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**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

FINAL EXAMINATION – DECEMBER 2018

**LAW 439.001
Construction Law**

**Section 1
Adjunct Professor Singleton**

TOTAL MARKS: 100

**TIME ALLOWED: 3 HOURS
And 30 minutes reading time**

- NOTE:**
- 1. This is an open book examination.**
 - 2. ANSWER 2 OUT OF 6 QUESTIONS AND THE MULTIPLE CHOICE QUESTIONS.**
 - 3. IN THE ESSAY SECTION, PLEASE INDICATE THE QUESTION NUMBER YOU ARE ANSWERING**

LAW 439.001, Section 1

ANSWER ANY TWO (2) OF THE FOLLOWING SIX (6) QUESTIONS

MARKS

1/3 1. Tall Building Development Ltd. (Tall Building) hired an architectural firm to design a 30 story office building. The architect agreed to provide for field reviews during construction of the project.

The architect in turn hired a structural engineering firm, to prepare detailed structural design and the structural engineer agreed to provide Professional Letters of Assurance regarding the structural design and the field reviews performed by the engineer.

A general contractor, Slip Shod Builders (Slip Shod) was awarded the construction contract by Tall Building.

The structural engineering firm appointed one of its newly graduated junior engineers, Diane Newgirl, to be the firm's representative and inspector on this project.

Construction commenced in November and during the early stages of the work, Slip Shod recommended to Tall Building that substantial cost savings could be achieved if the specified fill material around the foundation was changed to a more readily available material. Slip Shod did not know if the alternative material was suitable but rather only that it was easily available and less expensive. Tall Building sought the architect's advice on the proposed fill material and said they needed a decision right away in order to get the foundation work done before winter conditions set in.

The architect in turn asked Ms. Newgirl about the fill and repeated the developer's request that a decision be made as soon as possible. Ms. Newgirl determined that another engineer at the structural firm had specified the original fill material after a detailed soils investigation at the site, however that engineer no longer worked for the firm. Ms. Newgirl was told by her supervisor to conduct a further soils investigation before approving of the alternative fill material.

Under pressure from Tall Building and Slip Shod Ms. Newgirl approved the change of material without further investigation. The architect was aware that Newgirl had not done a further soils investigation. During installation of the new fill material Slip Shod failed to compact it to the density set out in the structural specifications.

LAW 439.001, Section 1

The substitute fill material did not drain as well as the material originally specified. It retained water and expanded during freeze up and caused significant cracking in the foundation walls. Tall Building said the material was not fit for use. The structural engineering firm said it would have been okay if Slip Shod had compacted it properly. Substantial remedial work was necessary after this defect was discovered causing additional expense and delay in the completion of the project.

Explain the potential liabilities arising from these facts and refer to supporting legal authorities.

2. 1/3 You have been approached by the Ministry of Health to provide legal services to the Ministry with respect to its proposed development of a new hospital complex in downtown Vancouver. The Ministry has expressed various concerns over the project, including the following:
- (a) The cost for the project is \$1.5 billion dollars, and the funding currently available to the Ministry is \$200 million less than that.
 - (b) The Ministry has retained a design consultant to prepare an indicative design for the project, but the design is far from complete and has many components yet to be decided upon and finally specified.
 - (c) The project will of necessity involve multiple consultants and building trades and the Ministry is very concerned about disputes arising during the course of construction which might delay the project beyond its mandatory completion date of January 1, 2019.
 - (d) The project is going to contain a number of commercial components and the Ministry does not want to operate these.

The Ministry has inquired of you how to best structure this project.

Outline what your advice to the Ministry would be providing examples of at least two different project structures and discussing the advantages or disadvantages of each, taking into account the Ministry's concerns as outlined above.

LAW 439.001, Section 1

- 1/3 3. ABC Development has purchased lands formerly on the site of a creosote plant for making roofing shingles. ABC wants to build a multi-family complex including retail and commercial operations on the land.

The property in question was historically operated as a service station between 1940 and 1955, then as a storage yard for scrap metal for ten years and, finally, as a shingle plant.

ABC has come to you with the advice that when attempting to obtain a development permit for the site they were contacted by the Ministry of Environment advising them that before developing the site they were going to have to remediate it to remove suspected hydrocarbons, contaminated metals and coal tars from the subsoils.

ABC has advised that if they were to do this on their own they would become bankrupt and have come to you for your advice as to what steps they might be able to take to have others contribute to the cost of the clean-up. They would also like to know what process they have to follow in order to finally get a development permit.

What advice would you give ABC?

