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**THIS EXAMINATION CONSISTS OF 8 PAGES (INCLUDING THIS COVER PAGE)**

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**THE UNIVERSITY OF BRITISH COLUMBIA**

**PETER A ALLARD SCHOOL OF LAW**

**FINAL EXAMINATION – DECEMBER 2019**

**LAW 469/590**

**Civil Procedure**

**Section 1**

**Adjunct Professors Greenberg and Mitretodis**

**TOTAL MARKS: 95**

**TIME ALLOWED: 3 HOURS**



**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 are now an associate in the litigation department of a mid-sized law firm in Vancouver.

Your firm has acted previously for cannabis activist turned entrepreneur Joanne Emery (“**Emery**”), and her company Cannabis Culture Ltd. (“**CCL**”). CCL, is a BC Business Corporation that uses your firm’s office address as its Registered and Records office. CCL operates six retail stores in Vancouver that sell consumable cannabis products and accessories. Emery is the President and Chief Executive Officer of CCL.

Since recreational cannabis was legalized in Canada in 2018, CCL has continued to operate its stores, but without the requisite business permits from the City of Vancouver.

Emery’s decision to continue operating the CCL stores without permits has been the subject of comment and criticism in the local media, as well as by Vancouver Mayor Stella Kennedy (“**Kennedy**”). Kennedy is a member of the Vancouver Civic Party (the “**VCP**”) and was elected Mayor in 2018.

Kennedy often publicly describes Emery and CCL as “drug dealers”, and “black market retailers”. Emery frequently responds to Kennedy’s public comments by posting articles on both her personal website and the CCL corporate website. Emery has described Kennedy as a “puritanical clown”, “Mayor Imbecile”, and as being “in the pocket of big cannabis”. Recently, Kennedy vowed to have the CCL stores shut down using, “any means available”. Emery responded with a post that suggested someone should “take out Mayor Kennedy,” and that she was willing to “donate to that cause.”

Emery comes to your firm on October 30, 2019, to meet with a partner in the litigation department, Alice Fung (“**Fung**”). Fung asks you to attend the meeting and to assist her with this matter.

Emery tells you that on September 3, 2019, a man on the street called her name, and handed her an envelope saying to her, “This is for you and your company.” He then walked away. Printed on the envelope were the words “**URGENT - COURT DOCUMENTS - OPEN IMMEDIATELY**”.

Emery opened the envelope right away and saw a document entitled Notice of Civil Claim that named her and CCL as defendants, and Stella Kennedy as plaintiff. Emery tells you that the Notice of Civil Claim accused her and CCL of the torts of libel, intentional infliction of emotional distress, and assault. The claims are all based on Emery’s posts on her website and the CCL’s website. The Notice of Civil Claim pleads that the suggestion to “take Kennedy out” was a physical threat that comprised an assault and caused her significant emotional distress.

Emery tells you that her reference to “taking out” the mayor was meant politically, not physically.

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. In your meeting with her, Emery tells you that when she read the Notice of Civil Claim, she thought it was all a load of lies. As a result, she sent the document by mail back to Kennedy’s lawyer, Joelle Nakinishi (“**Nakinishi**”), who had signed the Notice of Civil Claim. Emery included a note that said, “Take this up with my lawyer, Alice Fung: afung@litigationcounsel.ca”.

Emery tells you she did not know any other reply was required and did not keep a copy of the Notice of Civil Claim. She says that if it will help you deal with the matter, she is willing to give sworn evidence that she did not review the Notice of Civil Claim before sending it back to Nakinishi.

Fung knows you have taken a course in Civil Procedure, and asks you:

- (a) Has either Emery or CCL been effectively served with the Notice of Civil Claim in these circumstances, why or why not?
- (b) Assuming service was effected on Emery, could Nakinishi seek a default judgment against Emery right now?
- (c) What should Fung do to respond to the Notice of Civil Claim, as well as to help avoid a default judgment being obtained against Emery?
- (d) Would it help in dealing with the Notice of Civil Claim to accept Emery’s offer to provide evidence that she did not read the Notice of Civil Claim?

How do you respond to Fung’s questions?

