The total word count of this document is: 3939
I declare my academic integrity and awareness of the sanctions for academic fraud.

Part A

Question 2:

Option A is incorrect because it is accurate. Anne fulfilled her fiduciary duty to the Sami people. She ensured that Disney did not exploit the traditional cultural expressions of the Sami. As in *Bulun Bulun,* the artist Bulun Bulun fulfilled his fiduciary duty to his tribe by bringing an action to enforce his copyright against the company infringing it. The fiduciary duty is fulfilled if the interests of those owed the duty are protected, in these cases in a way that upholds their laws and customs.

Option B is incorrect because it is accurate. Frode Fjellheim's composition Vuelie is protected by copyright because it is legally considered an original expression with a single author. Fjellheim will hold this protection for his life plus 50 years. This is not helpful for the prevention of cultural misappropriation because it goes against the idea of communal authorship that is typically central to indigenous cultural expressions.

Option C is incorrect because it is accurate. Disney's depictions of Nothuldra garments based on Sami traditional culture does not infringe copyright regardless of the agreement. The Sami people have no legal grounds on which they could hold copyright to traditional garments. In *Bulun Bulun*, the court found that the tribe could not hold copyright collectively because the possibility of communal authorship was not acknowledged.

Option D is correct because it is inaccurate. It would not help the Inuit to claim Aboriginal title over their culture. Aboriginal title cannot be asserted to protect traditional cultural expressions because it only deals with claims to land, as seen in *Delgamuukw* and *Tsilhqot'in*.

Option E is incorrect because it is accurate. Respecting indigenous legal principles does help protect the songs, dress, spiritual beliefs and other aspects of Sami culture. Indigenous communities recognize authorship flowing from the community as a whole. Taking this principle into account would allow for more protection over expressions that are not currently able to be protected by copyright.

Question 3:

Option A is incorrect because it is irrelevant to a claim for Aboriginal Title. It quotes Justice Logan's dissent in *Edwards v Sims*. This fact would be persuasive if Pollack was putting forward a claim for personal ownership of the cave. That is not the situation here.

Option B is incorrect because it is not helpful to know that the park is Crown property. While it is relevant that the Crown holds the cave as part of its property, it is not helpful for establishing a claim for Aboriginal title because it does not answer any of the steps to the test established in *Delgamuukw*.

Option C is incorrect because it does not provide a full answer to the question of exclusive occupancy set forth in step 3 of the test for proving Aboriginal title. If it was known that the Simpcw people had made an agreement with the Ktunaxa to allow them to use the land, then that would be very helpful to to successfully establish the intention and capacity to control the land that are required for proving exclusive occupancy. Only knowing that it is a territory the Ktunaxa also occupied from time to time might even serve to weaken the Simpcw's claim if it could be shown the Ktunaxa have evidence of exclusive occupancy.

Option D is correct because the performance of spiritual ceremonies could be used to help prove sufficient occupancy if using the culturally sensitive approach suggested in *Tsilhqot'in*. Although in *Ktunaxa Nation v British Columbia*, the Supreme Court ruled the the Charter would not protect sacred sites under the provision of freedom of religion, the spiritual use of the site could fall into the category of an act of occupation. In *Tsilhqot'in*, the Court says that acts of occupation will differ depending on the manner of life of the people. They do not explicitly state

that spiritual ceremonies are evidence of occupation, but it can be inferred that this possibility would be included.

Option E is incorrect because the enactment of provincial legislation does not affect Aboriginal title, as the test and precedent has already been set. While the implementation of UNDRIP by the BC legislature is helpful generally to Indigenous peoples, and could contribute to the increased protection of traditional cultural expressions, it does not drastically change the Aboriginal title process right now.

Question 4:

Option A is not necessarily incorrect but it is less accurate than Option C. The *du Pont* factors are not considered by name in the test for confusion under the *Trademarks Act* of Canada. However, the five elements discussed in the test for confusion are essentially the same as the *du Pont* factors. Additionally, the Supreme Court has allowed for additional relevant circumstances to be considered within the scope of this test, so it is not totally implausible that they could refer to the *du Pont* factors.

Option B is incorrect because the USPTO's decision is consistent with the decision of the SCC in *Mattel.* The test applied was similar but with a different finding. The SCC held that there would be no confusion in the marketplace because the market and nature of the goods was sufficiently different. The USPTO applied a similar test but found that the market and nature of the goods was essentially the same.