- 1/3 4. Strata Corporation LP 246 has learned that it must replace all the copper piping in the 60 condominium units making up the Strata Corporation due to a defect in the manufacturing of the pipe. To that end, they retained HVAC Engineering, a mechanical engineer, to prepare drawings for the replacement work and to advertise the work for tenders.

The Tender Conditions prepared by HVAC contain a privilege clause stipulating that LP 246 is not obliged to accept any of the tenders received and has the right to reject any or all tenders. Additionally, the Tender Conditions stipulate that any irregularities in any of the bids received can be waived by LP 246 as it may in its sole discretion determine.

Three bids were received for the repair work all of which exceeded the preconstruction budget set by LP 246. Additionally, there were problems with two of the three bids. The low bidder, Piping International Ltd., failed to deliver a Bid Bond with its bid and the high bid, submitted by Super Tube International, contained an obvious arithmetical error in calculating the price it bid.

The president of the Strata Council, Mr. Einstein, thought he could solve all the problems by negotiating with the three bidders to obtain a better price and correct the errors in the low and high bid. He proceeded to discuss matters with each of the three bidders and in the process received

LAW 439.001, Section 1

the assurance of the second low bidder that if they were to be awarded the contract they would reduce the bid to below the Strata Corporation's budget for the project.

The Strata Council passed a resolution rejecting all three bids and then shortly thereafter awarded the contract to the second low bidder. The low and high bidder have commenced legal proceedings alleging a breach of the Tendering Contract by the Strata Corporation and seeking damages.

The Strata Corporation has retained you to defend the two proceedings commenced. What advice would you give them with respect to the following:

- a) Which of the three bids were compliant and capable of acceptance upon receipt?
- b) Did the privilege and discretion clauses give the Strata Corporation the ability to accept any of the three bids?
- c) Did the Tender Conditions give the Strata Corporation the power to negotiate with the three bids once received?
- d) Was the award to the second low bidder legally defensible?
- e) If the low and high bidders are successful in their actions what are they likely to be awarded in the way of damages?

1/3 5. The decision in *Shimko Metal Erectors Ltd. v. North Vancouver (District)*(2003) (C.A.) ("Shimko") is an important case for construction lawyers in the builders lien context. Please answer the following questions in the context of the *Shimko* decision:

- a. Describe and explain what the *Shimko* decision provided for lien claimants in terms of available remedies.
- b. What was the rationale for providing these remedies?
- c. What are some of the implications of the *Shimko* decision for an Owner?
- d. What are the possible implications for an Owner who does not maintain a holdback in the event that a lien claimant is owed monies but does not perfect its lien claim as required by the Act?

LAW 439.001, Section 1

- e. What are some possible law reform considerations with respect to the *Shimco* lien?

- 1/3 6. Big D developer built a 27 storey condo tower, called the "North Tower", in New Town in 2005. In 2009 an owner of a unit on the 27th floor noticed that oranges placed on the counter were rolling off and sent a nasty letter to the Strata council and Big D developer in which she complained that "this building is crooked". No one followed up, and peace on the 27th floor returned when her partner independently decided to change the counter top for a colour she liked better.

Later that same year a resident of the 8th floor noticed that a cigarette butt thrown off the penthouse balcony passed by her balcony three feet away. She complained to the Strata Council about her neighbors conduct. The President of the Strata council, a physics professor by day, realized that the fact that the butt flew so far away from the balcony edge might reduce fire risk, but could be related to the earlier complaint that the building was crooked.

The President of the Strata council is Ms. Pisano P. Eng. . Ms. Pisano was also the engineer of record for the construction of North Tower, and signed all the letters of assurance required from New Town's engineer. In 2011, Ms. Pisano, P. Eng. determined that the building was leaning 5 degrees to one side due to the foundations on that side sinking into the ground. Further investigations revealed that the building had shifted between 2005 and 2009 but that no further movement had occurred since that time. It was also determined that the building was stable and that it would be unwise to attempt to correct the lean. The Strata Corporation changed the name of the building to "Pisa North" and started a successful patio restaurant in the common garden area serving food and drinks and providing a place for patrons to take pictures of themselves "holding up the building".

In 2016, a new tower was planned for the site next door to Pisa North. It was called The Baptistery in the media roll out. The land was initially owned by Big D developer and they started the development process, again retaining Ms. Pisano to assist them. In 2018, Big D sold the new project to Off Shore Owner who, when they visited the site, after sale were concerned about the lean on Pisa North. Off Shore Owner then commissioned additional geotechnical investigations and it was determined that both the Baptistery and Pisa North were located on the site of a former gravel pit that had been operated under permits issued by New Town in the 1980s.

