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THE UNIVERSITY OF BRITISH COLUMBIA

FACULTY OF LAW

FINAL EXAMINATION – DECEMBER 17, 2021

LAW 469/590

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 are now an associate in a boutique litigation law firm in Vancouver. One of the firm's longstanding clients is Century Marine Towing Ltd. ("**Century**"). Century is a British Columbia Business Corporation with its registered and records office located at your firm.

Century provides tugboat and barge services throughout the Lower Mainland. Century owns and operates a number of tugboats and barges in Burrard Inlet. When not in use, Century's tugboats and barges dock at Lions Gate Marina (the "**Marina**"), operated by LGM Ltd. ("**LGM**"). Century has a mooring agreement with LGM (the "**Mooring Agreement**") for docking and storing its tugboats and barges at the Marina.

On November 15, 2021, a massive storm struck Vancouver. During the storm, one of Century's barges (the "**Barge**") broke loose from the dock at the Marina. The Barge struck and caused severe damage to the Marina's dock before floating freely through Burrard Inlet for a full day. The Barge drifted near the Lions Gate Bridge, causing it to be closed for 12 hours.

Eventually, the Barge became grounded on rocks below the sea wall surrounding Stanley Park near the Lions Gate Bridge. The Barge presented both a danger to marine traffic and a spectacle for the public. Many people took photographs of the Barge. Some were even seen clambering dangerously onto the rocks on which the Barge was stuck in an attempt to get better pictures.

On social media, the Barge was dubbed the "Burrard Inlet Barge", "BIB", "BIBby", and "Justin BieBarge".

The President of Century, Eve Lee ("**Lee**") comes to meet with a senior lawyer in your firm, Tarik Mohammed ("**Mohammed**"), who asks you to attend the meeting.

Lee tells you that everyone may think the Barge story is entertaining, but the Barge has sustained a lot of damage from being grounded. The damage will have to be repaired at the cost of at least \$200,000. Additionally, Century is losing potential revenue of \$5,000 for every day the Barge cannot be used.

Lee also shows you a letter received from a lawyer for LGM, Logan Johns ("**Johns**") demanding payment from Century within 7 days of \$250,000 for the damage to the Marina's dock, as well as \$100,000 for LGM's loss of income.

Lee tells you it is not yet clear how the Barge broke loose. It may be that the Marina's dock mooring failed, or that the line that connected the Barge to the dock (the "**Line**") gave out when it should not have. Lee is waiting for Century staff to access the Barge to examine the Line. Century staff have been refused access to the dock by LGM. Lee needs your advice as to how to proceed.

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. Lee tells you that it is very important for Century to recover not only the cost of repairing the Barge and the losses from its downtime, but also the costs of removing the Barge from the rocks. Century does not have a lot of money on-hand to pay all of these expenses.

Although Lee is not certain how the Barge became unmoored, Lee believes it is most likely that either the dock had not been properly cared for by LGM and the mooring post the Barge was tied to gave away, or the Line broke as a result of a defect.

The Mooring Agreement requires LGM to keep the dock “in good repair”. Lee had negotiated the agreement with the President of LGM, Robin Dhaliwal (“**Dhaliwal**”) who lives in Victoria, BC. Lee knows from the Mooring Agreement that LGM is incorporated under the BC Business Corporations Act.

The Line was manufactured by a company in India called Jandid Ropes (“**Jandid**”). Lee only has information about Jandid from its website which includes its address in Behror, India, as well as an email address and a fax number for customer service requests. Neither Lee nor Mohammed know anything else about the company or about Indian law.

Lee asks you:

- (a) How certain does Century have to be about the cause of the incident in order to bring claims to recover its losses, and can it bring claims against both LGM and Jandid at the same time, and in the same action?
- (b) Can Century wait to bring its claim until it has gathered more information as to what caused the Barge to become adrift, and what is the deadline, if any, for Century to bring its claims?
- (c) If Century brings a claim against LGM, how could it serve LGM and what would be the best way to serve LGM, and why?
- (d) Can Century serve Jandid using its email address or fax number,

why or why not?

How do you respond to Lee's questions?

- 7 Marks** 2. Lee tells you they want to think about the options and will get back to you with instructions. A week later Lee calls to tell you that someone came up and handed Lee a sealed envelope that morning after saying, "This is an important legal document for you."

