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Critical Concepts of Canadian Business Law

Instructor's Manual

Sixth Edition

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Contents

Introduction

Theory of the Text

In the context of legal education, the teaching of law to the layperson is relatively new. The business law courses being taught in Canada were formulated after World War II, and the current texts took form in the early 1960s and late 1970s. The pattern was set in texts written on the academic model and "new" books were primarily clones of these. We believe that there is a need for a new text that deals with the issues facing businesses today and reflects the experience that has been accumulated in the teaching of business law over the past 20 years. Accordingly, the principles that underlie the selection of the materials for *Critical Concepts of Canadian Business Law*, and the format that it takes, are:

- Only principles relevant to businesses at the present time and the foreseeable future are selected.
- Only essential principles, and not all the details, are included so that the business person can gain a general understanding. These courses are not intended to educate people to be lawyers.
- Each principle is taught in four or five different expressions—narration, bulleted format, case brief, and questions. Then there is a review in executive summary format, with review questions following.

Organization of the Instructor's Manual

Each chapter in this manual is divided into two sections:

- Answers to the Business Law—Applied Questions
- Answers to the Closing Questions

In Chapter 2, additional resource material is provided with a sample small claims court and sample assignment for instructors who want to do a small claims court drafting assignment.

Instructors have asked where the questions used in the text came from. Most are based on real situations from the authors' files. They have, of course, been modified for the purpose of illustrating the topic, but these cases did occur.

The Business Law—Applied Questions have been intentionally made easy, so students can answer them in class without the need for extensive study of the topic. Instructors can ask even

the weaker students for responses and elicit that level of student's participation. The instructor will not be limited to repeatedly asking only the same few students for answers.

These questions are, in effect, illustrations in simple question form. It is hoped that this level of ease will give those students, who have a mental block about law, confidence that they can understand the subject.

The authors prepared for writing these questions by making a survey of all of the important points under each topic in every chapter and not simply by writing questions. There is a danger that a writer may only select points that come easily to mind or that are the easy subject matter for questions.

Chapter Resources

Chapter 1
Fundamental Rights

Section 1 Answers to Business Law—Applied Questions

1. Sections 91 and 92 of the *Constitution Act* are reproduced in the Resource section at the end of this chapter of the Manual.
   a) Federal Government, s. 91(21): Bankruptcy and Insolvency.
   b) Provincial Government, s. 92(12): The Solemnization of Marriage in the Province.
   c) Federal Government, s. 91(27): The Criminal Law.
   d) Provincial Government, s. 92(10)(a): Local Works and Undertakings other than such as are of the following classes: (a) . . . Railways . . . connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.
   e) Federal Government, s. 91(22): Patents of Invention and Discovery.
2. a) Yes, because this is a law passed by the Parliament of Canada.
   b) No, because this is not a law passed by a government but an act of discrimination. It may come under human rights legislation but not Charter legislation.
   c) No, this is not a law but an act of discrimination.
   d) Yes, this is a law passed by a provincial government.
3. a) There is no right to bear arms in the Charter. This can be contrasted with the American Constitution where there is a constitutional right to bear arms.
   b) This is a Charter right. It is one of the legal rights in Section 10(b).
   c) Smoking is not a Charter right.
   d) This violates one of the democratic rights in Section 4(1).
4. No, the Charter does not apply to private businesses; it applies to laws made by governments. Absent Competition Act violations such as refusal to deal to give a competitor an advantage and restrict competition, (outside the scope of this chapter), a business is free to accept or reject a customer. In any event, the Charter is not available.

5. a) This proposed Quebec law would violate s. 2 Freedom of Religion and s. 15 Discrimination Based on Religion.

   b) The Quebec government would try to use Section 1 to say the law is justified as its goal is to ensure that the government is secular and religion is not reflected in government offices.

   c) If the Supreme Court rejected the Section 1 claim that it is justified to infringe on the workers' rights, Quebec could use s. 33, the notwithstanding clause, to pass the law even though it violates the Charter. The law would expire after five years, and then it could be reviewed at that time.

6. a) Yes, she does have a ground for complaint. Sex includes being pregnant. Whether the ground would be successful is a question that can only be answered after the students discuss the section on bona fide occupational requirements. The employer could argue that when he hired her, she knew that it was for looks. However, for the present purpose, the student need only recognize that there is a prohibited ground here. We know of no case exactly on point. This question can be revisited after the students read the section on bona fide occupational requirements.

7. a) All of the items except previous work experience relate to expressly prohibited grounds. Asking for a criminal record is a way of asking about conviction. The question would have to be phrased to ask about criminal convictions for which pardons have not been granted. Because Section 25(2) makes drug and alcohol addiction a disability within the meaning of Section 3(1), an employer cannot ask generally if employees use drugs. This item is dealt with again under bona fide occupational requirements. Certain employers may be able to ask that of selected employees.

8. a) Yes, the ATF complaint could be successful based on statistical evidence alone. The concept of systemic discrimination was developed to avoid the necessity of proving intention, which is often a very difficult matter.

   b) Because intention is not necessary, the lobby would not have to show actual incidents of discrimination.

   c) This type of discrimination goes by various names—systemic discrimination, adverse effect discrimination, and constructive discrimination are common terms.

   d) The advantage is that the complainant group does not have to prove any specific acts of discrimination. For example, the complainant does not have to call witnesses to prove specific events occurred. Evidence of this type is often one person's word against another's. It is difficult for the court or tribunal to sort out who is giving accurate testimony. In this situation, it would be difficult for the complainants to prove in specific cases that a person was not hired because she was a woman. On a case-by-case basis, the person who got the job may have had equal or better qualifications than the woman applicant. The bias is seen only when the result is the same in a large number of cases.

      The disadvantage is that this type of statistical evidence is valid only for large numbers. In a small employment situation, it is not likely that this type of evidence could be obtained.

9. a) The Canadian Human Rights Commission has stated that AIDS is to be considered a disability and therefore employers can't discriminate against people who

have AIDS. You might want to discuss with your students the difference between a Commission opinion and a Tribunal decision.

