PROPERTY 1108(C) FINAL EXAM

PROFESSOR DE BEER

FRIDAY, 6 DECEMBER 2019, 09H00 – 16H00 (**6 HOURS** + 1 HOUR BREAK)

IN **PART A**, YOU MUST **ANSWER 3 OF 4 QUESTIONS**.

THE **3 ANSWERS** IN PART I ARE **WORTH 30%** OF YOUR SCORE.

IN **PART B** YOU MUST **ANSWER 3 OF 4 QUESTIONS**.

THE **3 ANSWERS** IN PART II ARE **WORTH 60%** OF YOUR SCORE.

OVERALL IMPRESSION OF BOTH PARTS IS **WORTH 10%** OF YOUR SCORE.

ANSWERS MUST BE SUBMITTED ELECTRONICALLY VIA BRIGHTSPACE IN .PDF, .DOC(X), .PAGES OR A SIMILAR FILE FORMAT.

THERE ARE NO RESTRICTIONS ON THE WRITTEN REFERENCE MATERIALS YOU MAY USE TO PREPARE YOUR ANSWERS. YOU MAY NOT COLLABORATE WITH OR CONSULT ANY OTHER PERSON.

YOU MUST INCLUDE WITH YOUR ANSWERS A DECLARATION OF ACADEMIC INTEGRITY, AND YOUR TOTAL WORD COUNT.

THIS EXAM IS WORTH 60% OF YOUR FINAL GRADE.

You must include with your answers the total document word count, including footnotes:

"The total word count of this document is: #,### words."

The total document word count should not exceed 4,000 words (plus or minus 10%).

You must include with your answers the following declaration of academic integrity:

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

Academic integrity means being responsible for the quality of your work, preparing it honestly and respecting the intellectual community you are part of as a student. It is a core value in all scholarly work.

Academic fraud refers to "an act by a student that may result in a false academic evaluation of that student or of another student". Here are some examples:

- Submitting work prepared by someone else or for someone else
- Using work you have previously submitted for another course, without permission
- Falsifying or making up information or data
- Falsifying an academic evaluation
- Submitting work you have purchased on the Internet
- Plagiarizing ideas or facts from others

For this examination, collaboration or consultation with another student or any other person *during the examination window* will be deemed to be academic fraud. You are encouraged to collaborate and consult during your preparations before the examination and may discuss the examination with others afterwards.

Academic fraud, including plagiarism, will be dealt with according to Regulation 14 - Academic Fraud. Students who commit or attempt to commit academic fraud, or who are a party to academic fraud, are subject to one or more of the sanctions listed in the Regulation. Also, the Law Society of Ontario and/or other professional licensing bodies may be made aware of the results of an investigation regarding academic fraud.

A. ANSWER 3 OF 4 QUESTIONS, WHICH IS WORTH 30% OF THIS EXAM.

1. CTV News recently published the following report:

A dead veteran's car was parked at a hospital for years.
His estranged family now knows why

Adam Frisk | Nov. 8, 2019

TORONTO - An inquisitive security guard at a Toronto area hospital has helped solve the mystery of a Canadian veteran estranged from his family for 50 years.

Only days before Remembrance Day, the Goyetche family has answers about Arthur W. Goyetche, who drove himself to a Toronto hospital in 2015 and never left.

The former Royal Canadian Air Force flight technician's 2001 blue Kia has spent a little more than four years in a parking lot at Humber River Finch Hospital.

"He drove in here, he rushed into [Emergency] and the car idled for a couple of days and ran out of gas," explained security guard Francesco Barbera. "And it hasn't moved since."

Barbera noticed the car and its Ontario veteran license plate with expired tags while making his nightly rounds and mentioned it to a supervisor.

They assumed his family would eventually claim the car but as the seasons changed, the small time capsule of Arthur's life remained in place. Inside the car is a case of bottled water, two walking canes, a blanket, a file folder and what appears to be a green bomber jacket.

Arthur W. Goyetche's car pictured in a parking lot at a Toronto hospital in September 2019. (Adam Frisk/CTV News)

In October 2015, the hospital site closed for nearly two years to be converted into a transition facility – with the Kia where it was left.

Joe Gorman, director of communications for Humber River Hospital, said the car wasn't in the way during construction. Calling it a bit of an "oddity," he said the hospital allowed the car to sit in the parking lot out of respect for its patient's family. …

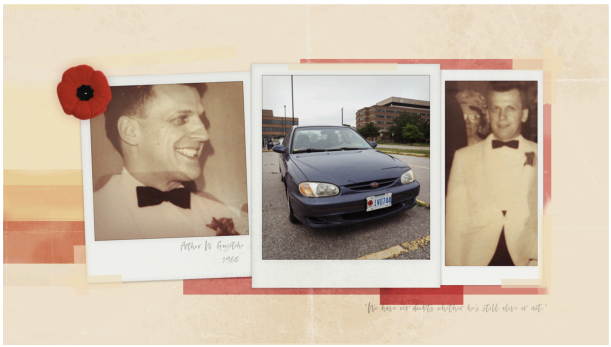
Barbera said the hospital gave him a green light to seek out the owner's relatives as long as it was outside of his shifts.

"I tried on my own time at home but I was kind of just going in circles," he said of his months-long search.

According to public records, the car was registered to an Arthur W. Goyetche of Weston, Ont. – not exactly a John Smith, but more of a common name than one might think. No home address was listed on the used vehicle information package.

The car in the hospital lot had a parking permit for a Toronto property management company with several properties across the city including apartment complexes in the Weston, Ont. area.

CTV News contacted the company, which confirmed that Arthur and his wife Betty were tenants at one of their properties from 1998 to 2015.



Arthur W. Goyetche pictured in 1968 and the veteran's car pictured at a Toronto hospital in September 2019. (Photo illustration by Fusun Uzun/CTV News)

Arthur died on May 29, 2015, at the age of 84. Betty died 11 days later, the property manager said. The apartment complex's landlord also confirmed that the Goyetches had died, noting their son, Bruce, handled his parents' personal items from their apartment. (CTV News was not able to locate Bruce.)

The search for Arthur's family was on.

CTV News contacted Alberta resident Darryl Goyetche, who has been tracking the family lineage and hosts an online genealogy site dedicated to the Goyetches.

Wanting to "help solve a mystery," Darryl made a few calls and put out a request for information through his social media channels.

"I've heard from two family members... who told me about their estranged brother," Darryl said in an August email to CTV News. "Lynda in [southern Ontario] tells me her husband Gerald has a brother, Arthur who they have been trying to locate for many years but unsuccessfully. Their Arthur was in the Air Force in his younger years and was known to live in Belleville with his wife Betty, and one son Bruce. He had a bad heart condition."

Darryl went on to explain their Arthur chose not to speak to the family for unknown reasons "much to the sadness of his mother Mary and father Wilfred who have since passed away." Darryl said the second brother had also been searching for an Arthur.

