

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – DECEMBER 2020

LAW439.001
Construction Law

John R. Singleton, Q.C.

EXAM PASSWORD: Q3efCE
RESUME CODE: ABB37C

TOTAL MARKS: 100

(8:50 AM PST) **PREPARATION TIME ALLOWED: 10 MINUTES**

(9:00 AM PST) **WRITING (INCLUSIVE OF READING) TIME ALLOWED: 3 HOURS AND 30 MINUTES**

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END OF COVER PAGES

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

MARKS

- 1/3 1. Boza developments has undertaken the development of a major residential/commercial project in Burnaby. The project has been designed by one of the leading architects in Canada and needs to be put out to tender to identify a builder experienced in building iconic structures like the one designed by the architect. Boza wants to assure that the project is completed on time and within budget and that if problems are encountered there is some form of insurance in place to respond to any increased costs or schedule delays that may be encountered due to design errors or faulty construction.
- Being an expert in the area of insurance law, Boza has come to you for advice as to what insurance should be purchased to assure the project is completed on time and on schedule. What advice would you give to Boza?
- 1/3 2. During the course of construction of a hard rock tunnel, the tunnel boring machine became stuck and was damaged when it ran into rock conditions that had not been predicted by the geotechnical report at the outside of the project. In addition to the damage to the tunnel boring machine, the tunnel itself was damaged when excessive collapse in the tunnel was encountered because of the absence of proper tunnel support by the contractor. The owner argued that the contractor was at fault for the incident as an experienced contractor in tunneling should have anticipated the conditions encountered even though they were not predicted by the geotechnical report. The contractor disagreed and filed a claim against the builders risk insurance policy for the cost of repairing the tunnel boring machine and the additional cost incurred to repair the collapsed portion of the tunnel. The insurer denied coverage arguing that the cause of the loss was faulty workmanship on the part of the contractor. The contractor disagreed and commenced legal proceedings against the insurer. What advice would you give to the contractor concerning the prospects for the outcome of the litigation ?
- 1/3 3. The government of British Columbia is considering issuing a Request for Proposals for a major hospital project in Vancouver. It is considering tendering the project as a public private partnership or, alternatively, a design bid build project. The government has come to you for advice on what project model it should choose and wants you to outline for it the pros and cons of each and your advice as to how the procurement process for each differs. What advice would you give the government?

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- 1/3 4. The decision in *Shimko Metal Erectors Ltd. v. North Vancouver (District)* (2003) (C.A.) ("Shimko") has led to some uncertainty and controversy for construction lawyers in the builders lien context. Please answer the following questions in the context of the *Shimko* decision:
- (a) What decision preceded *Shimco* in supporting the existence of an independent claim against the holdback under the *Condominium Act*, and what was the rationale for the decision?
 - (b) Describe and explain what the *Shimko* decision provided for lien claimants in terms of available remedies.
 - (c) What was the rationale for providing these remedies?
 - (d) What are some of the implications of the *Shimko* decision for an Owner?
 - (e) What procedures are available in the *Builders Lien Act* for securing a "holdback lien"?
 - (f) 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*?

What are some of the law reform recommendations with respect to the *Shimco* lien, and what is the basis for those recommendations?

- 1/3 5. Bert and Ernie have recently retired to a little half acre of paradise in the Fraser Valley. They had saved up for many years to plan and construct their own custom home, complete with a custom home theater in the building's basement. Bert and Ernie hired an architect, Grover Architects ("GA"), and general contractor, Big Bird Builders ("BBB") to help turn their dream home into a reality.

While in the process of obtaining a building permit for their home, Bert and Ernie were advised by the municipality that their property was located on a flood plain, and that, as a result, the property was subject to occasional flooding. Speaking with their new neighbours, Bert and Ernie discovered that the municipality had put in place a flood management system involving a series of locks and dykes that had been effective in preventing floods since their neighbours had lived in the area (approximately 20 years).

