Federation of Law Societies of Canada

National Committee on Accreditation

SAMPLE

Examination for Contracts

Candidate No.: _____

(To ensure your anonymity, please DO NOT include/type your name in any part of your exam)

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General conditions of NCA online exams:

The NCA allows **three (3) hours in total** for completion of each exam.

NCA exams are open-book. **Only hard copy study materials** will be permitted; you will **NOT** have access to electronic copies of your notes or textbooks.

The examination will be graded on a **pass/fail** basis (50% is a pass).

The contents of the examination, including the exam questions, **must not be disclosed** or discussed with others

If you finish early, you must to stay in place, with your computer still locked down, for the full 3 hours. **Failure to follow the proctor's instructions regarding sequestering is a violation of the Candidate Agreement and will result in your exam being disqualified.**

NCA online exams are available through a secure, browser-based platform that locks down your computer. This means the computer cannot be used for any other purpose or to access any other material during the exam.

As you write your exam, a person designated as proctor will check your identification and monitor you **using two cameras**; a web camera on your computer and a camera on a tablet or phone.

For more information concerning the NCA's online exams, including, exam rules, technical requirements and the candidate agreement please see the links below:

https://nca.legal/exams/online-exam-rules/
https://nca.legal/exams/technical-requirements-and-testing-for-online-exams/
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Each exam may have its own special instructions,
therefore, it is important for you to read these carefully before starting.

Instructions specific to this exam:

1. This examination contains **XYZ questions,** worth a total of **100 marks**.

2. You will be assessed primarily on your knowledge of the cases and statutes found in the assigned Casebook (as supplemented in the Syllabus), and, as part of that, your capacity to recognize the legal issues raised by the fact situations that form the bases for the questions and, thereafter, your analysis and assessment of the competing arguments relevant to each of those issues.

3. Unless you are relying on cases or statutes not covered by the syllabus, there is no need to include full citations when you are referring to a case or statute. The name of the case and the name and relevant section of the statute will suffice.

4. Do not feel obliged to provide an initial summary of the facts; rather, deploy the facts in your analysis and assessment of the various issues.

5. If quoting from any source, use quotation marks and identify the source. Failure to do so will result in grade reduction and, in egregious instances, automatic failure.

This sample exam provides an indication of the style/type of questions that may be asked in each exam. It does not reflect the content or actual format/structure of questions nor their value. Actual exams for a specific subject vary from exam session to exam session.

QUESTION ONE (25 marks, 45 minutes)

The City of Ottawa has issued a call for tenders for garbage compacting equipment. Three garbage compactors are to be purchased. The specifications are detailed in terms of the amount of garbage each compactor is able to handle per hour. Other clauses in the specifications state:

> [23] The tender will only be let on the basis that the equipment is less than five years old [Built in 2008 or after.].
>
> [27] All tenders must be sealed and received by the City of Ottawa Purchasing department no later than 5pm on December 2nd, 2012.

And later on:

> [41] Bidders who are unable to supply in accordance with the specifications must submit full particulars for approval to the Purchasing Department.
>
> [42] The City reserves the right to reject any and all tenders, and to waive any informality therein. The lowest or any tender may not necessarily be accepted.
>
> [43] All tendering will be in accordance with the City of Ottawa's policy manual on tendering public contracts.

A term of the City of Ottawa's policy manual on public tendering states that tenders will always be awarded on the basis of "lowest evaluated tender". The policy manual defines "lowest evaluated tender" as "the tender meeting the specifications at the overall lowest cost to the City".

On November 10th, Doubleday Garbage Ltd (DGL) deposited a tender with the City outlining that its three compactors would cost $300,000. However, on November 23rd, when George Doubleday was reviewing the bid documents sent to the City by his sales staff he realized that one of the garbage compactors he proposed selling was in fact built in 2007. He immediately faxed to the City purchasing department particulars outlining that one of his compactors was in fact built in 2007. He then called Mary Bolan, the City's chief purchasing officer to discuss whether she had received his fax. Mary indicated that she had and that she couldn't see any problem with his bid. Based on this conversation George did not do anything. If Mary had objected, he had intended to file another tender bid, at a higher price, but based on all three garbage compactors being built after 2008.

On December 2nd, the city opened the sealed bids it had received. In addition to the DGL bid, there was one from Clean Sweep Ltd (CSL). CSL's bid met all the specifications and quoted a price of $375,000. Upon opening the bids, Mary indicated that she would be recommending to City Council that the city accept DGL's bid. When Arthur Badger, the proprietor of CSL, heard the difference in bid prices, he yelled out that he couldn't believe DGL was offering to sell equipment that was less than five years old at those prices, and that he was going to see his lawyer.

On December 4th Mary received the following letter from Arthur Badger's lawyer.

