THIS EXAMINATION CONSISTS OF 5 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 469/590

Civil Procedure

Section 3

Professors Goulden/Kuntz

**TOTAL MARKS:** 100

**TIME ALLOWED:** 3 HOURS PLUS 10 MINUTES OF READING TIME

(Students can type or write their exam answers during the reading time)

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**NOTE:**

1. This is an open book examination. Students may refer to any written material, including computer printouts.

2. Where applicable, cite the relevant rules and cases.

3. Answer all questions.

THIS EXAMINATION IS FIVE PAGES LONG AND CONSISTS OF **13 QUESTIONS**

Michael Faraday resides in Saanich, British Columbia. An avid balloon enthusiast, Michael has established a local business, Balloon Boy Tours Ltd., which he runs out of his residential hobby farm on Maplewood Road. Michael offers hot air balloon rides and charges $200 per person for a one hour balloon ride around southern Vancouver Island. One can also rent the balloons to sail over town and advertise other local businesses and float celebratory messages of love and happiness to the local citizens, provided one is willing to pay $100 an hour for the advertising. Michael has recently scored a major contract with Seastar Cruise line, British Columbia’s largest (and only) Cruise Ship Company based out of Victoria. In its contract with Seastar Cruise line, Balloon Boy Tours Ltd. has agreed to collect Seastar’s cruise passengers from the Victoria Harbour and take them on three hour balloon rides throughout the lucrative summer season for a sizable fee of $1000 per passenger. Last July 4, 2022, Michael was positioning his balloon at the Ogden Point Pier to pick up several Seastar Passengers. On the Lido Deck of the MS Seastar Surprise, a new deck hand, Susanna Globophobe, saw the balloon approaching and began to panic. “It’s a spy balloon!!!” Susanna screamed, as she grabbed a limbo stick from the hands of the cruise director, Julie McCoy. Susanna hurled the limbo stick up into the air like a javelin, hitting Michael squarely between the eyes as he was attempting to land the balloon. As the balloon veered dangerously close to the ship’s smoke stack, Julie chastised Susanna, exclaiming “That’s not how you burst a balloon! Watch THIS!” while launching a lounge chair into the sky. Julie’s aim was better, and she successfully punctured the balloon. It quickly deflated, sending the balloon, basket and Michael into the pool on the ship’s Promenade Deck. The limbo stick broke Michael’s nose, and his right arm and left leg were also fractured as a result of the incident. Michael’s balloon was completely destroyed. Several cruise passengers were caught up in the tangled wreckage, while shouting “Our cruise has been ruined by Balloon Boy!” Michael has come to see you for advice. Since his balloon is inoperable, his livelihood has been ruined. He is too injured to tend to his hobby farm, and Seastar is threatening to sue him for damaging their ship and breaching the contract regarding the balloon rides offered to its passengers. You agree to take on Michael’s case.

1. (10 Marks) Draft the main document to commence a proceeding based on these facts.

2. (6 Marks) As counsel for Michael, you email a copy of the originating pleading to Isaac Washington, a lawyer who you know has acted for Seastar on other matters, and wait 21 days but do not receive a filed response to civil claim. The following day, you apply for default judgment against Seastar. If Seastar applies to set default judgment aside, what errors and problems would their counsel identify in support of their application, and do you think a judge would set aside default judgment if it had been issued? What is the proper process to apply for default judgment? Cite all applicable rules of court and professional or ethical considerations.

3. (8 Marks) Assume that the pleading period has ended, and you now wish to inspect documents, do you need to make a demand for discovery of documents? Explain. When you receive the list of documents from the defendant(s), you notice that several key documents are missing that should have been disclosed. Explain the process you must take to get these documents. If you have to go to court, who will hear the application and where will it be heard? Michael tells you that some of the missing documents are in the possession of a third person who is not involved in the action. What must you do to obtain these documents? Cite all applicable rules of court and authority for your answers.

4. (4 marks) Michael wants you to deliver a notice of application on your adversary the Friday before Spring Break, and he wants you to set the hearing date for a day when one of the defendants’ lawyers on the file is going to be away in Hawaii. Your client expects that the defendants’ lawyers will scramble to respond in time, if at all, and thinks that this will give you the upper hand. Can you proceed to serve the application on the respondents and set the hearing date of your choosing? Should you? Cite all applicable rules of court in addition to ethical, professional and practical considerations that may impact your decision.

5. (8 marks) You file an application for orders for production of documents from the defendant(s), and rely on the following affidavit. Assume the style of cause, form and execution of the affidavit are not problematic. Provide four (4) examples of why or how the substance of this affidavit is deficient or problematic. Explain your answers:

 *I, Perry Legalle, Barrister & Solicitor, make oath and swear as follows:*

 *1. I am an associate at the firm of Freshprince & Belaire LLP, and I swear or affirm that everything in this affidavit is absolutely true.*

*2. I have reviewed the legal file of my firm and have talked to our client and the instructing lawyer in this case in order to inform myself of the information I provide in this affidavit.*

*3. On January 4, 2023 a list of documents was received from the other side. It has been determined that there are very important and relevant documents missing from the list. My supervisor informed me that our managing partner, Carlton Banks, informed her that we may lose the case if we do not get the missing documents from the other side.*