Only a matter that has been heard by the Tribunal can be considered binding precedent. However, statements by the Commission can be considered "persuasive." As the Commission and Tribunals are considered to be somewhat more pro human rights and the courts a little more conservative by some commentators, the courts may or may not back up the Commission and Tribunal, in provinces where an appeal to the court is permitted.

b) The issue here is bona fide occupational requirement. According to the Canadian Human Rights Commission as reported in its literature, scientific evidence states that AIDS cannot be communicated by a person preparing food. However, if the public found out that a restaurant had a person with AIDS preparing food, undoubtedly that restaurant would lose business. The issue has not come full square before a board. However, in August 1995, the Ontario Human Rights Commission (OHRC), as part of its investigation, told a dentist who wore an extra disposable paper gown on top of her regular protection that she had discriminated against the patient based on a disability and should pay the patient $8,000.00 to compensate him for his mental anguish. The Royal College of Dental Surgeons supported the OHRC. The dentist refused to pay, and the current status of this matter is not known. The patient was a known drug addict with AIDS.

Section 2 Answers to Closing Questions

1. a) No, the pith and substance of this law is aimed at controlling a criminal act, not zoning to control use of the city's areas. Consequently, it falls within federal government powers under s. 91(27): The Criminal Law.

   This question could also be used to explore the delegation of authority by the federal or provincial government to various bodies, such as a city or liquor board.

2. a) No.

   b) Federal, s. 91(21): Bankruptcy and Insolvency; Provincial, s. 92(13): Property and Civil Rights in the Province.

   c) Although the right to sue for wages is a matter of contract law and considered within the category of civil rights and the provincial jurisdiction, this legislation is aimed at dealing with bankruptcy and the rights of creditors in a bankruptcy which is a federal power under s. 91(21).

3. The correct answers are:

   a) Charter of Rights and Freedoms.

   b) Canadian Human Rights Act.

   c) Charter of Rights and Freedoms.

   d) Provincial Human Rights Legislation.

4. a) Yes, this is likely systemic discrimination.

   This question could be used for, and in all probability will give rise to, a variety of discussions and opinions by the students. It will probably be necessary to

guide the discussions to look at the consequences of the actions and not the intentions of the employer. It is the result caused by the employer's action, indicating that the system has gone wrong, and resulting in systemic discrimination, not the intentions of the employer, that is critical for the students to grasp to answer this question.

5. a) Firstly, the division of powers under the constitution. The regulation of Trade and Commerce is an exclusive federal jurisdiction under s. 91.2. Secondly, the Charter s. 2(d), as advertising is a form of expression, but it may be reasonable to limit the expression under s. 1.

   b) The Irwin Toy case is a precedent for upholding the Charter issue. The bottom line, however, is that because it is *ultra vires* the province, the legislation would be ineffective under s. 91.2.

   c) The employees may have a remedy under human rights legislation. There cannot be discrimination in hiring, so there is a very strong argument that there cannot be discrimination in firing. The authors know of no case on point.

6. a) He can claim that he was discriminated against because of his age under the relevant provincial human rights legislation and ask the court to give him back his job or award him damages for his firing. He can claim that the company should have provided adequate training for him or found a position for him that he could have done within the company.

   b) The company will claim that he was not fired due to his age but that he was incompetent at his job so it was a just cause termination and he is not entitled to get his job back nor any financial award.

   c) It is a difficult case to predict, though one that will become more common as many people find they cannot afford to retire. The company may have to prove that it had tried to adequately train him or offered him other positions, and if so it is a just cause dismissal. If the company had not taken those actions he could succeed in his claim. The court may be more willing to award him damages though then give him back his job at that age.

Chapter 2

The Canadian Court System

Section 1 Answers to Business Law—Applied Questions

1. a) The basic limitation period is two years.

   b) It expired May 31, 2016

   c) Yes, the letter requesting time to pay was an acknowledgment of the debt, which started the limitation to run from its date, August 1, 2014 expiring July 31, 2016. So, Vsahman's lawsuit will not be barred by the expiry of the limitation period.

2. a) Ukani could waive the excess of the claim, the $7,000 that it is over the $25,000 small claims court limit, and then sue in small claims court for just $25,000.

3. a) Pushkov can ask the Small Claims Court to bring Al in for a Judgment Debtor Examination. There is a standard form given by the Small Claims Court that a creditor has to fill in. The Small Claims Court will then issue and serve a summon on Al who must attend at the date and time stated. A Small Claims Court Judge usually does the questioning and will ask Al where his bank accounts are located.

   b) If Al fails to appear, it is contempt of court and he can be arrested. This is frequently done. The reluctant debtor is usually held only overnight and is released upon a promise to attend for the next appointment.

4. a) Any patient has the right to sue on their own but if two or more want to form a class action, they can possibly sue as a class.

   b) If they want to sue as a class, they would have to select a representative plaintiff and then apply to the court for certification. They would have to show the court that the class is clearly defined, there are common issues to every class member, the representative plaintiff represents the interests of the entire class, and each case does not have to be litigated on its own and the advantages outweigh the disadvantages.

   c) The advantage is that they can share legal costs, there is power in numbers, and if they get certified, there is a very high chance that they will settle and not go to trial. The disadvantage is that the court may think that each patient should have their case litigated separately. If they do have a class action, the lawyers will take a large amount of the damage awards and it may take a very long time to settle the case.

Section 2 Answers to Closing Questions

1. Government-made law governs. Government-made law is passed by a statute. Often, statutes are used to change or modify a common law principle developed by judges.
2. The stages of a lawsuit are shown in the flow chart by that name in the text.

