THIS EXAMINATION CONSISTS OF 10 PAGES

PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA

PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2023

LAW 463

 Securities Regulation

Section 2

Professor Cristie L. Ford

**TOTAL MARKS:** 100

**TIME ALLOWED:** 2.5 HOURS

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**NOTES:**

1. This is an open book examination.
2. Assume that British Columbia law in effect as of April 1, 2023 applies.
3. This examination is worth 80% of your final grade. It will be 2.5 hours long.
4. You are strongly advised to read through the whole exam and all questions before preparing your answers. For all questions, please organize your answers as well as you can to respond to the particular questions asked. Please be as specific as you can, referring to statutory/regulatory language and cases as relevant. If you are missing facts that you consider necessary to your analysis, identify the facts you are missing and state how those facts would affect your answer.

*Instructions continue next page …*

1. The exam comprises two fact patterns, each with sub-questions, and one short essay question. You must answer all questions. Each question is weighted, and given an approximate time, as set out below. Students are cautioned to allocate their time accordingly.

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| **EXAM PART** | **MARKS** | **SUGGESTED TIME** |
| 1: Fact Pattern #12: Fact Pattern #23: Essay Question |  55 37 8 |  80 minutes 55 minutes 15 minutes |
| *TOTAL* | **100** marks | 150 minutes (2.5 hours) |

Good luck!

FACT PATTERN #1 (55 points)

You are a lawyer with a small but successful securities law practice. You have just agreed to take on a new client named Forge Fitzwilliam (Forge).

Forge arrived at your office distressed, claiming to have been the victim of “illegal and unethical conduct by the BC Securities Commission” (the BCSCn). You learn the following from him:

Forge is a long-time and continuing resident of Neverwinter, BC. He worked for years as a professional D&D Dungeon Master. Forge tells you that he quit that work in 2016, once he started to earn enough money from his online investing to make a living. Eventually, he said, people he knew began asking if he could make some investments on their behalf, and he came up with the idea to start a business.

Between 2017 and 2022 (the Relevant Period), Forge was the founder, sole proprietor, sole employee, and guiding mind of an incorporated business known as Best Available Savings Tactic, or “Beast.” Forge is Beast’s “Managing Director and Executive Strategist.” Forge has always done all of Beast’s banking, and made all of Beast’s strategic and investment decisions.

## Beast Adventurer Agreements, 2017

Forge tells you that he figured out how to pool money from people, through Beast, and generate returns that they could share. Reading the applicable securities regulation, he concluded that he could operate an investment-based business without having to worry about securities laws, so long as he kept the number of people involved to not more than 50. Forge prepared an “Adventurer Agreement” (the Agreement) and other informational materials.

In August 2017, Forge sold units in Beast (the Units) for $10,000 each. Interested persons entered into Agreements, which described Beast as the “Issuer.” The Agreement’s preamble indicated that the signer, termed the “Adventurer,” was purchasing Units of the Issuer. The second page noted that, “the Units will be subject to an indefinite hold period and may not be traded.” Forge tells you that he inserted this clause primarily to “foster commitment” among Adventurers.

The Agreement also set out applicable terms and conditions, including the following:

* 1. *The Issuer shall be compensated through the payment of management fees as follows:*

* + 1. *The payment of an annual management fee equal to two (2%) percent of the aggregate original issue price of the total Units issued by the Issuer, to be paid pro rata on a monthly basis;*

* + 1. *The payment of an amount equal to 20% of the profits earned by the Issuer (over and above the original issue price of the Units), which may be calculated and paid to the Issuer at such intervals as the Issuer determines, from time to time.*

* 1. *The remaining proceeds from the Issuer, after payment of the management fees described above, and all expenses, shall be disbursed to Adventurers in proportion to the number of Units held unless the Adventurers direct otherwise.*

On the second page of the agreement, Adventurers were required to initial a clause confirming that they were qualified to enter into the Agreement.

