Property Law Exam
6 December 2019

The total word count of this document is 3472 words.

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

Part A

Question 1

The most accurate statement is (d): Bruce's claim to the vehicle depends entirely on the terms of Betty's will. The word "entirely" gives me pause, as it implies a level of certainty that we can't ascertain from the facts in the article. We do not know if Arthur died with a will, and how that will may have directed the division of his estate. "Entirely" assumes that Arthur died intestate, and that upon his death, his whole estate transferred to Betty under the rules of intestate succession (*Succession Law Reform Act*, RSO 1990 c S26). If that is the case, then yes, Bruce's claim to the vehicle depends entirely on the terms of Betty's will—assuming there is one. If Betty died intestate, then Bruce will have a valid claim to the vehicle as Betty's issue under the rules of intestate succession.

Answer (a) is incorrect because in order to abandon something, you must do so with intent. Inferring an intent to abandon in this case would contradict the assumption that people go to the emergency room of a hospital with the intent to be healed and eventually return home.

The general rule for finders is that a finder of lost property acquires title good against the whole world except the true owner. In this case, answer (b) is incorrect because the property is not lost (it's the residue of Arthur's estate that has yet to be allocated), and because Bruce has a stronger claim.

Based on the facts of the article, Darryl is at best a distant relation to Arthur. If Arthur died intestate, there is an issue (Bruce) and kin (two brothers, Gerald and Clarence) who would have stronger claims to the vehicle than Darryl, making (c) is incorrect.

Answer (d) is incorrect because the Humber River Hospital did not have a duty to Arthur's family to begin with. They could have just as easily called to have the vehicle towed and impounded. Their lack of duty is evidenced by the fact that Francesco was not authorized to search for the family during work hours. [349 words]

Question 3

If the ancestors of the Secwepemc peoples performed spiritual ceremonies around and above the cave [answer (d)], that fact would go far in helping the Simpcw First Nation prove a claim for Aboriginal Title. As decided in *Delgamuukw v British Columbia* (1997, SCC), the test for proving aboriginal title requires (i) occupation prior to sovereignty; (ii) continuity with present occupation; and (iii) exclusive occupancy. "Sufficient occupation" was defined in *Tsilhqot'in Nation v British Columba*, 2014 SCC 44 as "regular and exclusive use." Therefore, if the Secwepemc peoples really do have evidence in their archives of the cave's existence and use for spiritual ceremonies prior to any Crown declaration of sovereignty over the land—and have continued that exclusive use through present day—they would have a strong claim for Aboriginal Title.

Answer (a) sounds like it would be great oral testimony proving that the Simpcw have known about the cave since time immemorial, but the use of Mr. Pollack's name renders the answer completely incorrect.

Provincial legislation establishing Wells Gray Provincial Park as property of the Crown would be entirely counterproductive to the Simpcw First Nation claim—especially if it occurred prior to the First Nation's occupation of the land. Therefore, answer (b) is incorrect.

If the Ktunaxa First Nation also occupied the territory surrounding the cave, it would be harder for the Simpcw First Nation to argue exclusive occupancy, thus rendering answer (c) incorrect.

While British Columbia's implementation of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) is a hugely positive step, it would not *strengthen* the Simpcw First Nation's claim [answer (e)]. Article 27 of UNDRIP implicitly leaves recognition and adjudication of aboriginal title claims in the hands of states party. While Canada is not a state party to the declaration, an adjudication process already exists through the Special Land Claims Tribunal—the venue through which the Simpcw could make their claim. [315 words]

Question 4

The most correct answer is (c): the relevant facts of *Mattel Inc v 3894207 Canada Inc*, 2006 SCC 22 [*Mattel*], are distinguishable from the relevant facts in Drake's application. In *Mattel*, the two parties sold entirely different goods/services: the appellant was an international manufacturer of children's toys, and the respondent was a "bar and grill" restaurant with two locations in the Montreal area. After an examination of "all the surrounding circumstances," the SCC concluded that there was no evidence of purchaser confusion within the meaning of s 6(5) of Canada's *Trademarks Act*, RSC, 1985, c T-13 [*Trademarks Act*]. In the case at hand, Dream Crew IP is applying for a mark that "presents a similar commercial impression" to the mark of Pineapple Express, and the goods the two companies sell are "essentially identical." Therefore, the facts of *Mattel* and this application are distinguishable in the sense that *Mattel* provides an example of a non-infringing mark, while Drake's application illustrates a mark that would infringe on a previously registered mark.

