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

FINAL EXAMINATION – DECEMBER 2019

**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. SECTION 1- ANSWER 2 OUT OF 6 QUESTIONS
SECTION 2- ANSWER ALL THE MULTIPLE CHOICE QUESTIONS.**
 - 3. IN THE ESSAY SECTION, PLEASE INDICATE THE QUESTION NUMBER YOU ARE ANSWERING.**
 - 4. MULTIPLE CHOICE QUESTIONS SHOULD BE ANSWERED ON BOTH THE EXAM QUESTION SHEET AND IN YOUR EXAM BOOKLET/EXAMPLIFY.**

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SECTION 1- ANSWER ANY TWO (2) OF THE FOLLOWING SIX (6) QUESTIONS**MARKS**

- 1/3 1. Your client, Brownfield Developments Ltd., has advised you that they are interested in purchasing property in Howe Sound for the purpose of constructing a residential and recreational complex. The property in question has approximately 500 metres of waterfront and was previously owned by Howe Sound Pulp & Paper. Over a period of approximately 40 years Howe Sound operated a pulp and paper plant and saw mill on the site, but it was shut down approximately ten years earlier due to a downturn in the lumber market.

Immediately adjacent to the property is a fish farm growing Atlantic salmon for a restaurant chain with operations in Squamish and Vancouver.

Before purchasing the property Brownfield has asked you what provincial or federal agencies may have to be contacted prior to purchase to obtain the necessary licenses for developing the property. Brownfield would also like to know what potential exposure it may have to purchasers of the residential components of the planned project, recreational users of the property and to the adjacent fish farm and its customers.

- 1/3 2. The Ministry of Transportation and Highways is in the process of issuing tender documents for the construction of a new bridge over the Burrard Inlet connecting North Vancouver to Downtown Vancouver. Their intention is to have the bridge being run by private industry for 25 years as a toll bridge and to have the design builder responsible for the design-build, finance, operation and maintenance of the bridge over that term

The Ministry is concerned about the risks associated with the construction of the bridge and the prospect of claims for costs overruns due to the difficult construction conditions which will be encountered. The Ministry wishes to assure that it is not exposed to liability or exposed to claims for additional costs due to damage caused to the bridge during the course of construction, or because of faulty workmanship by the contractor or design errors committed by the architects and engineers responsible for the design of the bridge and the adjoining roadways.

The Ministry has asked for your advice on the following:

- (a) How you would recommend the project be structured having regard to the Ministry's vision of the type of project they want to undertake;

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- (b) The appropriate insurance program and the pros and cons of each form of coverage you might recommend; and
- (c) What insurance might be available to secure the performance of the design-builder's contractual obligations.

1/3 3. The Town of Tofino has put out for tender the construction of a new municipal building. The tender documents issued included the following:

- (a) A bid form to be filled out by all bidders;
- (b) The requirement to deliver a 10% bid bond with each bid;
- (c) A requirement to list all subcontractors;
- (d) A privilege clause broadly drafted giving Tofino the discretion to accept or reject any bid;
- (e) A discretion clause giving Tofino the right to waive any regularity in a bid; and
- (f) An exculpatory clause barring any action against Tofino for any failure on its part to comply with the tender terms and conditions.

Three bids have been delivered in response to the invitation to tender. The low bidder, A1 Builders, neglected to include a list of its subtrades in submitting its bid. The second low tender proposed a design for the project different than the design made part of the tender conditions. The third bidder, the highest bidder, neglected to include a bid bond with its tender.

Realizing there may be some difficulty with the bids received, the Town's Manager, Mr. Know-it-all, advised the Tofino Town Council that he knew other contractors in the area and could go talk to them and probably get a better price than those submitted in response to the Tender Documents.

The Town Mayor has come to your for your advice on the following:

- (a) Which of the three bids received could be accepted, if any? If they cannot be accepted why could they not be accepted?
- (b) The advisability of allowing the Town Manager to go out and get bids from other contractors other than those that responded to the Invitation to Tender?