"From Halifax, I heard from Paul whose dad Clarence (Gerald's brother) has an estranged brother named Arthur," Darryl said. "He says they have been looking for him for years." …

The Goyetches said they are "comforted" by the confirmation of his death and thanked Barbera for taking the initiative. …

Barbera said he's just happy to have had a part in solving the mystery. … Barbera said even after four years in the lot, the parking fee will only be $5.

Which of the following statements is most accurate, and why?

a. Arthur abandoned the vehicle.
b. Francesco has the best claim to the vehicle.
c. If Arthur died intestate, Darryl has the best claim to the vehicle.
d. Bruce's claim to the vehicle depends entirely on the terms of Betty's will.
e. The Humber River Hospital fulfilled its duty to Arthur's family.

The most accurate statement is "e" (or "d" with adequate justification). Arthur did not abandon the vehicle; he died. While he gave up physical possession, he lacked intent to abandon (*Gustafson* or *Charrier v Bell*). So "a" is not the most accurate statement. Francesco cannot have the best claim to the vehicle because, even if he were a finder (which is questionable), he is an employee of the Hospital. Employees act as finders on behalf of employers (*Parker*). So "b" is not most accurate. While the vehicle probably belongs to someone amongst Arthur's heirs, "c" is the not most accurate statement. If Arthur died intestate, his estate would pass to closer heirs, including his widow Betty and their son Bruce, before a distant relative like Darryl. Bruce's claim does not depend entirely on Betty's will; rather it depends first on Arthur's will. So "d" is not the most accurate statement. That leaves "e". The Humber River Hospital is either the employer of the finder, in which case it becomes a bailee, or a bailee in its own right. According to finders law (*Parker*, *Trachuk*, or other cases), the Hospital has rights against everyone but the true owner. Although the Hospital did not take proactive steps to locate the owner, as it arguably should have, it permitted its employee to attempt to locate the owner, and did not sell or destroy the vehicle, therefore fulfilling its duty. Students who noticed the nuances of the Hospital's actions (allowing Francesco to search for the family only *outside* his shifts) and made appropriate assumptions about Arthur and/or Betty's wills, might have justifiably chosen "d" and received high marks.

AND/OR

2. *NOW Magazine* recently reported the following (spoilers deleted so you can watch the film after your exam):

Disney signed a contract with Indigenous people before making Frozen II

The Sámi-inspired Northuldra people in Frozen II (Walt Disney Studios).

The animated Disney film Frozen opened with a tribal-sounding choral chant that, for many in North America, sounded completely out of place.

The 2013 movie was about blond-haired, blue-eyed sisters Elsa and Anna, who reign over the Norwegian kingdom of Arendelle. Elsa's show-stopping Broadway-worthy anthem Let It Go was a far cry from that opening chant.

However, Sámi people – the Indigenous communities in Scandinavian regions – recognized the tune right away. It turns out the context behind that music was subject to erasure.

The song is Vuelie and it was written for the film by South Sámi musician and composer Frode Fjellheim. His music draws on joik, an ancient vocal tradition that was outlawed when Nordic Indigenous communities were Christianized (like what Canada did with the Potlatch ban).

The selective use of Sámi culture in Frozen led to debate on social media about appropriation and whitewashing, and not just because of the joiking. The character Kristoff (voiced by Jonathan Groff) has a wardrobe that resembles what Sámi reindeer herders would wear, but he looks very Norwegian. To be fair, Sámi people can have blond hair and blue eyes – the result of forced assimilation and ethnic cleansing for over a century.

To make sure cultural erasure didn't happen in Frozen II, Sámi leaders entered into a contract with Disney that affirms ownership of their culture.

This time, filmmakers Jennifer Lee, Chris Buck and producer Peter Del Vecho sought out expert advice on how to respectfully portray Indigenous culture, which is heavily and intricately featured in the film and its reconciliation plot.

The sequel finds Elsa summoned by a mysterious siren, a melodic voice calling from a far off land that holds buried secrets about Arendelle's past. The ensuing story enriches and expands the mythology behind its characters. … The film acknowledges the erasure of the Northuldra and their absence from the original film in dramatic terms.

After finding out that their culture would play an even more significant role in the Frozen sequel, the Sámi parliaments of Norway, Sweden and Finland, along with the Saami Council (a non-governmental organization of the Sámi people), reached out to the movie's producers to collaborate. The filmmakers were on board, and the Sámi groups rounded up a group of experts (called Verddet) to act as cultural consultants for the animation team.

Among the group was Anne Lájla Utsi, managing director at the International Sámi Film Institute, who shared with NOW the ceremonial non-confidential version of a contract drawn up between Walt Disney Animation Studios and the Sámi people.

The contract, signed by Del Vecho and the Sámi parliament reps, is printed to look like a hand-written document. It outlines the studio's "desire to collaborate with the Sámi in an effort to ensure that the content of Frozen 2 is culturally sensitive, appropriate and respectful of the Sámi and their culture."

In exchange for the Sámi people's input, Disney agreed it would also produce a dubbed version of Frozen II in one Sámi language (similar to the Maori-language, Tahitian and Hawaiian dubs of Moana) and participate in cross-learning initiatives that contribute to Indigenous communities in Scandinavia.

Agreement

This Agreement, hereinafter referred to as the "Agreement," is made and entered on the 22nd day of September, 2019 by and between Walt Disney Animation Studios ("WDAS") and the Sámi people, as represented by the Sámi Parliament of Finland, Sámi Parliament of Norway, Sámi Parliament of Sweden, and the Saami Council (collectively, "the Sámi") in connection with the feature length animated motion picture currently entitled "Frozen 2" ("Frozen 2").

PREAMBLE

WHEREAS, it is the position of the Sámi that their collective and individual culture, including aesthetic elements, music, language, stories, histories, and other traditional cultural expressions are property that belong to the Sámi;

WHEREAS, it is the position of the Sámi that to adequately respect the rights that the Sámi have to and in their culture, it is necessary to ensure sensitivity, allow for free, prior, and informed consent, and ensure that adequate benefit sharing is employed;

WHEREAS, the filmmakers of Frozen 2 wish to show respect to the Sámi people and their concerns, without expressing a view as to the above positions, and desire to collaborate with the Sámi in an effort to ensure that the content of Frozen 2 is culturally sensitive, appropriate and respectful of the Sámi and their culture.

Courtesy International Sámi Film Institute

"We have been approached by many outside filmmakers who are interested in Sámi stories," says Utsi, who is appreciative of Disney's collaboration and hopes others follow the studio's lead when it comes to telling Sámi stories.

"This is a good example of how a big, international company like Disney acknowledges the fact that we own our own culture and stories. It hasn't happened before." Jesse Wente, director of Canada's Indigenous Screen Office, says he has never seen an agreement like this before, but is enthusiastic about its possibilities.

