THIS EXAMINATION CONSISTS OF 13 PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – DECEMBER 2014

LAW 439
Construction Law

Section 1
Adjunct Professor Singleton

TOTAL MARKS: 100
TIME ALLOWED: 3 HOURS
And 30 minutes reading time

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

MARKS

1/3 1. 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.

1/3 2. The Royal Bank wishes to demolish its highrise tower in downtown Vancouver and build two new 60 storey towers. It would like to minimize the risk it faces for delays on the project due to construction or design difficulties and to further minimize the prospects of having to deal with deficiencies in the buildings once they are completed and occupied.

The risk manager for the bank has advised you that she would like you to draft the contracts for the project and include, in particular, such clauses as you may think appropriate to guard against the bank's liability for
deficiencies and problems during the course of construction. Additionally, she would like to know what type of insurance program the Bank might have in place both during and after completion of construction to assure that those who are responsible for any defects and deficiencies in the project have sufficient financial resources to pay for any remediation costs that might be required.

Outline the types of clauses you might recommend in the design consultant's and builder's contracts to protect the bank against liability for problems encountered during the course of construction and after. Further outline the advice you would give the bank with respect to the insurance programs that might be put in place during the course of construction and identify the key features of each form of insurance.

1/3 3. ABC Development has purchased a former service station lot upon which it is intending to build a multi-family complex including retail and commercial operations.

The property in question was historically operated as a creosote plant for manufacturing railway ties between 1940 and 1955, then as a storage yard for scrap metal for ten years and, finally, as a service station operation for the past 15 years.

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. Stanford Developments has issued an Invitation to Tender for its new university campus to be constructed adjacent to the UBC campus in Vancouver. Four bids had been received and Stanford has advised you of a number of concerns they have, including the following:

(a) The tender conditions advise that bids must be received by 12 noon on December 1, 2014. Three of the bids were received by this time but the fourth bid was one minute late. The person responsible for
receiving the bids had gone for a tuna fish sandwich at 5 minutes before bid closing and did not return until 30 seconds after bid closing.

(b) Of the three remaining bids, one was significantly lower than the other two. It was apparent this was due to an arithmetical error, but the University was nonetheless keen to accept the bid because of its low price.

(c) The second low bidder has advised the University that if they would like to go for a cup of coffee they are sure they could do better on the prices submitted.

(d) The third low bid has proposed a building quite different than that in the plans and specifications delivered to the bidders and the bidder has advised that they know this is the type of building the University requires and the University tends to agree.

(e) the Tender Conditions include a privilege clause permitting the University to accept or reject any tender.

Outline the advice you would give to the University with respect to each of the concerns it has raised.

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.

1/3 6. Provide a detailed explanation of the alternative means of resolving construction disputes without the need for the courtroom. Include a discussion of the various processes, advantages and disadvantages for each.
LAW 439, Section 1

MULTIPLE CHOICE (INDICATE ONLY ONE ANSWER TO EACH QUESTION)

MARKS

1/3

1. The party responsible for providing letters of assurance to local authorities with respect to the design and construction of a project is:

   (a) The owner of the project
   (b) The builder of the project
   (c) The building inspector
   (d) None of the above

2. The role of a local government in the building process is:

   (a) To take steps to assure design of the project meets the Building Code
   (b) To supervise the construction of the project
   (c) To stop construction if the builder runs out of money

3. A P3 project is one which:

   (a) Is designed and built by a public authority
   (b) Is designed and built by a design/build contractor
   (c) Is designed, built, financed and maintained by a private consortium for a public authority
   (d) Must include green building technology

4. A builder's general liability insurance policy provides coverage for:

   (a) Design errors
   (b) Cost overruns on a project caused by design errors
   (c) Liability for property damage caused by the builder's negligence
   (d) Only claims for pure economic loss

5. A professional liability policy provides coverage for:

   (a) Mistakes made by a builder during the course of construction
   (b) The Local Government inspectors
   (c) Property damage caused by negligent inspection by engineers and architects
6. A course of construction or builders risk policy provides coverage for:
   (a) Cost overruns
   (b) The cost of making good faulty workmanship, material or design
   (c) Physical damage to the project after construction is complete
   (d) None of the above