LAW 439.001, Section 1

A review of the records showed that in 1990, New Town had been told that the gravel plant had been abandoned and that it had not been properly decommissioned. That council passed a resolution later in 1990 they were not going to conduct further investigations. They said that they did not have the resources to do so and as a matter of policy they could not take on the work. The New Town legal department recommended at that time that New Town put a restrictive covenant on title to warn subsequent purchasers of the state of the land. Council agreed this would be a good idea but that was not done due to staff shortages in the New Town Legal department.

You have been asked to attend an *in camera* session of New Town Council to brief them on what liability New Town could be exposed to if either the owners of Pisa North or Baptistery commence an action against New Town.

Provide your briefing notes.

LAW 439.001, Section 1

MULTIPLE CHOICE (INDICATE ONLY ONE ANSWER TO EACH QUESTION)

MARKS

1/3

1. In preparing a design and cost estimate for his client, an architect:
 - (a) Has no liability for estimating costs
 - (b) Is only liable if the budget is off by more than 20%
 - (c) Must tell the client that the costs are only estimated and not guaranteed
 - (d) Should ensure that the design can be constructed within the budget expectations of the client

2. In the UK, adjudication is:
 - (a) Used during the construction project to avoid lengthy and costly delays
 - (b) Must be used to resolve all construction contract disputes
 - (c) Binding during the project but the parties can go to court after the project ends
 - (d) All of the above

3. In Canada, designers owe a duty of care to ensure their designs do not result in substantial dangers to life and safety:
 - (a) Only where physical damage has occurred
 - (b) Only to the local government that issued the building permit
 - (c) Only to their client
 - (d) But only to those who foreseeably might suffer damage

4. An engineer will be found negligent for design errors unless the engineer:
 - (a) Consults with world renowned expert in the field before finalizing the design
 - (b) Takes all possible steps to avoid damage occurring as a result of a defect in design
 - (c) Complies with the standard of care established by other engineers practicing in the same jurisdiction
 - (d) All of the above

5. Letters of Assurance are filed with a Local Government building department:
 - (a) To confirm that the engineer or architect will perform field reviews
 - (b) To notify neighbours that the project is proceeding
 - (c) To confirm that the owner has hired an engineer or architect;
 - (d) (a) and (c)

LAW 439.001, Section 1

6. The role of a local government in the building process is:
 - (a) To collect building permit fees
 - (b) To stop construction if the builder runs out of money
 - (c) To supervise the construction of the project
 - (d) To take steps to assure design of the project meets the Building Code
7. A P3 project is one which:
 - (a) Includes green building technology
 - (b) Is designed, built, financed and maintained by a private consortium for a public authority
 - (c) Is designed and built by a design/build contractor
 - (d) Is designed and built by a public authority
8. A builder's general liability insurance policy provides coverage for:
 - (a) Only claims for pure economic loss
 - (b) Liability for property damage caused by the builder's negligence
 - (c) Cost overruns on a project caused by design errors
 - (d) Design errors
9. A professional liability policy provides coverage for:
 - (a) Property damage caused by negligent inspection by engineers and architects
 - (b) The Local Government inspectors
 - (c) Mistakes made by a builder during the course of construction
10. A course of construction or builders risk policy provides coverage for:
 - (a) Physical damage to the project during construction
 - (b) Physical damage to the project after construction is complete
 - (c) The cost of making good faulty workmanship, material or design
 - (d) Cost overruns
11. A performance bond provides the owner of a project with assurance that:
 - (a) The project will meet all applicable codes and standards
 - (b) The project will be performed as intended
 - (c) The contractual obligations of the builder will be completed
 - (d) The contractual obligations of the architect will be complied with

LAW 439.001, Section 1

12. The term “faulty” when used to describe the cause of damage to a project means:
 - (a) The design did not meet the highest known standard of the day
 - (b) The design did not meet the highest accepted standard of the day
 - (c) The design was not fit for its intended purpose
 - (d) The designer was negligent

13. A professional liability insurance policy is usually:
 - (a) Insurance against physical damage
 - (b) An occurrence based policy
 - (c) A claims made and reported policy
 - (d) Contract of guarantee

14. A requirement of an insurance policy for the insured to report a claim “immediately” means the insured must report the claim:
 - (a) Within two years
 - (b) Within a reasonable length of time
 - (c) When a Notice of Civil Claim is delivered
 - (d) Immediately upon becoming aware of the claim

15. If a builder is sued, defence coverage is triggered under the builders general liability policy if:
 - (a) The builder was negligent
 - (b) If the claim is proven, the insurer would be obliged to indemnify the builder
 - (c) There is no limitation period applicable to the claim
 - (d) The builder reports the claim within a reasonable length of time