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- (c) If it is determined that none of the bids comply with material terms of the Tender Documents, is the privilege clause broad enough to enable the Town still to accept one of the bids?

- 1/3 4. A registered owner of property, Lion King Ltd. ("LK Ltd."), was building a new theatre in downtown Vancouver (the "Project"). The Project commenced in November 2017, and it was expected to take about two years to complete the design and construction of the Project with the total cost estimated at \$10 million.

In or about March 2018, LK Ltd. retained a General Contractor, Simba Contracting ("Simba"), to construct the Project on a fixed price contract, including the responsibility of retaining and coordinating all of the subtrades and suppliers. Rafiki Architects ("Rafiki") was the Consultant hired by LK Ltd. to administer the Project on behalf of LK Ltd., including the administration of the monthly progress payments to Simba.

For the steel framework portion of the Project, Simba hired Timon and Poomba Steel Ltd. ("TPS Ltd.") as the Steel Subcontractor. The Steel Subcontract was for the amount of \$2 million. TPS Ltd. commenced the Steel Subcontract in June 2018, and the work proceeded. On October 30, 2018, a Certificate of Substantial Completion was issued by Rafiki for the Steel Subcontract completed by TPS Ltd. However, at this date, Simba was having considerable financial difficulties, and it failed to pay a number of its subcontractors with the funds received from the October 2018 progress payment, including payment to TPS Ltd. Simba also used some of the contract funds paid to it by LK Ltd to pay down debts owed on other projects. Simba swore a statutory declaration in October 2018 that all of its subtrades and suppliers had been paid, as of September 10, 2018, even though that was not the case.

With the October 2018 progress payment, LK Ltd. made a payment to Simba, but Simba did not make the final contractual payment to TPS Ltd. nor did Simba release the holdback for the Steel Subcontract to TPS Ltd. TPS Ltd. is owed \$150,000 under the last contractual payment for the Steel Subcontract and is owed \$200,000 as the holdback amount for the Steel Subcontract. Needless to say, TPS Ltd. did not say Hakuna Matata, and they filed a lien on title in the amount of \$350,000 on December 13, 2018.

On December 14, 2018, a lien was filed on title by a sub-subcontractor to TPS Ltd. called Zazu Steel Supply ("Zazu") in the amount of \$100,000. On December 20, 2018, another lien was filed on title by another sub-subcontractor of TPS Ltd. called Nala Sprockets ("Nala") in the amount of \$50,000. Both of these liens were for amounts unpaid under their sub-

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subcontracts. No one has commenced an action against the holdback at this time.

You are counsel and the following parties ask for your advice (assume that the clients have come to see you independently):

1. Advise the Owner LK Ltd. on the following:
 - (a) What problems may be caused for LK Ltd. by having liens on title?
 - (b) What steps can LK Ltd. take to discharge the various liens on title?
 - (c) If progress payments have been made properly and in good faith by LK Ltd. to Simba, what is LK Ltd.'s limit of liability for all lien claims?
 - (d) What steps, if any, can LK Ltd. take with respect to Simba swearing a false statutory declaration relating to payments made to its subtrades and suppliers?
 2. Advise the Subcontractor TPS Ltd. on the following:
 - (a) What can TPS Ltd. do to recover payment of the final contract amount and the holdback amount owed to it by Simba?
 - (b) What steps can TPS Ltd. take to make sure that it has a claim against the holdback maintained by LK Ltd.?
 - (c) What obligations does TPS Ltd. have with respect to the unpaid sub-subcontractors under the Steel Subcontract?
 3. Advise the Sub-subcontractors Zazu Steel Supply and Nala Sprockets with respect to their potential lien claims?
- 1/3 5. Discuss the various forms of ADR available for resolution of disputes in the construction industry and identify the pros and cons of each.
- 1/3 6. One January morning Sally and Sarah woke up suddenly with a sinking feeling. To their horror they realised that their second floor bedroom was now a ground floor bedroom and that their house had fallen into a sink hole. Happily, they were able to safely escape through their window but their home was destroyed.

