Property 1108C Final Exam

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

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PART A

Question 2: Disney Signed a Contract with Indigenous people before making Frozen II

The correct answer is d). This option is the least accurate because the test for Aboriginal title in Canada, as outlined in *Delgamuukw*[1], is for protecting and recognizing a right to land or a territory. Aboriginal title is more than the right to engage in specific activities inherent to their distinct culture which may be aboriginal rights. And so, assuming a similar situation occurred in Canada, asserting an Aboriginal title would not stop the misappropriation of the Inuit people's culture. Option a) is analogous to the situation in *Bulun Bulun*[2]. There, it was claimed that Mr. Bulun Bulun held a fiduciary duty towards his community, the Ganalbingu with his artistic reproductions of their customs and traditions. His fiduciary duty was fulfilled by bringing legal action towards the infringers. Correspondingly, it is accurate that Anne Lajla Utsi had a fiduciary duty to the Sami people that was fulfilled through her role in consultation with Disney and raising cultural awareness, making it the incorrect answer. Option b) is not the least accurate statement. On the contrary, since copyright is intended to protect an original artistic expression that involves a unique skill or judgment, it would be accurate to say that Frode Fjellheim's musical composition is protected by copyright. Option c) is accurate because the *Copyright Act*[3] would not protect the Northuldra garments themselves, although it might be used on the artistic design elements of the clothing. Thus, whether there was an agreement with Disney or not does not change the copyright question. Finally, option e) is not least accurate as it reflects the conversations we've had in class about the Truth and Reconciliation Commission[4]'s goals to advance respect and reconciliation between the distinct cultures and traditions of Aboriginal and non-Aboriginal peoples. Additionally, respect and recognition for Aboriginal cultures, spiritual traditions and their social, political and economic principles also describes the purposes of the United Nations Declaration on the Rights of Indigenous Peoples[5], making e) an accurate, rather than least accurate, choice.

[1] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193.
[2] *Bulun Bulun v R & T Textiles Pty Ltd*., [1998] 41 IPR 513 (F.C.A.).
[3] Copyright Act, RSC 1985 c. C-42
[4] Truth and Reconciliation Commission of Canada (2012).
[5] United Nations. *United Nations Declaration on the Rights of Indigenous Peoples* (2011)

Question 3: A "Honking Big" Cave in Canada Lures Geologists to Its Mouth

The correct answer is d). In *Delgamuukw*[6], the Supreme Court of Canada established a three-fold test for Aboriginal Title, where it must be proven that: (1) the land must have been occupied prior to sovereignty, (2) continuity with present occupancy, and (3) that occupancy was exclusive. In applying the test to the facts, part two of the test is satisfied by the oral evidence given by Shelly Loring, the chief of Simpcw. According to Loring, the cave sits in Secwepemc Territory, on un-ceded and un-surrendered Aboriginal title lands. The fact that the territory is un-ceded works in favour of a claim to Aboriginal title as opposed to if the territory were the property of the Crown, which is why answer b) is incorrect. Having satisfied the second prong of the test, option d) gives strong evidence to establish the remaining two parts of the test. Proving that the ancestors of the Secwepemc peoples performed spiritual ceremonies around the cave establishes that they have long had occupancy, and exclusivity. It is not necessary for them to have entered the cave in order to establish occupancy as the test is not proximity. In fact, neither do they have to prove that they intensively used the tract of land[7]. The fact in option d) would be helpful because it satisfies the test for proof of sufficient occupation, as outlined in *Tsilhqot'in* as "regular and exclusive use". [8]Additionally, the fact that Loring asserts that the Secwepemc have had knowledge of the cave's existence since "time immemorial" helps solidify that they have held exclusive occupancy of the land prior to sovereignty.

On the surface, option c) may seem like it would hinder, rather than help a claim to Aboriginal Title. The third prong of the test requires the occupancy to have been exclusive at sovereignty, meaning the Nation held an intention and capacity to regain control, with the ability to exclude others. One may say that because the Ktunaxa First Nation occupied the territory from time-to-time, the third part of the test fails. However, it is important to remember that exclusivity need not be sole or absolute. Thus, this fact may be helpful to prove a claim for Aboriginal title, though I still believe that choice d) is the <u>most</u> helpful.

The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) being enacted in British Columbia would not be the most helpful option for a claim of Aboriginal Title. The purpose of UNDRIP is to ensure that Governments consult and cooperate in good faith with Indigenous peoples. Although UNDRIP is important for enforcing the fiduciary duty to act fairly towards Aboriginal groups[9], option e) does not help to prove Aboriginal title.

