

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2021

LAW 231.004
Property Law

Professor Graham J. Reynolds

EXAM PASSWORD: pFzAg7
RESUME CODE: B10FC3

TOTAL MARKS: 100

(8:50 AM PDT) **PREPARATION TIME ALLOWED: 10 MINUTES**

(9:00 AM PDT) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 3 HOURS 15 MINUTES (195 minutes)**

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I hope you have a safe and enjoyable summer!

This examination has FOUR questions. Please answer ALL questions and sub-questions. In responding to the questions in this exam, please limit yourself to materials studied or discussed this term in the context of our Property Law class

Question 1 of 4 [30 marks, 58 minutes]

The official mascot of Sally's All-Day Breakfast (Sally's), a well-known Vancouver restaurant chain, is a cartoon bear named Barry. Barry walks on two legs and wears orange shorts, suspenders, and a small orange baseball cap. Barry is used in all of Sally's marketing materials. One poster of Barry – created in 2015 – is particularly iconic. On this poster, Barry is pictured standing up, with a big smile, waving with one hand and holding a pancake flipper (a spatula) in the other. Below the picture of Barry is the slogan "Sally's All-Day Breakfast: Tastes Like Home" (in this question, this poster will be referred to as the 2015 Poster). Sally's has distributed the 2015 Poster widely on billboards around Vancouver and as advertising in magazines, newspapers, and on social media. The artist who created both Barry and the 2015 Poster is named Kelly. She created these works in the course of her job as a graphic designer with Two Peaks Design, a Vancouver-based company. Kelly is a full-time employee of Two Peaks Design. Both Kelly's name and the name of Two Peaks Design are visible on the 2015 Poster.

Employees at Sally's have long complained about Sally's practice of sending employees home before the end of their shift (and not paying them for their full shift); the frequency of health and safety violations that occur at Sally's branches; and the low pay given to employees. One employee, Mae, wanting to see some positive change in terms of the treatment of employees at Sally's, decided to take matters into her own hands. She found an online version of the 2015 Poster on a website with the domain name www.marketingmuseum.com. This website collects fun and interesting advertisements and other marketing materials. A disclaimer on this site states that all materials have been reproduced and are being made available without the authorization of the original copyright owner. Mae made a copy of the 2015 Poster from the site and saved it to her laptop. Then, using a digital drawing and painting program that she had downloaded from the internet, she modified the 2015 Poster in certain key ways. In Mae's version of the poster, rather than smiling, Barry is growling. Instead of holding a spatula, Barry is holding a bag of money. And instead of waving, Barry is shaking a fist. Mae also deleted the slogan from the 2015 Poster and replaced it with the words "Sally's All Day Breakfast: The Sick Taste of Labour Exploitation". She did not delete Kelly's name, or the name of Two Peaks Design, from her modified version of the 2015 Poster. However, she did add a link to a website where people can donate money to a fund for workers who have been negatively impacted by Sally's labour practices. It didn't take Mae long to make these changes. Mae had spent the previous summer as an intern with a local design company. She had also recently started a part-time course in graphic design at Arbutus College in Vancouver. As well, the drawing and painting program that Mae used to modify the 2015 Poster made it very easy to make these types of changes. Mae remarked to herself that making these changes was almost as easy as correcting grammatical errors and spelling mistakes (something that she had experience doing in another previous job as a copy-editor)!

Mae printed copies of her modified poster and taped them to the sides of buildings near the Sally's where she worked. She also distributed the modified poster through various social media platforms. It was shared widely, and quickly accumulated hundreds of views by individuals with Vancouver-based IP addresses, along with significant media coverage from media outlets across British Columbia.

Almost immediately, Kelly started to receive a significant amount of criticism on social media for her association with Sally's. Two Peaks Design was also subject to similar criticism. Kelly feels like the wide circulation of the modified version of her work has negatively impacted her standing within both her firm and the larger graphic design community. As evidence of this, Kelly points to a recent decision made by her firm not to include her on the team assigned to design a new mascot for Sally's. This decision was made after the modified version of the 2015 Poster was distributed widely. Kelly also notes that a panel on which she was scheduled to speak – titled “Mascots and Muffins: The Use of Cartoon Animals in Marketing Breakfast Restaurants” – was recently cancelled (again after the modified version of the 2015 Poster was distributed widely). She had expected to have been paid \$200 to appear on this panel. These speaking opportunities also often lead to additional business contracts. Kelly also heard colleagues on a company Zoom call repeating some of the online criticism Kelly had received regarding her work on the original Barry design (the colleagues thought they were muted).