   They are: pleadings; exchange of relevant documents; examination for discovery; pre-trial conference; trial, judgment; and appeal.
3. A trial court hears evidence given by live witnesses. It is a court of first instance in that the judge makes findings of fact and law for the first time. An appellate court rarely hears live witnesses. The appeal is usually on the transcript of the trial and is in that sense confined to a review of the judge's findings of fact and law.
4. The standard of proof in a criminal proceeding is beyond a reasonable doubt. In a civil proceeding, it is on a balance of probabilities.
5. a) i) Statement of claim
      ii) Statement of defense
      iii) Counterclaim
      iv) Third-party claim

   b) A statement of claim sets out in brief form the plaintiff's complaint against the defendant. The statement of defense sets out the defendant's response to the allegations in the statement of claim. At this point, each party's case is before the court in a very brief form.

      If the defendant has a claim against the plaintiff, the defendant will make that complaint in a form of a counterclaim.

      If the defendant believes that someone who is not a party to the action has responsibility to the plaintiff, either completely or in part, the defendant can sue that stranger by way of third party proceedings and have the defendant's claim against that stranger filed at the same time as the plaintiff's claim (main action).
6. A barrister is a trial lawyer; a solicitor does legal work that does not involve going to court such as real estate or corporate law. An attorney is used in Canada to describe an agent that has authority to sign a person's name such as by Power of Attorney. It is sometimes used for a government representative such as the Attorney General of Canada. In the U.S., it is a synonym for lawyer.
7. a) Mediation is a process where the parties and their lawyers meet with a mediator. The mediator tries to find ways to have the parties come to an agreement. The mediator can make no findings or force any result on the parties. Arbitration is similar to a trial. The arbitrator(s) is chosen by the parties. But once the arbitrator is chosen, that individual acts like a judge and makes the finding that is binding on the parties and which will be enforced like a court order under the Arbitrations Act.

   b) Mediation differs from a trial in that the mediator makes no findings and tries only to get agreement between the parties. Arbitration differs from a trial mainly in that the parties can choose the arbitrator. Sometimes arbitration is a little more informal concerning the admissibility of evidence, but it is similar to a trial in that the arbitrator can make a final binding judgment.

8.

	Choices	**Correct Answer**
Trial lawyer	Binding precedent	Barrister
Stare decisis	Mediation	Binding precedent
Alternative Dispute Resolution	Statement of defense	Mediation
Certification	Barrister	Approval
Pleading	Approval	Statement of Defense

9. No, it is not excluded because it is wrong, it is excluded because the form, that is repetition by a person testifying who was not present at the event, is considered unreliable.

10. a) Yes, Morgan can have the court (sheriff) seize the car and sell it at an auction to pay his judgment.

    b) No, the chattel mortgage will be paid off first, followed by sheriff's fees, bailiff's fees, and auctioneer's fees before Morgan sees anything other than fees.

11. This exercise is based on loan scams. Students are frequent victims of these loan brokers. You might ask students for their personal experience with loan brokers. We have found that almost every class has a student who has been taken by them. Some have been taken twice, so that it is a very pertinent matter to discuss. While it has to be stressed that there is no requirement of following a specific format in the small claims court, here is an example claim that follows the structure of a formal pleading, but is in simple language. The sample pleading follows the suggest outline above and has corresponding paragraph numbers.

    1. On July 15, 1997, I applied for a loan of $5,000.00 from Sure Finance Inc. and it agreed to give me the loan.
    2. I paid a $500.00 deposit on July 15, 1997, on the agreement that the deposit would be refunded if the loan was not given to me.
    3. Sure Finance Inc. did not give me the loan and refused to return the $500.00 deposit.
    4. I therefore claim:
       a) damages in the amount of $500.00,
       b) interest on $500.00, and
       c) costs, including GST, if any.

    Please note that the above pleading has ignored any consequential damage claim. Additionally, we suggest that students should be encouraged to look at the precedents given to serve as models.

    Loan broker frauds have become such a problem that Ontario introduced legislation to prohibit loan brokers from taking up-front deposits. This has not prevented them from continuing to operate in that province, so a warning to students is important.

12. This question requires doing a report and has no answer.

13. a) The negligent act was done when the report was made, June 1, 2013.

b) The basic limitation period expires in two years, May 30, 2015.

c) Yes, discoverability. An ordinary businessperson would not know if the appraisal was done negligently and would not be put on notice to inquire. Even the low value suggested by a real estate agent at listing may be due to market price fluctuations.

d) The discovery date is likely when the real estate agent said the low price was possibly due to negligence. That time may be viewed as unfair because most businesspeople would not, on an informal opinion, seek legal advice (an expense) or realize the necessity of getting an expert opinion from an appraiser (another expense) to confirm and issue a statement of claim with-in the limitation period. However, it is important for a business student to realize that they must take action immediately. Limitation periods are enforced somewhat "mercilessly" and they should not take the risk if a limitation period is involved.

Small Claims Court Sample Form and Sample Drafting Assignment

Below is a sample assignment that can use involving drafting of a small claims court assignment. A blank small claims court form is included and they are also available on all of the provincial small claims court websites. The forms are changed frequently and so no form on the websites will be identical to the example in the text.

SMALL CLAIMS COURT ASSIGNMENT

Due Date:

On December 3rd, 2013 Carol and John "Jack" Allen Brown, of Toronto, arranged for Susan Jones of Mississauga to be a surrogate mother for them by artificial insemination using John's sperm for the sum of $50,000; $20,000 paid at the time of the insemination and $30,000 on delivery of the baby. The insemination was performed and the $20,000 paid on December 10, 2013.

However, Carol became pregnant on June 1st, 2014, one month before the child was born, and the couple told Susan that same day they did not want the child and refused to pay the further $30,000.

1. Draft a Statement of Claim for Susan's claim against the couple in the proper form for the Small Claims Court. The form must be filled in completely. The claim is only for the balance of the unpaid amount and need not take into account any other possible claims such as the cost of raising the child, etc.
2. Draft the Statement of Defense for Carol and John Brown.

You can assume any further facts that you think are required.