Lee says that the document inside was a Notice of Civil Claim from LGM claiming against Century in negligence for damage to the Marina Dock and for loss of income. The Notice of Civil Claim alleges that Century was negligent in failing to secure the Barge to the dock properly. Lee tells you that the Notice of Civil Claim made them so angry they threw the Notice of Civil Claim in the trash and they no longer have a copy. Lee poses the following questions to you:

- (a) Has Century been properly served with the Notice of Civil Claim?
- (b) If it would help, Lee is willing to provide an affidavit stating that Lee did not read the Notice of Civil Claim before throwing it away. Lee asks if you want such an affidavit?
- (c) Lee tells you LGM's Notice of Civil Claim only described generally what the damage to the dock was and did not set-out what income LGM had lost or how. Lee asks if there is a way to get that information from LGM, and if so, how you would do that. Lee also asks if it is possible to obtain the information before Century has to respond to LGM's Notice of Civil Claim?

How do you respond to Lee's questions?

- 8 Marks** 3. Assume LGM's Notice of Civil Claim against Century has been properly served and is proceeding. Lee asks you:

- (a) Can Century bring its claims against LGM to recover the costs of dislodging, towing, and repairing the Barge, as well as for loss of income, in the same action LGM commenced, and if so how and when should it do so?
- (b) Lee still believes that the Line may have been defective and caused the Barge to become loose. Mohammed recommends Century confirm the problem with the Line and bring a third-party claim against Jandid. Lee is concerned it may cost up to \$10,000 for a

report to show that the Line was defective. Given the cost, Lee asks you if it is a good idea to bring the third-party claim against Jandid or not?

- (c) Lee asks if there are any restrictions on how long Century can wait to decide whether or not to bring a third-party claim against Jandid?
- (d) If Century decides to bring the third-party claim against Jandid, what would Century have to do procedurally with the third-party claim after it was filed?

How do you respond to Lee's questions?

- 8 Marks** 4. The litigation has proceeded past the pleadings phase with LGM as the plaintiff, Century as the Defendant with a counterclaim against LGM, and a third-party claim by Century against Jandid seeking contribution and indemnity for any damages incurred by LGM as well as damages caused to Century. All parties have been served and responded as required.

Mohammed has prepared a draft list of documents and asks you to review it with Lee. Lee reviews the draft and provides the following instructions and questions to you:

- (a) Lee instructs you not to include on the list of documents a spreadsheet showing its hourly charge out rates for its tugboats and barges, as that will disclose sensitive business information that could harm Century's competitiveness in the market.
- (b) The draft list includes a preliminary analysis of the Line, the degree of force it ought to have been able to withstand, and the apparent defects in the Line. The preliminary analysis had been obtained by Century to determine if its third-party claim against Jandid was feasible. Lee asks if the preliminary analysis should be included given that it was not a final report?
- (c) Century has obtained an estimate from a shipyard that repairs to the Barge will cost around \$150,000. Lee does not want you to include the document on Century's list of documents, saying that it is just a "guesstimate" from the shipyard, and Lee has more confidence with Century's assessment that repairs will cost around \$200,000. Lee instructs you to leave that document off the list.
- (d) Lee is surprised that Mohammed has included handwritten notes Lee made during a meeting with Mohammed held prior to

preparation of Century's counterclaim against LGM to discuss what Century's damages were. Lee had written down what Mohammed said could and could not be claimed and then added Lee's estimates of the amount for each claim. Lee asks you if the notes really have to be included on the list of documents?

- (e) Mohammed has also included on the draft list of documents statements he has printed out from Jandid's website about the quality of its goods, and the specific strength metrics for its products including for the Line purchased by Century. Mohammed has included the strength metrics for the Line in the third party claim against Jandid. Lee asks you if the printouts should be included on the list of documents?

How do you respond to Lee's questions and instructions?

8 Marks 5. After finalizing and delivering Century's list of documents to the other parties, you have received a list of documents from Johns, counsel for LGM. After providing the list to Century, Lee raises these questions:

- (a) LGM has claimed damages for loss of income as it was deprived of the use of the Marina's dock for a month due to damage from the Barge. However, there are no documents related to the customers that used that dock, or who stopped using the dock, and there are no documents showing how much customers had paid LGM for its use prior to the incident. Lee asks whether Century can obtain documents that show who had been using the dock and how much they paid LGM, and if so, how you would seek to obtain such documents?
- (b) Lee has reviewed LGM's Instagram and Twitter accounts, and LGM has posted and tweeted hundreds of pictures of the Marina dock before and after it was struck by the Barge. Lee could not tell from many of the pictures when they were taken, or if the dock was actually damaged. Lee believes having the pictures might still be helpful, as would the comments others have posted or tweeted in response. Lee asks whether you can require LGM to list some or all of the LGM Instagram posts and tweets, and if so, how would you make that happen?
- (c) Lee wants to rely on the maintenance records for the Marina dock that LGM has listed as a basis to terminate the Mooring Agreement for the rest of Century's fleet, as its other tugboats and barges are at risk from LGM's inadequate care for the dock. Lee asks if you can attach the documents, or at least make reference to them in a termination letter to LGM?