Option a) is incorrect as Mr. Pollack's hard-fought battle through the cave, although brave and courageous, is completely irrelevant to helping the Simpcw First Nation prove a claim for Aboriginal Title.

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[6] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193.
[7] *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44.
[8] Ibid.
[9] *Guerin v. The Queen,* [1984] 2 SCR 335.

Question 4: United States Patent and Trademark Office & Drake

The correct answer is c). In *Mattel*[10], the Supreme Court of Canada held that confusion between Mattel's Barbie and the Barbie's food chain was unlikely to cause confusion because the wares and services offered by the two **were not** identical enough. The facts in the Application, however, are distinguishable because it was determined that the wares and services **were** identical enough to assert confusion among prospective consumers of the product, as they both sold a variety of clothing items.

As we have studied in *Mattel*[11], section 6 of the *Trademarks Act*[12]outlines five factors that are helpful in determining whether trademarks cause confusion. Confusion is defined as the likelihood that prospective purchasers infer that the wares and services are supplied by the same person. The five factors are (1) Inherent distinctiveness of the trademarks, (2) length of time the trademark has been in use, (3) the nature of the goods and services, (4) the nature of the trade, and (5) the degree of resemblance between the trademarks.

Answer a) is incorrect because the *du Pont* factors outlined in the letter are the same ones that are considered for the test under Canada's *Trademarks Act.* The *du Pont* factors includes (1) similarities between the compared marks, and (2) relatedness of the compared goods. Part (1) of *du Pont* is completely analogous to part (5) of the Canadian test, and part (2) of *du Pont* is identical to part (3) of the Canadian test. Furthermore, later in the letter it states that "the channels of trade and class(es) of purchasers are the same for these goods), which is identical to part (4) of the Canadian test.

Answer b) is incorrect because the USPTO's decision is **consistent,** rather than inconsistent, with the decision in *Mattel*[13]. In *Mattel*, the Supreme Court of Canada found that, based on an analysis of the five factors, confusion was unlikely to arise because of the third part of the test. Mattel's Barbie was deemed to be associated with wares and services surrounding dolls and doll accessories, whereas the chain of Montreal "Barbie's" restaurant was associated with dining and restaurant services. In applying the same test, USPTO declared that confusion was likely to arise because both companies sold a variety of similar clothing items.

Choices d) and e) are incorrect because they deal with copyright and patents, respectively. There is no apparent copyright or patent issue or applicability to the problem, making them incorrect.

[10] *Mattel U.S.A. Inc. v. 3894207 Canada Inc.,* 2006 SCC 22.
[11] Ibid.
[12] Trademarks Act, RSC 1985, c. T-13.
[13] Supra note 10.

PART B

Question 5: Fight Brewing between Beach Residents over multi-million-dollar super homes

RE: Opinion letter to two property owners of the homes

Dear property owners:

This is the legal opinion pertaining to the rights available to you regarding the development of your new homes. Our law firm began the research with what property right you have to build on your land. Unfortunately, your private property rights do not give you the right to build whatever you want on your land, as there may be specific statutes, zoning laws, and legislation that would prohibit you from doing so. Municipal or provincial regulations may exist, such as the *Beaches Act*, 1999, in Nova Scotia[14], that prohibit building on a specific lot or that require assessment and authorization from the provincial governments. Under the *Expropriation Act*[15], there are two governing principles on private property rights. The first is that there is a valid legislation or action taken lawfully that may restrict an owner's enjoyment of land, and the second is that courts may order compensation for such restriction only where authorized to do so by legislation. Moreover, in Ontario, there is the *Planning Act*[16], where you must create a plan of subdivision of land and get a registered subdivision lot before being able to build or make an extension on what is on the land.

If the applications for bylaw variance are denied and/or the TRCS coastal hazard assessments are reversed it is likely that the merits of a legal claim may not be too strong. In *Mariner v. Nova Scotia,* the development of beachfront lots was denied due to the sensitive nature of the land and the negative environmental consequences of building on the dunes. Similarly, if the land for the homes is found to be environmentally sensitive, it may cause a restriction on the ability to build there.