Option C is correct because the relevant facts of this case are distinguishable from *Mattel*. In *Mattel*, there was found that there was no likelihood of a link to be found because the nature of the wares was sufficiently distinct. In this application, Drake will be manufacturing goods under the mark that are of the exact same nature as the registrant. This key difference in facts distinguishes the two cases from one another.

Option D is incorrect because the Applicant was applying for a trademark, not copyright so it is unrelated to Crown copyright. If the Crown held a trademark that was being infringed, then perhaps there might be an issue but trademarks and copyright cannot be conflated into one problem.

Option E is incorrect for a similar reason because patents and trademarks can also not be conflated. Aurora Cannabis could bring an action against Drake and Canopy Growth if they end up actually selling the patented strain of cannabis. However, that action would be unrelated to the trademark application.

Part B:

Question 5:

While your ownership of private property gives you many rights as to what you can do with your land, there are certain situations where you might be restricted from building exactly what you want. Wood has argued that your proposed buildings would be "too intrusive" due to their height and length. However, it is unlikely that this claim would be recognized by a court. In *Didow v Alberta Power*, the owner of the land argued that Alberta Power's structures were trespassing. The Court held that a landowner has the right to be free from permanent structures which in any way impinge upon the actual or potential use and enjoyment of the land. It seems as if this is the direction that Wood is going, however the facts in *Didow* are clearly distinguished from the facts of our case because in *Didow,* the power companies structures were actually hanging over his property. If you were to build in a way that parts of your new homes physically intruded on the space of your neighbours, it would be possible that Wood could successfully argue this in court based on *Didow*. Because that is not the case, there is not much that Wood can argue to stop you from building to a certain height or length.

No Merit in Legal Claim Against Municipal Government

Merits of legal claim against municipal government if variances are denied (reversed) mariner

If the municipal government denies your variances and the TRCA reverses their coastal hazard assessments, it is unlikely that you making a legal claim will have much merit. You would be making the legal claim that the denial of variance constitutes a de facto or regulatory expropriation. In *Mariner Real Estate v Nova Scotia,* Justice Cromwell outlines the two-step

Canadian test to establish a de facto taking has occurred. This test requires an acquisition of a beneficial interest by the regulating party and the removal of all reasonable uses of the property. In *Mariner,* similarly to your situation, the private landowners were denied building permits because of provisions established in the *Beaches Act* intended to preserve the beachfront. The facts of that case differ from ours because the regulation at issue in *Mariner* was provincial, where our regulatory issue flows from the municipality. However, the same test can be applied. Cromwell says that the actual application of the regulatory regime imposed is what must be evaluated, not the potential application. Therefore, the facts of our case must be evaluated within the framework of the exact application of municipal governance.

At step one of the test, we cannot see a beneficial interest that the government has acquired in the land. This was similarly found in *Mariner*. The real question in *Mariner* was whether or not the regulation had removed all reasonable uses of the property. In our case, the denial of a variance does not remove all reasonable uses of the property, just one use. There are many things that can still be done with the land, echoing the Court's findings in *Mariner*. The plans can be reevaluated and you can bring another variance application that might be successful. Failing on both steps of this test make it highly unlikely that a legal claim brought against the municipal government would have merit.

Key Differences Between Canadian and American Protections For Private Property

It is important to acknowledge the differences between Canadian and American law on this issue. The key difference flows from the respective constitutions of each country. In Canada, the right to property is not constitutionally protected. In the USA, the right to private property is constitutionally protected by the 5th amendment. This results in a much lower threshold for

establishing a compensable de facto expropriation in the United States. In *Penn Coal v Mahon*, the Court found that a mining statute imposed was a de facto expropriation because the government was attempting to regulate property too much. This ideology set the stage for the establishment of the US test for de facto expropriation, expressed by Justice Scalia in *Lucas v South Carolina Coastal Council*. In order to be considered a compensable de facto taking, Scalia said that either the owner must suffer a physical intrusion on the land or the owner must be denied economically beneficial or productive uses of the land. In *Lucas*, the Court found that the regulatory actions met the second part of this test and that Lucas should be compensated. In the US, property is more specifically defined in economic terms and removing economic value is an action that is compensable. The facts of the *Lucas* case are similar to ours and *Mariner*, as Lucas is faced with a statute that prohibits development on his beachfront properties. However, if *Lucas* was to be evaluated in a Canadian court, it is likely that it would not be considered a de facto expropriation, because not all of Lucas' reasonable uses are removed and the government is not receiving a beneficial interest. If our case were to be brought in an American court, it is likely that a de facto expropriation would be found because the denial of a variance, which would increase the economic value of the property, would likely be considered a denial of economic use of the land.