They had moved into the house six months before, having bought it on Craig's List for a song from a couple that claimed they had to suddenly leave the country because they had been living in Canada illegally. When they moved in, Sally and Sarah had seen cracks in the basement and had

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noticed that the driveway was buckled in several places but had not had time to think more about it.

As they stood on the street wrapped in blankets, they were told by their horrified neighbors that everyone had worried that something like this might happen. Sally and Sarah learnt that each winter pot holes appeared in the road which the Municipality of Happy Valley quickly filled in. One neighbor said to them, "I would have moved years ago but I have not been able to sell the house because of that darn restrictive covenant on the title".

Sally and Sarah had not bothered to read all the papers that came from the lawyer as when the sale closed they were still hung over from celebrating what a great deal they had got. They do remember her saying to them though that the price was as much as she would want to pay for something that risky.

The next day they called their lawyer and asked if she had a copy of the title. Sally and Sarah learnt that there was a restrictive covenant on the title to their house that warned that the area was prone to sink holes. Attached was a report from Big Geotechnical that said the area was prone to sink holes but the chance of one appearing on any particular parcel of land was low. The Restrictive Covenant and report had been placed on title by the Municipality of Happy Valley when the subdivision was approved 10 years before.

The Municipality of Happy Valley is a very small place and does not have an engineering department. It has a building by law that says the Municipality shall require the developer to provide letters of assurance from qualified engineers during construction but it is silent about the subdivision process itself. When the developer sought approval for the subdivision on this project, the developer had hired Big Geotechnical to give an opinion that the land was suitable for a subdivision. Big Geotechnical's report was provided to the Municipality of Happy Valley during the subdivision approval and was the one attached to the Restrictive Covenant on Sally and Sarah's house.

The weekend before the vote to approve the subdivision, the Mayor of Happy Valley, an avid hiker, had hiked the property in question. During that hike his dog Rover had fallen into a sink hole and the brave Mayor jumped in and saved Rover. He then got stuck and miraculously managed to call the head of the planning department who arrived with a big rope and saved both Rover and the Mayor.

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When the subdivision plan had come before Council for approval the Mayor had voted against it, saying "whatever Big Geotechnical says is wrong – I think the land is dangerous and it should not be developed". The head of the planning department agreed with him and said that he had heard at the pub that Big Geotechnical had never even been on the property. However, the Treasurer said that the only way they could keep the Happy Valley swimming pool open was to get more development fees into the Municipality's coffers. The subdivision was approved. The Council minutes record that the Council decided they did not have the resources to challenge the opinion of Big Geotechnical. Also in the minutes is a requirement that the developer file a restrictive covenant attaching the Big Geotechnical report to the title of each lot in the subdivision.

Sally and Sarah have also learnt that during construction a big sink hole had developed on the land directly under their house. The head of the planning department had been called and he had said that construction should be halted. Big Geotechnical was called and they said that they were too busy to come but the developer should just fill the hole with rocks and carry on. The head of the planning department resigned on the spot but the Treasurer attended at the site and approved the plan to fill the hole saying he thought that the chance of a hole developing twice in the same place was negligible.

Sally and Sarah have learned that the developer is bankrupt and have come to you to ask whether they might be successful if they started an action against the Municipality of Happy Valley. What would you tell Sally and Sarah?

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SECTION 2- MULTIPLE CHOICE (INDICATE ONLY ONE ANSWER TO EACH QUESTION)

MARKS

1/3

1. In preparing a design and cost estimate for its client, a design consultant:
 - (a) Must guarantee the estimate
 - (b) Owes a duty to the client to design a project that can be constructed within the cost estimate
 - (c) Owes a duty to the client to design a project which can be built within the client's known budget
 - (d) All of the above.

