Special instructions:

1. This examination paper contains one (1) question on 4 pages (not including this page). Please check now to ensure that you have received a complete examination. Raise your hand immediately if you do not have a complete examination.

2. This examination is a **RESTRICTED OPEN BOOK** examination. You may have with you and refer to the Ziff textbook (*Principles of Property Law*), the Casebook (*Property Law: Cases and Materials, 2004 ed.*), the Statutory Materials book, and any written annotations you have made directly into these enumerated books. You may not have with you or otherwise consult any other notes, summaries, texts or additional materials of any kind.

3. **THINK CAREFULLY ABOUT YOUR WORK, ORGANIZING YOUR ANSWER BEFORE YOU START WRITING.** Credit will be given for quality, not quantity. You must offer **concise, clear and well-organized answers** that are directed to the question asked, and, where appropriate, supported by reference to and argument derived from the relevant cases and statutes.

4. **WRITE IN COMPLETE SENTENCES.** Credit will not be awarded for point-form answers.

5. **WRITE LEGIBLY.** If this means you must write on every other line, then please do so.

6. Cell phones, pagers, beepers and related devices are strictly forbidden. Please turn off and stow away such devices immediately. Computers are also not permitted in this examination.

7. Adhere strictly to the time limitation imposed on this examination. Failure to stop writing at the end of the examination may lead to a deduction of grades or failure to accept the examination paper.

8. As a courtesy to your classmates, if you finish your examination during the last 15 minutes of the examination period, please refrain from leaving the room.

**PLEASE DO NOT TURN THE PAGE TO BEGIN READING THE EXAMINATION UNTIL YOU ARE DIRECTED TO DO SO.**
Question 1

Herbert (‘Herbie’) Duncan is a retired professional wrestler, author, and auto restorer. He was born in 1937, and is 67 years old. He was the only child of parents who emigrated together from Scotland in 1936. His mother Vivian died when Herbie was sixteen years – a loss he still grieves over 50 years later. His father Donald died of old age in the 1980’s. Herbie lives alone, having never been married, and he has no children.

Although Herbie never made very much money at any of his careers, he invested carefully and has accumulated some substantial assets. For example, since 1980 he has owned a lovely home, *The Vivian* (named after Herbie’s mother), near Medicine Hat, Alberta. It is an impressive looking neo-Georgian structure, built on the banks of the South Saskatchewan River. Herbie also acquired a large stamp collection worth about $20,000, and has accumulated a substantial collection of 19th century farm implements. The stamp collection was a gift from his late mother, and Herbie has spent many happy evenings admiring it. It is the only momento he has of her. He has been thinking of selling the farm implements to his next-door neighbour, Rhoda Rhodes, who has expressed interest in them. He has never had a will, believing that it really wasn’t necessary since everything would automatically ‘just go to a worthwhile charity.’ He has been thinking, however, that he would like to see his property go to the Alberta Ballet.

Herbie has decided that, after a long career, he will rent out *The Vivian* and retire to Edmonton. He has entered into a lease agreement with his best friend from childhood, Patrick (‘Paddy’) Leon. Their agreement takes effect June 1, 2005 and gives Paddy possession of *The Vivian* for the ensuing 15 years, although Herbie plans to sell *The Vivian* in 2007. Herbie is very fond of Paddy, and is concerned to ensure that when *The Vivian* is eventually sold, the new owner will honour the lease and let Paddy stay in the basement suite. He is quite certain that any purchaser would be local and would likely know that Paddy lives in the house.
Last week, Herbie came home from shopping to discover that The Vivian had been broken into. Both the stamp collection and the farm implements were gone. Police have since determined that the culprit was a traveling confidence trickster, who then sold the stamp collection and the farm implements for $200 to Herbie’s neighbour, Rhoda Rhodes. Herbie has asked Rhoda nicely to return the stamp collection and the implements, but she refuses. She states that she didn’t know the collection had been stolen, and Herbie believes she is telling the truth. She even tried to stop payment on her cheque when she was told by the police that the stamp collection had been stolen from Herbie, but it was too late – the confidence trickster had cashed the cheque and left Medicine Hat. Herbie always knew Rhoda liked the farm implements, but now she says that she has also long been an avid stamp collector and that she is quite pleased with this acquisition. He has even offered to pay her $200 to return the stamp collection, so she is not out-of-pocket. She still refuses, but she has offered him a life interest in her coin collection instead, and he is seriously considering this. He wants to bide his time, and hopes that in the meantime Rhoda takes a more reasonable position. ‘Maybe after a few years have passed,’ Herbie says, ‘she’ll see that it’s not worth fighting over.’ Now, to add to his troubles, Herbie has received a letter from the Alberta Ministry of Used Farm Implements. The letter states that the Ministry has designated all 19th century farm implements as ‘provincial heritage resources’ and requires that they be deposited with the Provincial Museum in Edmonton for permanent storage and safekeeping. This has Herbie wondering if it is worth bothering to pursue Rhoda for the farm implements.