You are an Associate Lawyer at a Vancouver-based law firm. Your firm is approached to provide legal assistance with respect to the matter described above. You are asked to answer the following questions:

1. Who is the owner of copyright in the 2015 Poster? Discuss.
2. In creating her modified version of the 2015 Poster, did Mae prima facie infringe the copyright that subsists in the 2015 Poster? Discuss. In answering this question, assume that copyright subsists in the 2015 Poster. Do not address any defences to infringement in your response to this question.
3. Does Mae's modified poster constitute an “original” work under s. 5 of the *Copyright Act*? Discuss.
4. Will Mae be able to rely on s. 29.21 of the *Copyright Act* (the non-commercial user-generated content exception) as a defence to copyright infringement? Discuss. In answering this question, assume that copyright subsists in the 2015 Poster, and that Mae's actions constitute prima facie copyright infringement.
5. In creating and distributing her modified version of the 2015 Poster, did Mae infringe Kelly's moral rights? Discuss.

Question 2 of 4 [20 marks, 39 minutes]

In late 2016, Andy and Bai met on a water taxi in False Creek. They are both in their 40s. Andy had been previously married to Chandra (they divorced in 2012) and does not have any children. Bai has a child from a previous relationship. This child's name is Dan. He was 7 years old in 2016. At the time when Bai met Andy, neither Bai nor Andy were in a relationship.

On the water taxi, Andy and Bai struck up a conversation. Rather than get off the taxi when their respective stops were called, they decided to stay and chat with each other. They ended up riding around False Creek all afternoon, engaged in conversation and periodically buying tickets when requested by the driver in order to stay on the boat. Bai had to leave at around 4pm to pick up Dan at school, but she exchanged numbers with Andy. Over the next few months, Andy and Bai spent increasing time together.

In the summer of 2017, when Andy was unexpectedly evicted from his apartment due to a renovation initiated by the landlord, Bai invited Andy to live with her and Dan. He accepted this invitation and they have lived together ever since. Shortly after Andy moved in (in September 2017), Andy and Bai started to refer to themselves both publicly and privately as a couple. While they were quite affectionate with each other, for reasons relating to Andy's health they were not able to engage in sexual relations for much of 2018, 2019, or 2020. They had a number of shared interests, one of which is soccer (they were the co-coaches of Dan's soccer team in 2019-2020). Bai loved to travel both for work and pleasure, and Andy did not. When Bai traveled during the school year, Andy stayed in Vancouver and was the primary caregiver for Dan. Bai and Andy took great pains to keep their finances separate, including through an elaborate spreadsheet. Neither is financially dependent on the other. For various reasons unconnected to their feelings for each other, neither wished to get married.

In December 2020, Andy and Bai went to see a lawyer to find out more about the process through which Andy could formally adopt Dan. They started to move forward with this process. However, in February 2021, before an adoption order was made, Andy died unexpectedly as a result of a zombie attack. When going through his things, Bai discovered a will that Andy had prepared by himself and without the assistance of legal counsel in January 2021. This valid will has only one clause. This clause deals with a piece of property that Andy owned in fee simple in the Okanagan (a cabin near Penticton), and that had been passed on to him by his parents. This clause states:

I want my cabin near Penticton to go to Bai for her use, and when she is no longer able to take care of it the cabin shall go to Dan.

Andy had also written a note as part of the will where he stated how much he had enjoyed this cabin as a child, and how happy it made him to think about the possibility first of Bai and Dan being able to enjoy it together, and second of Dan being able to spend time there as an adult with any children that he might have, after Bai's passing.

The remainder of Andy's estate – in the amount of \$500,000 held in various investments and cash accounts – was undisposed of by his will. Most of Andy's relatives have passed away. His closest living relatives are a niece named Nellie (his sister's daughter) and his Uncle Louis (his mother's brother).

You are an Associate Lawyer. Your firm has been retained by Bai to provide legal assistance with respect to the above matter. Please answer the following questions:

1. Identify the property interest(s) created by Andy's will in the cabin near Penticton.
2. Based on the facts as set out above, to whom will the remainder of Andy's estate be distributed, and on what basis? Discuss. In your response, please discuss and rank the relative strengths of the claims of Bai, Dan, Nellie, and Uncle Louis.

Question 3 of 4 [25 marks, 49 minutes]

Roger is a successful architect who had always wanted to become a property developer. In 2015, he purchased a large vacant property in Delta, British Columbia. He subdivided this property as follows. One half became a lot zoned for residential use that he used as a private green space (PG). The second half of the original property was further subdivided into four residential lots (R1, R2, R3, and R4). Roger built a single-family home on each of these residential lots. Roger planned to keep one of the lots for himself (R1) and sell the other lots. Roger wanted the four lots to have a common look and feel. In his view, this would make them more attractive and perhaps more valuable. After consulting with his lawyer, Roger decided that the best way through which to preserve the common look and feel of the lots would be to create a number of covenants that would apply to each of the lots.

