

**Write Your Exam Code Here:** \_\_\_\_\_

Return this exam question paper to your invigilator at the end of the exam before you leave the classroom.

*Please write below the question numbers that you have answered:*

Part 1, _____, _____	Part 2, 1-6
----------------------	-------------

_____
90

*THIS EXAMINATION CONSISTS OF 9 PAGES  
Please ensure that you have a complete paper*

THE UNIVERSITY OF BRITISH COLUMBIA  
FACULTY OF LAW

*FINAL EXAMINATION TUESDAY, APRIL 16, 2019*

**LAW 469.002/590.002**

**Civil Procedure**

**Adjunct Professors Gavin Cameron and Mark Fancourt-Smith**

**TOTAL MARKS: 90**

**TIME ALLOWED: 3 HOURS**

\*\*\*\*\*

### **General Instructions**

This Final Examination consists of two parts:

- Part 1 requires you to answer **two** of three short answer questions: 20 marks (22% of the exam) each, for a total of 40 marks. Recommended time: 40 minutes each.
- Part 2 consists of a Fact Pattern: 50 marks (55% of the exam). Recommended time: 100 minutes.

*We strongly urge you to think out your answers before you begin writing. Focus on the specific issues raised in each question. In marking, we will reward reflection and economy of prose, rather than broad regurgitation. Less is usually more: excessive discussion of unimportant or irrelevant issues will lower the mark, rather than be ignored. You should make brief and specific reference to any applicable legislation, Supreme Court Civil Rules, case law, ethical obligations and rules of conduct, but should not recite them word for word.*

The examination is open-book.

Good Luck.

**THIS EXAMINATION CONSISTS OF 4 QUESTIONS IN TOTAL,  
ONLY 3 OF WHICH MUST BE ANSWERED:  
2 OF 3 SHORT ESSAYS, AND 1 FACT PATTERN**

**PART 1**

**SHORT ESSAYS (20 marks each)  
(ANSWER ONLY TWO OF THE FOLLOWING THREE QUESTIONS)**

1. *Do we need bright line rules, or are flexible standards the way to go?*

Explain and argue your position, and provide specific examples from the law and rules covered in this course that support or illustrate why your position is right.

2. *In Inspiration Management v. McDermid St. Lawrence, Chief Justice McEachern held as follows:*

*“The procedure prescribed by R. 18A may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the Rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure. Chambers judges should be careful but not timid in using R. 18A for the purpose for which it was intended.”*

*This suggests the rules underpinning our law of procedure (be it common law, or rules based) cannot achieve “perfection”, but are intended to ensure the attainment of justice.*

Identify and discuss those portions of the Rules or our law of procedure generally that you believe can be usefully revised in order to better attain justice and come closer to perfection (explaining what you see as ‘perfection’ or ‘justice’ in a system of civil litigation, why you hold that view with reference to values underpinning our system of justice, and what changes would achieve those aims).

3. *You are acting for the Plaintiff in a personal injury action. She alleges that she was injured in a car accident, when the defendant driver’s Italian made sports car (in which the Plaintiff was a passenger) dramatically accelerated, causing a loss of control. You have sued the driver, on the basis he operated the vehicle negligently, and the manufacturer, on the basis the vehicle suffered from a software defect which caused the sports car to unexpectedly accelerate and become uncontrollable.*

*The manufacturer’s lawyer serves you with an expert report on the manufacturer’s policies to protect against unexpected acceleration. The report is 3 pages long and simply describes and summarizes the manufacturer’s policies to protect against unexpected acceleration. The author of the report includes his name, address and title as an automotive engineer, but*

*nothing further. All you can gather from the report is that the author can copy and paste from the manufacturer's policies. You received a letter from the manufacturer's lawyer advising you that this expert will testify at trial.*

- (a) What step or steps must the manufacturer's lawyer take to be able to rely on the opinion of this purported expert at trial?
- (b) What objections to admissibility could you recommend be made to the form and content of the report under the Rules as well as to the substance of the report?
- (c) By when and how should you make your objections?
- (d) Assuming the report or part of it is admissible, under what circumstances can the expert testify at trial?

