

## FACULTY OF LAW

### FINAL EXAMINATION - APRIL 2006

**LAW 599:B2 CONSTRUCTION LAW (Winter Term)**  
(Co-Instructors: Robert A. Graesser, Q.C. and Donald C.I. Lucky)

**TIME ALLOTTED: READING TIME: TWENTY MINUTES**  
**EXAM: TWO AND ONE-HALF HOURS**

**CODE NUMBER:** DO NOT ENTER YOUR NAME ON ANY ANSWER SHEETS OR BOOKLETS. A list will be circulated and your name is to be entered opposite a number on that sheet. That number will be your code number FOR THIS EXAMINATION ONLY and should be entered on the examination booklets in the space provided for surname. This will provide the anonymity during marking.

#### **SPECIAL INSTRUCTIONS:**

1. This examination question paper contains 9 questions on 8 pages. Check to ensure it is complete before starting.
  2. Answer ALL questions.
  3. Questions are NOT of equal value. Apportion your time intelligently.
  4. This is an OPEN BOOK examination.
  5. Adhere to the time limitation imposed on this examination strictly. Failure to stop writing at the end of the examination may lead to a deduction of grades or a failure to accept the examination paper.
  6. Whereas it is very disruptive for those students finishing examinations while others are leaving the examination room and discussing the examination outside the examination door, it is requested that no individual leave the examination room during the last 15 minutes of the examination period.
  7. Cell phones, pagers, beepers, lap top computers and related equipment are strictly forbidden. These items must be turned off and stowed.
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VALUE QUESTION

(12 marks) (18 minutes)

1. You have been consulted by the developer of a new strip mall shopping centre. Tenders have closed on the job, and the developer is seeking your advice as to which of the tenders to accept. The project is a design-bid-build project. The architect who did the design organized the tender call, drafted the tender documents, and recommended to the developer that the tender documents be given to 4 "invited" tenderers. The invited tenderers were all contractors the architect has worked with in the past and at the time the tender packages went out to the contractors, the architect had told the owner that he thought that each one of them had the experience, capability and resources to do the work. The architect has now presented you with the three tenders that were submitted. All three tenderers have submitted "regular" tenders. Tenderer A is the lowest tenderer. B is in the middle, and C is high. They are all within a 10 percent range. The privilege clause in the tender package is a simple one: "the lowest or any tender not necessarily accepted". The developer tells you that he has heard rumours (on the golf course) that Contractor A is having some cash flow problems. According to the rumours, Contractor A isn't being paid on a high rise condominium project it built over the previous year, and is having some financial difficulties as a result.. He has also heard that Contractor B is way behind schedule on a project that should have been finished by now, but has been plagued with labour problems (not enough skilled workers available) and problems managing the subcontractors on this project. The developer would like to accept C's bid, even though it is the high one. He hasn't heard anything negative about C, and is concerned about getting his project delivered on time and on budget. He believes that C is most likely to achieve those goals, although he is basing his concerns over the others on rumours. He asks your advice as to what he should do in these circumstances. **Can he accept C's bid without worrying? If he accepts C's bid, do A and B (or either) have any cause of action against him? Is A's position stronger than B's?**

(12 marks) (18 minutes)

2. A Contractor comes to see you. He has been working on a project since last August, and is very concerned about his financial position on the job, resulting from various delays. He is one of several contractors working on a hydro-electric project. His role is to build the powerhouse, which will house the large turbines. Another contractor is responsible for procuring the turbines and installing them in the powerhouse once the powerhouse is complete. The contractor has signed a CCDC 2 contract with the owner. GC 6.5 is attached for ease of reference (see page 8). The Contractor's portion of the project was to have been completed by April 15, 2006, so that the turbine could be installed by May 15. The owner intended to turn on the power plant shortly after May 15, when sufficient water would be