16. To have a tender considered on a construction project the party submitting the tender is usually required to deliver:
 - (a) A signed construction contract
 - (b) A fidelity bond
 - (c) A history of their experience on similar projects
 - (d) A compliant tender

17. If a subtrade has not been paid by a general contractor, the subtrade can:
 - (a) File a builders lien and sue the general contractor
 - (b) File a builders lien and sue the architect
 - (c) Remove any materials they have incorporated in the project
 - (d) Require the owner to pay the subtrade directly

LAW 439.001, Section 1

18. When a builder submits a bid irrevocable for 90 days on a construction project in response to an invitation to tender, then after tender closing:
 - (a) It can negotiate with its subtrades
 - (b) It can propose enhancements to the project for a period of 90 days
 - (c) It is free to withdraw its bid any time prior to its acceptance
 - (d) None of the above

19. A tender on a construction project is non-compliant if it:
 - (a) Contains minor irregularities
 - (b) Is not signed by the bidder
 - (c) Has spelling mistakes
 - (d) Complies with the tender conditions

20. The purpose of a privilege clause in tender conditions is to enable the owner:
 - (a) To award a contract based on undisclosed preferences
 - (b) To enable the owner to take a more nuanced view of the bids and not necessarily award to the lowest bid
 - (c) To award the contract to whomever they want

21. If an owner is in breach of the tender contract, Contract A, then an unsuccessful bidder can:
 - (a) Recover the cost of preparing its bid
 - (b) Insist that the contract be awarded to it
 - (c) Sue the successful bidder
 - (d) Cancel the tendering process

22. An architect on a construction project owes a duty to subsequent users of the project to:
 - (a) Follow the advice of his/her subconsultants
 - (b) Make sure the project is fit for its intended purpose
 - (c) Assure the project meets all codes and standards for 15 years
 - (d) All of the above

LAW 439.001, Section 1

23. When providing field services during the course of construction an architect must:
- (a) Identify defects or deficiencies in the builder's work
 - (b) Represent the owner's interests in any disputes between the owner and the builder
 - (c) Assess the builder's progress claims in a timely fashion
 - (d) Advise the builder on the means to be used to build a project
24. An architect will be liable to a subsequent purchaser of a project if:
- (a) The building is not fit for its intended purpose
 - (b) The subsequent purchaser is unhappy with the heating system in the building
 - (c) The project is not certified as a green building
25. A building authority's responsibilities on a construction project are defined by:
- (a) The common law
 - (b) The enabling statute of the authority
 - (c) Both of the above
26. A building regulator can be responsible for the cost of remedying inherent defects in a project:
- (a) If it was negligent in issuing an occupancy permit
 - (b) If the design of the project did not meet the highest standard of the day
 - (c) Only if there is physical damage to the project
27. A policy decision by a local government is one which:
- (a) One which reduces the liability of local governments
 - (b) Is based on the availability of economic and human resources
 - (c) Either of the above
28. A successful bidder that fails to enter into the stipulated formal contract with an owner:
- (a) Would forfeit its Bid Bond
 - (b) Has no reason to be concerned
 - (c) Will lose its license to carry on business

LAW 439.001, Section 1

29. An insured builder that fails to promptly report to its liability insurer a claim against it for damages caused by its work:
- (a) Will forfeit coverage only if the insurers ability to defend the claim has been prejudiced by the delay
 - (b) Can always report the claim after it is settled
 - (c) Will not be entitled to coverage for the claim
30. The presence of faulty materials in a building without causing any damage to any other component of the building will, for the purpose of determining the duty to defend under a General Liability policy, constitute physical damage to property:
- (a) Always
 - (b) Sometimes
 - (c) Never
31. In the case of a claim being advanced against its insured, the obligation of a liability insurer under standard policy wording is to:
- (a) Pay the insured for the defense of the claim
 - (b) Defend the claim if it raises an allegation which if **proven** would trigger the duty to indemnify the insured
 - (c) Pay the claim
32. The Winnipeg Condominium case changed the law relating to:
- (a) The complex building theory
 - (b) Dangerous construction defects that result in pure economic loss
 - (c) Recovery for the cost of repairing shoddy workmanship
33. A design professional who is sued by a third party for the tort of negligence:
- (a) Can avoid liability by a disclaimer clause in the contract with their client
 - (b) Is liable for non-dangerous defects in the design
 - (c) Is liable if they fail to take to take into account something their peers would have taken into account
34. In a design-build contract the contracting entity:
- (a) Is responsible for both the design and construction of the building
 - (b) Must supply the land on which the building is being constructed
 - (c) Is responsible for construction only

