

THIS EXAMINATION CONSISTS OF 7 PAGES (INCLUDING THIS COVER PAGE)
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 469.002
Civil Procedure

Adjunct Professors Gavin Cameron and Mark Fancourt-Smith

TOTAL MARKS: 90

TIME ALLOWED: 3 HOURS

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

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 with 8 questions, **all of which must be answered**: 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!

PART 1

SHORT ESSAYS (20 marks each)
(ANSWER ONLY TWO OF THE FOLLOWING THREE QUESTIONS)

1. There are several procedures available under the Supreme Court Civil Rules for obtaining evidence (physical, documentary, or oral evidence) from both parties and non-parties to the litigation before trial. Discuss three (3) of these procedures, setting out how a party can access them (i.e.: entitlement as of right, or by consent, or by court order after application), the process by which the procedure is conducted, and the limitations, if any, that are placed on using the evidence obtained from that procedure.
2. Limitation periods strive to strike a balance between protecting the rights of parties to seek redress for wrongs and the rights of parties not to live forever under the threat of litigation. To what extent do you think the *Limitation Act*, [S.B.C. 2012] c. 13 gets the balance right? Discuss, including with reference to the roles of basic limitation periods, discoverability, and ultimate limitation periods.
3. Do the *Supreme Court Civil Rules* use the principle of proportionality proportionately, or does Rule 1-3 lead to an erosion of standards and certainty? Discuss the role of proportionality in the litigation process as governed by the *Supreme Court Civil Rules*, including with reference to how certain rules have been written, and how they or others have been interpreted, and give your view as to whether the right balance has been struck.

PART 2

FACT PATTERN (50 marks total)

(YOU MUST ANSWER THE FOLLOWING 8 QUESTIONS)

This is your second day as a lawyer, having been called to the bar on April 12, 2022. You have been hired as an associate lawyer at the firm of Curtis & Pontin LLP, which specializes in construction litigation.

Leading counsel at your firm, Darvy Curtis (“**Curtis**”), asks you to sit in on a meeting today with Stewart Kennedy, a senior bureaucrat employed by a municipal corporation (the “**District**”), which you should treat for the purposes of this exam as being the equivalent of a company incorporated pursuant to the laws of British Columbia.

Stewart was tasked by the District to oversee the design and construction of a \$1 Billion wastewater treatment plant in North Vancouver (the “**Plant**”).

5 years ago, the District awarded a contract to Mega Construction Company (“**Mega**”), an international construction firm incorporated pursuant to the laws of the State of Delaware, USA. At Mega’s insistence, the contract is governed by Delaware law.

As is often the case on construction projects, Mega hired multiple sub-contractors and trades to perform tasks on the project. Mega’s lead sub-contractor was Dirt Movers (“**Dirt Movers**”), a British Columbia partnership between Joe Bob and Jim Bob Cooter (the “**Cooters**”). There is no direct contractual relationship between the District and Dirt Movers or the Cooters.

The District also hired lawyers and an engineer. The engineer in charge of design was Mr. Graham Wood (“**Wood**”), who was hired by the District. The District received advice in the contractual negotiation and design review stage from Lundell Fasken, a highly regarded Vancouver law firm (“**LunFas**”).

5 years after contracting, and \$1 Billion later, the District does not have an operating Plant, or anything close to it.

Design, procurement, and other preliminary site investigation and preparation works took more than three years to complete, and active construction did not commence until April 14, 2020, 2 years to the day before your meeting with Stewart.

There is a history of acrimony between the District and Mega. 4 years ago, Mega’s CEO demanded a meeting with Stewart. He accused the District of wrongfully conducting itself in the design review process, which caused delays and cost increases. While Mega and the District were both upset and believed they had claims for damages against each other, no litigation was commenced, and construction work continued to (apparently) completion.

But yesterday morning, disaster struck. Mega advised the District that Wood had certified the Plant as being ready for a final operational test before commissioning (the “**Big Flush**”).

The Big Flush was a disaster of epic proportions. The Plant released raw sewage into otherwise (sort-of) pristine waters, washing up at the foot of condominiums in Coal Harbour. The residents of these condominiums are irate and one of them has already told Global TV he’s going to sue whoever he can.

Yesterday afternoon, Mega told Stewart the sole cause of the problem was Wood’s design and his recommendations, which were negligent. Stewart is not so sure about that, and thinks it is more likely the construction work was faulty, rather than the engineering advice and services.

Mega walked off the job site after this conversation, and refuses to take steps to stop the release of sewage (which is continuing as you and Stewart speak), even though the contract says Mega must take all steps possible to address hazards to the environment or health, notwithstanding any dispute with the District.

Late last night, the Cooters contacted Stewart. On a Zoom call, the Cooters shared their screen to show him documents which demonstrate Mega knew the Big Flush was highly risky, and actively concealed this from the District. The Cooters also told Stewart that Mega had engaged a mobile shredding company to come to the Plant tomorrow to “deal with the smoking guns”.

Stewart is to spearhead the legal response to these issues. He is worried that as a senior bureaucrat, he may be fired by Robertson Gregor, the elected official in charge of the District. While LunFas are great, they’re no Curtis. He has come to Curtis to seek advice. What does the District do?!?

Answer ALL of the questions below.

1. 10 Marks

Curtis asks you whether there are any urgent applications for injunctive relief the District needs to consider bringing arising out of the facts set out above, and if there are, what the legal foundation in the Rules and the test would be.

What is your answer and what application(s), if any, do you recommend the District bring?

2. 4 Marks

Curtis instructs you to prepare a Notice of Civil Claim naming Mega as a defendant, and suggests you should serve a filed copy of the Notice of Civil Claim to Mega’s CEO by e-mail, as this is cost efficient and easy.

