part of the general public. What *you* do with your property has an effect on other people's property and you cannot absolutely control what happens on it.

You may be under the impression that if the bylaw variances are denied and/or the TRCA coastal hazard assessments are reversed, you can appeal the decision by stating the municipal government was depriving you of your land right and thus expropriating your land. This is not true. In Canada, regulations that restrict what private property owners can do with given property will not be considered expropriation. Based on the *Expropriation Act*, the government cannot expropriate for private purposes. Thus, if they were not claiming to take the land for a specific ***public*** benefit/purpose, then an expropriation claim would fail. In *Mariner Real Estate Ltd.,* the plaintiffs who wanted to develop property on a beach was denied such a right, and so the plaintiff claimed he was deprived of land and should be compensated. This is analogous to your case because you are trying to develop your property on a beach. However, Justice Cromwell held that government regulations that take away virtually *all* incidents of your property ownership may be considered expropriation *if* the land was subsequently **acquired** by the government. Applied to your case, this means that just because you cannot build your property the way you want to does *not* mean you lost all interests in your land. As well, the municipal government is not trying to acquire your land for a public use, so an expropriation claim would fail. As well, the merits of your claim against the government may not stand based on the environmental impact of your development. In *Pennsylvania Coal Co v Mahon* (1922, USSC), Justice Brandeis said in his dissent that every regulation takes away *some* property rights, so if your rights are restricted for a good reason (like public safety) it is *not* a taking. In your case, the proposed development is on "environmentally sensitive land" so if the municipal government did not allow your property to extend too close to the water, it may be for a good environmental reason.

It is necessary to distinguish Canadian and American property rights as well. In Canada, there is

no protection of property rights in the *Constitution Act, 1982* or *Charter of Rights and Freedoms*. Thus, you cannot claim the decision on the minor variances as "unconstitutional", whereas in the U.S. you could make this argument since property rights *are* protected in the U.S Fifth Amendment. For instance, you may Lucas made in *Lucas v South Carolina Coastal Council* (1992 USSC): he argued the government regulation was an unconstitutional taking of his land, and Justice Scalia agreed. He held that property owners acquire a bundle of rights when they obtain property, so taking away the economic benefits or uses of the land would be enough to constitute a taking. This argument would not hold in Canada since property owners cannot argue against takings/regulations based on their constitutionality.

You also may be tempted to claim that the minor variances would deprive you of using your land. But in *Mariner* and *CPR v Vancouver (City)* (1996 SCC) the cases show how in Canada, the threshold for a deprivation in land is higher than in the U.S. In *CPR*, a deprivation in land has to take away *more* than just economic uses and in *Mariner*, the *best* uses of your land do not determine whether there was a deprivation or not. So although you may consider extending your property to the shoreline hazard limit is the best way to make use of the property, based on *Mariner* all reasonable uses would need to be deprived. So, if you can still build a property on the land, it is *not* a deprivation even if it is not how you <u>*wanted*</u> to build the property.

In terms of the neighbours' claim over privacy issues, their merits may not be strong enough based on precedent set out in Vi*ctoria Park Racing and Recreation Grounds Ltd v Taylor* (1937, HCA). Although it is an Australian case, it can be applied. Chief Justice Latham, speaking for the majority, states there is no law against someone looking onto your property. He even advises the plaintiffs to "build a fence" if they do not appreciate the defendants' look at their property. You can argue the same idea.
I will advise you of possible arguments your neighbours may make. Justice Rich in the dissent for *Victoria Park Racing* held the defendants *were* creating a nuisance because you have an obligation with your neighbour to be reasonable. So your neighbours may argue that building a property that is too high, too long or too intrusive is not a reasonable use of your own property, and thus a nuisance. This *is* a dissenting opinion and in an Australian case so it may not be strong.
Your neighbours may also argue that their airspace boundaries extend to a height as is necessary for the ordinary use and enjoyment of their land (*Didow v Alberta Power Ltd.* 1988, ABCA). This argument would require them to prove they will be using the space above their land in a certain way which is adversely impacted by your tall development. This is also a weak argument.