**9 Marks**

2. Emery tells you that if anyone committed libel, it was Kennedy by calling her and CCL “drug dealers”. She does not want merely to respond to

Kennedy's claim, but she wants to go "on the offensive".

Emery asks you:

- (a) Can she and CCL claim against Kennedy for libel in the existing action, and if so, what would be required to do that, and when would they have to take such steps?
- (b) What would be the best way to serve Kennedy with any such claims and why?
- (c) How much time would Kennedy have to respond to such claims?
- (d) Can she and CCL also claim against the VCP in this action even though it is not currently a party? Emery tells you that the VCP is in debt still paying for its last election campaign. She wants VCP to have to incur the costs of defending the claims as that will make Kennedy's next election campaign more difficult. Emery says that she would bet that the VCP probably repeated Kennedy's libellous comments, and if you can obtain VCP's emails through the litigation process, it will show that was the case. She wants to claim that VCP participated in Kennedy's libel.

How do you respond to Emery?

- 7 Marks**
3. You have now obtained a copy of the Notice of Civil Claim, and in reviewing it, you see that in addition to naming Emery and CCL as defendants, Kennedy has claimed against the webhosting company Canadian Webhosting Corporation ("CWC") as a defendant. CWC provides hosting services for Emery's and CCL's websites. Kennedy has claimed that in hosting the websites, CWC committed libel by publishing and repeating Emery's tortious comments.
- (a) Fung has suggested to Emery that she bring a third party claim against CWC. Emery is considering that advice, but would prefer not to, as she is worried that CWC may stop hosting her website if she makes a claim against CWC. She asks you whether Fung's idea to bring a third party claim against CWC is a good one?
  - (b) Emery asks if there are any timing restrictions on her in deciding whether to bring the third party claim against CWC or not?
  - (c) Emery asks you if she decides to bring the third party claim against CWC, what procedurally must she do?

How do you respond to Emery?

- 8 Marks**      4. Pleadings have closed, Fung asks you to work with Emery to prepare a list of documents. Emery provides you with the documents she believes should be listed.

Emery also shows you an email that she had sent to the Director of Customer Service at CWC, Billy Golden (“**Golden**”) in 2018. Golden had passed on a complaint made by Kennedy to CWC about Emery’s posts on her website and on CCL’s website. Golden asked for a response from Emery to the complaint. Emery’s response email to Golden attaches an opinion from CCL’s corporate lawyer advising Emery that to limit any potential liability it would be best to tell Golden that the posts were both true and fair political commentary. The lawyer’s email goes on to say that some of Emery’s comments were “ill advised” and “may comprise libel”.

- (a) Emery says that her comments being described as “ill advised” is embarrassing, and she would rather that the corporate lawyer’s email not be seen by anyone. She asks you whether her email to Golden and the attached email from CCL’s corporate lawyer must be listed, and if so must copies of the emails be provided to Kennedy?
- (b) Emery suggests you wait for CWC’s list of documents to see if they list these emails. She explains that if CWC lists the emails, she may as well do the same, but if they do not, she would follow their lead and not list them.
- (c) Emery asks you if the emails are not listed, and Kennedy finds out about their existence, what steps could she take to seek disclosure of the emails?
- (d) Emery asks you if the emails are listed and provided to Kennedy, whether Kennedy could then leak them to the media to embarrass Emery?

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

- 7 Marks**      5. You have received a list of documents from counsel for Kennedy. After reviewing the list with Emery, she has the following questions:
- (a) Kennedy has claimed damages for libel based on diminishment of her reputation and lower public approval ratings. Emery knows that either Kennedy or the VCP, which is not currently a party, perform public polling monthly. However, there are no documents

related to public approval ratings on the list. Emery asks whether she can obtain documents relating to public approval ratings, and if so, how?

- (b) Emery tells you that Kennedy is constantly sending fundraising emails to supporters, and they often include comments about her political foes. She is sure that Kennedy has sent thousands of fundraising emails, some of which may have called Emery a “drug dealer”. She asks whether you can require Kennedy to list some or all of the fund raising emails, and what you would have to do to make that happen?
- (c) There is a reference in the privileged portion of Kennedy’s list to a “document subject to solicitor-client privilege”, without any other details. Emery asks you how they can get away with such a vague description, and if there is a way to obtain additional information about the document?