How would you serve Mega, what must the Notice of Civil Claim contain to address

jurisdictional issues (if there are any) and how long would Mega have to file a Response to Civil Claim after you served it with the Notice of Civil Claim?

3. 4 Marks

The Notice of Civil Claim has been filed and served on Mega. Curtis tells you the first order of business is to obtain the documents the Cooters had shown Stewart on Zoom. Stewart did not save or take copies of the documents, which were in the Cooters' hands. What options are available to obtain these documents, and what do you recommend to Curtis?

4. 6 Marks

Mega is the sole defendant named in the Notice of Civil Claim.

22 days after being served with the Notice of Civil Claim, Mega filed a third party notice naming Wood, Dirt Movers, and LunFas. It alleges Wood's design drawings were negligently prepared, and that Dirt Movers negligently performed its work, both of which were the cause of the damages alleged by the District. The claim against LunFas is that it breached a duty owed to the District in failing to advise that various terms should be included in the contract between the District and Mega, said to give rise to a claim by Mega against LunFas for contribution and indemnity for the damages claimed by the District.

Stewart remains confident Mega is the only party at fault, but cannot say it is impossible Wood, Dirt Movers, and LunFas made mistakes contributing to the loss.

(a) Having heard this news, would you recommend the District take any steps in relation to its Notice of Civil Claim?

(b) Can the District issue a Third Party Notice against Wood or LunFas?

(c) Is Mega's third party claim against LunFas flawed? If so, why?

5. 6 Marks

Stewart finds out that Mega has filed its own separate Notice of Civil Claim against the District for damages it suffered in 2019. The Notice of Civil Claim alleges any such damage or loss was suffered in 2019, not thereafter, and it is not alleged the District's wrongdoing caused or contributed to the losses the District is claiming in its own action arising from the Big Flush.

(a) Leaving aside substantive questions of liability or damages, do you see a clear defence the District has against the allegations made in the Notice of Civil Claim? If

so, how would you raise it and what Rule(s) would you recommend relying upon to raise that defence for determination to avoid the need for a full conventional trial?

(b) Is there a means by which Mega could assert these claims against the District other than through a Notice of Civil Claim? Would it be better off using a different process than the one it has, and why?

6. 5 Marks

All parties have been served and responded as required, and pleadings are closed.

Curtis has prepared a draft list of documents and has two questions for you:

(a) Stewart has told Curtis not to disclose a document describing the District's emergency preparedness plan, as it will show their bureaucratic failings made the District's damages and environmental pollution far worse than they otherwise would have been. It is political suicide if this document gets out. Realizing this to be so, can you tell Stewart it is acceptable not to disclose it?

(b) After the litigation was commenced, Curtis printed a number of documents from Mega's website which he believes could be useful on examinations for discovery, to impeach Mega's representative. Do these documents have to be listed, and if so, how should they be listed?

7. 12 Marks

In the course of discovery, you found bombshell documents which show Wood and Mega conspired together to cut corners on construction, claiming Dirt Movers performed essential work when it had not. Wood and Mega pocketed the money the District paid on the assumption that work had in fact been performed.

This led the District to amend its Notice of Civil Claim, to, in addition to its original claims in negligence and breach of contract against Mega, advance a claim for conspiracy against Wood and Mega, and in negligence against Dirt Movers, on the basis Dirt Movers knew or ought to have known it should have performed more work to ensure the Plant's safety.

Accordingly, there are now three defendants, who have all third partyed one another and are pointing the fingers at each other.

Curtis has provided an opinion to the District that the claim against Wood and Mega is very strong, while the claim against Dirt Movers is relatively weak. Wood is effectively bankrupt. Mega has nothing in British Columbia, but has significant assets in Delaware. Dirt Movers is no small fish; they have a fleet of construction equipment worth \$25 Million located in Coquitlam and Port Moody.

Curtis' significant legal bills are all over the news, as the District is required to

publicly disclose how much it is spending on legal services. Taxpayers are aghast. Stewart is under immense pressure from Robertson to settle the litigation and stop Curtis' fees from continuing to mount.

The District will be able to show damages of \$30 Million at trial.

Stewart asks you the following questions:

(a) Wood wants out, and Stewart is happy to let him out as he has no assets. Stewart proposes granting a release of all claims against Wood, in exchange for Wood guaranteeing his evidence will be favourable at trial. Do you have any concerns with a release on these terms, or generally?

(b) Mega is not interested in settling, on any terms. However, Dirt Movers are willing to pay \$4 Million (and not a penny more), as they too are sick of incurring substantial legal fees. The Cooters have also said "it has to be on *B.C. Ferries* terms. Period". What considerations should the District take into account when assessing this offer?

(c) Are there any settlement tools or strategies we can use to make it more likely the District will recover Curtis' huge fees, getting the taxpayer off Robertson's back, and Robertson's off of Stewart's?

Curtis also has a question for you:

(d) Stewart wants Curtis to operate on the basis of a "contingency fee agreement". Can Curtis & Pontin LLP act on that basis? If so, what do they need to do to implement this, and what is the largest fee that can be taken? Curtis loves money, and is upset LunFas had the District's work rather than him in the first place.

8. 3 Marks

Wood settled out. The case then went to trial, and the District prevailed against Mega, but lost against Dirt Movers. The only reason the District added Dirt Movers as a Defendant was the fact Mega pointed the finger at Dirt Movers as being solely responsible for the damage and loss in issue.

The District is concerned about being responsible for Dirt Movers' significant costs and disbursements. What costs order should the District seek?

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.