Answer (a) is inaccurate because even though the tests for confusion in the US and Canada are different, the (broader) Canadian test under s 6(5) of the *Trademarks Act* incorporates similar considerations as the *du Pont* factors. "Similarities between the compared marks" is analogous to s 6(5)(e) of the *Trademarks Act*, and "relatedness of the compared goods" is analyzed under s 6(5)(c).

There is no inconsistency between this USPTO decision and *Mattel*, as the crux of both analyses is whether consumers would be "confused… as to the commercial source of the goods." The USPTO determines the likelihood of confusion on a "case-by-case" basis, just as the SCC decided *Mattel* based on an examination of "all the surrounding circumstances."

Answer (d) is incorrect because the application was to the USTPO for a trademark in the US, not to the CIPO for a Canadian trademark. Similarly, answer (e) is incorrect because this is a trademark application, not a patent application. The mark Dream Crew IP registers for their product is separate from any disputes that may arise around intellectual property rights to the goods they ultimately sell. [354 words]

Question 5

Law Offices of
de Beer & Dodek
University of Ottawa

Mr. John Smith
The Beaches
Toronto

CC: Mr. John Doe

Re: Opinion Letter About Property Development and Toronto's Committee of Adjustment
Our File No: 12345

Dear Mr. Smith,

I enjoyed meeting you last week. As you requested, our firm has researched the questions you and Mr. Doe have concerning your rights to develop your properties. Specifically, you asked us to provide opinions on the following:

(a) Whether your private property rights allow you to build on your land how you see fit;
(b) The merits of any legal claim against the City of Toronto if your by-law variance is denied or if the Toronto Region Conservation Authority reverses its decision on the coastal hazard assessment;
(c) The differences between American and Canadian law on the above issues; and
(d) The merits of a legal claim by your neighbours concerning overlooking their homes.

[I ran out of time, but this is how I would try to approach the questions]

(a) I would attempt to explain that the the Province, has constitutional authority (CA 1867, s 92(13)) over private property rights. The municipalities are delegated some of that authority by the Province, and can set by-laws that regulate how private property is developed. The property owners' rights are not absolute.
(b) The legal claim would likely fail, given the answer in part (a). It's a question of Admin Law. Nothing in the facts state that the TRCA or the City would be abusing their authorities in deciding against the neighbours. And there are no concerns about procedural fairness.
(c) I would discuss how the 5th amendment of the US Constitution guarantees private property rights, but there are no such protections for non-indigenous Canadians within the Canadian Charter of Rights and Freedoms. I would contrast cases such as *Lucas v South Carolina* (1992, USSC) and Mariner v Nova Scotia (1999, NS CA) to illustrate the differences between Canadian and American law. Especially how the US courts frame the question in terms of the government action ("Is this a regulatory taking?") whereas in Canada the question centres the land ("Was there a deprivation of land?") It's nuanced, but it speaks to whether or not you've truly been deprived of your entire bundle of rights.
(d) Finally, I was very unsure about what exactly this part of the question is asking. I would have skated and made some stuff up about nuisance, *Victoria Park Racing*, and maybe even Riparian rights, just to show I was totally out to lunch and had no clue what to say.

Question 6

MEMO

To: J. de Beer, Supervisor

From:

Date: 6 Dec 19

Re: Legal Analysis of the Eviction Order Issued to Residents of the Bayview Station Tent City

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Introduction: In light of recent steps by the City of Ottawa and the National Capital Commission (NCC) to evict the population of a small tent city behind Bayview Station, you asked me to draft a memo supporting our firm's work for the City and the NCC as external counsel.

Issue: There are two issues to address in this memo: the first is whether enforcement of a trespass order would be constitutionally valid in the circumstances at hand; the second is what talking points the City and NCC should use to defend their legal position in a sensitive manner.

Brief Answer: *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams*], affirmed the BC Supreme Court decision that an eviction order only infringes the s 7 Charter right to security of the person when there is nowhere else for a homeless person to go. In this case, the City has found shelter in Vanier for tent city residents, therefore the eviction order is constitutional. When communicating this position to the public, the City and the NCC should focus on three points: the need to rapidly rehouse people after they experience a catastrophe such as a fire at a boarding house; the need to ensure the safety of the tent city residents; and the choice to not prosecute the summary offence.