- (d) There is a reference in the privileged portion of the LGM list to “a document that is subject to solicitor-client privilege”, without any other details. Lee asks if that description is sufficient, and if there is a way to obtain additional information about the document?

How do you respond to Lee?

6 Marks 6. You have exchanged possible dates for examinations for discovery with Johns. You receive an appointment from Johns to conduct an examination for discovery of Lee on March 4, 2022. You subsequently issue an appointment to conduct an examination for discovery of Dhaliwal on March 1, 2022. Counsel for LGM writes to you to insist the discovery of Lee proceed first.

- (a) If you do not agree to reverse the order, can counsel require the order of examination to be changed? If so on what basis? Does it matter who issued the appointment first?
- (b) You and Mohammed attend Lee’s examination for discovery. At the break for lunch, Lee asks you whether they can join you and Mohammed for lunch. What do you advise?
- (c) Compare and contrast the approach to oral discovery in civil litigation versus the approach in arbitration. In your view, which approach is better?

8 Marks 7. Counsel for LGM has served an application to compel further document production from Century. The application encloses an affidavit of Dhaliwal, which deposes in part as follows:

“I believe the Defendant’s list of documents is incomplete.”

“The Defendant is required to produce further documents under R. 7-2.”

“I am told by an employee of Century, and I verily believe it to be true, that they were copied on a number of emails with Lee about the cost of repairs to the Barge, yet no such emails were produced on Century’s list of documents.”

- (a) Is hearsay evidence allowable for this type of application?
- (b) Mohammed asks you to identify any objectionable sections of the affidavit. What do you include and why?
- (c) Mohammed wants you to prepare an Application Response.

Describe the steps you have to take as an Application Respondent and the timelines within which they must be taken.

- 6 Marks** 8. In Mohammed’s view, LGM’s Notice of Civil Claim is deficient as it does not properly plead the elements of any cause of action.
- (a) What recourse is available to you to address a deficient Notice of Civil Claim from the opposing party?
 - (b) What test will the court consider?
 - (c) Is any evidence required where a Notice of Civil Claim discloses no reasonable claim?

- 8 Marks** 9. Mohammed has provided Lee with a formal opinion that the claim against Jindad is a strong one, and the claim against LGM is very weak, as it appears that the Line was defective and gave way when it ought to have still secured the Barge to the dock.

Mohammed advises Lee that Century’s provable damages are around \$500,000, and that LGM appears to be able to prove damages of \$400,000.

Lee is still upset that LGM claimed against Century, and wants to focus the litigation against LGM, not Jindad.

Lee asks you to make an informal offer to settle (not a Rule 9-1 offer) to Jindad for \$100,000 in exchange for Century releasing Jindad from Century’s third-party claims. Lee says if Jindad accepts the settlement offer, Century can use the \$100,000 to fund the action against LGM.

Lee says that Mohammed said something in the opinion about a “BC Ferries” settlements, but Lee does not understand what that is. Lee asks you to explain what a BC Ferries settlement is, what you think about making an offer along the lines described, and whether a BC Ferries approach would make any difference to the offer Lee wants you to make to Jindad.

In order to improve the claim against LGM, Lee also asks you to arrange to have another associate from the firm call LGM posing as a customer and to ask questions about the dock and about LGM’s services, both to see what they say about availability of the dock and about the quality of their maintenance.

How do you respond to Lee’s suggestions?

- 8 Marks** 10. As a result of the Lion’s Gate Bridge being closed for 12 hours, many

businesses were interrupted and suffered financial losses because: (1) these businesses were forced to limit their operations because their employees could not get to work without access to the Lion's Gate Bridge; and (2) customers could not access the businesses without access to the Lion's Gate Bridge.

Many of the impacted businesses had business interruption insurance and submitted claims to their insurers. The insurers denied business interruption claims because, in their view, coverage requires physical loss or damage to the property, which was not the case for these businesses.

Lee is concerned that a proposed class proceeding will be commenced against Century, alleging that Century's negligence caused the 12-hour closure of the Lion's Gate Bridge, which in turn caused business interruptions to several businesses.

Mohammed asks you to set out the factors that must be satisfied for the court to certify the action and to provide an opinion based on the above facts as to whether each of those factors can be satisfied and what challenges plaintiffs would face in attempting to certify the claim.

- 20 Marks** 11. Discuss the similarities and differences between the various pre-trial injunctions that are available and whether in your view they achieve the objectives set out in Rule 1-3(1), and why or why not.

In your discussion include:

- (a) the circumstances under which a court will order each type of injunction;
- (b) the pros and cons of each injunction;
- (c) what you might take into consideration to determine whether to proceed with each injunction; and
- (d) whether injunctions can create a conflict with Indigenous legal principles, and if so, how such conflicts might best be reconciled.

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

END OF EXAMINATION