In the United States, property is specifically addressed and protected in the 5th Amendment. Any deprivation of life, liberty or property without due process of law must be compensated. Additionally, the inability to build or develop on land is held to be a bigger infringement of rights in the United States than in Canada. In *Pennsylvania Coal v. Mahon*[17], the United States Supreme Court held that, where a regulatory taking is too severe or regulatory, it may infringe the 5th amendment right. This case, which deprived the defendant of doing their job to remove coal from the land, held that a regulation against someone's economic interest in land constitutes expropriation. Similarly, *Lucas v. South Carolina*[18], Lucas was deprived from the ability to develop homes on the beachfront lot he purchased due to the Beachfront Management Act's ban. The United States Supreme Court again stated that because It destroyed the economic value in land, it required compensation. Justice Scalia also outlined a two-part test to determine when

[14] *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General),* 1999 NSCA 98.
[15] Expropriation Act, RSC 1985, c. E-21.
[16] Planning Act, RSO 1990, c. P.13
[17] *Pennsylvania Coal Co. v. Mahon,* [1922] 260 US 393 (USSC).
[18] *Lucas v. South Carolina Coastal Council,* [1992] 505 US 1003 (USSC).

regulatory actions are compensable. This includes (1) owner suffers a physical intrusion, and (2) that denies all economically beneficial or productive use of land". Thus, both cases hold that, after the taking, you are left with so little that it doesn't even fall into property rights anymore because the State removes the ability to exercise those rights. If this situation was in the United States, you may have a stronger claim. In Canada, however, the rules surrounding regulatory takings are not as strict. Property is not constitutionally protected under the Constitution Act, 1982. In fact, many provinces object on placing constitutional status on property due to impediments to oil and gas industry or to the difficulty of regulating land ownership. Although, the Canadian Bill of Rights does mention that every individual has a right to "the enjoyment of property" and not to be deprived thereof. Moreover, the *Expropriation Act*[19], requires compensation for loss of land. In *Mariner v. Nova Scotia*[20], the Court of Appeal denied the claim that Mariner was deprived of land for not being able to develop beachfront lots, on the basis that the Beaches Act does not completely deny Mariner of his rights. Justice Cromwell highlights that development is only one of the many uses of the land, and that other things can be done with the land that it would not constitute a regulatory taking. Analogously, *CPR v. Vancouver,* concluded that there was no deprivation of land because the taking did not remove all reasonable private uses of the land. Therefore, the ability to develop on land and the economic use of land is held to a more rigid standard in the United States. In Canada, it is likely that a claim that the inability to build the "super" homes is a regulatory taking will fail as Courts would suggest adapting the home proposals to meet the bylaw variations.

Finally, with regards to the privacy issue, it is unlikely that a neighbour's legal claim would be successful. In *Victoria Park Racing v. Taylor*[21], the court found that spectacle is not property. As such, you are able to look over another's land without legal repercussions. Chief Justice Latham stated that if your neighbours were to have an issue, they may erect higher fences, but property rights are subject to the private land you are on. However, it is important to note two things. First, although a claim in property will likely be unsuccessful, there is a possibility for a claim in the tort of nuisance. Second, although *Victoria Park Racing v. Taylor* is an Australian case, it nonetheless has a strong basis in Canadian law.

Based upon the facts you have provided us and the applicable law in Canada today, our firm has researched the rights available to you and believe that there is a chance that by-laws and expropriation regulations may not support a strong claim for building the proposed homes.

Best Regards,

Lawyer

[19] Supra note 15.
[20] Supra note 14.
[21] *Victoria Park Racing & Recreation Grounds Co. Ltd. v. Taylor,* [1937] 58 CLR 479 (HCA).

Question 6: Some tent city residents plan to ignore trespass notice

MEMO

To: City of Ottawa and the National Capital Commission

From: Our Firm

Date: December 6, 2019

Re: Ottawa "tent city"

This memorandum analyzes the legal position of the City and the National Capital Commission (NCC) with regards to the increasing issue of homelessness in what is being called Ottawa's "tent city".

