

FACULTY OF LAW

FINAL EXAMINATION - APRIL 2004

LAW 499:B1 CONSTRUCTION LAW

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TIME ALLOTTED: TWENTY (20) MINUTES READING TIME FOLLOWED BY TWO (2) HOURS WRITING TIME

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 7 questions on 7 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.

VALUE**QUESTION****(10 marks) (12 minutes)**

1. You have been consulted by John Doe. He wants to build a small office building on some land that he owns, and has hired an architect to design the building for him, as well as to assist with the administration of the project. The project will proceed on a “design bid build” basis. The architect has drafted the documents for a tender call for the general contract, and has included a privilege clause “highest or any bid not necessarily accepted”. John Doe has heard about MJB vs. Defence Construction, and is worried that he might have problems in the tender process. He asks you for your advice on the sufficiency of the proposed privilege clause, and to draft a different (better) one if you think that more should be done to protect him.

Advise Mr. Doe, and draft a clause if you think it necessary.

(20 marks) (24 minutes)

2. You have been consulted by the Province of Alberta’s Infrastructure Department (“AI”). They had been instructed by the Premier to have a new building designed and built, to house the Premier and his staff. A location has been selected, and the budget has been set for \$10,000,000. They put out a “request for qualifications” (“RFQ”) inviting interested parties to make a submission to AI, setting forth their interest in the project, the make-up of their team (i.e. who will do the design, who will do the construction), the experience of the proponents and the financial capabilities of the proponents (financial statements, insurance and bonding capabilities, etc.). Of the dozen or so proponents, AI selected the 3 finalists, and issued a request for proposals from them (“RFP”). The RFP invited the proponents to put forward their detailed design and cost, and contained the following terms:

- (a) The Government of Alberta will select the proposal that it deems to be in its best interests.
- (b) The unsuccessful proponents will receive a consolation fee of \$250,000 each, to offset their bidding costs.

All 3 of the proposals are responsive to the RFP – no qualifications – and all have submitted the necessary bid security, consents of surety, etc. 2 are under the \$10,000,000 budget estimate set for the project, and one is slightly over. AI (and the Premier) really like the design put forward by the highest of the bidders, and they internally decide to award the project to that bidder, even though it was a bit over budget. They have prepared

the necessary documents to announce the award, have cut the cheques to the 2 “unsuccessful” bidders and are set to make the necessary announcements. Unfortunately, the Gallup poll results, announced yesterday, show that the public is very concerned about government spending. The Premier has decided that he shouldn’t be spending \$10,000,000 on new digs. He has instructed AI to cancel, or at least put off the project.

AI wants your advice as to how to deal with the matter. Can they simply cancel the project because of the change in circumstances? If they do, do they have to pay all 3 proponents the \$250,000 consolation fee? Or do they have to pay the one they were set to award the work to something more (like its lost profit and overhead on the job)? Or can they pay it nothing because it was over budget? What are AI’s obligations here? What are the rights of the proponents? Do the 2 that were under the budget estimate have any claim for loss of anticipated profits, or are they stuck with \$250,000 or perhaps nothing? Advise AI on what it should do, and what its risks are.

(20 marks) (24 minutes)

3. You are consulted on an emergency basis by Webildem Construction Co. They have a job underway, building a 250 unit residential condominium project. They have run into a disagreement with the owner and the consultant. The architectural drawing produced by the owner’s architect show openings for through-wall air conditioning units, as the architect intended for the project to be fully air conditioned . The mechanical drawings, done by the architect’s mechanical consultant, do not show any air conditioning units at all. Neither do the electrical drawings, done by the architect’s electrical consultant. The specifications provide that “any through-wall air conditioning units will be Sears model 1500 units”. The framing is complete, and the contractor has framed for the air conditioning units it expects its subcontractor to provide and install. Webildem told Plumrite, the mechanical contractor, that the project is ready for installation of the air conditioners. Plumrite replied “What air conditioners?” They hadn’t seen any air conditioning units on the mechanical drawings they used to bid the work, and assumed that there were none specified. They hadn’t included any air conditioners in their price, and are refusing to supply them unless they get paid an extra \$250,000 (\$1000 per unit) for supply and installation. Webildem has gone to the architect (who is also the consultant on the project) and pointed out the inconsistency between the architectural and mechanical/electrical drawings. The architect/consultant responded that it was clear from the architectural drawings that air conditioning units were called for in each suite, and that Webildem is obliged to provide them for the original contract price. No extra charge would be entertained. They pointed out to Webildem that “time was of the essence”, and that they’d better get