## **PART 2**

### **FACT PATTERN (50 marks)**

#### **(YOU MUST ANSWER THE FOLLOWING 6 QUESTIONS)**

After completing law school and articles you have now obtained a position as an associate in a litigation focused law firm.

One of the senior partners in your firm, Bob Axworthy ("Axworthy"), asks you to attend a meeting with a client named Beth House ("House"). House is a wealthy tech entrepreneur, and is the CEO of THEREISNO, a very successful tech startup and valued client of the firm, with a market valuation in the billions. House has herself become a minor celebrity, as one of the first woman CEO's in the male-dominated world of tech startups.

THEREISNO is a company incorporated in British Columbia, with a registered and records office at Suite 666, 1600 West Georgia St., Vancouver, B.C. THEREISNO is a medical testing firm, which promises to create a revolutionary miniature lab, the "Franklin", which will be able to test blood for over 100 different diseases, and will be small and affordable enough for people to have in their homes. The Franklin is not yet on the market.

Recently a journalist at the Broad Street Journal ("BSJ"), by the name of Dan Nosey, has begun writing a number of unflattering articles about THEREISNO and House. The BSJ is incorporated in Delaware, U.S.A., and has a registered and records office there. Delaware's Rules of Civil Procedure are identical to those of British Columbia when it comes to effecting originating service. The BSJ also has a local distribution office in Vancouver, B.C., staffed primarily with printers and print technicians. Nosey lives in New York City, N.Y., U.S.A., but travels frequently.

In their reporting, Nosey and the BSJ are alleging that, among other things:

- Work on the Franklin is far behind schedule;
- The Franklin does not actually work, and the technology is fatally flawed;
- THEREISNO employees are faking tests on the Franklin prototypes, by doing them on other machines instead and using those results;
- House is aware of this and is actively deceiving investors and the public as to the progress and viability of the Franklin.

House is furious. While she admits that the Franklin has been delayed, she says it is only because one of the parts suppliers, Babbage Inc., delivered faulty motherboards for the Franklin which did not work, and so THEREISNO has not been able to start actual production and start shipping units.

House instructs you that the rest of the allegations are all false, and have the potential to ruin THEREISNO. The articles that Nosey and BSJ have published are being shared and republished on social media, including Snicker, a microblogging platform. All users of Snicker are displayed by their handles, and not the names they used in order to sign up for their Snicker account. There are four main users who are republishing the articles of concern:

1. Truther911
2. OcasioCorPrez
3. SandwichFan
4. SureNotDanNosey

Snicker is incorporated in California, but has been determined to be carrying on business in B.C. Its policies state that it accepts service of legal materials via email, and will attorn to the jurisdiction of, among others, the Supreme Court of British Columbia.

The timing could not be worse. There is a new round of financing that THEREISNO needs to close to continue development of the Franklin and bring it to market. Bad publicity could sink this round of financing, crippling THEREISNO. In addition to the financial harm to THEREISNO, there is the possibility for massive damage to THEREISNO's reputation, as well as House's.

Further, the Canadian Armed Forces, which has placed an order for 1,000 of the machines, has advised THEREISNO that they are considering cancelling their order as a result of delays, and over concerns that Nosey and BSJ's reporting has raised.

At the conclusion of the meeting, House tells you that she wants you to start an action for defamation as against Nosey, BSJ, and anyone else you can think of.

Bob Axworthy is a rainmaker and has a wonderful way with clients, which often involves telling them what they want to hear, as opposed to giving them practical and ethically sound advice, which he usually outsources to young associates, such as you. This is where you come in.

**Answer ALL of the questions below.**

**1.**

**8 Marks**

Axworthy asks you to review the draft Notice of Civil Claim, and to see to having it served once it is finalized and filed.

In the draft Notice of Civil Claim, you notice that Axworthy has named the BSJ and Nosey as defendants to a claim of defamation by THEREISNO and House. Recalling that House instructed you to sue anyone and everyone, you recommend that at least the four Snicker users be named as defendants. Axworthy seems confused as you do not know their real names.