How do you respond to Emery?

- 8 Marks**
6. It is January 6, 2020 and Fung just returned from a three week trip to Hawaii for the holidays. She barges into your office in a panic waving a Notice to Admit delivered by Nakinishi that her assistant stamped as being received the day before she left for Hawaii. She tells you that she forgot to check her mailbox before she left on vacation and only just found it now. Her assistant confirms that the document was properly served on the date it was stamped.
- (a) Can you still respond to the Notice to Admit?
  - (b) Assuming you are out of time, what is the effect of failing to respond to the Notice to Admit?
  - (c) Assume that Fung asks you to bring an application to have the admissions set aside, what must you file with the registry?
  - (d) What is the test you will have to meet and what facts can you rely on in an application to set the admissions aside?
  - (e) Who would be the appropriate person to swear the affidavit in support of your application and why?
- 7 Marks**
7. Fung asks you to prepare a summary trial application, but only with respect to Kennedy’s claim of libel against Emery, not the other torts

alleged. She believes it can be heard over five days as opposed to the two week conventional trial that has already been set down for two years from now. In reviewing the evidence from the examinations for discovery, some pre-trial examinations you conducted, and the documents, you note that there are various versions from different witnesses as to what Emery said about Kennedy and what Kennedy said about Emery. Emery also denies that she was responsible for some of the posts about Kennedy placed on CCL's website.

- (a) Are there any concerns with asking the court to grant judgment by summary trial on the issue of libel only and not on the other causes of action pled against Emery?
- (b) Can you adduce as evidence some parts of Kennedy and Emery's examinations for discovery transcripts?
- (c) Identify the relevant factors that the court is likely to consider in the suitability application for summary trial. Apply those factors to the facts and describe the most likely outcome of the application.

**7 Marks** 8. Kennedy serves Emery with an application for an interlocutory injunction to refrain from posting content about Kennedy on her personal website and CCL's websites.

- (a) Identify the relevant factors the court will assess in determining whether to order an interlocutory injunction? Apply those factors to the facts and describe the most likely outcome of the application.
- (b) Could Kennedy seek an injunction ordering CWC to take down Emery's and CCL's websites?
- (c) Assuming CWC is incorporated and located in California, can Kennedy still seek an injunction against CWC? Are there any additional risks in seeking such an injunction?

**8 Marks** 9. Fung has provided Emery with her opinion that there is a strong prospect that Kennedy will succeed in her claim for libel against both Emery and CCL, but not in the claims against CWC. Fung estimates the damages awarded to Kennedy will be \$100,000, and that Emery and CCL will be found equally at fault. Fung has also advised that it is unlikely Emery and CCL will be found to be truly joint tortfeasors.

Emery believes that Kennedy is only interested in making her pay damages personally to get back at her, and Kennedy named CCL as a

defendant as a way to get at Emery. She believes Kennedy would settle with CCL for a nominal payment of \$1,000. Emery does not want CCL to make a formal offer under the Rules, but asks if it would help Emery's position for CCL to settle with Kennedy for that amount.

Emery also suggests that in order to see if such an offer might be accepted, you have another associate from the firm call Kennedy posing as a reporter doing an interview about the case to see if any intelligence can be gathered about how strong Kennedy really thinks her claims are and how much she thinks the claims are really worth.

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

**6 Marks** 10. The action has still not settled. Emery is concerned that the trial date is two years from now and wants to have the matter proceed to trial as soon as possible. Fung asks you to consider whether fast track litigation is an alternative option.

- (a) Can this matter be subject to the application of the Fast Track Rule? Why or why not?
- (b) Assuming the Fast Track Rule can apply, what must be done procedurally to have the Fast Track Rule apply to the action?
- (c) What are the key distinguishing procedural features of the Fast Track Rule?

**20 Marks** 11. There are various means under the Rules to obtain oral evidence from a person before trial. Identify what those means are, when each may be used, the essential differences and similarities, the benefits and limitations of each, and how each serves the objects of the Rules set out in Rule 1-3.

Include in your discussion reference to specific examples, cases and Rules where appropriate.

**END OF EXAMINATION**