

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

FINAL EXAMINATION - APRIL 2020

LAW 469.002  
Civil Procedure

Adjunct Professors Gavin Cameron and Mark Fancourt-Smith

**EXAMSOFT PASSWORD:**  
**EXAMSOFT RESUME CODE:**

**TOTAL MARKS: 90**

**WRITING TIME ALLOWED: 3 HOURS**  
**PREPARATION TIME ALLOWED: 10 MINUTES**

Preparation Time has been given to download/print/set up for your exam once the exam has been made available online through Canvas. This time cannot be used for writing exam answers. All exam answer uploads will be monitored to ensure that typing of answers only occurred for the allotted Writing Time.

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This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings.

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.

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## 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. 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 do not need to recite them word for word.*

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. A pre-trial injunction to restrain certain conduct requires, as the first step of either the *Wale* or *RJR MacDonald* test, that there is a “fair question to be tried.”
  - a. Is this a low or a high bar, and what are the pros and cons of the bar being set where it is?
  - b. Other types of injunctions require that a “strong *prima facie* case” be shown. Name two types of injunctions that require this standard, and explain the rationale for why they require it, and whether you agree with it.
  
2. Discuss the function of pleadings, including:
  - a. Why is it important to take care in preparing them?
  - b. How and when can you amend them to correct an error or address a new issue?
  - c. How can well, or poorly, drafted pleadings affect other steps in an action?
  
3. Name three classes of privilege, explain how and when each arises, its purpose, how long it lasts, and name a circumstance in which it can be found to be waived, or lost.

END OF PART 1

## PART 2

### FACT PATTERN (50 marks)

#### (YOU MUST ANSWER THE FOLLOWING 8 QUESTIONS)

You have just been called to the bar, and are an associate in the litigation department of a full service law firm.

Your firm has been involved in the public listing of Solaris Power Farming Inc. (“**Solaris**”), a company incorporated pursuant to the British Columbia *Business Corporations Act*, which specializes in the construction and operation of solar power operations.

Solaris has offices in Vancouver, Calgary, and Furnace Creek, California. Solaris currently has three solar farms in operation, and is in the process of constructing several more in North America, with plans to expand to Europe. It has borrowed heavily, and a material delay in construction, or the shutdown of one of the three solar farms currently in operation, would have a devastating effect on the company’s finances. Reputation is everything to Solaris; it is a newly formed company, which has recently listed on the Toronto Stock Exchange, and is reliant on its reputation as a progressive and environmentally friendly company to attract investments from ethical mutual funds.

One of Solaris’ solar farms is located 20 kilometres east of sunny and warm Osoyoos, on a field near Provincial Highway 3 (the “**Osoyoos Solar Farm**”). Solaris leases the land from its owner, MegaLandHoldings Ltd. (“**MegaLands**”).

Your phone rings. The leading litigator in your firm, Brock Redberg, Q.C. (“**Redberg**”) asks you to attend an urgent meeting with Sunny Brightway (“**Brightway**”), the founder, CEO, and a director of Solaris.

You rush over to Solaris’ offices. Brightway is in a panic. She advises that an anonymous group of protestors have blockaded the Osoyoos Solar Farm. There is only one way into and out of the Osoyoos Solar Farm, and the protestors, who appear to be young college and university students, have formed a human chain to block that road.

While Solaris does not know the identity of the protestors, MegaLands has sophisticated surveillance systems on one of its adjoining parcels of property, which is devoted to cannabis cultivation. Those systems record audio and video, and capture all cell phone activity in the area, including the telephone number associated with the devices being used.

Some of the protestors have entered onto the Osoyoos Solar Farm and have used bats, two-by-fours, and rocks to destroy solar panels and other equipment which is necessary to the operations..

They have issued demands that the government take steps to protect birds killed or injured from the light reflected by solar collection mirrors, and have demanded a return to the full-scale use of fossil fuels in order to save the birds.

The protestors have prevented third party contractors from entering the Osoyoos Solar Farm to conduct necessary repairs to the damaged equipment.

The events have received significant publicity, and Solaris is rapidly losing market share. If its share price falls further, it is very unlikely Solaris will be able to meet its obligations to its lenders, or to secure the funds required to advance some, or perhaps all, of its other projects that are underway.