This assignment is due on or before:

Note to Instructors. The dates can be updated, or left to add a limitation period defence

SUGGESTED MARKING SCHEME FOR ASSIGNMENT

Claim
Fill-in names and address of Plaintiff (1 mark); 2 defendants (1 mark)
Jurisdiction–How Much? $25,000, depending on province (2 marks)
Prepared on (1 mark)

Total 5 marks

Marks within body of claim noted within total 10 marks

Total 15 marks

Defence
Fill in the boxes (1 mark)
Fill-in: Defense filed on behalf of John Allen Brown and Carol Brown (1 mark)
Pleading of statutory illegality as noted in the body of defense (3 marks)

Answer 1--Filled In **Claim** Form with Marking Scheme

Small Claims Court
Cour de justice

Plaintiff's Claim
Demande du demandeur
Form / *Formule* 7A Ont. Reg. No. / *Règl. de l'Ont.* : 258/98

Capital City
Small Claims Court / *Cour des petites créances de*

Claim No. / *N° de la demande*

Seal / *Sceau*

47 Sheppard Ave East
Address / *Adresse*

616-326-3554
Phone number / *Numéro de téléphone*

Plaintiff No. 1 / ***Demandeur n° 1***

☐ Additional plaintiff(s) listed on attached Form 1A.
Le ou les demandeurs additionnels sont mentionnés sur la formule 1A ci-jointe.

☐ Under 18 years of age.
Moins de 18 ans.

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
Jones		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Susan		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
123 Acme Street		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Mississauga	**Any Province**	**616 905. 9059**
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
L6M 8N9		**616 905.9057**
Representative / *Représentant(e)*		
N/A		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

Defendant No. 1 / ***Défendeur n° 1***

☐ Additional defendant(s) listed on attached Form 1A.
Le ou les défendeurs additionnels sont mentionnés sur la formule 1A ci-jointe.

☐ Under 18 years of age.
Moins de 18 ans.

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
Brown		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
John	**Allen**	**Jack**
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
456 Main Street		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Toronto	**Any Province**	**616 416.4166**
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
M7G N8B		**416 416.4167**
Representative / *Représentant(e)*		LSUC # / *N° du BHC*
N/A		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		

(*Continued*)

PAGE 1A

Small Claims Court
Cour supérieure de justice

Additional Parties
Parties additionnelles

Form / *Formule* 1A Ont. Reg. No. / *Règl. de l'Ont.* : 258/98

Claim No. / *N° de la demande*

☐ **Plaintiff No. /** ***Demandeur n°***

☒ **Defendant No. /** ***Défendeur n°*** **2**

Last name, or name of company / *Nom de famille ou nom de la compagnie* **Brown**		
First name / *Premier prénom* **Carol**	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)* **456 Main Street**		
City/Town / *Cité/ville* **Capital City**	Province **Any Province**	Phone no. / *N° de téléphone* **616 416.4166**
Postal code / *Code postal* **M7G N8B**		Fax no. / *N° de télécopieur* **616 416.467**
Representative / *Représentant(e)* **N/A**		
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

☐ **Plaintiff No. /** ***Demandeur n°***

☐ **Defendant No. /** ***Défendeur n°***

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
Representative / *Représentant(e)*		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

☐ **Plaintiff No. /** ***Demandeur n°***

☐ **Defendant No. /** ***Défendeur n°***

Last name, or name of company / *Nom de famille ou nom de la compagnie*		
First name / *Premier prénom*	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*
Representative / *Représentant(e)*		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		

FORM / *FORMULE* 7A **PAGE 3**

Claim No. / *N° de la demande*

How much? $ **25,000.00**
Combien? (Principal amount claimed / *Somme demandée*) *$*

X☐ **ADDITIONAL PAGES ARE ATTACHED BECAUSE MORE ROOM WAS NEEDED.**
DES FEUILLES SUPPLÉMENTAIRES SONT ANNEXÉES EN RAISON DU MANQUE D'ESPACE.

The plaintiff also claims pre-judgment interest from **June 1, 2011** (Date) **under:**
Le demandeur demande aussi des intérêts antérieurs au jugement de ***conformément à :***

(Check only one box / Cochez une seule case*)*

X
☐ **the *Courts of Justice Act***
***la* Loi sur les tribunaux judiciaires**

☐ **an agreement at the rate of** _____ **% per year**
un accord au taux de ***% par an***

and post-judgment interest, and court costs.
et des intérêts postérieurs au jugement, ainsi que les dépens.

Prepared on: **March 2** , 20 **14**
Fait le :

(Signature of plaintiff or representative / *Signature du demandeur/de la demanderesse ou du/de la représentant(e)*)

Issued on: _____ , 20 ____
Délivré le :

(Signature of clerk / *Signature du greffier*)

CAUTION TO DEFENDANT:	**IF YOU DO NOT FILE A DEFENCE** (Form 9A) with the court within twenty (20) calendar days after you have been served with this Plaintiff's Claim, judgment may be obtained without notice and enforced against you. Forms and self-help materials are available at the Small Claims Court and on the following website: www.ontariocourtforms.on.ca.
AVERTISSEMENT AU DÉFENDEUR :	***SI VOUS NE DÉPOSEZ PAS DE DÉFENSE*** *(formule 9A) auprès du tribunal au plus tard vingt (20) jours civils après avoir reçu signification de la présente demande du demandeur, un jugement peut être obtenu sans préavis et être exécuté contre vous. Vous pouvez obtenir les formules et la documentation à l'usage du client à la Cour des petites créances et sur le site Web suivant : www.ontariocourtforms.on.ca.*

Schedule "A"

1. On December 3, 2013 the Plaintiff agreed/contracted with the Defendants to be a surrogate mother for them. (2 marks)
2. The relevant terms of the agreement/contract were:
   a) the Plaintiff agreed to be inseminated with sperm provided by the Defendant John Allen Brown (2 marks)
   b) the Defendants agreed to pay the Plaintiff $50,000 for the service; $20,000 on insemination and $30,000 on delivery of the baby. (2 marks)
3. The Plaintiff performed the contract, was inseminated and gave birth to a baby from this insemination. (2 marks)
4. The Defendants paid the $20,000 on insemination but breached the contract in that they refused to accept the baby and pay the balance of the amount owing of $30,000. That sum of $30,000 is now owed to the Plaintiff. (2 marks)

Total for Schedule "A" — 10 marks

Answer 2 –filled in **Defence** form with marking scheme attached.

