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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – DECEMBER 2021

LAW 325.002/592.002
Conflict of Laws

Professors Calvert and Bjornson

TOTAL MARKS: 100

TIME ALLOWED: 2 HOURS
(INCLUDING READING TIME)

- NOTE:
1. This is a LIMITED OPEN BOOK examination. You may use the required materials for the course, class handouts, and your own notes. Only hard-copy materials (i.e. no material stored on electronic devices) may be taken into the examination room. No other sources may be used in the examination.
 2. Please answer all three (3) questions.
 3. If you think you would need more facts in order to answer any question completely, please state what those facts are.

THIS EXAMINATION CONSISTS OF 3 QUESTIONS

MARKS

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Question 1

Mario had a long career as a plumber in Milan, Italy. His brother Luigi worked full time assisting Mario. In fact, Luigi did the vast majority of the plumbing work – Mario was little more than the face of the operation. Mario never paid Luigi, but Luigi trusted that he and Mario would both eventually retire on the proceeds of the plumbing business. The plumbing business eventually amassed \$4 million CAD in savings, all in Mario's name.

A few years before he retired, Mario began a spousal relationship with Peach (though the two never married). Peach was Italian nobility and lived off of a stipend from a family trust.

During a 2008 trip to Whistler, B.C., Mario told Peach that he wanted to retire there. Peach agreed to move with Mario to Whistler and finance their living expenses out of her stipend, on the condition that the retirement property he purchased would be held in joint tenancy until it was sold (assume that this is a valid and binding contract). That same week, Mario purchased a house in Whistler using the entire \$4 million amassed by the plumbing business. The house was registered in joint tenancy. Mario and Peach moved to Whistler shortly thereafter.

Recall that where spouses hold property in a joint tenancy, they share a single undivided interest in the whole property. The other form of co-ownership is called a tenancy in common. In a tenancy in common, each spouse holds a half interest in the property. A joint tenancy is subject to a right of survivorship, meaning that the surviving spouse acquires the entire interest automatically on the death of the other. In a tenancy in common, the deceased spouse's share becomes part of the deceased's estate. A joint tenancy may be severed by unilateral act of one of the spouses, transforming it into a tenancy in common.

In February of 2010, Mario and Peach rented out their Whistler property to the Italian Bobsled Team for the Olympics and spent the month in Milan. While they were in Milan, Luigi learned that Mario had purchased the Whistler property using all of the savings from the plumbing business, and that it was held in joint tenancy with Peach. Unbeknownst to Peach, Luigi persuaded Mario to sever the joint tenancy (do not worry about how the severance occurred, and assume it was effective). Mario and Luigi's friend Toad, who lives in Milan, was a witness to this discussion.

Mario died in February, 2020. At the time of his death, Mario and Peach were both domiciled and resident in BC. The same month, Peach moved back to Milan, becoming an Italian resident and acquiring an Italian domicile. Luigi was domiciled and resident in Italy at all material times.

Mario's will, made decades earlier, named Toad as executor and named Luigi as sole beneficiary. There is no dispute as to the validity of the will. (Disregard any wills variation or family law issues that might arise in this scenario).

MARKS

(Question 1 continued)

The estate is being administered in British Columbia. The entire value of Mario's estate was in the Whistler property, which was promptly listed for sale. The assessed value of the property is \$6 million.

Peach learned about the 2010 severance during the administration of the estate. Toad explained that, as a result of the severance, Peach and Luigi were to split the proceeds of sale of the Whistler property evenly (\$3 million each). But for the severance, Peach would have received the entire value of the Whistler property, and Luigi would have received nothing.

Luigi has no assets that could be used to satisfy a judgment against him other than whatever he obtains as beneficiary of Mario's estate. Assume this means that enforcement proceedings in respect of any judgment against Luigi will most likely take place in British Columbia.

In May of 2020, Peach commenced an action against Luigi in the courts of Milan, seeking \$3 million in damages from Luigi for the tort of inducing breach of contract. Luigi will not be liable for inducing breach of contract unless Peach can prove that Luigi knew about the contract to hold the Whistler property in joint tenancy. Luigi has denied any such knowledge.

In June of 2020, Luigi commenced an action in BC in unjust enrichment seeking a constructive trust over the Whistler property. Peach was named as a defendant, as was Mario's estate.