Forge raised a combined amount of $500,000 from 40 unique Adventurers (some of whom bought more than one Unit) through the Agreement. Adventurers included a number of people in D&D circles, some of Forge’s family members (including an uncle and an aunt), and a person who owned a successful board game store in a strip mall in Neverwinter.

## Beast Lender Agreements, 2018-2022

Early in 2018, Forge amended Beast’s forms in order to, as he put it, “make us more formal-sounding.” Beast now offered promissory notes (Lender Agreements), under which Beast offered a flat rate of return. The new forms set up a relationship between persons participating as “Lender,” and Beast as “Borrower.” It read as follows:

*The Lender promises to loan $10,000.00 CAD to the Borrower and the Borrower promises to repay this principal amount to the Lender, with interest payable on the unpaid principal at the rate of 1.00 percent per month, calculated monthly not in advance, beginning on [the date of signature].*

The Lender Agreement was executed by Forge on behalf of Beast. Forge tells you that Beast’s Lenders understood that their funds were loans that he was entitled to allocate in whatever manner he wanted, though they knew he was an investor. He therefore paid himself what he considered to be a reasonable salary, and he combined lenders’ funds (along with remaining Adventure Agreement funds) in his own bank accounts.

Forge tells you that he knew that Beast’s only obligation was to repay the Lenders according to the terms of the Lender Agreements. However, he admits that he likes “to toot my own horn a bit sometimes,” and that he “couldn’t resist” updating Beast’s Lenders on how well Beast was doing. This is how he explains an email he sent in February 2019, addressed to “Beast Believers,” which stated in part:

*Do you have any other assets working for you that will earn you a +56% return over the next three years? And a +108% return over the next 5 years?*

*If you're lucky, you might only have one asset like that. And it's with BEAST.*

*If you don't have it yet, this is the time to consider getting it.
We use careful due diligence and sophisticated instincts to grow Beast, and my personal mission is to grow it faster than anything you have seen through traditional plays.*

Between 2018 and 2022, using Lender Agreements, Forge received funds for Beast from 75 unique persons (some of whom executed promissory notes for more than the minimum $10,000), raising approximately $1,000,000. Lenders included 50 British Columbia residents. The other 25 Lenders were Alberta residents. Forge agreed that he did not know much about many of his Lenders, since “excitement about what we were doing was moving like lightning by then.”

Forge was ultimately unsuccessful with his investing activities and, by late 2022, Beast failed. All of its Adventurers and Lenders lost all their initial funds and received no additional funds. Forge’s bank accounts carried low or even negative balances.

## Investigation

Following complaints from investors, the Executive Director of the BCSCn, acting on delegated authority from the Commission, appointed Holga Kilgore (Holga) to make an investigation into Forge’s and Beast’s business conduct. The Executive Director cited s. 142 of the Act and argued that an investigation was expedient for the administration of the Act. Pursuant to her appointment as investigator under s. 142, Holga:

* Went to Forge’s place of business and took away all records, which included disorganized piles of banking and other financial information about Beast, as well as a laptop and a hard drive found there;
* Personally delivered to Forge a written demand that he testify under oath before BCSCn Enforcement Staff, on a date two weeks away;
* Registered a lien on his house, which is jointly owned by Forge and his spouse; seized Forge’s Ducati motorcycle and put it in a locked warehouse; and put a padlock on his 32’ sailboat in False Creek.

Forge tells you that he did not know that Holga had “stolen [his] property” until he and his spouse went down to False Creek, where the boat was moored, planning to take a “short sailing vacation down to Mexico.”

## Your Client Meeting

Forge tells you that the BCSCn is mistaken about everything, because he was never selling securities. In particular, he says that since 2018 Beast has operated its business based purely on loans, which are not securities. With respect to the 2017 agreements, Forge tells you that even if the BCSCn took what he calls the “unreasonable” view that Beast Units were “securities,” they were exempt securities and so everything he did was fine. He acknowledges that he “could have done a better job papering the files.”