"It's a treaty," says Wente. "It's in keeping with how Indigenous nations have tended to negotiate with other entities in the past. I think it's a great precedent for how Indigenous nations might deal with a corporation the size of Walt Disney, as well as governments and other agencies, around the use of their cultural and intellectual property in popular entertainment. …

In Frozen II, Fjellheim's Vuelie gets an encore recital, but this time it is sung by the Northuldra characters, a nod to their Sámi-inspired heritage. Other elements in Frozen II inspired by Sámi culture include spirits that represent earth, wind and fire (the Sámi connection to the land is not unlike Indigenous communities in Canada).

There's also the Northuldra dress, which Utsi explains was a sensitive area. Indigenous communities across the globe have to be wary of how their traditional garments are used considering how they are often appropriated for mascots or Halloween costumes.

Anne Lajla Utsi (centre) among a gathering of Sámi leaders and the Verddet group during the signing of the agreement between Walt Disney Animation Studios and the Sámi people in Oslo.

"We felt good about them," says Utsi about the white fur garments worn by Northuldra characters, as well as their traditional use of reindeer and guksi cups. … "Disney's team really wanted to make it right," says Utsi. We in Verddet are proud of this collaboration."

Which of the following statements is <u>least</u> accurate regarding the attempts of indigenous peoples to prevent cultural misappropriation, and why?

a. Anne Lájla Utsi fulfilled her fiduciary duty to the Sámi people.
b. Frode Fjellheim's musical composition, Vuelie, is protected by copyright.
c. With or without this Agreement, Disney's depiction of Northuldra garments in its film would not infringe copyright.
d. If a similar situation arose in Canada, Inuit peoples could assert Aboriginal title to stop the misappropriation of their culture.
e. Respect for indigenous legal principles would help to the protect songs, dress, spiritual beliefs, and other aspects of Sámi culture.

The least accurate statement is (d). Although some commentators (including me) have argued that section 35 should be interpreted and applied to protect Indigenous traditional cultural expression, the doctrine of Aboriginal title—as articulated in *Delgamuukw* and *Tsilquot-in*—does not adequately protect against cultural misappropriation. As highlighted by Cynthia Westaway there is currently no Canadian legal authority to support that proposition. Respect for Indigenous legal principles would help, however, which is why statement (e) is not inaccurate. Statement (a) is not inaccurate; if Utsi had a duty to the Sámi, which is arguable based on *BulunBulun*, her negotiations with Disney likely fulfilled it. Statement (b) is not inaccurate. While joik generally might not be protected by copyright, a specific recent composition by an identifiable individual author would be protected, no different than the paintings in *Théberge* for example. Statement c) is not inaccurate, because like joik generally, the general style of Indigenous Sámi garments broadly speaking would probably not meet the authorship requirements for copyright and, if they did, are likely to have passed into the public domain.

AND/OR

3. About the time of last year's property law exam, the *New York Times* (and many other media outlets) reported the following:

A 'Honking Big' Cave in Canada Lures Geologists to Its Mouth

Aerial View of Massive Cave In British Columbia, CanadaCreditCredit...By Catherine Hickson

By Emily S. Rueb | Dec. 8, 2018

In the era of Google Maps, one might be tempted to believe that there are no undiscovered corners of the Earth. But a cave with an opening that can accommodate the Statue of Liberty, and a roaring river running through it, has been discovered in a remote area of British Columbia in Wells Gray Provincial Park, about 280 miles northeast of Vancouver.

"As far as North America goes, this is a honking big cave," said John Pollack, a career caver and governor of the Royal Canadian Geographical Society, which last week announced the cave's existence.

"It's one of the biggest in Canada," he said, "and certainly one of the most spectacular." The cave was discovered in early spring when a group of biologists and researchers conducting a mountain caribou census first noticed what looked like a black hole on the snow-covered slope.

The helicopter pilot sent photos to Dr. Catherine Hickson, a geologist who worked for decades on the Geological Survey of Canada and conducted her Ph.D. research in the park. Dr. Hickson quietly assembled a team of experts, including Mr. Pollack, and raised about 5,000 Canadian dollars (including some of her own money) to make a site visit.

John Pollack, via the Royal Canadian Geographical Society

On Sept. 9, a five-person team took a 50-minute helicopter ride from Clearwater, Canada, to the northeast corner of the park, a rugged area that has almost never seen humans.

In a statement, the Ministry of Environment and Climate Change Strategy, which oversees the park, said it was "completing the engagement with local Indigenous

communities to determine if there is cultural significance or any protection measures that need to be considered in managing this remote and special natural feature."

Catherine Hickson, Tuya Terra Geo Corp

Until the Indigenous communities are consulted, the cave is being called "Sarlacc's Pit" because of its resemblance to the desert creature in "Star Wars: Return of the Jedi.

"You know it's big when you're standing there," said Lee Hollis, a spelunker and member of the expedition team. "But it's hard to tell just looking at the photo."

Mr. Hollis, circled in red in the photo above, is standing to the right of the pit. …

Mr. Hollis was the person on the September expedition who descended into the cave. He carried about 50 pounds of gear, including a hulking battery-powered hammer drill to set bolts into the rock and about 500 feet of rope.

"In my 30-plus years of caving, this is by far the biggest pit that I've had the privilege to descend," he said.

According to Dr. Hickson, the cave is most likely tens of thousands of years old, and the rocks are hundreds of millions of years old. …

"As a geologist, there aren't necessarily a lot of things we do that excite people," said Dr. Hickson. But there is a mystery here, she said.

"Caving is all about the exploration of the unknown."

Much less widely reported was this story, published in the Williams Lake Tribune on February 25, 2019:

Simpcw First Nation speaks on Wells Gray cave

"The cave in Wells Gray Park is a sacred site, and Sarlacc's Pit is not its name."

Chief and council of Simpcw First Nation ("Simpcw") are calling on the Province of B.C. to immediately suspend all management planning of the recently discovered cave in Wells Gray Park until Simpcw and Canim Lake Indian Band are a part of the discussions.

"We understand this is being viewed as an exciting and remarkable find," said Shelly Loring, Chief of Simpcw, in a recent press release.

"But it's not newly discovered – the Secwepemc have had knowledge of its existence since time immemorial."

The cave sits in Secwepemc Territory, on un-ceded and un-surrendered aboriginal title lands, she added, and the Secwepemc Nations with responsibility and stewardship over the cave are Simpcw First Nation and Tsq'escen' (Canim Lake Indian Band.)

According to Loring, the Secwepemc have evidence of its existence, and are consulting their archives for further information.

Simpcw objects to the Province moving forward with reconnaissance work without their consent and involvement, the release said; the park lands are known to have significant Secwepemc cultural heritage values and the cave is considered a Secwepemc sacred site.

