

Write Your Exam Code Here: _____

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

**THIS EXAMINATION CONSISTS OF 5 PAGES (INCLUDING THIS PAGE)
PLEASE ENSURE THAT YOU HAVE A COMPLETE EXAMINATION**

**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

**FINAL EXAMINATION
DECEMBER 2019**

**LAW 325
CONFLICTS**

**SECTION 1
PROFESSOR EDINGER**

TIME ALLOWED: 3 HOURS PLUS 10 MINUTES READING TIME

TOTAL MARKS: 100

Note: this is an open book examination. Students may bring in and use their notes and casebooks.

In any Conflicts problem, as in any case, there may be too little or too much information given. Do not assume, therefore, that every fact is relevant and do state, where necessary, what other information would be required and for what purpose.

40 1. Mr Bush is a lawyer in Vancouver.

Yelp, a social networking site, is a company organized under the laws of Delaware but with its head office in California. Yelp has no offices in Canada. Yelp provides and publishes a forum for members of the public to write reviews about local businesses and services.

Bush created a business owner account with Yelp and used the account to post information about his office including, for example, its location and its special areas of practice. Bush agreed to Yelp's terms of service each time he logged on to the Yelp site.

A material term of service provided:

California law will govern the terms of service as well as any claim, cause of action or dispute that may arise between a user and Yelp without regard to the conflict of law provisions and that: for any claim brought by either party you agree to submit and consent to the personal and exclusive jurisdiction in and the exclusive venue of the state and federal courts located within San Francisco County, California.

In April of 2018, a user posted a review on the Yelp site page for the Bush law office. Bush asserts that it is defamatory. He tried to persuade Yelp to remove it. Yelp declined.

Bush commenced an action in British Columbia against Yelp seeking damages for defamation and other relief.

Yelp, the defendant, filed a jurisdictional response. Yelp argues that the BC court has no territorial competence, is *forum non conveniens* and points to the exclusive forum selection clause in the terms of service.

Yelp retains you.

A. Draft a memorandum setting out the argument you will make for Yelp to persuade the British Columbia Court to stay Bush' action;

and

B. If, despite your argument in favour of California, the British Columbia court decides to retain jurisdiction, what law will the court likely apply to the defamation action?

- 20** **2.** B has commenced an action in British Columbia against N for recognition and enforcement of a Kuwait judgement dated March 2015. It was a tort claim. The tort complained of was similar to the common law tort of intentional interference with economic relations. In the alternative, B seeks permission to convert the claim to one based on the original cause of action in tort.

B and N have known each other since the 1980s and still have a business relationship. However, the original friendship has become acrimonious and litigation has ensued. B came to believe that N had committed theft and forgery. Despite his pleas of innocence, N was imprisoned and then, in 2013, deported to Canada as a Canadian citizen. He resides in British Columbia.

At the time B commenced the tort action, N was serving his term of imprisonment. B asserts that he tried twice to serve N in prison. However, the process server was twice informed that the prison held no one with N's name. In consequence, B employed the process for substitutional service authorized by the law of Kuwait. B delivered the documents to the Kuwait Public Prosecution as required by Kuwait law. N has no idea what happened to the documents delivery to the Public Prosecutor.

N did not appear in the action. The Kuwait court held that he had been properly served and gave judgment for B.

At the trial in British Columbia, B stated that he had not known that N resides in British Columbia until 2016 and that he then immediately commenced the action for recognition and enforcement of the Kuwait judgment. N asserted that B could have determined his address in a variety of ways in Kuwait and, that long before he was deported, N knew that he, N, was a Canadian citizen and that he had a home in British Columbia. He testified that, until the action was commenced in British Columbia on the Kuwait judgment, he was completely ignorant of the tort action. He noted also that he had already been deported at the time when B tried to serve him in prison.

You are a law clerk in the British Columbia Supreme court and have to provide your judge with a memorandum on the case. Your judge never took Conflicts at law school. Draft the memorandum advising the judge. You know that British Columbia law also provides for substitutional service in certain circumstances.

- 20** 3. X and her husband, Y, arranged with Kuoni Travel for a package trip to Sri Lanka. X and Y reside in British Columbia. Kuoni Travel is incorporated and has its head office in Switzerland but it has a branch in British Columbia where X and Y made the arrangements.

X and Y arrived at the hotel in Colombo, Sri Lanka, and were shown to their room. After dinner and a visit to the bar, they returned to the room and discovered that their neighbours were making a great deal of noise. X immediately wanted a different room. Y agreed but preferred to wait until the morning. They disagreed. X decided to go to the front office to have their room changed.

X set out from their room but was confused as to how to get to the front office. She met a hotel employee in uniform who offered to show her the way. Instead of doing so, he led her into a room and attacked her.

After their return home, X and Y decided to sue Kuoni. They retain you. X and Y want British Columbia law to apply because damages will be higher than under the law of Sri Lanka, both in contract and in tort.

Draft a memorandum advising what law the British Columbia court will apply:

- A. if they sue in contract; and
- B. if they sue in tort

Kuoni has indicated that it will submit.

- 20** 4. KMG obtained an arbitration award of \$200M US against DPH Holdings SA. DPH caused a sub-subsiary to part with the shares of a German company. KMG, as creditor, brought a tort action against DPH in England, based on Dutch law, arguing that DPH's action had resulted in a diminution of the assets of DPH and that the diminution would disable DPH from satisfying the arbitration award.

DPH applied to have the claims struck out on the grounds either (1) that the claim would breach the procedural English rule against reflective loss or (2) that the claim was contrary to English public policy. Such claims are permissible under Dutch law.

The English rule against reflective loss was created by the English Court of Appeal around twenty years ago. The rule prevents a shareholder or a creditor from bringing claims when their claims merely reflect the loss suffered by the company.

Assume that you are somewhere in Canada (such in a British Columbia court) and assume that Canada has a similar rule to the reflective loss rule. Make the arguments (as if you were acting for KMG) that:

- A. The rule is not a procedural rule; and
- B. The claim does not breach forum (British Columbia) public policy.

END OF EXAMINATION