Brightway then drops a bombshell.

She has heard from two anonymous sources that the whole protest is a scam, run by big oil, who have conspired with the young protestors. The protestors had the entirety of their student loans paid off and were provided with a year's worth of instant noodles in exchange for their agreement to blockade and damage the Osoyoos Solar Farm.

Brightway's sources tell her that unless the government capitulates to the demands of the protestors, Solaris' solar farm in Fort Nelson (which is already facing difficulties, as it remains buried under 3 feet of snow) will be subjected to a blockade and vandalism soon.

The corporation which is orchestrating the protests is Global Hothouse PLC ("**Hothouse**"), which is incorporated and carries on business in Switzerland. They have retained the services of Vancouver resident Dirk Provocateur ("**Provocateur**") to coordinate and lead the protests.

Brightway is in a state of panic. She believes you and Redberg are the last and only hope for her business - there must be something lawyers and courts can do about the situation - right?

Redberg assures Brightway everything will be straightened out, immediately. You leave Solaris' offices, and walk back to yours. Along the way, Redberg mentions that there is real money to be made here, and that in light of Solaris' desperate situation, even though your standard hourly rate is \$350, he intends to charge \$700 for each hour you bill.

He thinks on this further while you walk down West Georgia Street. He concludes this is a case where you should act on a contingency fee basis. He calls Brightway, and over the phone, they agree that your firm will be entitled to 50% of any and all damages recovered in the course of litigation, or, to double your standard hourly rates if that leads to more fees than the contingency discussed on the telephone.

QUESTIONS BEGIN ON FOLLOWING PAGE

Answer ALL of the questions below.

**Question 1 (12 Marks)**

Redberg immediately drafts a Notice of Civil Claim, and asks you to review it, see that it is filed, and take care of serving it.

You notice that Redberg has named Hothouse and Provocateur as the sole defendants.

Before taking steps to file and serve the claim:

- (a) Is there anything you should do to formalize or alter the terms on which your firm will be acting for Solaris?
- (b) Should you name the individual protestors as defendants? If so, why, and how do you do that? 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) Redberg wants to effect service on Hothouse by providing a copy to Provocateur, as he has a hunch that Provocateur is an employee of Hothouse. Do you agree with this strategy? If not, what steps do you think you should take to serve Hothouse with the Notice of Civil Claim?
- (d) Taking into account the urgency of the situation, and leaving aside any issues relating to service, as soon as a Notice of Civil Claim is filed, are there any applications you should be bringing on an interim basis? If so, what should you be seeking? What arguments should you advance in support of your application, and what evidence will need to be marshalled?

**Question 2 (5 Marks)**

Assume you know the identity of the protestors, and you have included them as defendants in the Notice of Civil Claim, which has now been filed and served.

Many of them have filed Responses to Civil Claim. Some have not.

Of those who have filed a Response to Civil Claim, some exclusively raise the defence of “The ends justify the means. Birds must live, no matter the cost”. You know this is not a substantively viable defence to the claims that have been pled.

Others have raised a defence which seems very dubious, claiming they did not participate in the protest, though you are now in possession of clear photographic and documentary evidence which establishes they participated in the destruction of Solaris’ solar panels and equipment.

Redberg wants to show Solaris that you can obtain quick and significant results without having to wait months for a trial. He wants you to seek judgment against the protestors.

What steps do you pursue, under which Rule(s) of court? Will the strategy and steps you recommend for the protestors be the same for the group as a whole, or will it differ based on the facts outlined above?

### **Question 3 (3 Marks)**

Provocateur lives in a penthouse in Coal Harbour. He knows you are attempting to serve him with the Notice of Civil Claim. Your process server has taped a copy to the door of his apartment, but Provocateur has refused to open the door and has said “you can’t get me, I’m never coming out”.

Do you need to do anything more to effect service on Provocateur? If so, what do you need to do, and what steps do you take next?

### **Question 4 (8 Marks)**

Assume Provocateur and Hothouse have been served with the Notice of Civil Claim.

(a) Redberg’s recollection of the law and rules governing jurisdiction and private international law is very rusty. He asks you to advise him what steps, if any, are available to Hothouse to contest the jurisdiction of the Supreme Court of British Columbia, and what Hothouse would have to do to take those steps under the Rules. What is your advice to Redberg?