moving on the installation, as the owner would be looking for delay damages if they didn't get the project finished on time. The architect/consultant directed Webildem to provide and install the air conditioners "as per the contract", at no additional cost. Plumrite has told Webildem that they don't care what the consultant says – they won't install air conditioners unless they get paid the \$250,000. Because of the disagreement, they now want the \$250,000 in advance! Webildem consults you.

Do they have to install the air conditioners, even though there is an inconsistency in the drawings? How do they do so without waiving their position against the owner or architect, as they want to preserve a claim against the owner for the additional costs if they have to do the installation? What do they do with Plumrite, as they feel that this is really Plumrite's problem as they didn't look at the architectural drawings properly. Advise Webildem as to how they should proceed.

(15 marks) (18 minutes)

4. You are consulted by Badluck Windows Ltd., a manufacturer of exterior windows. Badluck Windows has supplied \$100,000.00 worth of windows as a result of an arrangement that Badluck Windows entered into with GoingBroke Contracting Ltd. Badluck has just learned that GoingBroke Contracting has assigned itself into bankruptcy. Badluck has not been paid anything towards the windows that it supplied to GoingBroke Contracting. Badluck has asked you to prepare a claim in the bankruptcy of GoingBroke General Ltd. You are aware that Badluck Windows will recover very little, if anything, out of the bankruptcy proceedings and so you have taken it upon yourself to consider what other remedies may be available to Badluck Windows.

Describe all of the remedies and actions (other than bankruptcy proceedings) that may be available to Badluck Windows. In describing the alternative remedies and actions, describe the information that you will need to obtain from Badluck Windows to determine whether the remedy is available to be pursued.

(8 marks) (9 minutes)

5. You have been consulted by a contractor who has performed tenant improvement work pursuant to a construction contract executed with the Tenant of office space in a downtown office tower. The Tenant has instructed your office to file a builders' lien against the property. The contractor has provided you with the correct legal description.

What information do you need to know in order to determine what interest in land can be liened?

(6 marks) (7 minutes)

6. A senior partner at your lawfirm states that the Builders Lien Act requires that owners maintain a lien holdback of 10% and that, therefore, if an owner makes a mistake in how it makes payments on a project, it will be liable to pay no more than an additional 10 % of the value of its contract.

(a) This statement is not correct. Explain.

(b) Explain the correct way for Owner's to make payments under the Builders Lien Act so that they will not be exposed to any additional liability.

(21 marks) (26 minutes)

7. Old Folks Inc. is a developer of old folks homes. It purchased a parcel of land in the river valley of the City of Floodsville to order to construct its new facility. Floodsville issued a Development Permit to Old Folks Inc. with the following 2 conditions: that weeping tile be installed on the exterior of the foundation of any structures constructed and that Old Folks Inc. provide a soils and geotechnical report indicating that the level of the water table at the vicinity of the property was acceptable. Old Folks Inc. hired AAA Architects to design the new facility and to develop the tender package and conduct the tender. Old Folks Inc. neglected to advise AAA Architects of the requirement that weeping tile be installed on the exterior of the foundation. The contract between Old Folks Inc. and AAA Architects provided:

(a) That the Architect was to obtain a soils and geotechnical report which would indicate the level of the water table (the "Water Table Report"); and

(b) That the Architect's liability in tort or contract or otherwise was limited to \$50,000.00.