Analysis: There is a sound statutory and constitutional basis for the oral eviction notice that was delivered to residents of the encampment on 29 November 2019. Section 7(1)(i) of Ottawa's *Parks and Facilities By-Law* (2004-276) prohibits camping in any city park without a permit. Although the area behind Bayview Station is not a City park, the s 1 definition of "park" covers areas devoted to "active or passive recreation." Furthermore, s 38 the federal *National Capital Commission Traffic and Property Regulations*, CRC, c 1044, states "No person shall camp, picnic or erect a tent on any property of the Commission not specifically designated by the Commission for that purpose." Section 40 goes on to state that anyone who contravenes the regulations is "liable on summary conviction to a fine not exceeding $500 or to imprisonment for a term not exceeding six months, or both." The residents of the tent city are

occupying a public space that is privately owned by the City and the NCC, counter to Ottawa by-law and federal statute.

The facts of this situation are not dissimilar to *Adams*, but can be distinguished in a manner that prevents a finding of a Charter violation. In Adams, a tent city was established in a public park every night. Like Ottawa, the City of Victory has a by-law that requires a permit to erect a shelter. Therefore, in 2005 the City issued an eviction notice to the residents of the tent city, which was challenged at the BC Supreme Court on. The plaintiffs claimed that the Charter afforded them a property right to be in a public place. While the court held that s 7 of the Charter does not give a positive right to property, there is a right to be free from a violation of security of the person. The case turned on the key fact that there were hundreds more homeless people in Victoria than there were shelter beds available each night. Given that fact, the court decided that it was unconstitutional to prohibit homeless people from erecting shelters in a public space *if shelters are full*.

The distinguishing fact in the case at hand is that the City of Ottawa has found temporary shelter for the residents of the tent city, in Vanier. In the language of *Adams*, the "shelters are not full," so-to-speak. However, the residents of the tent city are refusing to temporarily relocate to Vanier due to the distance from their home neighbourhood of Somerset West, and the perceived increased risk to relapse in the Vanier area (described as "Drug Central" by one resident of the tent city).

For case law from this jurisdiction, *Batty v Toronto (City)*, 2011 ONSC 6785 [*Batty*] provides some guidance. *Batty* involved a s 2 Charter challenge to Toronto's eviction notice served to the "Occupy" movement, who had erected a tent city within Toronto's St. James Park. The court held that the trespass notice did violate s 2 rights to freedom of assembly, but that it was justified under s 1. It was necessary to balance the Occupy movement's rights with the rights of those who lived around the park. While this decision lends strength to Ottawa's eviction order, the residents of the tent city would likely challenge the order on s 7 grounds, not s 2. Furthermore, although it could be argued that evicting the residents of the tent city preserves the public's enjoyment of the NCC lands (like the public's enjoyment of St. James Park), that is a less sensitive argument when deployed against the homeless (as opposed to protestors) and should be downplayed.

In terms of public affairs, Ottawa and the NCC should advance the following three talking points to sensitively buttress their legal position:

A) **The need to rapidly rehouse people after they experience a catastrophe**. Councilor McKenney used this argument on CBC radio, and it bears adoption (although in order to advance a contrary position to theirs). The residents of the tent city were displaced by a terrible boarding house fire—the City merely wants to put them in more suitable shelter for the time being.

B) **The eviction notice is necessary in order to ensure the safety of the displaced persons**. There has already been one tent fire, and colder winter temperatures have already set in. Eviction from NCC lands and relocation to Vanier is a necessary safety measure.

C) **The refusal to "criminalize" homelessness**. Some scholars (RC Ellickson) would argue that more privatized control over public spaces is necessary. Ottawa and the NCC disagree, and take a view more similar to Jeremy Waldron that homelessness is an affront to human freedom and dignity. Therefore, authorities are taking a compassionate approach by not charging the tent city residents under the *NCC Traffic and Property Regulations*. The goal here is not to criminalize homelessness, but to take measures to ensure these people have adequate shelter. [1059 words]

Question 8

Bold Jurists and Efficient Markets: Why the UK Jurisdiction Task Force was Right on Crypto-Assets

The position advanced by Sir Geoffrey Vos regarding the legal statement from the UK Jurisdiction Task Force, and the legal statement itself, both engage a multitude of fundamental concepts concerning the nature of property. It is fertile ground for a discussion about the future of property, and how it will evolve through the 21st century. This essay will argue that Sir Geoffrey Vos is staking a clear legal position which should be commended in the face of historic property cases where the judiciary was hesitant to set policy. Furthermore, the Task Force legal statement perfectly weaves together multiple-variable essentialist and nominalist arguments about the concept of property in a way that gives clarity to the technological complexity inherent to discussions of blockchain.