available in the river. The Contractor tells you that his contract obliges him to pay liquidated damages to the owner of \$10,000 per day for each day the power house is late (i.e. past April 15). The Contractor tells you that they had some problems getting the job started last summer. They were about a month late in actually getting going, because one of the Owner's other contractors hadn't completed the road into the work-site on time. When the road was finally complete, they got their equipment onto the site quickly and got started. However, once they got going, they experienced the wettest September on record, and couldn't get the excavation work done in the planned time because of the rain and mud. As a result of their late start, and the wet weather, they didn't complete the excavation until late October, instead of late August, as planned. Because of the time of year, they had to put additives in the concrete to protect it from frost, and had to cover all poured concrete with frost blankets to keep it from freezing. All of these additional costs would have been avoided if they'd been able to complete the excavation in late August or even late September. Since March 1, they have been working overtime and have put on extra shifts to try to speed up the work, but the Owner has refused to pay them any extra costs, saying that the Contractor has "no contractual entitlement" to any additional payment. Worse yet, the Owner is now threatening the Contractor with liquidated damages because of the delay in completion. The Contractor has just learned that the turbine is still under construction in Hamilton, and won't be shipped out to the site until at least June 1, at least a month after the powerhouse is now scheduled to be complete. The Contractor is very upset that he wasn't told about the delay in the turbine, as if he'd known the turbine was going to be late, he wouldn't have had his men work extra shifts and overtime. You ask about notices to the owner, and the Contractor tells you that he's talked about the problems at site meetings with the owner's representative and the consultant, but hasn't put anything in writing yet. He asks you what he needs to do to advance a claim for the costs of the concrete additives and blankets and for the extra labour and overtime costs. He also seeks your assurance that he doesn't need to worry about liquidated damages. **What do you advise the Contractor as to the prospects of success on his claims? What do you advise the Contractor as to his risks of being liable for liquidated damages?**

**(12 marks) (18 minutes)**

3. You are consulted by High Tech Glass Ltd. They are the window and door supplier and installer to General Construction Ltd., the general contractor on a highrise apartment building that is being constructed for Faulty Towers Inc., the building owner. General Construction Ltd. and Faulty Towers Inc. have a lump sum/stipulated price contract. High Tech had been asked by General to provide a quote on the "supply and installation of all doors and windows as per Section 23.1 of the Specifications". High Tech went to General's offices, looked at the

Specifications, and submitted their quote: "In response to your request for quotation, we are pleased to quote our lump sum price of \$995,000.00 plus GST. 10 year limited guarantee on glass to apply. Our bank letter of credit in the amount of 10% of the subcontract price is enclosed, as required and as security for performance of our work." (High Tech tells you that they can't get bonding, so they have to put up letters of credit as security whenever contractors or owners require security. They are short of work, and bid this job with a 5% fee included in the cost.) Once General was awarded the work by Faulty, they notified High Tech that they were the successful bidder on their portion of the work. High Tech was anxious to proceed with the project as they wanted to get some cash flow going. For a number of weeks, they tried to get General to commit to a date on which High Tech could get started, as they needed to know when to order the glass and doors, and mobilize their crews. Unfortunately, General was having some difficulties in getting the project started, as there were some problems with getting the necessary building permit. By the time General gave High Tech a firm start date, glass prices had gone up 25%, and High Tech realized that it was going to cost them an additional \$75,000 just to buy the glass. High Tech notified General that because of the delays in scheduling, the cost would now be \$75,000 higher. General responded that they would not pay any more than the \$995,000, that High Tech was bound by their bid, and if High Tech didn't drop its demand for additional funds and get started on the job, General would go to the second lowest bidder (\$60,000 higher than High Tech's price) and simply call on the letter of credit to collect the difference from High Tech. High Tech is very nervous about their letter of credit being called, because it might jeopardize their relationship with the bank. They want the additional \$75,000, and certainly don't want to take a loss on the job, which would be the result if they did the work for the original price. On the other hand, from High Tech's perspective, the worst case would be for General to terminate High Tech's contract. If High Tech can do the job, reserving their right to claim the additional \$75,000 if they can establish a legal entitlement to it, High Tech will be content, as they feel strongly as to their entitlement to additional compensation. **Advise High Tech what its options are, and recommend a course of action to them.**