Whether a public place can be used for public assembly necessitates a case-by-case analysis. In public places, the right to distribute leaflets in a crowded Airport[22], or to protest on a University campus[23] are upheld by Courts as being justified uses of the public space. In *Batty v. Toronto*[24], however, the overnight protests part of the Occupy Toronto Movement, were deemed to encroach on the community's' ability to use the public space. The *Trespass to Property Act*[25] governs the illegal entry into private and public property in Ontario. In general, under this Act, a property owner must give notice, either orally or in writing, to have unwanted individuals prohibited from access to the property. In *Batty v. Toronto,* the protestors were given a notice that they are not allowed, in any Toronto park, to install, erect or maintain a tent or shelter or else the City will enforce the notice. The protestors argued that the Notice violates their s.2 rights under the *Charter,* specifically their freedom of peaceful assembly. The Court concluded, however, that although it does constitute a *prima facie* violation, it is justified by s.1 as a reasonable limit. The Court found that it was reasonable because, although public spaces are common property, a problem arises when one person's exercise of their right has the effect of discouraging others from using that space. This is a common problem on panhandling or the "broken windows" syndrome, as described by Ellickson in "*Controlling Chronic Misconduct in City Spaces".* He proposes the idea of "green", "yellow" and "red" zones, which is interesting to think about because the City, by trying to move the homeless individuals to Vanier, is trying to group them in a "red" zone. Implementing this, however, would infringe on human dignity and would create a human rights issue. Waldon's point of view, in "*Homelessness and the Issue of Freedom"* is that homeless individuals just want the space to carry out their basic needs with satisfaction and are not concerned with freedom. Thus, the City of Ottawa should provide the individuals at the tent city the opportunity to stay in their current areas in order to have a minimum sense of property. An important fact to discern from *Batty v. Toronto,* is that the individuals were not homeless, but rather were staying overnight as part of a movement. Therefore, they had homes to go back to, whereas the homeless in our case do not have anywhere else to stay.

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[22] *Committee for Commonwealth of Canada v. Canada*, [1991] 1 SCR 139
[23] *State v. Schmid,* [1980] 84 NJ 535 (NJSC)
[24] *Batty v. Toronto (City),* 2011 ONSC 6862.
[25] Trespass to Property Act, RSO 1990 c. T-21.

Although property *per se* is not constitutionally recognized as a right in Canada, many cases have protected "the most vulnerable groups" in Canada. Most notably, *Victoria (City) v. Adams*[26], held that a municipal bylaw regulating behavior in public places and inhibiting the right to erect shelter were unconstitutional interferences with homeless individuals. Unlike *Batty v. Toronto,* the claim was made under s.7 of the *Canadian Charter of Rights and Freedoms,* the right to life, liberty and security, rather than s.2. In this case, it is important to note that the Court stated it is only unconstitutional if all the shelters are full. In the Ottawa tent city, there are shelters being offered for the homeless individuals, however they are in locations far from where they live, volunteer and work. Therefore, if the Court of Appeal in *Victoria (City) v. Adams,* stated that it's only unconstitutional if the shelters are full, it's likely that the enforcement of a trespass order in the Ottawa tent city would be constitutionally valid, as they are providing options for housing elsewhere.

However, it may be possible to see the other side of the argument as well. A key legal circumstance that might influence the outcome is that the homeless individuals refuse to use the provided shelters because they are away from their communities. Thus, it's not that there is inadequate housing available, but rather that the housing that is available is not to the likeness of the homeless individuals. The homeless individuals should be able to stay in their preferred locations, and not be threatened with the trespass notice. Thus, even if they are being offered housing elsewhere, the fact that they cannot stay in the public locations in their preferred areas can amount to an unconstitutionality of the trespass notice. In the ruling of *Victoria (City) v. Adams,* the government changed the bylaw regulating public spaces, but did not provide more housing or shelter space to reduce homeless persons' need to use public spaces. In Ottawa, this would be an implementation that would reduce any likelihood of a Charter claim being successful against the City.

The City and the NCC should therefore implement the following talking points:

1) The situation at the Ottawa tent city requires an immediate response. For that reason, the adequate housing being provided at another location is an ideal way to provide shelter in the cold weather and of ensuring everyone's safety and security.

2) Although the City is understanding of the rights of an individual to be located in the area of their choice, this must be done in a way that does not create the potential for fire or havoc. Thus, shelters elsewhere will be provided for those who want it. For those who want to stay in the area, the notice has been extended to provide more time for an adequate housing situation.

3) If, however, after the extension of the notice, individuals are still in the area, the City will enforce the trespass order. This will be done with an understanding of the dire situation and with a helpful hand to provide temporary shelters.

[26] *Victoria (City) v. Adams,* 2009 BCCA 563.

Question 8: Major UK legal panel considers digital assets are property

The term property and the propositions of what constitutes property have been in contention for decades. With increasing technology and the digital age, the question of what is and is not property becomes increasingly difficult to distinguish. Sir Geoffrey Vos proposes that crypto-assets should be classified as property because they have all of the "indicia of property". I assert that the justifications for extending property rights into the domain of crypto-assets are founded.