Small Claims Court

Defence / *Défense*

Form / *Formule* 9A Ont. Reg. No. / *Règl. de l'Ont.* : 258/98

Capital City — Small Claims Court / *Cour des petites créances de*

1234567 — Claim No. / *N° de la demande*

47 Sheppard East

Address / *Adresse*

616.326.3554

Phone number / *Numéro de téléphone*

Plaintiff No. 1 / *Demandeur n° 1*

☐ Additional plaintiff(s) listed on attached Form 1A. *Le ou les demandeurs additionnels sont mentionnés sur la formule 1A ci-jointe.*

☐ Under 18 years of age. *Moins de 18 ans.*

Last name, or name of company / *Nom de famille ou nom de la compagnie* **Jones**		
First name / *Premier prénom* **Susan**	Second name / *Deuxième prénom*	Also known as / *Également connu(e) sous le nom de*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)* **123 Acme Street**		
City/Town / *Cité/ville* **Capital City**	Province **New Province**	Phone no. / *N° de téléphone* **616.905.9059**
Postal code / *Code postal* **L6M 8N9**		Fax no. / *N° de télécopieur*
Representative / *Représentant(e)* **N/A**		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

Defendant No. 1 / *Défendeur n° 1*

x ☐ Additional defendant(s) listed on attached Form 1A. *Le ou les défendeurs additionnels sont mentionnés sur la formule 1A ci-jointe.*

☐ Under 18 years of age. *Moins de 18 ans.*

Last name, or name of company / *Nom de famille ou nom de la compagnie* **Brown**		
John	Second name / *Deuxième prénom* **Allen**	Also known as / *Également connu(e) sous le nom de* **Jack**
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)* **456 Main Street**		
City/Town / *Cité/ville* **Capital City**	Province **Any Province**	Phone no. / *N° de téléphone* **616.416.4146**
Postal code / *Code postal* **M7G N8B**		Fax no. / *N° de télécopieur* **616.416.4167**
Representative / *Représentant(e)* **N/A**		LSUC # / *N° du BHC*
Address (street number, apt., unit) / *Adresse (numéro et rue, app., unité)*		
City/Town / *Cité/ville*	Province	Phone no. / *N° de téléphone*
Postal code / *Code postal*		Fax no. / *N° de télécopieur*

(*Continued*)

FORM / *FORMULE* 9A **PAGE 2**

Claim No. / *N° de la demande*

THIS DEFENCE IS BEING FILED ON BEHALF OF:
LA PRÉSENTE DÉFENSE EST DÉPOSÉE AU NOM DE : *(Nom du/de la ou des défendeur(s)/défenderesse(s))*

John Allen Brown and Carol Brown

and I/we: (Check as many as apply)
et je/nous : (Cochez la ou les cases qui s'appliquent)

X☐ Dispute the claim made against me/us.
conteste/contestons la demande présentée contre moi/nous.

☐ Admit the full claim and propose the following terms of payment:
reconnais/reconnaissons être redevable(s) de la totalité de la demande et propose/proposons les modalités de paiement suivantes :

$ _____ per _____ commencing _____ , 20 ____ .
(Amount / *Montant*) *$ par* (Week/month / *semaine/mois*) *à compter du*

☐ Admit part of the claim in the amount of $ _____ and propose the following terms of payment:
reconnais/reconnaissons être redevable(s) d'une partie de la demande, soit (Amount / *Montant*) *$ et propose/proposons les modalités de paiement suivantes :*

$ _____ per _____ commencing _____ , 20 ____ .
(Amount / *Montant*) *$ par* (Week/month / *semaine/mois*) *à compter du*

REASONS FOR DISPUTING THE CLAIM AND DETAILS:
MOTIFS DE CONTESTATION DE LA DEMANDE ET PRÉCISIONS :

Explain what happened, including where and when. Explain why you do not agree with the claim made against you.
Expliquez ce qui s'est passé, en précisant où et quand. Expliquez pourquoi vous contestez la demande présentée contre vous.

If you are relying on any documents, you **MUST** attach copies to the Defence. If evidence is lost or unavailable, you **MUST** explain why it is not attached.
*Si vous vous appuyez sur des documents, vous **DEVEZ** en annexer des copies à la défense. Si une preuve est perdue ou n'est pas disponible, vous **DEVEZ** expliquer pourquoi elle n'est pas annexée.*

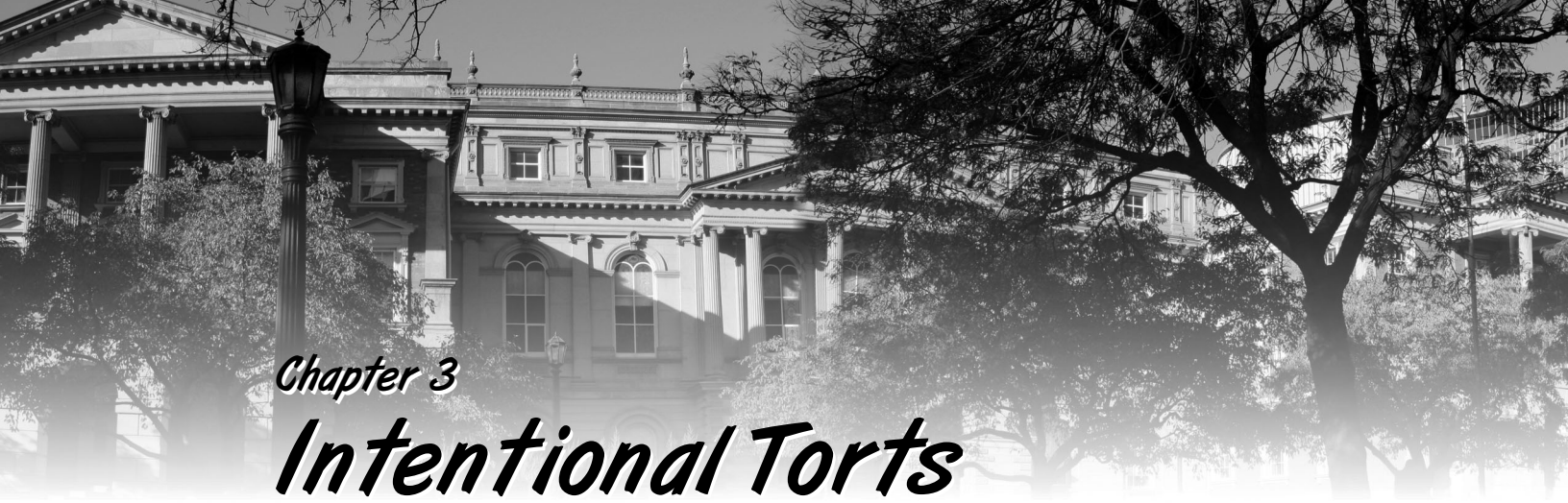
What happened?
Where?
When?
Que s'est-il passé?
Où?
Quand?