**(7 marks) (10.5 minutes)**

4. A school board consults you. They are very unhappy with the contractor of their new school. They spent a lot of money having a world-famous architect design the school so that it would be a landmark in their district. The plans called for three symmetrical pyramid skylights over the assembly area. Because of difficulties the contractor's superintendent had in interpreting the plans, the contractor made a few last minute design changes on its own, and proceeded to construct and install their version of the skylights. The school board advises you that their new school has just been completed, and they have noticed that the skylights are not

symmetrical. Rather, the centre skylight is taller and has broader angles than the other 2. They don't like the looks of the skylights, and they are different from what they expected from the plans for the school. From a spacing point of view, it is impossible to simply change the centre pyramid's size and shape. For all three pyramids to be exactly the same size, and symmetrical, all 3 need to be rebuilt, at an anticipated cost of \$640,000. The school board wants the contractor to tear the pyramids down, and build them correctly. The contractor has refused, saying that he did the best he could with the design, they look fine and they work as intended. He has no intention of tearing down perfectly good work, just because of a minor aesthetic issue. **Advise the school board of its rights, and their ability to require the contractor to do as they want.**

**(7 marks) (10.5 minutes)**

5. You are planning to build a small office building. You have already assembled the land, and now want to get going with your project. Development controls will allow you to build a 6 story office building, with about 8,000 square feet on each floor. You are concerned about rising construction costs. You have heard about labour shortages, rapidly escalating wages for trades people because of all the high paying jobs in Fort McMurray and the need to pay them more to keep them from leaving town. You've heard that costs are increasing by 1.5% per month! You realize that a traditional design process will likely take many months, and by the time the design has been finalized to your satisfaction, construction costs will likely have significantly increased. If you wait until the project is designed and costed before you start trying to lease it out, you are afraid that you may miss some opportunities with good, national tenants. Yet you are afraid to sign leases and fix rents until you know what your costs will be. **Discuss some of the options you might consider to manage your design and tendering processes, with a view to getting firm prices as soon as possible, and getting the building completed as soon as possible.** As well, comment on the potential contractual relationship(s) you might have with the architect and contractor.

**(10 marks) (15 minutes)**

6. A current trend is for public bodies to use the construction delivery process known as a "Public-Private Partnership" ("P-3") wherein, in addition to designing and building a project, public bodies are asking bidders to agree to also (a) finance construction and (b) operate the completed project for an extended term (20-30 years in duration). The contracts are sometimes referred to as DBFO contracts because they include the obligations to design, build, finance and operate. **Discuss the different risk considerations that arise for a contractor bidding on a P-3 DBFO contract (as opposed to a more traditional design-build contract).**

(12 marks)(18 minutes)

7. The decision of the Supreme Court of Canada in *City of Kamloops v. Nielsen (1984)* introduced at least 3 significant new concepts into the law of Canada. Discuss these developments and how they have continued to evolve in Canadian law to the present. In answering the question, contrast the approaches taken in Canada with the approaches taken by the Courts in the United Kingdom.

(14 marks)(21 minutes)

8. You are consulted by a granite supplier ("Granite Co"). Granite Co. has supplied granite to be used in the finishing of an upscale new restaurant called "Mercedes" being built by 12345 Alberta Ltd. ("12345"). Granite Co. was a supplier to the General Contractor who had a contract with 12345. 12345 has a long-term lease with a landlord named "WEM Holdings". Your client, Granite Co. has heard through the grapevine that the General Contractor is insolvent. Your client is concerned because, 50 days earlier, it had delivered \$50,000.00 worth of granite to the General Contractor at the General Contractor's off-site storage to be used in the Mercedes project but has still not been paid anything. Your client knows a little about the Builders' Lien Act and knows that there is a 45 day period to lien. Your client tells you that a Certificate of Substantial Performance has already been issued on the project. He also tells you that he thinks that "there may have been bonding on the project". **Discuss all remedies available to your client, any additional information that you may need to collect in order to provide a conclusive opinion and the steps that would be needed to enforce such rights. Discuss whether your client is time-barred from filing a builders' lien. As a matter of general interest, your client has asked you to provide them with information as to the builders' lien rights that they would enjoy in these circumstances and the steps that need to be taken to enforce such builders' lien rights.**