Peach submitted to the jurisdiction of the BC court, but applied for an order that the BC court decline to exercise its jurisdiction in favour of the courts of Milan. Luigi applied for an anti-suit injunction, asking the BC court to enjoin Peach from proceeding with her action in Milan for inducing breach of contract.

You have reviewed a textbook on the law of restitution to refresh your memory on the doctrine of unjust enrichment and the remedy of constructive trust, and you have determined three things:

- Unjust enrichment occurs when one person benefits from the unpaid labour of another;
- Under Canadian law, the remedy for unjust enrichment can involve either the payment of money or the imposition of a constructive trust in respect of property; and
- A constructive trust, if granted, would entitle Luigi to the proceeds of sale of the Whistler property.

According to your preliminary research on the tort of inducing breach of contract:

- Under BC law, the *situs* of the tort of inducing breach of a contract involving BC property is BC.
- Under BC law, Peach's claim would be barred by the 10-year ultimate limitation period unless she can show that Luigi purposefully concealed the severance of the joint tenancy from her.

MARKS

(Question 1 continued)

According to the expert evidence on the law of Italy as it relates to unjust enrichment:

- Italian law recognizes unjust enrichment, but a plaintiff may only ever obtain a monetary remedy. A constructive trust is not available. The Italian expert advises that under Italian law, only Mario (or his estate) would be liable for a monetary penalty. Since Luigi is the sole beneficiary of Mario's estate, any liability of the estate effectively comes out of his own pocket, and gains him nothing.
- The Italian choice of law rule for unjust enrichment is that the law applicable to a claim in unjust enrichment is the law of the place where the enrichment occurred, unless the gains were used to purchase foreign immovable property, in which case it is the law of the place where the property is situated.

According to the expert evidence on the law of Italy as it relates to the tort of inducing breach of contract:

- Under Italian law, the tort of inducing breach of contract is deemed to have taken place where the inducement occurred.
- The Italian choice of law rule for tort is *lex loci delicti*.
- Under Italian law, the applicable limitation period would be 15 years.

You are clerking for a judge of the B.C. Supreme Court. Draft a memorandum for the judge for whom you are clerking advising her about the conflicts issues she will need to resolve to dispose of (a) Peach's application for a stay; and (b) Luigi's application for an anti-suit injunction.

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Question 2

Sadie Snooks is a documentary filmmaker based in Vancouver, British Columbia. In March 2018, Sadie decided to make a film about the elusive Sasquatch located in Washington, USA. She contacted renowned documentary narrator Balaj Bloggs to do the voiceover, to which Balaj agreed.

Sadie and Balaj entered into a contract for Balaj's narration services. Balaj lives in Austria but was temporarily working in Paris, France. Sadie flew to Paris, where French lawyers drew up the contract in French. Sadie and Balaj executed the contract at a café in Paris by the Seine. The contract included a clause stating that Balaj could not contemporaneously provide narration for any film about the same subject. Sadie had heard Balaj had a habit of doing multiple narrating jobs at the same time and so she negotiated the inclusion of a term stating that Balaj's share of his family property, which is located in Austria, would act as security in the event of any breach of the contract.

In early 2019, filming began in Washington, USA. During film production, Sadie learned that Balaj was also providing narration to a rival filmmaker's

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(Question 2 Continued)

documentary about Bigfoot. Sadie was furious and she ended the working relationship with Balaj immediately.

Sadie commenced an action in France for breach of contract based on the connections set out above. A French statute requires that an additional 15% fine, payable to the French government, is added to any damages award for breach of contract. The statute makes the successful plaintiff responsible for collecting that fine along with the damages award and then remitting the fine amount afterwards to the government.

Sadie was successful in a preliminary hearing relying on only affidavit (i.e. written) evidence before a single judge. Balaj was ordered to pay an award of 70,000 euros, inclusive of the 15% fine. In reliance on the term in the contract discussed above, the judgment expressly states that Sadie has a right to a 70,000 euro share in Balaj's portion of the family property.

Sadie properly served Balaj with the documents for the French action, but he did not attend, which he says is because he was unable to return to the country in time due to covid-19 restrictions. Under French rules of procedure, Balaj is entitled to proceed to a second hearing relying on oral evidence before a three-judge panel if he files a notice of his intention to do so within 90 days. If he does not file the notice, the initial judgment is unaffected. The 90 days have not yet expired.

Immediately after the French judgment, Sadie commenced an action for recognition in Austria. She successfully had the Austrian court recognize the judgment and is taking steps to enforce that judgment against Balaj's family property.