I hope this helped you understand your property rights and merits of a claim if your variances are denied.

Question 2

TO: City of Ottawa and National Capital Commission
SUBJECT: Position on the Ottawa Housing Issue

Your actions as the City of Ottawa and the National Capital Commission (NCC) reflect an effort to accommodate the residents of the homeless encampment. A fire at one of the tent encampments prompted the City to declare the areas "unsafe" for the general public. A verbal "trespass notice" was issued to the residents of this encampment. Below, I address whether the initial enforcement of a trespass order would be constitutionally valid in these circumstances:

For the people displaced and offered a hotel/shelter to live in, it is likely that the trespass notice would be constitutionally valid.
Property is not protected under the Canadian *Constitutional Act, 1982*, but section 7 of the *Charter of Rights and Freedoms* implies a duty to the government to protect the safety and security of people. This can be applied to property in the sense that a lack of shelter can infringe someone's s.7 rights. Consider *Victoria (City) v Adams* (2008, BSSC). Speaking for the majority, Justice Ross held that although s.7 does not say anything about property explicitly, shelter is essential to human dignity. The judge held that if shelters are full, a trespass notice is unconstitutional because there is nowhere else for the homeless people to go. As Waldron suggests, homeless people will go from trespass to trespass since they are not "free" to "be" anywhere (*Homelessness and the Issue of Freedom*). The trespass in that case was *not* justified under s.1. With the present situation, 5 people (displaced after the housing fire on Lebreton Street) were offered hotels to live for the time being, so housing *has* been provided. These people to remaining in the tent city because they do not like its location in Vanier does not mean the government's trespass is unconstitutional. Based on *Victoria City*, a trespass is unconstitutional *if* shelter is unavailable/full.
Here in Ottawa, the section 7 right may be infringed, but it would likely be justified under s.1. The trespass notice is meant to keep people safe after a recent tent fire, and rationally connected to that safety issue. The notice is also minimally impairing as these 5 people have been offered accommodations.

For the people displaced and not offered a hotel/shelter to live in, it is likely that the trespass notice would be constitutionally invalid.
Based on *Victoria City*, if shelter is not provided to the displaced individuals, the trespass order is likely **not** valid. The displaced people in this particular tent encampment are not asserting property rights over this area, nor are they able to live anywhere else at the time being. It is the government's duty to balance the management of this city land behind the LRT, and the interests of these homeless individuals. Contrast this with Occupy Movement in St. James Park in *Batty v Toronto (City)*. In that case, the trespass notice *was* valid because the park was a shared common space and people are not allowed to monopolize an area like this, then use the *Charter* to justify it. As well, these people were protestors, *not* homeless people, so they had a place to go when they were barred from being in the park. Here in Ottawa, these people have nowhere else to be, so to order them as trespassing without providing shelter is unconstitutional (*Victoria (City) v Adams)* and cannot be justified under s.1.

Below, I provide some key points to communicate to the public regarding your legal position:

The notice was meant to protect people

This trespass notice was not meant to intentionally displace people, but to protect people. In *Batty v Toronto*, the notice was issued because the general public had a right to use the park; it was meant to dismantle the protestor's monopoly. In this case, this land is not being used *other than* for this encampment. The general public can still access it, as they have in support. The purpose of this order was to protect people.

Your initial trespass notice has been reprieved

Your initial trespass notice was issued in the efforts to keep the people in these encampment safe. As the City/NCC, you recognize the need to balance these homeless people's interests to be sheltered on the one hand, but also be safe on the other. In this case, your judgment led you to place safety higher on the list of priority. Since issuing the notice, you as the City recognized the lapse in judgement and have reprieved the order. Shelter is just as important as safety.