(14 Marks) (21 minutes)

9. You are consulted by the Municipality of Whoville. The Municipality has had problems with an arena project and wants you to claim on a Performance Bond issued by ABC Surety Co. The Performance Bond was issued in relation to a contract between the Municipality and "Arena Gods Contracting". You learn that the project was originally bid as just an arena project, however, a few months into the project, your Client decided to add a swimming pool to the work. Arena Gods Contracting agreed with the change. You also learn that the construction contract contained a liquidated damages clause in the amount of \$1,000.00 per day for every day that the project is late. Despite its best efforts, Arena Gods Contracting ran into a series of problems with its mechanical

subcontractor on the project. The mechanical subcontractor was having financial difficulties and issued an ultimatum that unless it was paid its entire subcontract price, it would not be able to complete the work on the project. Arena Gods Contracting did not have the resources to pay the mechanical subcontractor so your client reluctantly decided to make an advance payment in order to keep the work progressing. Unfortunately for Arena Gods Contracting and your client, the mechanical subcontractor went broke and did not complete the work. At this point, your client decided to terminate the contract of Arena Gods Contracting and make a claim on the Performance Bond. After two weeks of answering numerous requests for information about the project, your client felt that ABC Surety "was jerking the Municipality around" and that it had no intention of completing the work and, therefore, took it upon itself to hire a new contractor to complete the work. The project was completed 75 days late. Because of the increased cost in completing the work paid to the replacement contractor, your client has suffered damages of \$200,000.00. Your client wants you to sue ABC Surety for \$200,000 in damages and for \$75,000 in liquidated damages. Your client provides you with an electronic scanned copy of a Performance Bond that was properly executed by ABC Surety Company and by Arena Gods Contracting. You ask where the original Performance Bond is and your client advises that it does not know but not to worry because they have contacted ABC Surety Company who have confirmed that ABC Surety Company did indeed provide a Performance Bond for the project. Your client admits that it may not have acted "perfectly" in relation to the Performance Bond but that insofar as ABC Surety Company was a "compensated surety" as opposed to an "accommodation surety", any problems would be mere technicalities that a court would disregard. **Discuss all of the defences that are likely to be raised by ABC Surety Company in denying paying under the Performance Bond and whether your client is likely to be successful in its claim on the Performance Bond?**

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TOTAL MARKS: 100

End of Examination

GOOD LUCK IN YOUR FUTURE ENDEAVORS!

## CCDC 2 – GC 6.5

### GC 6.5 DELAYS

- 6.5.1 If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.
- 6.5.2 If the *Contractor* is delayed in the performance of the *Work* by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or any person employed or engaged by the *Contractor* directly or indirectly, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.
- 6.5.3 If the *Contractor* is delayed in the performance of the *Work* by labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound), fire, unusual delay by common carriers or unavoidable casualties, or without limit to any of the foregoing, by a cause beyond the *Contractor's* control, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*.
- 6.5.4 No extension shall be made for delay unless notice in writing of claim is given to the *Consultant* not later than 10 *Working Days* after the commencement of delay, providing however, that in the case of a continuing cause of delay only one notice of claim shall be necessary.
- 6.5.5 If no schedule is made under paragraph 2.2.9 of GC 2.2 - ROLE OF THE CONSULTANT, no claim for delay shall be allowed because of failure of the *Consultant* to furnish instructions until 10 *Working Days* after demand for such instructions has been made and not then, unless the claim is reasonable.