LAW 439.001, Section 1

35. If an arbitrator makes an error of natural justice in the award made:
- (a) The losing side does not have to pay costs
 - (b) There must be an error in law before there can be a judicial review
 - (c) The award can be set aside in a judicial review
36. If a project is damaged by fire during the course of construction by the negligence of the welding trade, which of the following insurance policies will pay for the repair of the damage:
- (a) The wrap up liability policy
 - (b) The Performance Bond of the General Contractor
 - (c) The Builder's Risk policy
37. If a contractor installs the wrong type of windows and they have to be replaced:
- (a) There is no insurance to cover the cost of replacing the windows
 - (b) The contractor's liability policy will pay
 - (c) The Builder's Risk policy will pay for this
38. The role of a mediator in a construction dispute is to:
- (a) Making sure the case does not go to trial
 - (b) Assist the parties in arriving at a settlement
 - (c) Make a decision on which project participant is liable for the claims advanced
39. A failure to report a claim to an insurer as required by the policy conditions:
- (a) Is fatal only if insurer is prejudiced in some material way
 - (b) Subjects the insured to financial penalties
 - (c) Results in forfeiture of coverage
40. An Architect retained by an Owner on a Project is:
- (a) Entitled to file a Claim of Lien for architectural services for a proposed development even if there is no construction of the improvement.
 - (b) A contractor for the purpose of the Builders Lien Act.
 - (c) Able to retain subconsultants who maintain rights to claim a lien.
 - (d) Not entitled to file a Claim of Lien on the Project.

LAW 439.001, Section 1

41. A duty to warn will arise in favour of
- (a) Only people whom you have a contract
 - (b) Anyone who might be exposed suffer health and safety risks
 - (c) Those with whom you have a sufficient degree of proximity
 - (d) All persons who might be harmed if you remain silent
42. The CCDC construction contract:
- (a) Has mandatory mediation requirements
 - (b) Allows the parties to arbitrate after they go to court
 - (c) Nominates the contractor as the person to resolve disputes
 - (d) Contains dispute resolution provisions
43. Construction consultants, like other professionals have a duty to perform their work:
- (a) In a fair and reasonable manner
 - (b) To the standards of leading world experts in their field
 - (c) In accordance with the standards of their peers
 - (d) To the best of their ability
44. A consultant's description of expected site conditions can be relied upon by a builder
- (a) Only if the builder tells the consultant he is going do so
 - (b) Only if the contract says so
 - (c) When it is reasonable and foreseeable that they would do so
 - (d) Always
45. A municipality, before issuing a building permit, will expect to receive from the consultant
- (a) The Owner's Commitment to hire the consultant
 - (b) A Letter of Assurance
 - (c) Drawings bearing a professional seal
 - (d) All of the above

LAW 439.001, Section 1

46. The City of Vancouver can be held liable for wrongly issuing a building permit:
- (a) If its employees are guilty of gross negligence in doing so
 - (b) If its employees are negligent in doing so
 - (c) If it does not rely on an architect or an engineer in doing so
47. A British Columbia Court will enforce an award from an international arbitration if:
- (a) The decision comes from a panel of three arbitrators
 - (b) At least one party participated in the arbitration
 - (c) The subject matter of the arbitration is one that could be arbitrated in BC
 - (d) The arbitration agreement giving rise to the arbitration is valid in the jurisdiction where the arbitration took place
48. For the purposes of filing a builders lien, the definition of "completed" in the *Builders Lien Act* means:
- (a) For a strata lot, no later than the date it is first occupied
 - (b) If used in reference to an "improvement", if the improvement or a substantial part of it is ready for use or is being used for the purpose intended
 - (c) Substantially completed or performed, and not necessarily totally complete or performed
 - (d) All of the above
49. Section 4 of the *Builders Lien Act* creates the holdback requirement such that:
- (a) The holdback is always paid out on the 55th day after completion
 - (b) The statutory holdback is the maximum amount required to be held back
 - (c) The statutory holdback is mandatory
 - (d) All of the above
50. The purpose of Section 23 of the *Builders Lien Act* is to:
- (a) Allow an Owner to cancel a lien if the lien is expired or clearly invalid
 - (b) Allow an Owner who has lien holdback liability to be removed from lien disputes in return for payment into court of the maximum amount of that liability
 - (c) Allow an Owner to secure a lien by paying the amount of the lien into a lawyer's trust account
 - (d) All of the above

END OF EXAMINATION