"We assert decision making authority over the park lands, and this includes the cave—the first response of the Province upon its discovery ought to have been contacting Simpcw and Canim to discuss how to approach the management of the cave collaboratively," said Loring.

She added the situation shows the need for a parks and wildlife co-management framework agreement with the Province, which Simpcw has been proposing for years.

"We have the right to be at the table and be actively involved in the planning processes for our park lands and wildlife management," Loring said, noting the cave was discovered during caribou surveys, also to the exclusion of Simpcw.

"We should have been involved in the survey work—caribou are an integral and irreplaceable part of Secwep'emc culture and way of life.

When the question of the cave potentially becoming a tourist attraction came up, Loring said they're not necessarily opposed to sharing the cave with Canadians.

"However, our first priority is ensuring its protection and preservation, and honouring our Secwepemc laws and protocols—we have the responsibility and right to develop a culturally appropriate response that is guided by our traditional laws, our Elders and backed by our People, prior to the cave being exposed to any type of reconnaissance work".

With respect to the nickname Sarlacc's Pit, Loring said, "It's inappropriate. Our traditions and culture dictate that a naming ceremony or revitalization of an existing name must occur collaboratively with the Simpcw and Tsq'escen' People."

Simpcw has reached out to the Province and expects to work closely in the coming months to ensure the cave is preserved and protected in accordance with Secwepemc laws.

"If the Province is serious about adhering to the United Declaration on the Rights of Indigenous Peoples as it claims, all work and planning with respect to the cave will be suspended until we sit down and pave a path forward together."

Which of the following facts would be most helpful to the Simpcw First Nation to prove a claim for Aboriginal Title, and why?

a. Mr. Pollack fought his way through the eternal darkness, into the mysterious and abysmal depths of the bowels of a groaning world to discover the theretofore unseen splendors of unknown natural scenic wonders.
b. Provincial legislation establishing Wells Gray Provincial Park states that the territory is the property of the Crown.
c. The cave is located on territory that the neighbouring Ktunaxa First Nation has also occupied from time-to-time.
d. Ancestors of the Secwepemc peoples performed spiritual ceremonies around and above the cave, but never entered the cave.
e. British Columbia recently enacted legislation to implement the United Nations Declaration of the Rights of Indigenous Peoples.

The most helpful fact is (d). Based on the tests for title in *Delgamuukw* and *Tsilqot'in*, the performance of ceremonies around and above the case is evidence of occupation, and the sufficiency of occupation (*i.e.* not "in" but near the cave) is demonstrated by context: the area is remote and the difficulty of accessing the cave itself. Statement (a) is not helpful to the Simpcw, although it might help Mr. Pollack based on the labour theory of property reflected in Justice Logan's dissent in *Edwards v Sims*. Statement (b) is not helpful; it is harmful (although, as demonstrated by the term "property" in state legislation in Queensland at issue in *Yanner*, not fatal to infringe/extinguish the right). Statement (c) is not harmful; but it is not helpful either unless it could be proven that the Ktunaxa occupancy was done with the permission of the Simpcw, as mentioned in *Delgamuukw*. (High marks were given to students who selected (c) knowing this nuance and highlighting the distinction between title and rights that could arguably make (c) the better answer than (d).) Statement (e) is helpful, but more on the issue of infringement than proof, because it affirms the duty of consultation via its provisions on prior informed consent.

AND/OR

4. On November 26, 2019, the United States Patent and Trademark Office (USPTO) sent the following correspondence (edited for brevity) to Dream Crew IP, legal representative of Aubrey Graham, better known as Drake:

ROBERT KLEINMAN
COMMON SENSE COUNSEL
404 WEST 7TH STREET AUSTIN, TX 78701
Applicant: Dream Crew IP

NONFINAL OFFICE ACTION

Issue date: November 21, 2019

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below.

SECTION 2(d) REFUSAL – LIKELIHOOD OF CONFUSION

Registration of the applied-for mark is refused because of a likelihood of confusion with the mark in U.S. Registration No. 1954405. See the attached registration. Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the goods of the parties. See 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (called the "du Pont factors"). Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods. …

COMPARISON OF THE MARKS

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321 (Fed. Cir. 2014). Registrant's mark is THC in standard characters. Applicant's mark is THC set inside a stop sign design with a cannabis leaf in the center of the sign. Here both marks are comprised of identical lettering, namely, THC. This literal element in applicant's mark presents a similar commercial impression to the registered mark.

COMPARISON OF THE GOODS

The compared goods need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012).

In this case the registrant is using its mark in connection with clothing, namely T-shirts, hats, beanies, pants, shorts, baseball jerseys, jackets, sweatshirts, polo shirts and sweat pants. Applicant has identified many of the same clothing items, namely, t-shirts, hats, shorts, jackets, sweatshirts and sweat pants. Applicant has also listed some broader terms that encompass some of the more specific item listed by registrant such as beanies (a type of hat), baseball jerseys (a type of jersey), pants (trousers) and shirts (polo shirts).

In this case, the goods in the application and registration(s) are essentially identical. Therefore, it is presumed that the channels of trade and class(es) of purchasers are the same for these goods. See *Cai v. Diamond Hong, Inc.*, __ F.3d __ (Fed. Cir. 2018). Thus, applicant's and registrant's goods are related.

Because the goods are either the same or very closely related, coupled with the fact that the dominant element of applicant's mark is identical to the registered mark, consumers who encounter the THC branded clothing of applicant and registrant in the marketplace could likely confuse the source of the goods.

Please call or email the assigned trademark examining attorney with questions about this Office action. Although the USPTO does not accept emails as responses to Office actions, emails can be used for informal communications and will be included in the application record.

Jeffrey J Look. Trademark Examining Attorney Law Office 108
Phone: [REDACTED FOR PRIVACY]
Email: [REDACTED FOR PRIVACY]

RESPONSE GUIDANCE
Missing the response deadline to this letter will cause the application to abandon. A response or notice of appeal must be received by the USPTO before midnight Eastern Time of the last day of the response period.

The prior Registrant referred to in the USPTO letter is a California company, Pineapple Express. Its previously registered mark is THC, shown below on the left. The proposed mark of the Applicant, Drake's company, is shown below on the right.

THC

Which of the following statements is most accurate, and why?

a. The *du Pont* factors examined by the USPTO would not be considered as part of the test for confusion under Canada's *Trademarks Act*, RSC, 1985, c T-13.
b. The USPTO's decision is inconsistent with the Supreme Court of Canada's decision in *Mattel Inc v 3894207 Canada Inc*, 2006 SCC 22.

c. The relevant facts of *Mattel Inc v 3894207 Canada Inc*, 2006 SCC 22, are distinguishable from the relevant facts of this Application.
d. The USPTO should have refused the trademark application because the Applicant's mark infringes Crown copyright owned by the Government of Canada, and the *Cannabis Regulations*, SOR/2018-144, require the standardized cannabis symbol to appear on the label of all cannabis products with THC concentration greater than 10 micrograms per gram
e. The USPTO should have refused the trademark application because the strain of cannabis Drake's company would sell is patented by Aurora Cannabis, a competitor of Drake's partner, Canopy Growth.