To begin, the first, and most important, issue that must be addressed is whether cyber-assets are property. In *Yanner v. Eaton*[27], the court grappled with how the term property was essentially used as a tool to infringe Aboriginal rights. The High Court of Australia ultimately concluded that property does not mean the right to exclude and does not refer to a thing, but that essentially it did not mean anything. As such, they took a quite nominalist approach viewing property as a purely conventional concept with no fixed meaning. Thus, by looking at crypto-assets through a nominalist lens, a legal system can label as property anything it wants. Similarly, *INS v. AP*[28] also took the approach that the property didn't mean anything in the end, and it was just in writing. *Victoria Park Racing,* however, outlined the concept that property is a "bundle of rights" that includes the right to use, sell, exchange and exclude from others. Through this multiple-variable essentialist lens, crypto-assets are property because they can be owned, and they allow the ability to be sold or exchanged.

One argument against crypto-assets being property is that their intangibility. This position is refuted, however, as it would not be the first time an intangible thing is deemed to be property. The Ontario Court of Appeal has determined that a domain name satisfies the definition of property under the common law and can be considered personal property. [29] *Tucows.com v. Loias Renner* used an analysis of the word property to outline the proper procedure of what property compromises. The courts outlined four aspects that comprise property: (1) ownership and quasi-ownership interests in things, (2) other rights which are enforceable, (3) money, and (4) cashable rights. Crypto-assets are definable, identifiable by third parties, capable of assumption by third party (through exchanges or being sold) and have a degree of permanence or stability. As such, they outline the requirements for property rights as described by the Ontario Court of Appeal[30]. In *Intel v. Hamidi*[31], the question surrounded extending the law to account of cyber-trespass. The majority concluded that applying cyber-trespass would cause problems because the objects in cyberspace lack a physical existence. Similarly, crypto-assets lack a physical existence as they are solely virtual. This, however, does not diminish the ability of crypto-assets to meet the bundle of rights that constitute property. Thus, digital intangibles are, and should, be property.

Another argument against crypto-assets being proprerty may be that cryptoassets cannot be physically possessed as they are purely "virtual". The test in *Popov v. Hayashi*[32], would require

[27] *Yanner v Eaton,* [1999] HCA 53.
[28] *International News Service v. Associated Press,* [1918] 248 US 215 (USSC).
[29] *Tucows.Com Co. v. Lojas Renner S.A.,* 2011 ONCA 548.
[30] Ibid.
[31] *Intel Corp. v. Hamidi,* [2003] 30 Cal. 4th 1342 (Cal SC).
[32] *Popov v. Hayashi,* [2002] WL 31833731 (Cal. Sup. Ct.)

that one has (1) physical control over the item, and (2) intent to control it or exclude it from others. Although the intent to control cryptoassets may be present, the inability to assert physical control over them lessens the grounds for a claim that they constitute property. However, possession and property are different. To have property rights is to have something that is owned. Crypto-assets are solely owned by one individual, and so meet the requirement for private property rights.

Finally, crypto-assets do have distinctive and novel features such as cryptographic authentication, rule by consensus or intangibility, however, as stated by the Panel's Legal Statement, this does not disqualify them from being property. These are novel claims, and as Justice Mosk stated in *Moore v. Regents*[33], there is no precedent either way and since it's the first time the issue is being dealt with, there is no one better than the courts to address this issue.

Since it is deemed that cryptoassets do constitute property, the issue of inheritance arises. Whether or not they are inheritable depends on what aspects of the bundle of rights are integral. Through a single-variable essentialism lens, the fact that cyberassets provide the right to exclude, they would be deemed as property. Additionally, John Locke's labour theory would suggest that if you extend labour to work on something, and as a result gain the crypto-assets, you must be recognized with property in that thing.

Truthfully, the intangible nature of crypto-assets and the complexity of the exchange and transfer of these assets within the digital space make it difficult to ascertain the true value of the asset on death. This may touch upon the uncertainty spectrum of the state limits on testamentary transfers of property, as the true value may not be accessible. The only way to prevent the abandonment of crypto-assets upon death may be to enclose within the will how to access this form of assets.

Therefore, although the question of inheritability remains unanswered, crypto-assets assert a bundle of rights similar to tangible properties. The "indicia" of property, as stated by Sir Geoffrey Vos have been met by crypto-assets and they should thus be classified as property.

[33] *Moore v. Regents of the University of California,* [1990] 51 Cal. 3d 120 (Cal SC).