7. A performance bond provides the owner of a project with assurance that:
   (a) The contractual obligations of the architect will be complied with
   (b) The contractual obligations of the builder will be completed
   (c) The project will be perform as intended
   (d) The project will meet all applicable codes and standards

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

9. A professional liability insurance policy is a:
   (a) Contract of guarantee
   (b) A claims made policy
   (c) An occurrence based policy

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

11. If a builder is sued, defence coverage is triggered under the builders general liability policy if:
    (a) The builder reports the claim within a reasonable length of time
    (b) There is no limitation period applicable to the claim
    (c) If the claim is proven, the insurer would be obliged to indemnify the builder
    (d) The builder was negligent
To have a tender considered on a construction project the party submitting the tender is usually required to deliver:

- A compliant tender
- A history of their experience on similar projects
- A fidelity bond
- A signed construction contract

If a subtrade has not been paid by a general contractor, the subtrade can:

- Require the owner to pay the subtrade directly
- Remove any materials they have incorporated in the project
- File a builders lien

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:

- It is free to withdraw their bid any time prior to its acceptance
- It can propose enhancements to the project which would save the owner money
- Upon submission of its tender, immediately enters into a contract with the owner

A tender on a construction project is non-compliant if it:

- Offers alternate prices
- Is presented on a modified bid form
- Is not signed by the bidder
- All of the above

The purpose of a privilege clause in tender conditions is to enable the owner:

- To award the contract to whomever they want
- To enable the owner to take a more nuanced view of the bids and not necessarily award to the lowest bid
- To award a contract based on undisclosed preferences

If an owner is in breach of the tender contract, Contract A, then an unsuccessful bidder can:

- Cancel the tendering process
- Sue the successful bidder
- Insist that the contract be awarded to it
- Recover the cost of preparing its bid
LAW 439, Section 1

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

19. When providing field services during the course of construction an architect must:
   (a) Advise the builder on the means to be used to build a project
   (b) Assess the builder's progress claims in a timely fashion
   (c) Represent the owner's interests in any disputes between the owner and the builder
   (d) Identify defects or deficiencies in the builder's work

20. An architect will be liable to a subsequent purchaser of a project if:
   (a) The project is not certified as a green building
   (b) The subsequent purchaser is unhappy with the heating system in the building
   (c) The building is not fit for its intended purpose

21. A building authority's responsibilities on a construction project are defined by:
   (a) The enabling statute of the authority
   (b) The common law
   (c) Both of the above

22. A building regulator can be responsible for the cost of remedying inherent defects in a project:
   (a) Only if there is physical damage to the project
   (b) If the design of the project did not meet the highest standard of the day
   (c) If it was negligent in issuing an occupancy permit

23. A policy decision by a local government is one which:
   (a) Is based on the availability of economic and human resources
   (b) One which reduces the liability of local governments
   (c) Either of the above
24. A successful bidder that fails to enter into the stipulated formal contract with an owner:
   (a) Will lose its license to carry on business
   (b) Has no reason to be concerned
   (c) Would forfeit its Bid Bond

25. An insured builder that fails to promptly report to its liability insurer a claim against it for damages caused by its work:
   (a) Will not be entitled to coverage for the claim
   (b) Can always report the claim after it is settled
   (c) Will forfeit coverage only if the insurer's ability to defend the claim has been prejudiced by the delay

26. 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) Never
   (c) Sometimes

27. 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 claim
   (b) Defend the claim if it raises an allegation which if proven would trigger the duty to indemnify the insured
   (c) Pay the insured for the defense of the claim

28. The Winnipeg Condominium case changed the law relating to:
   (a) Recovery for the cost of repairing shoddy workmanship
   (b) Dangerous construction defects that result in pure economic loss
   (c) The complex building theory

29. A design professional who is sued by a third party for the tort of negligence:
   (a) Is liable if they fail to take into account something their peers would have taken into account
   (b) Is liable for non-dangerous defects in the design
      Can avoid liability by a disclaimer clause in the contract with their client
LAW 439, Section 1

30. In a design-build contract the contracting entity:
   (a) Is responsible for construction only
   (b) Must supply the land on which the building is being constructed
   (c) Is responsible for both the design and construction of the building