In common law jurisdictions around the world, judges have often hesitated to make declarative statements about how property rights should evolve, believing that such decisions are best left to elected representatives. While Justice Pitney created the concept of "quasi-property" in *International New Service v Associate Press* (1918, USSC) [*INS v AP*], Justice Brandeis (dissenting) maintained that the courts ware ill-equipped to set those type of property limits. Writing for the majority, Justice Panelli was not prepared to extend property rights to body parts in *Moore v Regents of the University of California* (1990, Cal Sup Ct) [*Moore*]. In that case, Justice Mosk dissented, stating that since the legislature doesn't have the institutional capacity to fix all deficient laws, the courts should take matters into their own hands. The trend has continued since the turn of the century. In *Intel v Hamidi* (2003, Cal SC) [*Intel*], Justice Wedegar was not prepared to declare that computer servers are akin to private property, recognizing the resulting anti-commons problem and leaving the matter for the legislature to consider if they wish. More recently, in this country, Justice Abella recognized that Canada's copyright law suffers from "atrocious drafting" but abided by it anyway, suggesting that it was Parliament's to correct (*Keatley Surveying v Teranet*, 2019 SCC 43 [*Keatley Surveying*]).

In asserting that the Task Force legal statement is a positivist view of what English law actually is as opposed to a normative indication of what the law ought to be, Sir Geoffrey is clearly indicating a willingness to settle a policy debate instead of leaving it to the UK House of Commons. By asserting that there is a two-fold debate around crypto-assets, Vos creates a question of fact for jurists to settle (whether or not they can be conceptualized as property) and a question of law for the legislature to decide (how those crypto-assets are regulated). This nuanced framing of the question allowed Vos to follow in the

footsteps of Justice Pitney in *INS v AP* and declare crypto-assets to be property. It also accords with a more recent decision like *Tucows.com v Lojas Renner* (2011, ONCA) [*Renner*] where the court took a similar stance and declared a domain name to be property.

The boldness and importance of this stance should not be overlooked. Declaring crypto-assets to be property is an important policy decision that ensures commercial efficiency in contract law, and contributes to Posner's idea of efficient markets in the realm of private property.

The panel's legal statement itself is also a work of academic brilliance. Section 15 of the summary of their legal statement rightly points to *Yanner v Eaton* (1999, HCA) [*Yanner*], acknowledging that whether crypto-assets are property "ultimately depends." This indicates a legal-realist view that property is nothing at all, or that it's whatever we (or statute) say it is, as in *Keatley Surveying*. However, when they state that crypto-assets have the "indicia of property," the panel rightly recognizes that crypto-currency comes with a bundle of rights to exclude, possess, use, and dispose that is more in keeping with the US Supreme Court and thinkers such as Merrill, Blackstone, and Cohen. The panel's treatment of intangibility is akin to decisions such as *Black v Molson* (2002, ONSCJ) and *Renner*.

Finally, in acknowledging that "crypto-assets cannot be physically possessed," the panel forces us to think critically about concepts that we take for granted, and that date back as far as *Pierson v Post* (1805, NY SC). If crypto-assets are purely virtual and cannot be physically possessed, it will be interesting to see how the jurisprudence around such property evolves. Questions of security such as in *LaSalle Recreations v Canadian Camdex Investments* (1969, BCCA) will need to be confronted with fresh eyes. Maybe the conception of crypto-assets as virtual property will lend itself to more new and novel equitable decisions about possession in the same vein as *Popov v Hayushi* (2002, Cal SC).

Sir Geoffrey Vos and his Task Force were confronted with the kind of fundamental question that comes up only in the rarest of instances: Is this property? Instead of deferring to the legislature, Vos lead the panel to a bold (and correct) conclusion that will foster efficient markets and avoided the need for parliamentary debate. By taking a positivist approach to stating what the law actually is, Vos gave clarity to businesses and investors, and prioritized commercial efficiency. His panel achieved this through an analysis that traces back to the fundamental thinkers and decisions on the subject, and will be studied by future generations of jurists in the same manner as *Yanner* and *INS v AP*. [903 words]