Axworthy has also found out that Nosey will be in Vancouver next week, staying at the Rosewood Hotel Georgia. He has also found out that Nosey will be attending a funeral at Greaves' Funeral Home in Mount Pleasant, next Tuesday at 11:00 a.m. precisely.

He asks you:

(a) Can you include the Snicker users in the defamation action based on the information you have? If so, how?

(b) If you do name them in the Action, what steps could you take under the Supreme Court Civil Rules, after the action has started, using the information you have, to try to find out their names?

(c) Axworthy wants to effect service on BSJ by mailing a copy of the filed Notice of Civil Claim to its Vancouver distribution centre, as he would prefer not to wait the additional length of time given to US recipients of originating documents. What advice do you give him as to how best to effect service on the BSJ?

(d) Axworthy tells you that he wants to ensure that Nosey is served while in town. He has hired a process server to effect service. What are the pros and cons of serving him at either of the locations in Vancouver, where you know Nosey will be?

2.

**6 Marks**

The BSJ and Nosey have filed their Response to Civil Claim. In your Notice of Civil Claim, you had set out a number of the specific statements in an article by Nosey, and published by the BSJ, that the plaintiffs claim are defamatory, including:

- “Franklin does not function, and its technology is a sham;”
- “House is knowingly deceiving investors and her own Board”; and
- “THEREISNO is the epitome of everything wrong with startup technology companies: fake-it-till-you-make-it optimism turning into outright fraud.”

Consistent with proper pleading of a claim in defamation (or libel/slander), you have pleaded that the plain and ordinary meaning of the words is such that they would tend to lower the reputation of THEREISNO and House among their peers. You have pleaded that the words in question were published and read in B.C., and that the BSJ and Nosey were the authors.

A party responding to a claim in defamation has a few options for defences. They can claim, among other things:

- “Justification” (the statement is true);
- “Consent” (the plaintiff agreed to the statement being made)
- “Fair Comment” (expression of an opinion that could reasonable be held)
- “Responsible Communication on Matters of Public Interest.” (primarily for protection of journalists)

In the Response to Civil Claim, the BSJ and Nosey state as their legal basis in response to all of the enumerated statements, and the whole of the Response to Civil Claim: "truth or responsible comment on public interest matter."

Axworthy asks you:

(a) Are the BSJ and Nosey's pleadings detailed enough to satisfy the requirements for particulars required by the Supreme Court Civil Rules when pleading these defences? If not, why not?

(b) Axworthy tells you to make an application right away to demand further and better particulars of the defence set out in the Response to Civil Claim. He wants to move quickly and force a response as soon as possible. What do you recommend in terms of a course of action to secure particulars of the defence?

<p><b>3.</b></p>	<p><b>6 Marks</b></p> <p>Bad news! While the Canadian Armed Forces has not cancelled its Order for the 1000 Franklins, it has sued THEREISNO for breach of contract for failing to deliver them, including a claim that THEREISNO has repudiated the contract by failing or refusing to deliver the Franklin machines.</p> <p>(a) In addition to pleading a defence to the claims of breach of contract (and including repudiation), what else would you recommend that THEREISNO plead, or file, in relation to its failure to produce the Franklins for the Canadian Armed Forces yet?</p> <p>You are successful on a summary judgment application, in having the Canadian Armed Forces claims dismissed. The next week, the Canadian Armed Forces files another claim as against THEREISNO, alleging unjust enrichment and negligent misrepresentation as a result of the failure to yet provide the Franklins that were ordered.</p> <p>(b) Axworthy tells you to file a Response to Civil Claim denying these claims as well, complaining: "Don't they get it? They lost already!" In addition to denials of the new claims, what other defences might be available to THEREISNO to plead?</p>
<p><b>4.</b></p>	<p><b>12 Marks</b></p> <p>House is convinced that Nosey and the BSJ have tapes of conversations between Nosey and THEREISNO employees, which would show that every employee has tried to tell Nosey that he is wrong in his reporting. These have not been listed or produced in the BSJ or Nosey's List of Documents, but a THEREISNO employee, A. Stooze, will provide affidavit evidence to confirm that Nosey had a recorder when interviewing him and other employees, and that he told A. Stooze "Don't worry - this tape will never see the light of day. I'll destroy it before House and THEREISNO get their hands on it." Axworthy tells you that he wants to get his hands on them.</p> <p>(a) What steps, including which application, would you bring in order to secure and preserve the recordings?</p> <p>(b) On the information you have, what would be the legal test for the Order being sought, including specific criteria that need to be shown or satisfied?</p> <p>(c) Would you bring the application on notice, or <i>ex parte</i>? Why, and what would be the advantage or disadvantage of each approach on these facts, including in terms of your obligation as counsel?</p> <p>(d) In addition to your application materials, what steps or arrangements do you need to make, or people do you need to retain, to execute this Order?</p>

