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THE UNIVERSITY OF BRITISH COLUMBIA

FACULTY OF LAW

FINAL EXAMINATION – DECEMBER 2018

LAW 469

Civil Procedure

Section 1

Adjunct Professors Greenberg and Mitretodis

TOTAL MARKS: 95

TIME ALLOWED: 3 HOURS

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- NOTE:**
- 1. This is an open book examination. You may have any class materials including *British Columbia Annual Practice***
 - 2. ANSWER ALL QUESTIONS.**

THIS EXAMINATION CONSISTS OF 11 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, Marsha Leesk (“**Leesk**”) asks you to attend a meeting with a client named Carla Walker (“**Walker**”). Walker is a wealthy entrepreneur and investor who has been a long-time client of the firm.

Walker is also a frequent user of the popular social networking service FaceTome. Walker uses FaceTome to stay in contact with business acquaintances. She also periodically posts personal investment tips and advice on her FaceTome page.

FaceTome is owned and operated by FaceTome Inc. (“**FTI**”), a company incorporated in California and headquartered in Menlo Park, California, USA. FTI has no offices, employees or operations in British Columbia. The President and Chief Executive Officer of FaceTome is Priscilla Chen (“**Chen**”). Chen ordinarily resides in Menlo Park, but also spends a significant amount of time in London, England.

On September 27, 2018, FTI announced that an unknown third party had gained access to all of its users’ accounts. As a result, the personal information for more than 100 million people was made available to the unauthorized third party.

Walker tells you that on September 28, 2018, someone other than her was able to access her investment accounts at Investrade Inc. (“**Investrade**”) and drain them of \$10 million. The missing funds were paid out using several electronic transfers to a series of investment and bank accounts. Walker is certain that the theft from her accounts was related to the unauthorized access to the FTI user accounts since the FTI security breach happened immediately before funds were taken from her account.

Investrade is a company incorporated in Ontario and with a registered and records office address under the Ontario *Business Corporations Act* in Toronto, Ontario.

Walker is angry with both FTI and Investrade. She tells you and Leesk that FTI was clearly negligent in failing to safeguard so much personal information, particularly given how important it was. She also believes that Investrade should have had more precautions in place to avoid frauds involving identity theft.

At the end of the meeting, Walker tells you that she wants to commence an action against FTI and Investrade immediately. Walker also advises that she would have you include a claim against the person who actually committed the fraud, but she has no idea who did it.

The day after your meeting with Walker, Leesk tells you she has drafted a Notice of Civil Claim with Walker as plaintiff and both FTI and Investrade as defendants. The claim against each defendant is in negligence.

Answer all of the questions below.

****NOTE: In each of your answers, make specific reference to any applicable legislation, *Supreme Court Civil Rules* (the “Rules”), case law, ethical obligations and rules of conduct. ****

8 Marks

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

Leesk tells you that she has some information that might help you with serving the Notice of Civil Claim. She has obtained from the FTI website a mailing address for the FTI head office, as well as a fax number and an email address, both of which were identified as being for “inquiries”. She has no other information about FTI.

Leesk has been able to determine that Chen will be in London staying at the Royal Gardens Hotel for the next 4 days. After that she will return to her home in Menlo Park for the next several months.

Leesk has no information about Investrade other than its registered and records office address in Toronto. She knows from prior matters that the legislation and service rules for corporations in Ontario are exactly the same as in British Columbia.

Leesk asks you:

- (a) Can service be effected on FTI by its email or fax number, why or why not?
- (b) Can service be effected on FTI by serving Chen in London or Menlo Park, and if so what would be required to effect service that way?
- (c) Based on the information you have, what would be the best way of effecting service on FTI if you wished to be entitled to a Response to Civil Claim in the shortest time possible?
- (d) Based on the information you have, what is the best way of effecting service on Investrade, and what would you be required to do to effect service that way?

How do you respond to Leesk’s questions?

- 8 Marks** 2. Prior to finalizing the Notice of Civil Claim, Leesk asks you whether it is possible to include a claim against the person who committed the fraud given that the identity of that party is currently unknown.

Leesk asks you:

- (a) Can a claim be included in the Notice of Civil Claim against the party who committed the fraud without knowing their identity?
- (b) Is there a good reason or reasons to include such a claim now?
- (c) If so, what is the best way to include a claim against the unknown party in the Notice of Civil Claim?
- (d) What could you do and what would you recommend doing once the name of the party who committed the fraud was discovered?

How do you respond to Leesk?