Forge is also very upset about the BCSCn’s investigation. He tells you that Holga has embarked on an impermissible “fishing expedition” in his office, that he refuses to testify under oath, and that her conduct with regard to his property cannot possibly be legal.

## Questions for Fact Pattern #1:

For your client, provide your opinion on the following:

1. With respect to the Beast Units offered pursuant to the Adventurer Agreements, was Forge distributing securities? Explain why or why not. (6 points)
2. Were the Lender Agreements securities? Explain why or why not. ( 3 points)
3. Consider Forge’s claim that, if the Beast Units offered pursuant to the Adventurer Agreements were securities, they were exempt from securities regulatory obligations. You will have to concede on Forge’s behalf that he failed in his obligation to confirm that all Adventurers were qualified to purchase exempt market securities. Leaving that aside, identify the ***three likeliest grounds*** on which Beast Units could be exempt, and evaluate the strength of those claims. Identify any policy concerns or rationales at stake. (12 points)
4. Assume (for purposes of this question only) that the Beast Units or the Lender Agreements ***were*** securities, and were ***not*** exempt securities. What was required of Forge and Beast? (12 points)
5. Consider Holga’s investigation and the steps she has taken. Identify and apply the relevant law to determine whether her conduct was permissible. (8 points)
6. Describe for Forge the potential consequences and penalties he could face, in the event that either the Beast Units or the Lender Agreements are found to be securities, which are not exempt. Be sure to clarify any questions about jurisdiction and forum for your client. (14 points)

FACT PATTERN #2 (37 points)

Your securities practice is growing fast, so much so that you have now hired a more junior lawyer to work with you. You also have another new client: Autumn, a climate activist who is upset with representations by the Royal Bank of Canada (RBC) concerning its actions to address climate change. Autumn inherited a substantial number of RBC shares in summer 2022.

## RBC and its Climate-Related Disclosure

In 2015, Canada formally adopted the Paris Agreement, an internationally binding treaty on climate change. The Paris Agreement set a goal of limiting global temperature rise to well below 2°C above pre-industrial levels, and to take efforts to limit warming to 1.5°C. Article 2(1)(c) of the Paris Agreement notes that making financial flows consistent with low greenhouse gas (GHG) emissions is critical to addressing climate change. Fossil fuels are the primary driver of climate change. The International Energy Agency (IEA) has determined that to achieve the 1.5°C Goal, no new fossil fuel developments or expansions should be allowed, and investment in the fossil fuel industry must decline substantially.

RBC is Canada’s largest bank. As a full-service bank, it lends to, underwrites, and invests across the Canadian and global economy, including in fossil fuel companies. In part because of the nature of the Canadian economy, RBC ranks fifth among the world’s 60 largest private banks in terms of fossil fuel financing, even though it ranks 24th in terms of total assets.

Autumn tells you that RBC gives the impression that is taking climate change seriously and is taking steps to reduce its emissions. However, it is actually acting to increase emissions and exacerbate climate change by providing tens of billions of dollars annually in financing for fossil fuel development and expansion. Autumn points out that RBC’s November 1, 2022 Annual Report makes the following claims:

1. *RBC “supports the principles of the Paris Agreement and the international goal to hold global warming to below 2°C” and is, therefore, committed to achieve “net-zero emissions in our lending by 2050” and “net zero emissions in our global operations”;*
2. *As part of its climate strategy, RBC will provide “$500 billion in sustainable financing by 2025”;*
3. *RBC’s Board of Directors approved the RBC Climate Blueprint in February 2022, and “responsibility for climate is incorporated into our management structure and business models throughout the enterprise, and key businesses have an executive with responsibility for climate change. Going forward, our business is ready to successfully navigate the sustainable financing, investment and client needs associated with the net-zero transition.”*
4. *“Our ability to achieve our climate and sustainable finance-related commitments, goals and targets will depend on the collective efforts and actions across a wide range of stakeholders outside of our control, and there can be no assurance that they will be achieved.”*

The Annual Report also includes boilerplate language cautioning readers about relying on forward-looking statements.