<p><b>5.</b></p>	<p><b>10 Marks</b></p> <p>You are at THEREISNO, collecting electronic and physical documents for listing and production. House calls you into her office. She tells you that she has reviewed all of her emails and made the call as to what is relevant and what is not. She gives you a USB thumb drive marked "RELEVANT". You also notice a USB thumb drive on her desk, which is labeled "BAD EMAILS - DO NOT GIVE TO LAWYER" ("USB 2"). When you ask her about USB 2, she tells you that "It is irrelevant or privileged or whatever. Axworthy said I don't have to list it and I am just going to delete it now anyway." She further tells you that THEREISNO has a standard and long-standing document destruction policy which has not yet been stopped, as she had forgotten to mention it when the pleadings were being drafted, and she has a list of files that have been deleted or destroyed, but tells you to keep it to yourself as some of the files were: "pretty, pretty .. bad."</p> <p>(a) What do you tell House regarding the contents of USB 2 and her determination that the contents are privileged or irrelevant?</p> <p>(b) What advice do you give House regarding Axworthy's advice that the contents do not need to be listed?</p> <p>(c) What advice do you give House regarding the company's standard document destruction policy, and the consequences of stopping or not stopping it?</p> <p>(d) What advice do you give regarding the files that have already been deleted, and the list of them?</p>
<p><b>6.</b></p>	<p><b>8 Marks</b></p> <p>Axworthy tells you that the client has litigation fatigue, partly because all of the allegations are true. Examination for discovery is approaching as well, and he says that if House is examined under oath, one of two things will happen: "A) She'll lie like a cheap rug, or B) sing like a canary. Both bad." The discoveries have been informally set for next week, 5 days away, but you have yet to receive the Appointment to Examine, or any conduct money for House, who is coming from her home in Ontario. You were clear with counsel for the defendants, Eric Slowhand, that you required both.</p> <p>You have, however, just received a formal settlement offer from Nosey and the BSJ for \$500,000, in full and final settlement of the matter, and which they say they reserve the right to bring to the attention of the Court, after judgment is pronounced, in respect of an award of costs. The offer states that it is open for acceptance for one month.</p> <p>Axworthy is pretty sure that the defendants will go to \$1,000,000, or maybe at least \$750,000. Time is ticking, however, and he knows their lawyer, Eric Slowhand, can be slow to relay information to his client. He wants to cut to the chase and get this deal</p>



<p>done, and tells you to call Nosey directly to "cut out the middleman."</p> <p>(a) What do you advise Axworthy and THEREISNO about the consequences of accepting or rejecting the offer, from a litigation risk and costs standpoint?</p> <p>(b) What do you tell Axworthy about contacting Nosey as he has suggested?</p> <p>(c) You have counteroffered at \$1,000,000, and the offer is open until withdrawn in writing. It is now Monday, the day before the examination for discovery. You have not heard back from Mr. Slowhand. You worry that if House is examined, the defendants will not take your offer seriously, and may get a renewed appetite for litigation. What options do you have to avoid this?</p>
---

**END OF EXAMINATION**

*It has been our great pleasure teaching you this term.*

*We appreciated your enthusiasm and interest.*

*Our best wishes to you all for a happy summer and a successful and enriching career, in law, or otherwise.*