1. The Defendants admit the allegations in paragraphs 1 through 5 of the Claim

2. The Defendants deny any amount is owing to the Plaintiff because the agreement is illegal at common law and by statute. The Defendants rely on The Assisted Human Reproduction Act.

[Marking: mention illegality (1 Mark), statute (1 Mark), Assisted Human Reproduction Act (1 Mark. Total 3 marks]

3. The Defendants ask that the Claim be dismissed with costs.



Chapter 3

Intentional Torts

Section 1 Answers to Business Law—Applied Questions

1. a) There was no proof that a crime was committed. Therefore, there would be no justification for holding Wishart.

2. a) There was proof that a crime was committed, and it was reasonable to believe Wilfred had done it. Based on similar case law, Wilfred likely does not have a case.

3. a) The bouncer is correct. The public has no right to enter a business. A business is private property. The business gives the public a licence to enter but can withdraw that licence for any reason. There is no right to enter a bar just because a person is 21.

4. a) He cannot restrain her from picketing in front of a business—that is not a nuisance.

   b) A YouTube video has nothing to do with the use of property and hence it is not a nuisance.

   c) Picketing a private residence is a nuisance as an invasion of a residential privacy which is an incident of the use of residential land.

5. a) This question is drafted to emphasize that a business is private property and that the owner gives people a licence to come onto the premises for the purpose of doing business. Comparative shopping by a competitor is not in accordance with the licence and so Chaytor was a trespasser from the beginning.

   b) According to the civil law alone, the business would not have had a right to detain Chaytor, but simply to ask him to leave, then use reasonable force to evict him if required. The words "watch these people" implied that Chaytor and his colleague were being detained by the security guards.

   c) "You must come with us," spoken by a police officer is sufficient to be a constraint. If the person did not go with the police officer, the police officer would very likely use physical restraint. (*Chaytor et al. v. London, New York and Paris Association of Fashion Ltd. and Price, 1961 30 D.L.R. (2d), 527 (Nfld. S.C.)*) The plaintiffs sued only the manager and the business, not the police, and were awarded damages for false imprisonment.

6. a) Because it is written, the defamatory statement is libel.

   b) Since it was on display, there is a good argument that it was publication as it was communicated to passers-by.

   c) Because this statement is written, actual monetary loss is not required. If the statement had been oral (slander), of course, actual monetary loss would have been required before an action could have been brought.

7. a) The statement is slander.

   b) The statement was not communicated to a third party and it did not result in actual monetary loss.

   c) The statement is slander.

   d) There is still no monetary loss; so, Nowark cannot bring an action against Youssoff. The statement has been communicated.

   e) There is still no actual monetary loss. However, this is a statement about a person in respect of profession or calling and is actionable without proof of actual loss.

      This question also foreshadows defenses dealt with next. If Youssoff felt that he had a duty to tell his boss because Nowark was incompetent and could back-up the opinion, Youssoff would have the defenses of qualified privilege. However, if Youssoff did this out of spite, that would be malice and the defenses of qualified privilege would not apply. You might want to revisit this question after the defenses have been covered.

8. a) The author could rely on truth and the publisher could do the same. The library, however, could rely on innocent dissemination even if the statements were untrue. Some students will have difficulty grasping that the privilege defenses apply when the statement is false.

9. a) No, because a statement in court is absolutely privileged.

   b) No, the boy cannot be sued for defamation because there is an absolute privilege for statements made in court.

   c) No, there would be no defense. The statement is given to be untrue in the question. This is an obvious allusion to the Michael Jackson situation. The class will be divided as to whether they believe the allegations in the Michael Jackson case to be true or not. However, in the fact situation as given, the readers are to assume the allegations untrue to answer the question. A defense such as qualified privilege would not apply here because the boy is not reporting it to an authority such as the police who have a duty to investigate.

   d) The newspaper has a privilege defense. Since the statement was made in court, the newspaper can report it. While technically the newspaper's privilege is called a qualified privilege, this term was not mentioned in the text as an unnecessary detail. It was felt that it was sufficient to outline absolute privilege for court matters. The newspaper also has special media defenses that are outlined in the text that may apply depending on assumptions.

10. a) The parking of the car outside the dealership could be unlawful interference with business, economic relations. The painting of the car and the sign "purchased at Fred's Car Dealer" could also be injurious falsehood.

b) Truth is a defence to unlawful interference. It is generally accepted that if a car repeatedly needs repairs over a lengthy period of time, it is a "lemon." For injurious falsehood, there is also a defence of truth.

11. a) She would have the defense of truth if she could establish that the software was in fact effective. However, if the problem was caused by her not being able to use it correctly, she might not have any defense. However, businesses often do not want to take the risk of adverse publicity by way of a YouTube video going viral. A good example is a criticism of United Airlines baggage handling in the video that got wide attention "United Breaks Guitars".

    b) Because she had created the web-site, she would be jointly responsible with anyone who had posted messages. She and the persons who posted would have the defense of truth if the contents were true, but no other relevant defense.