The most accurate statement is (c). While *Mattel* involved similar marks on very different goods, this dispute involves similar marks on similar goods. The "nature of the wares or services" factor of the test is most relevant to distinguish the cases. For the same reason, (b) is not accurate. Even though the results/outcomes were different, the USPTO and SCC decisions are not inconsistent because they are distinguishable. Statement (a) is not accurate. While the section 6(5) test under Canada's *Trademarks Act* includes other factors too, and the exact wording is different, the similarities between marks and relatedness of compared goods are two crucial factors in Canadian law. Statement (d) is only partly true; the Government does own and claim Crown copyright in the symbol (*Keatley*), but neither that fact nor the regulatory requirement of the symbol's use in Canada clearly prohibit the registration of the mark by Drake's company in the US. For similar reasons, (e) is not accurate. The issue of possible patent infringement (*Monsanto*) is separate from the trademark issue.

B. ANSWER 3 OF 4 QUESTIONS, WHICH IS WORTH 60% OF THIS EXAM.

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5. In November 2019, the CBC reported:

Fight brewing between Beach residents over multi-million-dollar super homes

Neighbourhood is "environmentally sensitive land," area councillor says

This 3D rendering shows one of the proposed homes that residents are worried about in The Beach.

Lawyer Dennis Wood, who is a specialist in municipal law, is representing some neighbours in the area as the issue makes its way to the city. The owners of both homes are slated to appear before the committee of adjustment in the coming weeks to argue in favour of variances to their properties — though Ward 19 Coun. Brad Bradford said those proceedings could be deferred.

The committee either approves or denies requested variance changes. The losing side then has the option to appeal the decision.

Wood says about 30 or 40 people went to a community meeting on Monday to voice their concerns about the proposed developments.

“Each time there’s a new development … it tries to get closer to the water, and it inevitably blocks the views of the people who are beside it,” Wood said.

“It’s kind of a race to the beach.”

Lawyer Dennis Wood is representing neighbours from nearby homes in the area. (CBC)

Bradford told CBC News his office has also heard from several residents about the issue. “I understand why residents have voiced some concerns,” he said.

In a letter to the committee of adjustment, Wood’s law firm laid out the reasons why they are objecting to the variances, namely that they propose homes that are too high and too long, that are out of character with the immediate neighborhood, and “too intrusive on [neighbours] enjoyment of their properties with significant overlook and privacy issues given the length of the building and its position on the lot.”

The letter also alleges that if approved, the developments would set a negative precedent for the redevelopment of the remaining lots along the top of the bluff.

This home at 428 Lake Front sold for $5 million back in the summer of 2016. (CBC)

Bradford also raised the issue of the area being "environmentally sensitive land."

According to the Toronto Region Conservation Authority (TRCA), lake levels have slightly exceeded historic highs in two of the last three years.

Both properties originally had coastal hazard assessments approved by the TRCA, deeming their proposals to be safe.

But on Thursday, the conservation authority reversed its original decision, saying it is now recommending that the application be deferred so the shoreline hazard limit — which is the property line closest to the water — can be reconsidered. Bradford agrees that issue should be examined.

"In a world where climate change is very much a reality, and season after season we see shoreline rise on our beaches … is it a good idea to be waiving variances?" he said.

"I would suggest not."

Our firm has been retained by the two property owners requesting variances from the committee of adjustment. Please **prepare a 1000-word legal opinion letter** that **identifies, analyses, and advises our clients on their rights**. The letter must explain:

a. reasons that the owners may be conceptually mistaken that their private property rights give them the right to build whatever they want on their land;
b. the merits of a legal claim by them against the municipal government if the applications for bylaw variances are denied and/or the TRCA coastal hazard assessments are reversed;
c. since one of the property owners is American, the differences between Canadian and American law on the above issues; and
d. the merits of a legal claim by neighbours over privacy issues arising from overlooking the neighbours' homes, which are allegedly too high, too long, and too intrusive.

This question asked for an opinion letter; the clearest and most organized answers were presented in that form. As authority for the proposition that private property rights do not allow owners to build whatever they want, many students cited *Didow* making an analogy to airspace rights. While not wrong *per se*, it was better to reference more fundamental conceptual materials about the nature of property being a right to exclude (and/or other rights) but not necessarily including unlimited, unregulated use rights. That all property rights are limited in some ways was a theme in some of the cases we read, such as the dissenting judgment in *Moore* for one example. On the merits of a legal claim against the municipal government, the strongest answers grappled with *Mariner* and *CPR* in depth. Almost everyone mentioned those cases, and most students stated the test, and formed a conclusion. Relatively fewer students applied the test, with specific and nuanced factual comparisons, contrasts, hypotheticals, and examples. (For instance, is a bylaw variance analogous to the Ministerial permit requirement under the *Beaches Act*? How

does the TRCA assessment compare? What exactly would the denial of a variance leave these owners with, in comparison to Mariner Real Estate? How does the timing of the enactments/variants/permitting matter? It's just a few sentences, but this is the kind of depth that was typically missing from "B"-range answers.) Almost everyone also mentioned *Lucas* and the 5th amendment of the US Constitution. But the strongest students recognized precisely how under US law it is not just the outcome that might be different; it is the very issue that is different. In Ontario, the question is whether there is a statutory entitlement to compensation under the *Expropriation Act*. In the US, the question is whether the municipality's actions would be unconstitutional. Examining the merits of the legal claim by neighbours over privacy required engagement with *Victoria Park*, which most students did well. The real difference between good, very good, and excellent grades on this question was depth; the more depth in applying the law (especially on point (b), the better).

AND/OR

6. On December 2, 2019, CBC News reported:

Some tent city residents plan to ignore trespass notice

Justin Bolger stands near where his tent used to be before it burned down in a fire on Nov. 22, 2019. The fire left him homeless for the second time in less than eight months, after the rooming house he lived in burned down in the spring. (Kimberley Molina/CBC)

Kimberley Molina | Dec 02, 2019

Some residents of a homeless encampment near an Ottawa LRT station say they plan to stay put until the city finds them accommodation nearby.

On Friday, the City of Ottawa issued a verbal "trespass" notice to the 10 or so residents of the tent community behind Bayview station, situated on land belonging to both the city and the National Capital Commission (NCC). Residents say they were told they had 72 hours to leave, with a deadline of 10 a.m. Monday. The NCC told CBC it would not take enforcement action on their lands but would ask residents to leave "once they have been provided housing."