(b) Still holed up in his penthouse, 20 days have passed since you effected service on Provocateur. In keeping with Redberg’s advice that Solaris wishes to see immediate results, you have drafted an application to take default judgment. That afternoon, Cameron Fenwick-Smythe, a local lawyer, calls you to advise that she has just been engaged as Provocateur’s counsel, and that Provocateur intends to defend the action.

Fenwick-Smythe takes no steps in over a month to do so. What do you do?

(c) Assume you have taken default judgment. Provocateur has by now engaged new counsel, Nathan Andrewson. Provocateur had been kidnapped by pro-solar power vigilantes, and was unable to give instructions to Fenwick-Smythe, who was negligent in failing to respond to you, and accepted service of the Notice of Civil Claim without Provocateur’s knowledge or instructions.

If you were Nathan Andrewson, what steps would you advise Provocateur to take in the circumstances, and what arguments would you advance in support of those steps on his behalf?

### **Question 5 (5 Marks)**

Redberg tells you that Hothouse has approached Solaris informally, and has indicated a desire to settle. Hothouse is very worried that its executives may be the subject of vigilante justice, having heard of what happened to Provocateur.

Hothouse, Provocateur, and several of the protestors who are part of the conspiracy which caused the blockades and vandalism remain as defendants. Provocateur and the protestors have no interest in settlement on any terms.



Brightway has instructed you that Solaris' objective is to maximize its recovery in the litigation, to try and obtain the largest amount of money possible to remedy the losses it has suffered.

Taking that objective, the facts, and your understanding of the law into account, what options do you recommend in structuring a settlement with Hothouse, and why?

**Question 6 (6 Marks)**

(a) Settlement talks have failed. Discovery processes are underway, and Hothouse has produced an initial list of documents. It does not contain documents you would have expected to see, and although those documents are not ones which could be used to prove or disprove a material fact, you believe they are relevant. Could you take steps to obtain these documents? If so, what are those steps, and what must you show in order to obtain an order compelling Hothouse to produce these further documents?

(b) Having told you in the morning he was interested in obtaining further documents from Hothouse, Redberg drops by your office at lunch. He is fuming. He is in the midst of his examination for discovery of Provocateur. Provocateur's counsel is answering questions for the witness, and is objecting to questions which relate to the conduct of Hothouse and the protestors, but do not directly relate to Provocateur's own alleged involvement in the conspiracy.

Redberg has not conducted an examination for discovery in many years, preferring to leave the hard work to his juniors. He is lost, and does not know what to do in response.

What advice do you give him?

**Question 7 (3 Marks)**

One of the protestors, Myloon Isindefault, is represented by Valerie Pain, an aggressive lawyer whom you have had difficult dealings with in the past. Valerie is not someone who is likely to help you, even if her client wants her to.

Myloon has googled your contact information, and sends you an e-mail, advising that he "has the smoking gun - I can tell you everything you need to take Hothouse down". He asks you to attend a meeting with him at the Nest.

What should you do?

**Question 8 (8 Marks)**

The protests have ceased, in large part due to the actions of the solar vigilante club, which has set up patrols and come to the aid of your client.

A trial is approaching; it is set for 35 days, and will commence in 120 days. All of the original defendants remain in the action. Solaris has suffered substantial losses, which are difficult to quantify, and raise difficult accounting and quantification issues that are beyond the understanding of most people. The pleadings raise claims of conspiracy, trespass, intentional interference with economic relations, and defamation.

Solaris wishes to proceed to trial in the most efficient and economical manner possible. It suggests you limit the trial to a single claim, the tort of trespass, which it believes is a “no-brainer”. Solaris also wants to obtain complete recovery for the legal costs it has incurred responding to the protests and advancing the action, and it asks you whether it is likely they will be able to do so, given the fact the protestors and Hothouse conspired with one another and acted abhorrently in orchestrating the underlying protest.

What steps do you take in advance of your looming trial date (and when do you have to take them), and what options and recommendations do you make to Solaris in light of the facts and objectives outlined above? What advice do you offer in relation to Solaris’ question on the recovery of legal costs?

**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 future and a successful and enriching career, in law, or otherwise.*