- 7 Marks** 3. You succeeded in effectively serving the Notice of Civil Claim on both FTI and Investrade on January 7, 2019. FTI was served in Menlo Park, California, and Investrade was served in Toronto, Ontario.

Leesk tells you that she received a telephone message from Donovan Bailey Q.C. (“**Bailey**”) a Vancouver lawyer who has been asked to represent Investrade in the action brought by Walker. Bailey advised in his message that he planned to file and serve a Response to Civil Claim by January 21, 2019. On January 23, 2019, Leesk called Bailey as no Response had been received from Investrade. Bailey advised Leesk that he had been unable to finalize the Response, but now hoped to do so by January 27, 2019.

It is now January 31, 2019. Leesk has heard nothing further from Bailey and has heard nothing at all from FTI. Leesk tells you that Walker is tired of waiting for the Responses from FTI and Investrade, and wants something to be done immediately. Leesk tells you she wants you to seek default judgments against FTI and Investrade as soon as possible.

Leesk asks you what you plan to do to carry out these instructions. What do you tell Leesk you plan to do and why?

- 7 Marks** 4. For various reasons, no default judgment was issued against FTI or Investrade. FTI has now filed and delivered a lengthy Response to Civil

Claim.

Bailey filed and delivered a Response to Civil Claim on behalf of Investrade, as well as a Counterclaim against Walker alleging that her own negligence caused not only the loss of the funds, but also a shortage and an amount owing in her investment accounts for which she must repay Investrade.

Additionally, Investrade filed and delivered to Leesk a Third Party Notice claiming against Walker's investment advisor Wilma Buffet ("**Buffet**"). The Third Party notice alleges that Buffet failed to advise Walker to instruct Investrade to reverse the unauthorized trades, which if Walker had done could have limited her losses.

You provide all of these pleadings to Walker who asks you:

- (a) What, if anything, must Walker do with regard to the pleadings received from FTI and Investrade?
- (b) Is it permissible for Investrade to issue the Third Party Notice claiming against Buffet, and if not what would you recommend be done?
- (c) Assuming the Third Party Notice is permissible, what steps must Investrade take to make it effective?

How do you respond to Walker's questions?

- 7 Marks** 5. Now that pleadings have closed, Leesk asks you to work with Walker to prepare a list of documents. Walker provides you with the documents she believes should be listed, and she asks you the following questions:
- (a) Walker has provided her account statements from Investrade for the last year, showing her balances and showing the date of the fraudulent transactions. She does not want FTI to see how much money was in her accounts. She asks if these amounts can be blacked out before they are provided to FTI?
 - (b) Walker also gives you a report prepared by a private investigator and delivered to Walker in October 2018. Walker had asked the private investigator to try to find out who had committed the fraud so that Walker could try to recover the funds. The private investigator reported she was unable to identify the party who committed the fraud. Walker asks if that document needs to be listed?

- (c) Walker has an email sent to her from Leesk attaching a number of press releases which FTI had issued publicly and were about the unauthorized access to its user accounts. In the email, Leesk advised Walker that she planned to use the press releases in the examination for discovery of the FTI representative. Walker asks if either the email or the attached press releases need to be included on the list?
- (d) Walker also has a note that she received from Buffet in which Buffet said she was surprised that someone was able to access Walker's Investrade accounts because, "Investrade may be run by f'ing morons, but their security systems are industry leading." Walker tells you she does not want to list that note because it is damaging to her case and because the language in it may embarrass Buffet. She instructs you to leave the document off the list.

How do you respond to Walker's questions and suggestions?

- 8 Marks** 6. Leesk has asked you to write to all the parties to schedule examinations for discovery to ask that parties each identify a representative to be examined. Investrade nominates Gizelle Hadid ("**Hadid**") for the examination for discovery. Hadid is Investrade's CEO. Walker informs you that Kirby Jenner ("**Jenner**") was her account and portfolio manager.
- (a) In your view is it always desirable, proportional and helpful to conduct an examination for discovery?
 - (b) At the examination for discovery of Hadid, it turns out that she is unable to answer the majority of your questions because she is not knowledgeable about Walker's account details or portfolio. What options are available to you to obtain the evidence you need? Can you examine both Hadid and Jenner?
 - (c) Are there any restrictions on Bailey discussing Hadid's evidence with her during the breaks?
 - (d) In response to one of your questions, Hadid gives evidence that contradicts statements she previously made in emails that were produced. What use can you make of this evidence at trial?
 - (e) During the course of your examination for discovery, Bailey repeatedly objects to your questions and interrupts the flow of your discovery. What recourse is available to you?