> Please be advised that it has come to our attention that you are determined to recommend to City Council that the recently tendered contract for garbage compactors be given to DGL. It is our understanding that some, or all, of DGL's equipment does not meet the specifications of the tender documents. If my client was given the opportunity to bid on the equipment without the need to meet the age specification, it would have tendered a price below that of DGL's. My client is prepared to settle this matter for his out of pocket expenses and a modest return on investment being $25,000. We are anxious to meet you to resolve this dispute and await your reply.

You act for the City of Ottawa. Mary has come to you for advice on what she should do and what potential liabilities the city may have to either or both DGL or CSL.

QUESTION TWO (25 marks, 45 minutes)

In May 2012 Adriano entered into a contract to carpet and tile the new offices of the William and Mary Corporation, which had its headquarters in downtown Vancouver. The price was set at $90,000 for the tile work and $100,000 for the carpeting. He was to finish the work in August 2012.

The Middle Eastern countries from which Adriano usually imported his carpets were still suffering the effects of various blockades on their goods and did not have a sufficient supply of carpet in Canada for the job. Adriano soon realized that he would not meet his deadline. He had a meeting with William and Mary and laid out the problem. He told them he could have the job done on time but he would have to order a more expensive carpet from Italy and that the cost would be increased by $10,000. Otherwise, the job would be delayed by an additional two months (until October). Mr. William and Ms. Mary were not impressed by this news. Mr. William stated, "It is important to have the contract completed on time, do what you have to do to get it done."

Ahmed, the Sales Manager for William and Mary Corporation, approached Adriano and asked that if his office could be completed first, he would pay a $2000 bonus. Adriano agreed to finish the office first, but on condition that Ahmed should pay the $2,000 bonus to the local Humane Society.

Adriano finished the project on September 28th. He billed William and Mary $200,000. William and Mary sent a cheque for $190,000.

Ahmed has also refused to pay the Humane Society.

Adriano seeks your advice on whether he can sue William and Mary for the additional $10,000, and Ahmed for the $2,000.

The Humane Society would also like to know its legal rights as, based on comments it received from Adriano, it has gone and printed a new brochure publicizing its work, at a cost of $2,000.

QUESTION THREE (30 marks total, each part 10 marks, 54 minutes total, each part 18 minutes)

Five years ago, the City of Windsor acquired Peche Island, a small island situated on the Detroit River, approximately forty metres from the shoreline. The island has been a sanctuary for bird life for many years, but access to the island has required the use of a boat. As part of its efforts to increase tourism the City included in its long-range plan a proposal to build a pedestrian bridge to the island.

Three years ago, in an effort to move the bridge proposal along, the City received money from the Province of Ontario to undertake an engineering feasibility study. The City contracted with Windsor Geological Services (WGS) to undertake the work. In the summer of 2009 WGS did the survey work and filed its report. The report was extremely long but a summary on the front page indicated the following details:

> The most desirable access way to the island would be the construction of a cantilevered pedestrian bridge using a reinforced cement base constructed on dry land. Such a plan would be aesthetically pleasing and could create a signature attraction to the area although the cost of such a proposal would be high. An alternative and far cheaper construction method would be to use piles driven across the riverbed at 5 metre intervals. The riverbed is mostly sandstone although there are pockets of packed sand in the middle of the riverbed. There are no geological or engineering reasons that would prevent the building of a pedestrian bridge.

Further on in the report, some ten pages after the summary, the following clause appeared:

> WGS has based its geological survey on current river conditions. If the main channel of the Detroit River was to be dredged, the change in currents could have an impact on silting and/or erosion, which may adversely impact upon the depth of the riverbed to Peche Island.

In 2010 the Federal Government, the government responsible for navigable waters, dredged the Detroit River so that larger ships could pass through the great lakes system. The City was aware of this work.

In February 2012 the City called for tenders to build a pedestrian bridge. As part of the tender package the City enclosed the engineering report of WGS. At the time of calling for the tenders, the City had no reason to believe that the riverbed conditions had changed, although it had done nothing to check this out, and simply assumed that bidders would do whatever was necessary to prepare their bids. The City also indicated that it was open to all types of proposals and that tenders would be evaluated giving equal weight to aesthetic design and low price.

Boco Developers Ltd. (BDL) submitted a bid, together with a tender deposit of $30,000, of $250,000. BDL's bid was a 'bare bones' approach, building a simple wooden bridge using piles driven into the riverbed. BDL had utilized the WGS's report to make its bid, although it had only

read the summary sheet and had done no other site inspection or its own geological work to prepare its bid. BDL was motivated into placing a bid because they owned land adjoining the river, and knew that such a bridge would further enhance the resale value of their residential developments. BDL was in the business of building residential houses and had no experience in building bridges. However, since the owner of BDL had made an inspection of the area, and was able to hit a simple wedge golf shot across the water, he thought, “how difficult could it be to build a bridge”.