*4. After receiving the other side’s list of documents, the managing partner told me to file an application for production of documents within 24 hours, because the lack of documents will prejudice us if we don’t get them and he’s not prepared to wait any longer.*

*5. It has been determined that the prejudice our client will suffer outweighs the harm the other side will face if they are ordered to produce the documents. It is in the interests of justice that the court grant relief in these circumstances.*

6. (6 Marks) When you apply to court to obtain orders for production of documents from the defendants, the Master dismisses your application. The Master does not provide reasons for his decision except for observing that he doesn’t think documents are important to decide legal cases, and he also chastised you for not wearing a nicer outfit to court. The Master orders your client Michael to pay special costs of the application in any event of the cause, payable forthwith. Explain what this order would mean in terms of your client’s obligations as it relates to costs. Michael is very upset by the decision. Do you need to appeal the decision to the court of appeal? Why or why not? Explain the steps you would take to seek the reversal of these orders. Cite all applicable rules of court or practice directions.

7. (10 marks) Of the following documents in Michael’s possession, which ones would you list in his list of documents? If they are to be listed, specify in what section of the list they would be listed, and if they are not to be listed, explain why not.

 a. Spreadsheets summarizing the income and expenses of Michael’s hobby farm;

b. a letter you wrote to counsel for the defendant(s) explaining the weaknesses of their case, but offering to settle the lawsuit for $2 million and other terms;

c. the 1st draft of the balloon services contract with Seastar, which was heavily edited and revised before the final executed version;

d. an email Michael sent to his neighbour stating that he plans on trying to land his balloon on the Seastar Promenade Deck on July 4th to try to attract more attention and publicity for his Balloon Boy company;

e. an email you send to Michael’s orthopedic surgeon requesting details of Michael’s injuries, and the doctor’s reply to you.

8. (10 marks) A lawyer for a defendant decides to schedule an examination for discovery of your client Michael. What is the lawyer trying to achieve by doing so? At trial, you would like to use the transcript of Michael’s examination for discovery evidence. Can you? Why or why not? If so, how? During your discovery of a defendant, she admits to several facts pleaded in your originating document, and she agrees that she wrote a number of the e-mails and letters you intend to rely on at trial. What do you do before trial to bring this helpful information forward, and describe how this works?

9. (10 marks) After Michael has completed his examination for discovery, he returns to his hobby farm, exhausted. The next morning, he wakes up to see hundreds of text messages on his phone from friends and strangers about some article they had read online. His maid arrives shortly after and quits, stating that she can’t work for such an evil person. Clients who purchase eggs and vegetables from Michael’s hobby farm call to cancel their orders. Michael jumps to his computer and reads a headline on the popular Island news site “Victoria Truth”, entitled “Balloon Boy Admits to Plotting Terrorist Attack”. The article also quotes excerpts from, and depicts photographs of, documents Michael produced in the lawsuit, and includes quotes from the evidence Michael gave at his discovery, albeit the quotes are taken out of context. Is it ok that the article quotes your client’s discovery testimony and litigation documents in the article? Why or why not? Explain what steps you should take to stop the story from ongoing publication in the most expeditious fashion, and cite the test the court will use to determine whether ongoing publication should cease. Cite all order(s) you would seek to address the situation, and identify who the lawyers would seek order(s) against. Cite all applicable rules of court.

10. (6 marks) You decide you want to provide evidence from an individual about the safety of your client’s balloons. How would you do that? Discuss the process and requirements to present that evidence at trial. Cite all applicable rules of court.

11. (8 marks) The trial dates are rapidly approaching and Michael is wondering whether there is a way he can avoid the expense and effort associated with a full trial, and asks you to look into a reasonable settlement. Identify two options available to pursue a settlement of the lawsuit (but not involving a final adjudication by the court)? Which option might have the most impact on the costs of the action if the parties fail to settle? Why? Explain how the process for a settlement option that involves the courts is initiated, and one benefit of this option. If your client makes a concession or admission during settlement negotiations, but ultimately there is no settlement and the parties proceed to trial, can you or the opposing party refer to your client’s statements at trial? Why or why not?

12. (4 marks) A week before trial, you’ve been told that one of your star witnesses plans on being out of town during the time scheduled for trial. Identify and discuss two options for obtaining evidence of this witness at the full trial, including the advantages and disadvantages of each.

13. (10 marks) Identify and discuss the two kinds of cost orders that a judge may make after a trial, including the difference between them. After the trial concludes, the judge decides that you and Michael have won the case and awards $1 million in damages. Is your client entitled to costs? Explain. Would your answer change if the defendants had made a formal offer to settle eight months prior to trial for $3 million? Explain what the costs outcome might be in that scenario. If Michael won the case but lost 5 pre-trial court applications, is he likely to recover the costs of those applications (assuming the Master or Judge had not already made costs orders following the outcome of each application)? For all of the scenarios, explain the possible cost outcomes and cite all applicable rules of court. When you send the bill of costs to the opposing counsel and she and her clients dispute the unit points you have allocated towards various steps in the proceeding in addition to many of your claimed disbursements, do you ask the trial judge to resolve this dispute? Why or why not?

**THIS IS THE END OF THE EXAM**