But residents like Justin Bolger say just any housing offer isn't good enough. "[The city] offered to take us to Vanier and give us hotel rooms, which is taking us out of where we

want to be, so that's ... why we're not obviously not going to accept that," said Bolger.

The community sprung up after a pair of rooming houses burned down in separate fires in the spring, leaving residents without anywhere to go. One was on Lebreton Street, not far from the current site.

Relocating to the east-of-downtown Vanier neighbourhood will take residents away from where they work, volunteer and receive help, Bolger said — and will be especially difficult for those at various stages of addiction recovery.

"It's setting us up for failure," he said. "This is where everybody calls home."

Fire at encampment

The camp's residents had planned to live there throughout the winter until a fire broke out Nov. 22, destroying one of the tents.

This is all that remains of Bolger's tent. (Kimberley Molina/CBC)

That tent was Bolger's, making it the second fire in less than eight months that's destroyed his home.

Bolger said he believes it was deliberately set by someone who didn't live in the encampment. He's currently sleeping in another resident's tent.

It was that fire that prompted the city and NCC to declare the area unsafe.

"With the presence of propane on site, the safety risks to both the individuals at the tent encampment and the first responders attending the scene are increasing. The decision was made with everyone's safety and security in mind," said Shelley VanBuskirk, Ottawa's director of housing services, in a statement to CBC Ottawa.

Since then, police have been visiting the encampment every day, Bolger said, putting residents further at unease. CBC witnessed four peace officers walking around the site early Sunday afternoon.

The NCC also said its conservation officers were on site Sunday "to provide support and offer assistance to the City of Ottawa and community partners."

"Not a dignified place to live"

"The issuing of a trespass notice, and then the threat of eviction, is absolutely contrary to international human rights law and the obligations of the NCC as a state authority and against the obligations of the city," said Leilani Farha, the United Nations Special Rapporteur on the Right to Housing.

Leilani Farha, the UN Special Rapporteur on the Right to Housing, visited the tent community Sunday and spoke to some of its residents. (Kimberley Molina/CBC)

Farha, who visited the encampment Sunday, said she was alarmed to hear residents hadn't been given housing after the rooming house fires.

"People who are so vulnerable should have been treated in a way to get them into long-term and secure housing immediately after the fire," she said. "It's really very cold and obviously, a tent encampment is not a dignified place to live or a secure place to live."

Farha said she's seen many tent cities around the world, and it's particularly horrible to have them in Canada — especially in the nation's capital.

"We're the 10th largest economy in the world and that means we have resources and wealth," Farha said. "There's no reason for people to be living in these conditions."

Two city counsellors, Catherine McKenney and Jeff Leiper, were interviewed on CBC's Ottawa morning about this story. The 9-minute audio recording of their interview with the CBC's Robyn Bresnahan can be heard by visiting this link: http://www.cbc.ca/player/play/1651696707959/.

Our firm has been retained as external counsel to the City of Ottawa and the National Capital Commission. City and NCC officials are scrambling to prepare their legal position and public relations strategy in response to news reports. Prepare a **1000-word legal memo** to support our firm's work for the City and NCC. The memorandum should **address two major issues**:

a. Would enforcement of a trespass order be constitutionally valid in these circumstances? Be sure to highlight relevant statutory and constitutional provisions and apply or distinguish relevant case law.
b. What should the City and NCC's key talking points be to sensitively communicate but defend their legal position to the people of Ottawa? Prepare for City/NCC officials two or three public talking points along with short explanatory notes for each.

Most of your memo (approximately ¾) should address the first issue; less (approximately ¼) should address the second.

The timing could not have been better with this story in the news and our property exam the same week. Most students did well. As with question 5, the real difference in students' answers

was depth of analysis. An excellent answer explored the subtle nuances and differences between this case and others we studied. One distinction here is that this is not a bylaw issue, but rather a trespass notice (more like *Batty* than *Adams*). Strong students knew and cited the legislation under which that would've been issued (section 2 of the *TPA*). And wasn't just a prohibition on erecting structures, but an order to leave the land. And the land here wasn't a frequently used, central park like St. James Park in Toronto or Cridge Park in Victoria. The crux of the issue (and the most obvious point for many students) is whether the alternatives Ottawa and the NCC offered being far are analogous the shelters in *Adams* being full. That seems to me to be a socially sympathetic case, but a legally hard one to make. It seems most, or at least many, students disagree with me, however! More students suggested the order would be invalid. Of course, students were not marked their argument, not their agreement with me. Legally, students were required to distinguish between section 7 cases (*Adams*) and section 2 cases (*Banks*, *Batty*, and numerous others) and section 1 cases (*Batty* especially). The strongest answers noticed a parallel but distinction between this case and *Batty*; they argued that even if the trespass order were *prima facie* a violation of section 7, it could be justified under section 1 as necessary for safety. *Batty* was similarly a justification case (i.e. a section 2 violation but justified under section 1), although not on grounds of safety but on grounds of the public's countervailing right to use the land. That countervailing public right to use this land isn't the same here as it was in St. James Park in Toronto. Those kinds of nuances distinguished good from great answers. As for the talking points, most students did these very well. I was especially impressed with references (in students' explanatory notes to the talking points) to Elickson's ideas about red/yellow/green zones, and Waldron's ideas about homelessness and freedom.

AND/OR

7. On November 29, 2019 Kenya's *Standard Digital* reported the following:

MP proposes law to lock out "partners", ex-wives' from inheritance

By Kamau Muthoni
29 November 2019

A proposal to amend a section of the succession law will see partners, former wives and children born out of wedlock locked out of inheritance.

If the Bill to amend the *Law of Succession Act* as proposed by Homa Bay Township MP Peter Kaluma passes in the House, inheritance will be limited to only men and women who are legally married, their legal children and extended family.

Homa Bay Township MP Peter Kaluma. [Beverlyne Musili/Standard]

"The principal object of this Bill is to amend the *Law of Succession Act* to give legitimate dependants of a deceased person a claim and a right in the deceased's intestate estate. The main aim of the Bill is to avoid situations where opportunistic schemers successfully claim a stake in a deceased person's estate hence disenfranchising the legitimate heirs of the deceased," Mr Kaluma says.

The MP, who is also a lawyer, wants section three of the Act be amended to read that a spouse means a husband or wife or wives recognised under the *Marriage Act*.

The current section three defines a wife; and this includes a woman who has separated from her husband, a spouse, a widow and also caters for men who are widowers.

It does not limit inheritance to only those who have tied the knot under civil, traditional or religious marriages.

On children, the current law specifies that a child includes one who is conceived but not yet born, any child born out of wedlock and any child whom a man or woman has expressly recognised or accepted as a child of his own or one whom he or she has voluntarily assumed permanent responsibility.