When the City opened the bids, it was disappointed at the fact that BDL’s bid was the only one submitted, and that it had no aesthetic design whatsoever. Nevertheless, because the city was desperate to have something moving on this initiative it accepted BDL’s bid and signed a contract in March 2012. The only contractual term read:

> The City of Windsor agrees to pay $250,000 to BDL as total compensation to construct a pedestrian bridge between the foreshore and Peche Island to be completed by August 2012.

BDL commenced building a bridge in May 2012. Within a few short weeks it ran into problems. Under the contract it had included a sum of $100,000 to complete the piles at 5m intervals across the riverbed. However, when it started pile driving, it became obvious that the riverbed had undergone significant changes from 2009. A great deal of silting had occurred in some parts and erosion in others. Where silting has occurred, the piles cannot be driven to a depth sufficient to find a stable base. And where erosion has occurred, the piles can no longer be made of wood but required steel to meet the additional depth required to find stable sandstone. With their cost climbing way above the contract price, BDL has pulled out of completing their contract.

A. You are the solicitor for the City of Windsor. The City wishes to enforce the contract with BDL. Please advise on the likelihood of success and what possible defences BDL will have to such a claim. **[10 marks, 18 minutes]**

B. Now assume that in April 2012 the Federal Government enacted the following legislation:

Detroit River Navigable Waters Act

An Act to ensure the unhindered passage of navigable water to shipping in the Detroit River Basin.

1. **No construction work is to commence on open water that may impede river navigation without first gaining approval of the Minister of Transport.**

2. **No permanent work (piles, docks, causeways) may be commenced without first gaining approval of the Minister of Transport.**

3. **It is an offence to permanently change the contour of any navigable waters.**

BDL was unable to secure the approval of the Minister of Transport. They could build a cantilevered bridge without ministerial approval that would not impede shipping or change

the contour of the riverbed, but the cost of such a bridge would be $350,000. BDL is yet to start construction of any bridge and have approached the City to see if they can renegotiate the contract price.

You are the solicitor for the City of Windsor. The City wishes to enforce the contract with BDL and insists that BDL must build a cantilevered bridge, which, in fact, will be a much better design, as it is aesthetically pleasing. Please advise on the likelihood of success and what possible defences BDL will have to such a claim. Please indicate if the City is liable for any increase in cost or has to refund the bid deposit. **[10 marks, 18 minutes]**

C. Now assume it is July 2012. BDL completed the bridge in ignorance of the passage of the Detroit River Navigable Water Act. The bridge has piles driven across the riverbed at 5m intervals. The cost is clearly above the contract price but BDL still thinks that it will add value to their residential development. BDL never got ministerial approval. After it became aware of the Act, BDL had preliminary discussions with the Minister, arguing that since shipping never used that side of the Detroit River the bridge did not impede shipping. The Minister did not agree with that interpretation of the legislation but indicated that it was highly unlikely that the ministry would prosecute for any contravention of the Act that may have occurred. In fact, the Minister supported the improved public access to Peche Island.

You are the solicitor for the City of Windsor. The City has received an invoice from BDL for $350,000, the actual cost of building the cantilevered bridge, but without any profit margin for BDL. The City wishes to know what is their contractual liability to pay this, or any part, of BDL's invoice. **[10 marks, 18 minutes]**

QUESTION FOUR (20 marks, 36 minutes)

David Peier was interested in purchasing a property in a new subdivision in Banff, Alberta. The subdivision was the work of Cressey Development Ltd (CDL). When David inspected the subdivision in June, 2012 he was impressed with the views across the river, however, he noticed that a large black hydro power line strung between wooden power poles ran beside the river and marred the pristine view. When he questioned Margaret Dawson, CDL's agent, Margaret indicated that it was the intention of CDL to bury the overhead hydro power lines in a couple of weeks' time and that such a condition could be part of the sale and purchase agreement. Margaret also told David that on this development CDL needed to have a deposit of one third the asking price, namely $100,000, with remaining $200,000 paid on closing. David replied:

> "Well as long as the condition about the buried hydro power line was part of the agreement, I will pay the asking price of $300,000 and pay a deposit of $100,000."
>
> Margaret said:
> "Well then, we have a deal, I will draw up the papers and send them to you."

David gave Margaret a cheque for $100,000. Written on the cheque was, 'deposit payment for purchase of Banff section, closing to be by August, 2012.'

A week following their meeting in Banff, Margaret sent David a standard sale and purchase agreement recording all the details but omitting any clause concerning the hydro power line. David did not notice the omission.

In August, when David came to close the purchase, he noticed that the hydro power lines were still not buried. Margaret assured him that they would be buried in September, and that the delay had been caused by a shortage of hydro workers to do the necessary work. David, who had since seen another property in Banff more to his liking, said he was not going to close the deal and wanted his deposit back.

You act for CDL. You have received the following letter from David's solicitor.

> Please be advised that we act for David Peier. This letter will act as formal demand for the return of our client's deposit on the grounds that CDL were in breach of contract.

Advise CDL of their legal rights in this matter.

End of Examination