12. a) It is difficult to determine—perhaps breach of contract, defamation. The class discussion needs to attempt to define what unlawful acts are.

    b) A possible suit for unlawful interference with business relationship, if they can show some unlawful means.

Section 2 Answers to Closing Questions

1. a) Conversion.

    b) No, though they can be liable for negligent supervision.

    c) No, and the YOA is of no impact because it is criminal law.

    d) Petty Trespass Act.

2. The discussion should include the practical difficulties of running a business versus personal freedom concerns.

3. a) The tort of defamation.

4. a) The intentional tort of assault and battery has been committed by Greyson on Frank DeValeriote. Students may also identify an unintentional tort based on negligence because of Greyson's actions and Mrs. DeValeriote's third degree burns from the dropped cup of coffee.

    b) Provocation would not act as an absolute defense for Greyson. At best, it would help to reduce the damages he would have to pay if found liable. It is unlikely that provocation would be available given the fact situation in which the obscene words and Frank's refusal to move occurred.

    This fact situation can be used to explore the nature of intentional and unintentional torts using the two individuals, Frank DeValeriote and Marsha DeValeriote. In discussing the unintentional tort involving Marsha, the concept of remoteness of injury and the plaintiff's ability to recover could be raised.

5. a) The necessary elements for an action based on defamation are present as it is an untrue statement that causes harm to the reputation of the individual, and that false statement has been communicated to a third party. The damage suffered might be the loss of job opportunity if it can be shown that she was turned down for the

position applied for as a result of the comments made by the previous employer. Even if no actual monetary loss can be proven, the statement made might fall within the exception relating to statements that a party has committed a crime.

b) On the assumption that the employer was not aware that the real thief had been caught, the employer might argue the defense of qualified privilege. The statement was made out of a duty to respond to the inquiry made by the potential employer of the young woman, and it was made without malice or for any improper purpose.

The fact situation is unclear as to whether the former employer was aware of the real thief having been caught or whether the discussion with the potential employer had taken place prior to the real thief being determined. This uncertainty can be used to explore the nature of the defenses, which may or may not be available.

6. a) The police officers' remedy would be an action based on malicious prosecution. They appear to meet the four criteria required to be successful. However, there may not be a great deal of financial advantage in bringing an action against a person charged with armed robbery.

7. a) Sun Yat would have the remedy of an action for false imprisonment. Students should discuss the nature of the restraint imposed on Sun Yat by the manager of the store. The students could be asked to act as a jury to give their opinion by writing it without discussing with others as to how much should be paid in compensation. There may be an initial reaction that they can't do it, but after insisting that they give a number in confidence, there may be a consensus in the class with some interesting divergent opinions when the numbers are disclosed. Juries are always faced with this problem of coming up with a number in such cases. It is purely subjective, but there is often a consensus.

b) There is no defense of reasonable grounds or honest mistake.

The question presents an opportunity to review the principles of intentional torts, in particular the intentional tort of false imprisonment. As well, it is an opportunity to discuss the concept of remoteness of damage when injury has occurred.

8. a) Elliot would bring an action for the intentional tort of conversion.

Conversion is very much a business-related tort and this very broad example of the tort of conversion could serve as a starting point for further examples which are more specifically business-oriented. For example, a customer obtaining goods under false pretences by deliberately using checks which will not be honored at the bank.

9. a) The statements concerning the cook would be dealt with under defamation. The statements about using leftovers in hamburgers fall in the tort of injurious falsehood.

b) The neighboring chef would be successful in a court action for injurious falsehood as Kirk's actions are not of the same nature as those of a consumer group seeking to protect consumers at large. The comment about the cook's abilities has been qualified with the words "in my opinion," and would not have the quality required of a statement of fact which is false.

10. a) The framers of the law wanted to discourage lawsuits for slander, so the restriction of monetary loss was created. There is an often-repeated quote from an old slander case: The best defense for slander is a thick skin.

b) An underlying principle may be permanence. One of the aspects of libel being in printed form is its permanence, which results in it being more likely to be seen by more people. This principle may help to distinguish between less permanent expressions on the Internet, such as in chat rooms, and more permanent ones such as web-sites. The mid-category of bulletin boards is problematic.

11. a) The research may yield any number of facts. Here is a summary: **Wayne Crookes** is a Vancouver businessman and former Green Party organizer. In 2006, he filed a lawsuit against several blogs for alleged defamatory postings. In 2007, he expanded his lawsuits to include Yahoo, Google, PBwiki, and Wikimedia, some of the largest websites on the Internet, charging that they allowed anonymous users to post (what he called) defamatory content [1]. He also sued Michael Geist, a prominent legal scholar active in many Internet-related causes in Canada, after Geist published a column warning of grave implications for freedom of speech were Crookes to prevail [2]. Crookes also sued other known activists on similar causes, giving rise to the accusation that his lawsuits were so-called SLAPP lawsuits to silence critics who engaged him on public issues, rather than to recover actual damages he suffered. He even sued a domain name registrar for respecting the confidentiality of a domain holder. The suits immediately triggered a flood of negative publicity still visible on the net.

In October 2008, the BC Supreme Court ruled against Crookes in one defamation lawsuit he filed against p2pnet.net, because the site hyperlinked to unfavorable articles about him. The judge ruled that while "a hyperlink provides immediate access to material published on another website, this does not amount to republication of the content on the originating site" [3]. This decision may have set national precedent regarding file sharing, influencing the legal strategies involving Bit Torrent, as file sharing programs exchange links to materials rather than the materials themselves.