Sadie is concerned that Balaj's share will not be enough to satisfy the judgment. Balaj makes money in British Columbia from his narrating through Vancouver-based companies and Sadie thinks Balaj has bank accounts in British Columbia too. To address her concerns, Sadie has also commenced an action in British Columbia seeking recognition of the Austrian judgment.

Balaj rarely physically goes to British Columbia but is planning on going there next week. Rather than wait until then, Balaj wrote to the British Columbia court to explain his position that, among other things, the British Columbia courts have no jurisdiction and that he was unable to present a defence in France. He also advised the British Columbia courts of his intention to proceed to the three-judge hearing in France. Balaj made no mention of the Austrian judgment.

Discuss the conflicts aspects of Sadie's potential action against Balaj in British Columbia.

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Question 3

ABC Realty Ltd. is a company that specializes in marketing for real estate agents. ABC Realty Ltd. is a family-run business based in Montreal, Quebec. The family that runs ABC Realty Ltd. almost always speak English in their business dealings with clients, but their internal communications are usually conducted in French.

ABC Realty Ltd. negotiated the opportunity to make marketing films of all properties listed for sale in Vancouver, British Columbia by any real estate agent in 2021. It could not handle all of the volume of filming on its own; however, and so ABC Realty Ltd. decided to retain another company to assist.

Specifically, ABC Realty Ltd. entered into a contract with HouseFilms Inc., which is a corporation doing business in, and incorporated in, Ontario. HouseFilms Inc. has extensive experience making the type of content that ABC Realty Ltd. requires. Although all of the negotiations occurred while both companies' representatives were in Vancouver, ABC Realty Ltd.'s Quebec-based lawyers drafted the parties' contract. The final version of the contract contains duplicative language in English and in French.

The contract includes a term that HouseFilms Inc. must not infringe upon anyone's privacy when filming the marketing videos. The contract includes another term that payment to HouseFilms Inc. shall be made by cheque delivered to HouseFilms Inc.'s Ontario head office. (Ultimately, payment was made as contemplated, and ABC Realty Ltd. mailed its cheques from its Vancouver head office directly to HouseFilm's head office.)

The contract also includes a term stating that in the event of a dispute concerning the proper exchange rate, the parties would submit to a one-day arbitration in Montreal. The contract contains no other dispute resolution mechanism. The contract includes a handwritten notation in English stating: "Ontario Consumer Protection Act applies". It is unclear at this point when that notation was inserted and which of the parties inserted it.

During its filming in Vancouver, HouseFilms Inc. inadvertently captured footage of a social media "influencer" living in a neighbouring property, who was in the middle of filming the latest dance craze. That footage was released to the public through ABC Realty Ltd.'s marketing materials. The influencer commenced an action against ABC Realty Ltd. in the British Columbia courts for a violation of privacy under B.C.'s *Privacy Act*, RSBC 1996, c. 373, which states that it "is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another."

Before retaining a lawyer, ABC Realty Ltd. filed a separate claim against HouseFilms Inc., asserting that the latter was in breach of the contract and so must compensate ABC Realty Ltd. for any damages payable to the influencer. HouseFilms Inc. responded by filing an application contesting the jurisdiction of the B.C. courts and saying the dispute should be heard in Ontario, or alternatively Quebec, and that in any event, the law of Ontario

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(Question 3 Continued)

should apply. In support of the application, ABC Realty Ltd. filed an affidavit from its CEO, saying that she always believed and intended that Ontario law should apply. ABC Realty Ltd.'s CEO has told you that at the time of signing, HouseFilms' CEO had actually made an offhand comment about B.C. law applying to any dispute.

You know that Ontario does not have an equivalent "privacy statute" and instead has judge-made tortious causes of action such as "invasion of privacy" and related torts. You also know that the courts of British Columbia have consistently rejected the argument that there is a common law privacy tort in British Columbia (such as that found in Ontario) and that instead the statutorily created tort enacted by the legislature in British Columbia is an important legislative policy choice to 'cover the field'.

It is likely that the filming would support a tort action under Ontario law but not under the B.C. *Privacy Act*. However, the Ontario *Consumer Protection Act* offers a strong defence against a breach of contract claim against HouseFilms Inc. that would not exist applying B.C.'s equivalent statute.

ABC Realty Ltd. consults you about the litigation. Advise ABC Realty Ltd. on the conflicts issues.

END OF EXAMINATION