Minimal Likelihood of Privacy Issues

If your neighbours were to make a legal claim that there were privacy issues arising from your homes overlooking theirs, this claim would not have much merit. The idea that you can trespass with your eyes was dealt with in *Victoria Park Racing v Taylor*. In that case, Taylor had built a tower to overlook a neighbouring race track. There were other issues in that case that are

not relevant to our situation. In *Victoria Park*, the Court established that the law cannot create fences that the plaintiff is not prepared to build. This would put the onus on your neighbours to build a higher fence, should they be concerned about you looking over into their homes or yards. Even if we consider your neighbours' activities to be a 'spectacle', *Victoria Park* tells us that there are no property rights in a spectacle. This claim would be very unlikely to have any merit.

Question 6:

To: The NCC and City of Ottawa

Introduction

You asked me to evaluate whether enforcement of the trespass order is constitutionally valid and provide some talking points to defend our legal position in a sensitive way.

Issues

Is enforcement of the trespass order constitutionally valid?

How will we sensitively address our legal position when communicating with the people of Ottawa?

Analysis

In many of the cases involving tent cities and homelessness, the constitutionality of certain situations is evaluated under section 7 of the Charter of Rights and Freedoms. Section 7 guarantees the right to life, liberty, and security of the person. *Victoria (City) v Adams* found that prohibiting people from fulfilling basic human functions in public spaces is a violation of s.7 if there are not enough shelter beds for the homeless population. In *Victoria (City)*, city bylaws prohibited building temporary shelter on public property. In Ottawa, our parks and facilities bylaws similarly state that you cannot camp or erect a structure in parks. However, in *Victoria (City)*, the city sent a written notice threatening to take the tent city resident's personal belongings, not a verbal notice of eviction as in our case. As stated by city counseller McKenney in her CBC interview, it is very unclear where the notice of eviction came from. The NCC has said that they will not take enforcement action until housing has been secured for the residents of the tent city. This provides a contrast to *Victoria (City)* because in that case they were trying to

evict the residents when they had no other place to go, and this was the fact that the case turned upon. Because there has been shelter found for the residents, as said in both the article and in Counseller McKenny's interview, it is unlikely that a violation of s7 would be found based on the precedent set in *Victoria City*.

Another distinguishing fact of this case is that all the residents of the tent city set up camp due to displacement. When their previous residences burned down, they collectively moved to the tent city. Because of this, they might consider bringing a claim that a trespass notice violates their rights under Section 2 of the Charter, for freedom of assembly. Although it was not evident from the statements made by Justin Bolger that there was any aspect of the encampment that was a protest, the situation seems potentially analogous to the protest encampment at issue in *Batty v City of Toronto*. The City of Toronto in *Batty* had served the protestors a trespass notice, prohibiting the maintenance of a tent or shelter and the use of the park between 12 and 5:30am. The trespass notice in this case was served via a sign, which could be considered a different level of severity from the verbal notice served in our case. In *Batty,* the Court found that the restrictions on park use were a reasonable limit on s. 2 of the Charter. However, in Justice Brown's reasoning for the majority, he wrote that the Charter does not permit protestors to take over a public space and exclude others from reasonable enjoyment. This served as a reason that illustrated the necessity of limiting s. 2 rights in *Batty*. If this reasoning is applied to our case, it is possible that the tent city residents would have a stronger argument, as their encampment isn't directly impacting traditional public enjoyment of the place they are occupying. It seems to be located immediately behind the train tracks, a space that is not likely to be considered as somewhere that the public regularly uses and enjoys. If the residents were to bring a s.2

argument, it would be important for us to consider whether the location of their protest was critical to what they were trying to achieve, as stated in *Jones (Margaret)*. If they were camped directly beside the burned down buildings where they used to live, it is possible they would have a strong argument but because that is not the case, we would likely be able to dismiss this claim.

Talking Points

1. The first point to emphasize is that the tent city is not a “dignified place to live," as stated by Leilani Farha. She says there is no reason for people to be living in these conditions. That’s why we have found housing for the residents of this encampment. Their safety is the priority.

Notes: This is an important issue to discuss because it speaks to the necessity of providing homeless people with a place to be, as discussed by Waldron. He says that everyone needs a place to be and that for most homeless people, they feel they are not free to be anywhere. The city has found places for these people to go and that must be a point that is brought to the forefront because legally there is no violation of s. 7 of the Charter.