Autumn says that the first claim above is false and misleading when one considers RBC’s actual business conduct. Between 2016 and 2021, RBC provided over $201 billion (USD) in loans and underwriting to fossil fuel companies. During this period, RBC also provided $38.8 billion (USD) to companies expanding fossil fuel production and use. Contrary to the IEA statement that no new fossil fuel expansion should be financed as of 2021, RBC’s financing of companies expanding fossil fuels increased by $3.5 billion (USD) between 2020 and 2021.

Autumn says that the second claim above is misleading, because its definition of “sustainable financing” is not linked to the reduction of GHG emissions or climate-related risks. For example, RBC has characterized its contribution to over $2 billion in syndicated “sustainability-linked” loans to Enbridge – a fossil fuel pipeline company — as being part of its sustainable finance commitment to support RBC’s climate goals, even though these loans likely enable an increase in overall emissions.

On RBC’s third point in its Annual Report, above, Autumn also thinks it is obvious that, despite expressing its support for the Paris Agreement, RBC does not have a climate plan that has taken (or commits to taking) genuinely meaningful actions to reduce its fossil fuel financing and associated emissions on a trajectory that would align with the Paris Agreement goals. Autumn feels very strongly that the claims that RBC has made in its Annual Report mislead people – investors in particular – in a very substantial way as to the nature of RBC’s business, and the likely value of that business in the future as popular opinion turns firmly and permanently away from fossil fuels, and those assets become stranded.

## Your Junior

After your meeting with Autumn, you go back to your office and overhear your junior lawyer talking on the telephone, apparently with a friend. Your junior says into the phone, “what would you do if you knew that the biggest bank in Canada was lying about its climate commitments? Talk about reputational damage!”

You confront your junior. In response, your junior tells you that although they did overhear the conversation between you and Autumn, nothing you said counted as material information vis-à-vis RBC. Moreover, your junior tells you that they are not in any kind of insider position vis-à-vis Autumn or RBC. In any event, they say that their friend does not know you, that their friend trades all the time, and that it would be impossible to prove any case against the friend or your junior. (It later turns out that the friend on the phone, who is indeed a regular trader with a substantial portfolio, sold all their RBC shares that same afternoon.)

## Questions for Fact Pattern #2:

In her capacity as a shareholder, Autumn wants to bring a statutory civil liability claim against RBC for misrepresentation, ***both*** with respect to what RBC claims to be doing now, ***and*** about its claim that it is “ready” to address climate-related goals. Provide the following information for your client, focusing only on the RBC Annual Report that Autumn brought in to show you:

1. Assess the claims your client would like to bring against RBC itself under the relevant statutory provisions. Identify, describe, and apply the relevant law for Autumn, including what she would have to prove. Identify and assess the single strongest defence that RBC itself is likely to mount in response to a proposed claim, and assess its viability. (15 points)
2. Advise your client on the process for bringing such a claim and provide your recommendation on how to proceed. (5 points)
3. Recognizing that your information is limited, describe who Autumn should be naming as defendant(s) in her potential claim, and why. (5 points)
4. With respect to the conduct of your junior lawyer, try to assess the situation dispassionately. Respond to your junior with an analysis of the relevant law, and describe any realistic or likely consequences you see for your junior. Be sure to address each of your junior’s arguments. (12 points)

EXAM PART #3 – ESSAY QUESTION (8 points)

*Re Aurora Cannabis Inc*., 2018 ONSEC 10 was a joint decision of the Saskatchewan and Ontario securities regulators. At para 154, the decision says:

“Given the careful rebalancing of the Canadian take-over bid regime and in the absence of factors requiring our intervention in the public interest, we have preserved the take-over bid requirements as prescribed in our rules. We have cease-traded the tactical Shareholder Rights Plan since its continuation was unnecessary, given this rebalancing that operates, in this case, to preserve shareholder choice.”

Explain this quote by reference to relevant securities law and policy, as it has evolved in Canada (i.e., British Columbia) .

**END OF EXAM**