2. In the event of a mediation of a construction dispute:
 - (a) The mediator is the ultimate decision maker
 - (b) Admissions made during the course of a mediation can be used as evidence if the case moves to a trial;
 - (c) The entirety of the mediation process is without prejudice;
 - (d) The mediator can be called as a witness in subsequent proceedings if a settlement is not achieved

3. Architects and engineers owe a duty to:
 - (a) All future users and occupants of the projects they design
 - (b) Only to their client
 - (c) All those who might suffer physical harm or damage
 - (d) Only to assure that the project meets all the applicable codes and standards

4. A structural engineer acting as a sub-consultant to an architect:
 - (a) Owes a duty of care only to the architect
 - (b) Must warn the architect's client of any defects in design which the engineer knows are unknown to the client
 - (c) Owes a duty to the owner of the project to charge the lowest possible fee for their services
 - (d) Owes a duty to the contractors and subtrades on the site to assure their work is constructed in accordance with the plans and specifications.

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5. The purpose of Letters of Assurance being filed with the authority have jurisdiction is:
 - (a) To assure the authority that a professional has been retained to coordinate all professionals on the project
 - (b) To assure that the project is designed in accordance with all applicable codes and standards
 - (c) To assure that the project has been constructed in accordance with the plans and specifications on the project
 - (d) All of the above.

6. The role of local government in the building process is:
 - (a) To collect building permit fees from the project participants
 - (b) To assure the owner is properly funded to complete the project
 - (c) To supervise the construction of the project
 - (d) To take reasonable steps to assure the design of the project meets applicable codes and standards

7. The City of Vancouver's involvement in the building process is governed by the Vancouver Charter which provides, in part, as follows:
 - (a) That Vancouver is not to become involved in the issuance of building permits
 - (b) That Vancouver must identify any defects in the plans and specifications presented for issuance of a building permit
 - (c) That Vancouver is not liable for any role they play in the building process, even if it is negligent
 - (d) Can order work on a project stopped at any time for any reasons

8. 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

9. 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

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10. 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

11. 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

12. 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

13. 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

14. 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

15. 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

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16. 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

17. 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

18. 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

19. 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

20. 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

21. 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

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22. 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
23. 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
24. 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
25. 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
26. 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
27. 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

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28. A policy decision by a local government is one which:
- (a) Reduces the liability of local governments
 - (b) Is based on the availability of economic and human resources
 - (c) Either of the above
29. 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
30. 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
31. 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
32. 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
33. 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

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34. 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 into account something their peers would have taken into account
35. 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
36. 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
37. 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
38. 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
39. 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

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40. 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
41. 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.
42. A duty to warn will arise in favour of
- (a) Only people whom you have a contract
 - (b) Anyone who might be exposed to 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
43. 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
44. 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
45. 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 to do so
 - (b) Only if the contract says so
 - (c) When it is reasonable and foreseeable that they would do so
 - (d) Always

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46. 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
47. 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
48. The purpose of Section 23 of the *Builders Lien Act* is to:
- (a) allow an Owner to secure a lien by paying the amount of the lien into a lawyer's trust account.
 - (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 cancel a lien if the lien is expired or clearly invalid.
 - (d) all of the above.
49. A lien may be discharged pursuant to section 25 of the *Builders Lien Act* if:
- (a) The lien was not filed within the time provided by the *Act*;
 - (b) No lien enforcement action was commenced within one year from the date of the lien filing;
 - (c) The claim of lien has been satisfied;
 - (d) All of the above.
50. In the case of a leased property, the "owner" for the purpose of the *Builders Lien Act* is:
- (a) The registered owner of the property;
 - (b) The tenant of the property;
 - (c) The contractor working on the property;
 - (d) Both a) and b).

END OF EXAMINATION