On this basis, Bert and Ernie instructed GA to proceed with the design of the home, including the basement theatre, and to spare no expense in fitting it out with the latest technology. At the same time, as their neighbourhood in Vancouver was quickly gentrifying, they told BBB to get started with excavation and pouring the foundations as they would like to be able to move in as soon as possible. As the architectural plans were being drafted and the construction was ongoing simultaneously, there were often coordination issues between GA, BBB,

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1/3 Question 5, continued

and the municipal building inspector with regards to when and what was reviewed before the next stage of construction commenced.

Meanwhile, at City Hall, tough decisions were having to be made on the budget as a result of the municipality's spending in relation to COVID-19. As a result of budget cuts, which Mayor Grouch stated in council chambers to be "difficult but necessary," funding for the building inspection department was cut by 10%, with council's direction that resources be focused on "core code compliance inspections." This direction was to be maintained until 2030 at which time it would be subject to review. Following this direction, the municipal engineering department implemented a policy whereby building inspectors would only inspect residential projects at the foundation, lock-up, and occupancy stages of the build. The engineering department further cut new hire on-boarding and lowered the qualifications for applicants to reduce costs and salaries as a result of the cuts.

Following the cuts at City Hall, the inspector eventually assigned to Bert and Ernie's build, T.M. Elmo ("Elmo") was hired. Elmo did not have any expertise in inspecting building drainage or plumbing systems, although other inspectors at the municipality who had been there longer had such expertise. Elmo attended at the property at the foundation, lock-up, and building occupancy stage, but struggled to figure out which architectural drawings BBB had built to. During one of their inspections, Elmo looked at the drainage system being installed at the foundation stage and was impressed by the flashy manufacturer's brochure that BBB provided them for the "state of the art, passive, gravity fed drainage system" that BBB said had been specified by GA and Elmo confirmed that BBB was permitted to continue building.

Bert and Ernie's build was completed and they moved into the home in late 2022.

In 2030, as a result of increasing urbanization in the Fraser Valley contributing to increased runoff, the river behind Bert and Ernie's property burst its banks, flooding their property to a depth of 1 inch. Despite the low height of the standing water, as a result of the failure of the "state of the art" drainage system, a system that was expected to keep water out of the basement in the event of 1 foot of standing water on the property, Bert and Ernie's basement theatre was destroyed. Bert and Ernie incurred costs to remediate the home theatre and to replace the deficient drainage system. GA and BBB both went bankrupt in 2024, however, BBB's drainage subcontractor, Snufflepagus Waterworks ("SW"), remains in business.

Bert and Ernie are also amateur film buffs, and as a result of the closure of their home theatre due to the flood, they are unable to watch advance copies of films they receive from production houses, and have suffered a marked decline in revenue from their movie review blog (bnegotothemovies.substack.com) as a result.

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1/3 Question 5, continued

Bert and Ernie have now come to you for advice. Please provide your advice to Bert and Ernie, including any additional information you may require from them in order to form your opinion, and your advice based on what you expect that additional information to be.

1/3 6. Learned Hand, a young lawyer has landed a dream job in Vancouver. His Great Aunt Agatha, who lives in an old house at the crest of a hill in Dunbar, had offered to let him build a laneway house at the bottom of her garden, in return for agreeing to help her with the garden and house repairs as she ages. Learned Hand borrowed money from his mother, Great Aunt Agatha's sister, to build the laneway house. It is not really enough, so to save money he hired Bob the Builder to build it in an off the books cash deal.

Bob the Builder borrows an excavator from his brother and one Sunday morning starts digging a trench from the road to the proposed site for the laneway house. Shortly after he starts, the excavator hits a buried oil tank. Rather than stopping he decides that the best course is to rip it from the ground. The tank unfortunately was full and it spills oil which flows downhill into the neighboring property owned by Mr. Watson. Mr. Watson, an environmental warrior, has an award winning organic garden and a large flock of chickens. The vegetables are ruined and the chicken have to be sent to the bird hospital to be washed and cared for.

Once the tank is out of the ground it is clear that it had been leaking from the bottom for some time. The plume from the leaked tank is flowing not towards Mr. Watson's property but in the other direction towards, and probably under, a new home recently completed by Great Aunt Agatha's other neighbor, Mr. Robinson.