- 8 Marks** 7. FTI’s lawyer serves you with an expert report on FTI’s policies to protect against data breaches. The report is 3 pages long and simply describes and summarizes FTI’s policies to protect against data breaches. The author of the report includes his name, address and title as a digital forensic expert, but nothing further. All you can gather from the report is that the author can copy and paste from FTI’s policies. You received a letter from FTI’s lawyer advising you that this expert will testify at trial.
- (a) What step or steps must FTI’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?

- 8 Marks** 8. FTI has pleaded that it requires all users to accept its terms of service before using FaceTome. FTI has also pleaded that Walker accepted its terms of service, and that the terms of service include a waiver of all claims against FTI.

In a filed Reply, Walker has pleaded that the correct interpretation of the waiver is that it does not apply to claims in negligence.

Leesk believes that although FTI has pleaded other defences, if you could succeed on the argument that the waiver does not apply to Walker’s claims in negligence, it would make FTI much more likely to make a reasonable settlement offer. Leesk does not expect FTI to agree to or cooperate in bringing an application to have any issues determined prior to trial.

What summary procedures might be employed in these circumstances to address the issue of the proper interpretation of the waiver, and would you recommend using any of the available procedures?

- 8 Marks** 9. Assume that time has gone by and that the trial is in 2 months. Leesk asks you to prepare whatever materials are necessary before the trial. She asks you to leave out the names of your witnesses in case you decide not to call them. She wants to list them the week before the trial instead.

Leesk also tells you she does not want to bother appearing in chambers before the trial and asks you to talk to opposing counsel to see whether they will agree to this.

- (a) Do you need to take any steps before the trial and if so, when? Do you need to file anything prior to the trial, and if so when?
- (b) What should you tell Leesk about her instructions with respect to listing the key witness and the other possible witnesses?
- (c) If you want to avoid any chambers appearances prior to trial as suggested by Leesk, what conditions must be met and how must you proceed?

8 Marks 10. Walker has asked for and received an opinion from Leesk as to her chances of success at trial.

Leesk believes that Walker has very strong claims in negligence against both FTI and Investrade. Leesk also believes each defendant will likely be held equally at fault. Leesk has advised in her opinion that it is likely the damages awarded to Walker would be equal to the \$10 million wrongfully transferred from her accounts.

Walker is considering an informal offer to settle which you recently received from Bailey on behalf of Investrade. In its informal offer, Investrade stated that it is in dire financial circumstances, and that it currently has only \$500,000 in cash, and no other assets. As a result, Investrade has offered to pay Walker the whole \$500,000 now if Walker will agree to a “BC Ferries” type settlement agreement with Investrade. If the offer is not accepted, the \$500,000 will likely be used up to pay Investrade’s legal fees for trial, leaving Investrade with no funds to pay a damages award.

Walker asks you to explain what a “BC Ferries” settlement agreement is, and whether you recommend accepting the offer or not.

Walker also suggests that even if you think the offer should be accepted it might be wise for you to make a counter-offer directly to Investrade’s Chief Executive Officer so you can get an “unfiltered” sense as to whether this is the best possible offer from Investrade, and not just a “lawyer’s trick” by Bailey.

How do you respond to Walker’s questions and suggestions?

- 18 Marks** 11. You have been asked to prepare a memo for Leesk in a different litigation matter she is conducting. The memo is meant to set out the process for bringing a chambers application seeking an injunction. The luxury shoe designer Jamie Shoo has retained your firm because it has recently been brought to her attention that numerous boutique stores in Vancouver are selling knock-offs of Jamie Shoo shoes. No court action has been started yet. You are asked to discuss the following specific points:
- (a) the type of injunction that is appropriate in the circumstances;
 - (b) a description of the test and factors for determining whether the order should be granted;
 - (c) the procedure for setting down the application and whether it matters that no action has been commenced;
 - (d) what type of evidence you should present at the application and what standard of proof you must meet;
 - (e) the differences between an interim, interlocutory and permanent injunctions; and
 - (f) assuming the order is granted, what precautions you need to put in place in executing the order.
 - (g) Leesk wishes to make submissions that an injunction application like this serves the objects of the Rules set out in Rule 1-3. She also wants to prepare for the other side's argument that such applications do not serve the objects of the rules. Discuss how injunctions do and do not serve the objects of the Rules.

Cite Rules and case law where appropriate.

END OF EXAMINATION