The MP also wants to amend section 29 of the Act. This section defines who a dependant is. According to Kaluma, the section should read that a dependent is a spouse and the children of a deceased.

The section Kaluma wants to be repealed defines dependants as the wife or wives, former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to a man's death.

He, however, wants parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers, half-sisters to claim the earthly wealth left by a man upon death as dependants.

Locked out

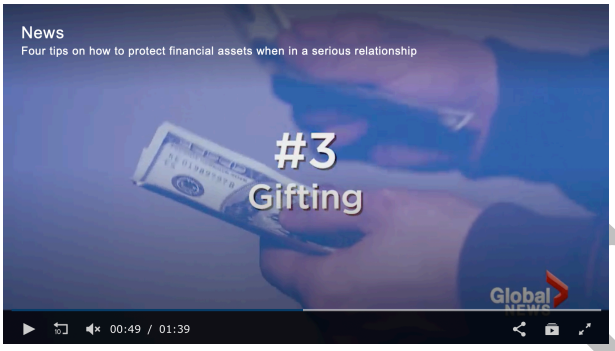
"A person not named in this section shall not be a dependant for the purposes of this Act unless the person proves was maintained by the deceased for a period of two years prior to the deceased's death," Kaluma proposes.

He continues: "The Bill seeks to provide clarity on who a dependant of a deceased person is. It gives stronger protection to the spouse, children and extended family of a deceased person in succession matters. In that regard, clause 2 of the Bill introduces the definition of the term 'spouse' as contained in the Marriage Act."

Our firm has been contacted by a Kenyan NGO advocating in support of United Nations Sustainable Development Goal #5: "Achieve gender equality and empower women and girls." The NGO's Managing Director sees MP Kaluma's proposed Bill as a threat to gender equality. As a result of research partnerships with Canada, the Director is somewhat but not very familiar with Canadian estate planning and family law. She found and emailed us this news article:

Own a house with your partner? Here's what happens if you break up

By Laura Hensley
Global News
November 3, 2019



WATCH: Here are four tips on how to protect your assets when entering a serious relationship [https://globalnews.ca/news/6107240/common-law-buying-property-unmarried/]

The last thing you expect when you buy a home with your long-term partner is to break-up shortly after.

But that's exactly what happened to Nora, who asked Global News to change her name for privacy reasons.

Nora and her boyfriend dated for about three years before they decided to buy a house together in an Ontario suburb.

At the time, she was given financial advice to put the home in her name because she was earning more money while her partner was finishing school. Nora also took advantage of the government's first-time homebuyers tax credit.

Only a year after living in the home together, Nora and her boyfriend split. They didn't have any formal agreement about their property and who would be responsible for paying what.

Their mortgage was in Nora's name, and the couple had another personal loan, too.

"I ended up getting a lawyer because I was very unsure [of my rights] and it was a ton of money we were talking about," Nora said. "She unfortunately advised me that he could get up and walk away if he really wanted to, and I would have to take him to court to try and get the money that he owed," she said.

Thankfully, Nora and her ex-boyfriend came to an agreement through her lawyer. The pair decided they would sell the house, and he would be responsible for his half of their outstanding debt.

> **"I had no idea the sort of risk I took."**
>
> TWEET THIS

"I was, in all honesty, very lucky, but it was incredibly stressful," said Nora.

Nora's experience is not that uncommon. More Canadians are in common-law relationships today than in the past, data shows, and many are buying homes together. More than one-fifth of all couples — 21 per cent — were living common law in 2016, according to Statistics Canada. This is a big jump from about 6 per cent in 1981.

What's more, the government agency says many adults now choose to live common law before marriage. The latest available data found that 39 per cent of married 25- to 64-year-olds lived common law with their current spouse before getting married.

But common-law partners don't have the same rights married couples do, and many don't understand the risks of buying a home together, says Diana Isaac, a family lawyer at Toronto's Shulman Law Firm.

In Ontario where Isaac practices, common-law couples do not have any automatic rights to property like married couples do. This means if a couple lives together but their home is only in one person's name, as in Nora's case, a cohabitation agreement is important.

These agreements are especially vital if property is only in one person's name (i.e. "on title") but both parties put money into it. Cohabitation agreements are also valuable when one partner moves into another person's house, and begins contributing to the household.

This is because if a couple splits, each person keeps whatever they technically own — including property.

"If the person is not on title and they have contributed to the home, the title would take precedence," explained Isaac.

"The individual that is not on title would have to prove their contributions by way of a trust claim in order to have an equitable interest, which becomes very complicated and very costly."

In cases like Nora's, if she and her boyfriend didn't come to a post-split agreement, she would have been on the hook for the house, Isaac said.

Laws vary across Canada

Common law legislation varies from province to province. In Ontario, couples are considered common law if they've lived together for three years or more. If they have a child together, a couple becomes common law sooner. …

Nora wishes she knew about Ontario's laws earlier. She wants unmarried partners to know it's important both parties protect themselves if they're going to put money into property together.

If her ex didn't agree to cover his half of their home, it would have been up to her to figure it out.

"When it was deemed that there was no way this relationship was going to be salvageable … I had no interest staying in [the house]," she said.

"It just had too many bad memories."

We have agreed to provide the Director and her NGO *pro bono* legal services, starting with a **1000-word report explaining the nuances of the Canadian estate planning and family law matters** covered only generally in the above story**.** Our report must:

a. explain what happens under Canadian law when one person purchases or contributes to property in another person's name, and how that law would apply to the various situations involving married partners, unmarried partners, parents/children, and extended family relationships, as mentioned in the above news reports.
b. elaborate on Canadian law governing the distribution of property after the breakdown of a relationship between married versus unmarried partners, including specifically how the law would have applied to the facts of Nora's case.
c. contextualize the proposed Kenyan Bill in light of the experiences of women and gender-based critiques of Canadian property law.

The more specific, relevant references you can provide to statutes, case law, commentary, and real or hypothetical examples, the more helpful the report will be to the client.

Many students wrote very good answers to this question. The best answers did not merely describe the law in neutral or abstract terms, but explained the law using specific examples linking the course materials and the questions posed. It was most effective to weave the gender-based critique of Canadian law and the Kenyan proposal throughout the response, rather than as an afterthought only at the end of the question. There was an opportunity, for example, to reference the evolution of the law of resulting trusts away from gender-based stereotypes, as discussed by Justice Rothstein in *Pecore*. While point (a) did ask specifically about resulting trusts, the strongest answers recognized that the Kenyan bill is actually about succession law, i.e. estates. So linkages could be drawn to some of the historical discrimination women faced in the law of property, as described by Maggie Conway, and seen in cases such as *Re Millar*. On the distribution of property following a relationship breakdown, some students noticed in the Nora's case the reversal of gender stereotypes, i.e. the facts of this case are the inverse of every other case we studied. Good answers described the test for unjust enrichment and a proprietary remedy; great answers applied to the facts of Nora's situation with assumptions and hypothetical examples to address factual unknowns. Accurate reference to the *Family Law Act* was necessary, as was discussion of the historical evolution of Canadian case law on constructive trusts discussed during our class and the all-group "Not Just a Nanny" guest lecture.