Learned Hand comes to you for advice. He is worried that he is responsible for the costs of cleaning up the whole mess. He tells you that Great Aunt Agatha has only been living in the house for 10 years and that the house was previously owned by a large corporation, ABC Roofing, that housed their staff there. ABC Roofing went bankrupt after they were found liable for a big fire loss. The papers reported that there was insurance for the fire but that it was found to have been invalidated as the fire was an act of arson by an employee of ABC Roofing who was upset after he was evicted from the company's Dunbar house.

Great Aunt Agatha had purchased the house in a Court Ordered auction at the end of the Bankruptcy proceedings. She thinks that before ABC Roofing, the house was owned by the local chapter of the Church of the Moon. They had been bequeathed it in the will of the original builder and owner of the house, a devout member of the congregation. Learned Hand thinks that his Aunt never

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1/3 Question 6, continued

used oil to heat the property but is worried that she may have known that the house was at some time in the past heated that way. He remembers his mother saying that Great Aunt Agatha had found the house cold when she moved in and had done quite a few renovations including putting in a new gas furnace.

Discuss what liability your client may have to damages (consider not only Great Aunt Agatha's position but also Mr. Watson and Mr. Robinson's potential claims). Please also consider what possible sources of recovery may be available from ABC Roofing and the Church of the Moon.

Multiple Choice begins on following page

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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

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

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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. 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

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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

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

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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 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
28. 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
29. 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

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30. 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
31. 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
32. 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
33. 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
34. 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
35. 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
36. 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

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37. 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
38. 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
39. 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.
40. 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
41. 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
42. Provincial building codes apply to the following sites:
- (a) Residential building projects on Indian Reserves
 - (b) Commercial building projects in Dunbar
 - (c) Provincial hydro-electric projects
 - (d) All of the above
 - (e) C and B

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43. The *Negligence Act*, RSBC 1996, c 333, provides that where a plaintiff has contributed to the loss for which they recover an award against various defendants,
- (a) The defendants are jointly and severally liable to the plaintiff
 - (b) The defendants are jointly liable to the plaintiff
 - (c) The defendants are severally liable to the plaintiff
 - (d) The plaintiff's recovery against any party is adjusted to reflect any uncollectable contribution from any other person at fault for the loss
 - (e) C and D
44. 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
45. 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, if they are the head contractor
 - (d) Both (a) and (b)
46. A triggering event for the 45 day lien filing period starts when:
- (a) A tenant moves into the building
 - (b) A project is abandoned on the expiry of 30 days during which no work has been done on the project
 - (c) A subcontractor is advised by the general contractor that they did not get paid by the owner
 - (d) All of the above
47. Proposed Federal Prompt Payment legislation includes:
- (a) Application to all property in Canada
 - (b) Provision that a contractor must provide a notice of adjudication no later than 21 days after receiving a certificate of completion or within the payment timeline of the proper invoice
 - (c) Immediate application to all projects effective upon the legislation coming into force
 - (d) None of the above.

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48. Section 24 of the *Builders Lien Act* allows for a lien to be discharged from title if:
- (a) The appropriate amount of security is posted in court or in a lawyer's trust account by agreement
 - (b) The security posted is in the form of cash, lien bond, or irrevocable lien of credit
 - (c) The amount of security posted is for the face amount of the lien or an amount otherwise agreed to or ordered by a court
 - (d) All of the above
49. Prompt payment legislation is in place in which of the following jurisdictions?
- (a) Ontario
 - (b) BC
 - (c) Alberta
 - (d) Yukon
 - (e) All of the above
50. Bob signs a 10 year lease valid from 2011-2021 for a shop to operate a dry cleaners from, but only operates his business for one year, closing it in 2012. He has asked how long he has to worry about a spill that took place in 2011 which he did not tell anyone about. Assuming a 2 year limitation period for property damage, an ultimate 15 year limitation, and no remediation effort, when will he be able to put the spill behind him:
- (a) 2013
 - (b) 2021
 - (c) 2023
 - (d) 2026
 - (e) Never

END OF EXAMINATION