Question 4

Property is more than something tangible; it is not just a bundle of rights or a right to exclude. Unfortunately, it is a term as vague as the word "reasonable". Nonetheless, it is possible for things to be deemed "property", which at first glance do not seem to be. Sir Geoffrey and the UK's legal panel recently classified "crypto-assets" as property, a statement with which I agree. I assert that crypto-assets should be considered "property" not because of what it necessarily *is,* but what it *does*.

A main feature of the Panel's statement is that crypto-assets "novel" features do not discount it from being property. In fact, novel claims help define and expand the law of "property". You can own news (when it is "hot") like in *INS v AP* (1918, USSC), but you cannot own a racing spectacle on your land (*Victoria Park Racing v Taylor,* 1937, HCA). You can own a domain name (*Tucows.Com Co v Lojas Renner* (2011, ON CA)) but you cannot own your body cells (*Moore v Regents of University of California,* 1990, Cal SC). A novel claim, however, should be based on what that novelty would do for the greater public. For instance, news was held to be "quasi-property" by Justice Pitney because AP held a right to exclude its competitors from copying their news while it was "hot". News was considered property because AP would have no incentive to run a news-gathering association. So, news is not classified as "property" because the words or stories themselves need regulating, but what the news *does* for the public and its competitors needs to be regulated. Crypto-assets can be viewed in a similar way. The novelty of crypto-assets (its intangibility, its decentralization, etc.) does not classify it property; it's the *way* these novel assets help society and businesses that should allow for its classification as such. For instance, blockchain contracts are more secure and efficient, and such contracts can help revolutionize the property and medical world, as is discussed in the article.

I also agree that crypto-assets should be considered "property" because as Sir Geoffrey claims, the importance of this classification comes down to its regulation. Geoffrey seems to take an economic standpoint for this, similar to Posner. Clearly, this Panel's statement has a huge impact on businesses, which correlates with Posner's theory on property in that property creates efficient markets. Posner specifically states that property rights have to be exclusive, universal, and transferable. Crypto-assets falls in line with this theory: these assets are exclusive, as now people

will "own" them and can thus exclude other from using them; the assets are universal, as bitcoin and blockchain laws appear to come up in both the UK and the U.S; and these assets are transferable, as the "private key" signature indicates an ability to sign contracts and make transferable deals. Regulation is also important because it helps promote innovation. People who "own" crypto-assets will feel more secure in business, allowing for more risks to be taken and envelopes to be pushed. This kind of regulation was warned against by Justice Werdegar, but embraced in Justice Brown's dissent in *Intel v Hamidi* (Cal SC, 2003). Werdegar held that applying tangible property rights to cyber-space dealings is not wise because a tragedy of the anti-commons could ensue. However, Brown disagreed because when rights are protected in cyber-space, there is more inclination to innovate and share ideas, since you can always come back to something that is specifically "yours". This is the stance Geoffrey makes, with which I agree. If regulation is privatized and does not curtail the flow of ideas or the flow of business, crypto-assets should be considered "property". Business want to conduct digital transactions with certainty, so having a property right over crypto-assets allows for this to occur.

The Panel's statement makes reference to potential implications of such a classification, which I partly agree with. Specifically, classifying "crypto-assets" as property may lead to a need to extend laws regarding conversion and trespass. In *Intel v Hamidi*, Justice Werdegar did not extend the law of trespass because the computers were not physically damaged by Hamidi's emails. In *Moore*, the law of conversion was not extended because too many people would assert rights to their DNA or cells which would hinder medical research. Classifying crypto-assets as property could pose similar issues: people will not need to prove physical damage in order to succeed with trespass claims, and too many people asserting crypto-asset rights could take away blockchain's transferability feature.

Nevertheless, technology is headed in the direction of expanding more and more into blockchain and crypto-currency, so it only makes sense for the law to follow suit. I agree that crypto-assets should be property, not because it inherently "seems" like property but because classifying and regulating it as such helps society.