Roger created three covenants. The first covenant deals with the permitted colour of paint on the exterior of the homes. It indicates that "should the owner decide to re-paint the house, they must use one of three shades of yellow: honey yellow, lemon yellow, or dandelion yellow." The second covenant requires owners to power wash the exterior of their homes at least once every two years. The third covenant permits owners to host one large party per year that would otherwise constitute a nuisance, on the condition that all of the other owners of properties R1, R2, R3, and R4, and their households, are invited to the party. The background to this third covenant is that for a few years now, Roger had hosted a big annual party in his home in Vancouver that had on each occasion resulted in his neighbours calling the police to complain of bylaw violations relating to noise. He wanted to ensure that this didn't occur in his new home in Delta.

Each of the properties benefited from the covenants granted by the other three properties. For instance, R1 was the benefited property with respect to the covenants granted by R2, R3, and R4; R2 was the benefited property with respect to the covenants granted by R1, R3, and R4; etc. Each covenant agreement stated that the grantor (the owner of the burdened property), for itself and its successors and assigns, hereby covenants with each of the three grantees (the owners of the three benefited properties), that the burden of the covenants shall run with and bind the burdened lands, and with the intent that the benefit of these covenants shall run with each of the three benefited lands. In the agreement, the properties were referred to by their proper legal description.

Roger also created a separate easement agreement which granted the owners of R1, R2, R3, and R4 the right to "the full enjoyment in common with the other owners [of R1, R2, R3, and R4] of the lot designated as PG, including the ability to set up one or more tents on this lot for

up to 120 days in a calendar year.” Each of these covenants and easements were registered in the Land Title Office while Roger was the owner of R1, R2, R3, R4, and PG.

In 2017, Roger started marketing the lots for sale. He kept one lot (R1) for himself. He sold the second to Cherry (R2), the third to Lucas (R3), and the fourth to Rahim (R4). Roger also retained ownership of the lot designated as PG.

In 2021, Roger decided to leave British Columbia in order to join an architecture firm in Winnipeg, Manitoba. He sold R1 to Dianne. He also sold the lot designated as PG to a developer (Luxlife) who wants to build a mixed-use development (commercial & residential units) on the site. Luxlife ultimately wants to replace all of the green space on PG with either buildings or a surface-level parking lot.

A few days after taking possession of R1, Dianne decided that she did not like the way in which her house looked painted yellow, and would prefer for the exterior of her home to be painted eggshell blue. After a short trip to the paint store, Dianne started to paint the outside of her home eggshell blue. Cherry has never liked the colour eggshell blue, and was horrified to see Dianne painting her home this colour. Cherry tried speaking with Dianne, but Dianne responded by saying that “it’s my home, and I can do whatever I want with it.” Dianne then pointed out that it looked like Cherry hadn’t power-washed her home in years (which was accurate – she had actually never done this), and that she was going to go to court to require Cherry to take this step. While this was going on, Lucas was in the process of planning a big party at R3 for the Victoria Day long weekend in May. He had hired a live band to play cover songs and didn’t want the evening ruined by fighting between neighbours. In light of their recent dispute, Lucas decided not to invite Cherry or Dianne to his party. He has already invited Rahim.

Almost immediately after taking possession of PG, Luxlife brought in a construction team that tore up all of the grass and other landscaping. The entirety of PG became a dirt patch. Periodic rains over the subsequent few days turned the dirt to mud and left a number of large pools of water on PG. Luxlife stopped work at this point. They need to get re-zoning permission to build their desired development, and the City of Delta has told them that in order to get re-zoning permission they will need to have the easement discharged. The owners of R1, R2, R3, and R4 have refused to give up their easement rights and are staging regular “walk-throughs” over the muddy land to assert their rights. They have also set up a number of tents on PG (approximately 3-4 per residential lot, or 11 in total), which is causing issues for Luxlife’s development team as they try to survey the site.

You are an Associate Lawyer at a Vancouver-based property law firm. You have been hired by Cherry to answer the following questions:

1. Can Cherry get a court order preventing Dianne from painting her house blue? Discuss.
2. Can Dianne get a court order compelling Cherry to power-wash her house? Discuss.
3. Does Lucas have to invite Cherry and Dianne to his party? Discuss.

4. Is there any legal mechanism that Luxlife can use to modify or cancel the easement? If so, is their attempt to use this mechanism to modify or cancel the easement likely to succeed? Discuss.

Question 4 of 4 [25 marks, 49 minutes]

Describe the ownership rights (including any limitations on these rights) associated with fee simple interests in Nisga'a Lands, as provided for under the Nisga'a Final Agreement (Nisga'a fee simple). Explain how the Nisga'a fee simple is similar to and different from (A) fee simple interests that are held from the Crown, (B) land rights on reserves, and (C) Aboriginal title.

END OF EXAMINATION