AAA Architects hired NotsoGood Engineers Ltd., a firm of professional engineers to provide the mechanical, electrical and structural design and to provide the Water Table Report. The Water Table Report was prepared by Joe Smith Jr., a junior engineer at NotsoGood Engineers; the Water Table Report was sealed with the professional seal of John Jones Sr., a senior engineer.

The tender package prepared by AAA Architects attached a copy of the Water Table Report. The architectural design within the tender package called for weeping tile to be installed on the inside of the foundation (which would have been an acceptable method of construction if the Water Table Report was correct). The tender package also required that the successful bidder execute the CCDC-2 contract document and post a Performance Bond and a Labour and Material Payment Bond.

The successful bidder was a General Contractor by the name of GC Contracting.

After entering into the construction contract with Old Folks Inc. and providing the necessary bonds, GC Contracting made application for a building permit. The City of Floodsville was not well staffed and it was taking 3-4 weeks to get Building Permits issued. GC Contracting knew that Old Folks Inc. wanted construction to begin immediately so it approached and asked Old Folks Inc. whether it could begin excavation and foundation work before the Building Permit had been issued. Old Folks Inc. agreed that such construction could begin without the Building Permit having been issued.

GC Contracting retained Weeping Tile R US, a well-known subcontractor to perform the excavation work, pour the foundation and install the weeping tile. After the weeping tile was completed, backfill occurred so that the work could not be inspected. The weeping tile was installed on the inside of the foundation wall (as the architectural design required). When the Building Permit was finally issued, the following 2 conditions were attached: (1) that weeping tile be installed on the outside of the foundation wall and (2) that backfill not take place until the weeping tile had been inspected. When the Building Inspector for Floodsville attended on site to inspect the weeping tile, he determined that backfill had already occurred. He met with the Superintendent for GC Contracting to make inquiries about the weeping tile system but the Superintendent did not know how it had been installed. As such, a representative of Weeping Tile R Us was asked to join the on-site meeting. He improperly confirmed that the weeping tile had been installed correctly on the outside of the foundation. The Building Inspector decided not to make GC Contracting dig up the work so that he could inspect the weeping tile system because he knew the cost that would be involved and because he had regard for the experience of Weeping Tile R Us.

1 year after construction was completed, the new old folk's facility was experiencing flooding and water ponding and water entry into the structure. Inspections occurred and 2 things were learned. Firstly, the water table was determined to be higher than the Water Table Report had indicated. Secondly, the weeping tile was determined to have not been installed on the exterior of the foundation wall. The cumulative effect of

these two factors was that flooding would be a recurring problem and that the creation of mould within the wood structure was a possibility. The cost to remediate the problem was estimated to be \$1,500,000.00. GC Contracting was contacted to remediate the problem but its response was to argue that it installed the weeping tile as designed and that the problem arose because of the improper Water Table Report.

Assume that you are retained to act on behalf of Old Folks Inc. who want you to issue a Statement of Claim against any party that Old Folks Inc. may have any conceivable claim and to take advantage of any other remedies available to Old Folks Inc. Discuss what action you would suggest taking, what defendants to name in a Statement of Claim, the causes of action that you will make against each defendant, any legal impediments that you may expect to reasonably encounter in making your claims, and make reference to any case authority that may be relevant to the claims.

Assume that Old Folks Inc. was fortunate enough to have sold the facility to New Folks Inc. before the flooding problems had been discovered and that you have been retained to act on behalf of New Folks Inc. New Folks Inc. has retained you to issue a Statement of Claim against any party that New Folks Inc. may have any conceivable claim. Discuss what defendants to name in a Statement of Claim, the causes of action that you will make against each defendant, any legal impediments that you may expect to reasonably encounter in making your claims, and make reference to any case authority that may be relevant to the claims.