2. Because these people were displaced by fires, they should be rehoused rapidly. For many of them, this will greatly impact their recovery processes. Housing has been offered to them in Vanier. Although this removes them from their current neighbourhood, there are many resources available to them there and it could be a temporary relocation until housing can be found in the Somerset area.

Notes: Although the people in the encampment do not want to move to Vanier, the fact that places have been found for them live should be discussed. Justin Bolger speaks to the fact that he does not want to move to Vanier because he says it will negatively impact his recovery, calling it

“drug central”. In this way, he is reinforcing Ellickson’s idea of zones, identifying Vanier as a red zone and an undesirable place to live or be in. This is not a good narrative to promote, because it further entrenches the negative stereotypes surrounding Vanier and we do not want to encourage this.

Question 8:

Defining what is property and why certain things are classified as property is at the heart of this issue. In analyzing whether Sir Geoffrey is correct that crypto-assets have the indicia of property, it's necessary to discuss what his personal definition of property is. Because he lists multiple features, it would seem that he defines property as a bundle of rights, using the theory of multi-variable essentialism. It is evident that Sir Geoffrey does not believe property is solely the right to exclude, and that the bundle of rights can change and shift depending on the type of property. I agree with Sir Geoffrey that crypto-assets should be considered property.

By recognizing the property in crypto-assets, the realities of the modern market are acknowledged and streamlined. This is supported by the economic theories of Richard Posner and Hernando de Soto. Sir Geoffrey and the Panel cite increased efficiency of contracting as a potential result of the classification of crypto-assets as property. This would enhance the efficiency of markets, abiding by the three elements that Posner describes, exclusivity through ownership, universality through an increase in exchangeable goods and transferability through the ability to trade or sell it. De Soto says property rights make a more successful society. He says if you have a clear title to own something you can achieve much more in a society, like getting loans and credit. These ideas are further illustrated by Judge Rich's dissent in *Victoria Park v Racing v Taylor*. Rich argued that one of the purposes of occupying land is to pursue a profitable enterprise, therefore we can infer that one of the purposes of owning property would be for the same reason. If the ownership of property is to generate profits, then the recognition of property rights in crypto-assets would serve this goal by increasing market efficiency.

Sir Geoffrey and the Panel also address the idea of intangibility, and he is clear to explain that classifying the digital assets as crypto-assets is aimed to distinguish them from intellectual property. Because cryptoassets are intangible, they are also unable to be physically possessed. This raises an interesting issue when considering what might happen if there was a dispute over their possession. In *Popov v Hiyashi*, the Court discusses the two components that are necessary to establish possession: physical control over the item and intent to control and exclude others. If physical possession is impossible, how will this be established in the digital age? In *Intel v Hamidi*, Justice Mosk said in his dissent that property rights need to transcend into the digital age. The question then is whether this issue is up to the courts or it needs to be resolved by the government in the legislature. In *Moore v the Regents of the University of California*, Justice Panelli stated that the courts are unable to extend the law and these matters should be left to the government. I think that property rights need to evolve with technology and that just because there might be no precedent does not mean the court cannot create one. This is the view held by Justice Mosk in his dissent in *Moore*, where he argues that just because there is not precedent does not mean that one cannot be made.

The issue of the intangibility of property was addressed in *Tucows v Renner*, when the Court was tasked with establishing whether or not a domain name should be considered property. The Court found that a domain would be considered an intangible form of property, similar to the treatment of cryptoassets by Sir Geoffrey. Therefore, I think the same four aspects comprising property as defined in *Tucows* would be applicable to this situation. *Tucows* stated that property is comprised of 1) ownership interest in things, 2) other enforceable rights, 3) money, and 4) cashable rights. Applying this to cryptoassets, I think there are clear ownership

interests and enforceable rights at stake. The cryptoassets have a clear owner and the rights surrounding them are enforceable against others. This also aligns with the idea of property as a bundle of rights. In *Tucows*, Bruce Ziff is quoted as saying property is "a set of relationships among people that concern claims to tangible and intangible items". I think that this describes the nature of cryptoassets well because they are critical parts of the relationships between people and can represent or purchase tangible items in addition to their intangible nature.

Overall, I agree with Sir Geoffrey and the Panel that property rights should be found in cryptoassets because it advances market efficiency. The ability to hold property rights in your digital assets allows for more opportunity and more incentive to contribute to society, as per De Soto, and I think that this is an important aspect of the discussion. If property rights were not found in digital assets, I think it would be hard to move forward in the digital age. People need to be encouraged to embrace new technologies and recognizing ownership in cryptoassets is an important step towards this effort.