Herbie has also received a letter from a lawyer acting for Herbie’s other next-door-neighbour, Tony Madam. About two weeks before the snow in October, Herbie was out digging in the potato patch he keeps in his back yard, and decided to dig deeper than usual in order to access what he anticipated would be richer soil. Instead, four feet down, he struck a layer of peat. Herbie was born in Scotland, and so he knows good peat when he sees it. He stripped his entire backyard of the upper four feet of earth, which he then surreptitiously dumped into the South Saskatchewan River. Tony is unhappy about this. He has argued several times over the fence with Herbie about how Herbie harmed the river environment. The letter doesn’t say anything about the river, but it does complain that Herbie’s backyard is now an eyesore, and has injured Tony’s interests because the market value of his home has depreciated, and therefore his ‘rights to enjoy his property’ have been injured.

Tony’s lawyer also writes that Tony actually entered into a lease agreement with Freda Lundgren, who owned Herbie’s home prior to 1980. She adds that this lease agreement gave Tony a leasehold interest in all the minerals to Herbie’s property several years ‘sometime in the early to mid-1960’s.’ The letter concludes that the term of the lease was for 50 years, and thus the peat is still Tony’s, not Herbie’s. Herbie, however, tells you that the woman who sold him the property mumbled something about how he was getting ‘the whole kit and caboodle – if you strike oil, it’s yours!’
Tony’s lawyer’s letter also states that Tony has gotten wind of Herbie’s hopes to sell his place to Paddy. She says that, at the time Tony acquired his leasehold interest in the minerals, he also rented, for an indefinite period of time, a built-in fish-tank to Freda. Herbie knows the tank well. He has never kept fish in it, but it is still where it has been since he bought the home, held inside the living room wall with what appears to be brackets on the outside and ‘heaven knows what’ (in Herbie’s words’) inside. He says that his purchase agreement with Mrs. Lundgren did not mention the tank at all. Tony’s lawyer, however, has produced an undated written agreement between Mrs. Lundgren and him that specifies that the fishtank ‘is agreed by the parties to be a chattel, and not a fixture.’

Herbie believes, however, that things are starting to look up for him. In fact, he tells you that he’s recently had a bit of luck come his way. Herbie had recently borrowed Tony’s chainsaw and, infuriated by the letter from Tony’s lawyer, Herbie decided to toss it into the South Saskatchewan River, too. When he threw it, instead of hearing a great splash, he heard a soft thud. Casting his eyes towards the river, he noticed that it had receded by about 10 feet since he had last wandered down to that side of his property, before the snows of last month. Tony, having seen his nearly new Stihl chainsaw flying through the air, ran out to see what Herbie had done. Seeing Herbie, amazed, staring at where the river used to be, Tony snarled, ‘Why, you dumb old vandal, haven’t you heard? The river has been diverted for irrigation purposes. I’ve been having a look every week or so and it sure has been sucked dry. Now you have a place to pitch a tent when I take over your peat operation.’ Herbie is amazed. The exposed riverbed probably has peat underneath it, too, and he’s anxious to explore it. He’s all set to do so, because around 15 years ago, he built a concrete stairway down the side of his property to the river. ‘Frankly, I’m not even sure my property goes down to where the river was in the first place, but nobody’s ever made a fuss about the stairway, so I don’t anticipate any trouble.’

Herbie also has another simmering dispute with Tony. As a neighbourly gesture last year, Herbie agreed to do some restoration work on Tony’s dilapidated old 1969 John Deere tractor. Tony had tried to sell it at a flea market, but he wasn’t happy with the prices being offered which were generally around $750. He doesn’t dispute that amount as reflecting the market value, but because it was his father’s, he won’t part with it for such a small amount. He asked Herbie to restore it to a more marketable condition. So last January, Herbie washed the tractor down and installed new parts that cost approximately $200. In March, he installed a new seat and seat covers that cost approximately $150. In April, he replaced part of the exhaust system, which cost approximately $300. Then, in June, he replaced the electrical system, the battery and repainted the entire tractor at a cost of $1200.
Now, however, because of his peat farm, Tony is refusing to repay Herbie’s out-of-pocket costs and wants the tractor back. Herbie is furious, having spent $1850 of his own money. He is particularly angry about the work done in June. ‘That amount alone was more money than that cheapskate Tony could have sold the tractor for in the first place!’, he groused. But he’s not concerned about getting the money back. He wants the tractor, so that perhaps he can restart his farm implements collection if the government takes it all from him.

Please write a memorandum to Herbie addressing **ALL** property law issues that may arise in the facts that have been set out above. Please indicate in the memorandum if you need more information on any issue and, if your advice to him depends on what such additional information might reveal, please canvass the various possible outcomes.