AND/OR

8. In November 2019 the opinion of a legal advisory panel in the UK made headlines such as this one in *Ledger Insights*, a publication about enterprise blockchain news:

Major UK legal panel considers digital assets are property

Today, a legal panel headed by the Chancellor of the High Court, Sir Geoffrey Vos, issued a statement classifying crypto-assets as property in the U.K., clearing the path for businesses to use digital assets on a blockchain, reported *The Times*.

That clarity was the purpose behind a public consultation announced back in May when Vos stated: "The answers to those legal questions will provide a dependable foundation for the mainstream utilisation of cryptoassets and smart legal contracts."

The 'legal statement' said crypto-assets "have all of the indicia of property", giving cryptocurrencies and blockchain a legal standing similar to physical assets.

The panel also explained that "novel or distinctive features possessed by some crypto-assets — intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, rule by consensus — do not disqualify them from being property".

Why does the property classification matter? Because property can be owned. And it's usually necessary to determine the location of property in order to determine the relevant jurisdiction.

In the U.S. there has been case law in Ohio where stolen Bitcoin was classified as property as opposed to currency under an insurance contract, and the insurer was ordered to pay out.

The statement was issued by the UK Jurisdiction Task Force, part of Lawtech, an industry initiative that has U.K. government backing. It aims to cement the U.K.'s role as the second biggest legal jurisdiction in terms of revenues that amounted to £26 billion ($34 billion) in 2017.

The goal is already showing some dividends in the blockchain sector. A few months back Santander issued a bond on the Ethereum blockchain. Legally the bond documentation was all UK-based, in part because the U.K. was seen as a favourable jurisdiction with greater certainty.

Last week Sir Geoffrey gave a speech referring to the statement. He said: "questions were put to a team of experts asking them to deliver a definitive statement of what English law now provides in this area. The outcome is not about what they would like English law to be; it is about what they believe English law actually to be." Hence the distinction between current law versus enacting legislation.

In a lecture at the University of Liverpool back in May, Sir Geoffrey advocated his stand for

crypto-assets as property. “It is a matter of how they are regulated. As I have already said, a clear distinction needs to be drawn between the concept of crypto assets as property, on the one hand, and how they are to be regulated, on the other hand,” said Sir Geoffrey.

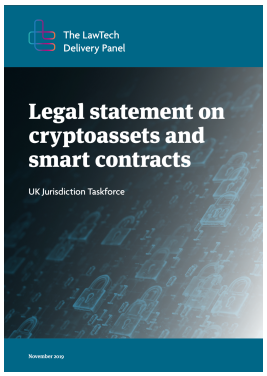
The statement by the panel also talks about blockchain smart contracts to “create more secure and more efficient ways of implementing — and automating the performance of — contracts between parties”. The panel said it sees a lot of potential in crypto-asset systems to revolutionise agreements such as mortgages, medical research and property ownership, with smart contacts in the background.

Law firm Eversheds Sutherland also added its perspective. “Perhaps the most welcome aspect of the report is as regards the recognition that a private key can be a signature,” said James Burnie, Head of Blockchain and Cryptoassets.

“This reflects the reality of modern-day interactions, where it is not practical to, for example, suggest that documents need a wet ink signature to be validly signed. Indeed, given the weaknesses of the traditional signature in terms of fraudulent copying, a private key that is only under one individual’s control could be better in terms of providing evidence of an actual agreement.”

Coming back to Sir Geoffrey, he refers to cryptocurrencies and blockchain tokens as crypto-assets, instead of terming them ‘digital assets’. The reason, he explains, is because crypto-assets ”directs attention to assets that are recorded on a distributed ledger, and stops short of electronic data and intellectual property.”

The Summary of the Legal statement on Property reads as follows:



Property
15. Whether English law would treat a particular cryptoasset as property ultimately depends on the nature of the asset, the rules of the system in which it exists, and the purpose for which the question is asked. In general, however:

(a) cryptoassets have all of the indicia of property;
(b) the novel or distinctive features possessed by some cryptoassets—intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, rule by consensus—do not disqualify them from being property;
(c) nor are cryptoassets disqualified from being property as pure information, or because they might not be classifiable either as things in possession or as things in action;
(d) cryptoassets are therefore to be treated in principle as property.

16. This is likely to have important consequences for the application of a number of legal rules, including those relating to succession on death, the vesting of property in personal bankruptcy, and the rights of liquidators in corporate insolvency, as well as in cases of fraud, theft or breach of trust.

17. Cryptoassets cannot be physically possessed: they are purely "virtual". Accordingly, as a matter of law they cannot be the object of a bailment, and only some types of security can be granted over them, though we see no obstacle to the granting of other types of security. They are not documents of title, documentary intangibles or negotiable instruments (though some form of negotiability may arise in future as a result of market custom), nor are they instruments under the Bills of Exchange Act.

Prepare **1000-word essay on whether or not you agree** with Sir Geoffrey's position and the Panel's Legal Statement, **and why**. Specific reference to an appropriate range of relevant course materials is crucial.

Answers to this question were also very good. Almost everyone cited *Tucows* and *Intel* as the go-to cases, which was appropriate. There was a lot of discussion of the tragedy of the anticommons, which was somewhat less relevant to this particular issue. In my opinion, the best way to organize this question was in two parts: Are cryptoassets property? Should cryptoassets be property? Those are subtly different questions. On the "are" question, it really depends on what one means by "property". That's where reference to *Tucows* was appropriate, and even cases like *Yanner v Eaton*. The strongest answers took a position on what property is, and then applied that standard. I saw some confusion amongst students referencing "nominalism". If one believes property can mean anything, well then of course cryptoassets are property. But the question then becomes, so what? Better answers looked at the Ontario Court of Appeal's judgment in *Tucows*, or the conceptual materials on multi-variable essentialism, and argued that cryptoassets have many of those features, so they are "property". Some students also made a good argument that cryto is at least "quasi-property" like in *INS*. A few students got sidetracked citing cases on gifts like *Nolan* and *Bayoff*, which were not really relevant (although transferability/alienability is indeed an indicia of property under multiple-variable essentialism theory). The next question—really a separate issue—is should crypto be property. This is where economic arguments ought to feature most strongly. Students who cited Judge Posner were on the right track; that was more relevant than citing De Soto, or Ostrom, or Hardin, or Heller. Because of the format of this question, *i.e.* an essay, clarity and organization were especially important. (In comparison, the other questions provided more specific direction about content and structure, so ought to have been – and seemed to be – a bit easier for students to organize.)

THE END.