31. If an arbitrator makes an error of natural justice in the award made:
   (a) The award can be set aside in a judicial review
   (b) There must be an error in law before there can be a judicial review
   (c) The losing side does not have to pay costs

32. 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 Builder's Risk policy
   (b) The Performance Bond of the General Contractor
   (c) The wrap up liability policy

33. If a contractor installs the wrong type of windows and they have to be replaced:
   (a) The Builder's Risk policy will pay for this
   (b) The contractor's liability policy will pay
   (c) There is no insurance to cover the cost of replacing the windows

34. The role of a mediator in a construction dispute is to:
   (a) Make a decision on which project participant is liable for the claims advanced
   (b) Assist the parties in arriving at a settlement
   (c) Making sure the case does not go to trial

35. A failure to report a claim to an insurer as required by the policy conditions:
   (a) Results in forfeiture of coverage
   (b) Subjects the insured to financial penalties
   (c) Is fatal only if insurer is prejudiced in some material way
LAW 439, Section 1

36. An Architect retained by an Owner on a Project is:
   (a) Not entitled to file a Claim of Lien on the Project.
   (b) Able to retain subconsultants who maintain rights to claim a lien.
   (c) A contractor for the purpose of the Builders Lien Act.
   (d) Entitled to file a Claim of Lien for architectural services for a proposed development even if there is no construction of the improvement.

37. A duty to warn will arise in favour of
   (a) all persons who might be harmed if you remain silent
   (b) those with whom you have a sufficient degree of proximity
   (c) anyone who might be exposed suffer health and safety risks
   (d) only people whom you have a contract

38. The CCDC construction contract:
   (a) contains dispute resolution provisions
   (b) nominates the contractor as the person to resolve disputes
   (c) allows the parties to arbitrate after they go to court
   (d) has mandatory mediation requirements

39. Construction consultants, like other professionals have a duty to perform their work:
   (a) to the best of their ability
   (b) in accordance with the standards of their peers
   (c) to the standards of leading world experts in their field
   (d) in a fair and reasonable manner

40. A consultant's description of expected site conditions can be relied upon by a builder
   (a) always
   (b) when it is reasonable and foreseeable that they would do so
   (c) only if the contract says so
   (d) only if the builder tells the consultant he is going do so

41. A municipality, before issuing a building permit, will expect to receive from the consultant
   (a) drawings bearing a professional seal
   (b) a Letter of Assurance
   (c) the Owner's Commitment to hire the consultant
   (d) all of the above
LAW 439, Section 1

42. A British Columbia Court will enforce an award from an international arbitration if:

(a) the arbitration agreement giving rise to the arbitration is valid in the jurisdiction where the arbitration took place
(b) the subject matter of the arbitration is one that could be arbitrated in BC
(c) at least one party participated in the arbitration
(d) the decision comes from a panel of three arbitrators

43. For the purposes of filing a builders lien, the definition of "completed" in the Builders Lien Act means:

(a) substantially completed or performed, and not necessarily totally completed or performed
(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) for a strata lot, no later than the date it is first occupied.
(d) all of the above

44. 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

45. An action for breach of trust is maintainable even if:

(a) the Owner has not paid the contractor who retained a potential lien claimant
(b) a claim of lien has been proven and judgment obtained
(c) a potential lien claimant has failed to file or perfect a lien claim
(d) none of the above
LAW 439, Section 1

46. A primary objective of the Builders Lien Act is to:

(a) provide a remedy against the land so that an Owner cannot take advantage of the work and materials provided by others
(b) create a trust between an Owner and a Subcontractor
(c) allow an Owner to maintain a holdback from a contractor if there are deficiencies in the work provided by the contractor
(d) all of the above

47. If a Subcontractor fails to commence a legal action and file a Certificate of Pending Litigation within one year of filing a claim of lien against the title to the land, the Subcontractor is:

(a) no longer able to pursue a claim of lien against the land
(b) entitled to pursue a separate lien against the holdback, if the statutory holdback has not been released
(c) able to share the holdback with other successful lien claimants if the Subcontractor commences a separate action against the holdback and proves his claim
(d) all of the above

END OF EXAMINATION