Several other lawsuits remained active as of March 2009. After the ruling, several persons targeted in them outlined other legal precedents they expected would be set in the resolution of the remaining cases he had filed [1] including political freedom of speech and anonymity rights, and other legal issues relevant to the operation of large public wikis debating public issues, including whether such services can exist at all or be used by any Canadian.

b) Repetition of a defamatory statement is defamatory. Telling to even one person such as a teacher is publication. There is no educational purpose exception such as in copyright. Technically, the repetition, assuming a defamatory statement, could be actionable against the student. Of course, that is highly technical reasoning and would never result in an action. None of the standard defenses apply.

12. **Pro:** The general principle is that repetition of libel is libel. Newspapers are responsible for repeating a libelous story. The search results page will show an excerpt of the libel. A Google search contains more than just a name but is directed also by content which contains the libelous allegation. A telephone directory gives only a name and an address. Also a person can opt out of the telephone directory for confidentiality reasons.

Contra: Google is not repeating the story, merely directing to it like a telephone directory. It does not affirm the truth of the contents of the website. The better analogy is likely to website linking without an affirmation of the truth. The case of *Crookes v Wikimedia* is a precedent that supports this argument.

Making Google liable could put a high burden on Google. It could never carry any results linking to, say, the National Enquirer.

A new provision in the common law of libel might be necessitated by this new technology. Analogous to a newspaper notice, perhaps the wronged person would have to give Google a notice of the alleged libel and an opportunity to make certain that the search results did not go to any website that contained the libelous statement, which would be similar to the notice and take down procedure used in US copyright law.

The question has yet to be determined.

13. This is an exercise to examine how the case law might be developed referencing the values and principles in the existing law. There may be many other respectable opinions.

    i) **The issue:** First the issue must be stated: When should a webmaster/blogger be responsible for a defamatory statement posted by a user?

    ii) **Analogy:** A review of the existing defenses suggests that a close analogy is Innocent Dissemination, a defense that is often used to protect librarians who may be offering books to the public that contain libelous statements, but do not know of the statements.

    iii) **Similarity:** A similarity between librarians and webmasters would be that they would not know the detailed content of every posting or link just as a librarian would not know the content on every page of every book in the library.

    iv) **Differences:** Librarians are not expected to read every book in the library; however, websites often have moderators and even options for users to bring objectionable content to the webmaster's attention. When a website allows a post, it impliedly approves of the content and must be taken to have at least scanned the contents.

    v) **Proposal:** A possible solution here might be, by analogy to the Libel and Slander Act relating to newspapers and broadcasters, that the webmaster be given notice and a short period of time to take down and publish either a retraction or a disclaimer; alternatively, the more neutral notice, and takedown of the US copyright law could be adopted.

14. a) Stewart can sue John for breach of confidence as he had told him information that was confidential and John is liable for misuse of the confidential information. John used it for his own benefit and the detriment of Stewart.

    b) John can claim that there was no contract or joint venture so he is not bound by their discussions to develop the property together. But given the confidential nature of the information Stewart shared, he has no defense to the breach of confidence claim by Stewart. The court made John divide proceeds of this development on the original 30 percent to Stewart and 70 percent to John. See case *Walter Stewart Realty Ltd. v. Traber*, 1995 ABCA 307 (CanLII)

15. a) Kevin can sue Company M for wrongful dismissal. The company had no right to fire him. Kevin can also sue cable Company C for inducing breach of contract. You may think that he could also sue company C for intentional interference with economic relations; however, the court in this case took a strict view of that tort and ruled that C had not used any "unlawful means" to have Kevin fired, just a policy it had to exclude certain workers, so since that element of Unlawful means was absent, it was

not liable for the tort, intentional interference with economic relations. He was only awarded damages for his claim against company C for inducing breach of contract.

b) Kevin was awarded damages for the lost income that he suffered during his periods of unemployment and the difference in wages made at his new position compared to his income as a cable installer. See case: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 (CanLII).

16. a) Steve can claim breach of contract because he had bought the exclusive right to sell water and the beer company and Ron had let others sell water and forced Steve to give away much of his water for free. He could also succeed in a claim for intentional interference with economic relations.

b) The court would rule that there was clearly a breach of contract as Steve had been given the exclusive right to sell water, but others were allowed to sell water as well. The claim for intentional interference with economic interests should also succeed. The beer company and Ron had committed unlawful conduct that was directed at Steve, it was done intentionally to hurt Steve and resulted in provable economic losses. Ron was liable for the lost profits in contract law, for tort damages for intentional interference and punitive damages. (See case *Barber v. Molson Sport & Entertainment Inc.*, 2010 ONCA 570 (CanLII)

Chapter 4
Negligence

Section I Answers to Business Law—Applied Questions

1. a) The test the courts will apply is reasonable foreseeability to establish whether Seel owed a duty to Kuz. Reasonable foreseeability is a question of fact, not of law. Opinions will vary. Another way of asking the test of reasonable foreseeability is whether the event was surprising or unexpected. In jurisdictions where there is jury, this would be a question for the jury. You could take a vote of the class and see if there is any consensus as to whether the presence of Kuz was reasonably foreseeable. There is no absolute answer. This finding will vary with the judge or jury.

   In spite of the word formula, there is a tendency by courts to increase liability. This is particularly so when a judge is making a decision, as a judge will assume there is insurance.

   b) If the presence of Kuz is foreseeable, then the type of injury, i.e., burning, is foreseeable. This question foreshadows the discussion of limitation because of the unexpected type of injury later.

2. a) Again, this calls for the application of reasonable foreseeability. Since the other driver was driving illegally, that may be a factor that makes the second driver unforeseeable. However, this will be a matter of opinion.

   b) If the second driver was foreseeable, then it was foreseeable that the driver would have a family. In *Oke v. Weide Transport Ltd., (1963) 41 D.L.R. (2d) 53 (Man. C.A.)*, the court held that this was a freakish accident and that the defendant could not have anticipated that someone would endeavor to pass a car when it was wrong to do so.

3. a) The court would apply the test of reasonable foreseeability. Was it reasonably foreseeable that a child would go to the back of a gas station? Our answer is yes.

   b) The court would apply the test of what a reasonable person would have done, knowing that a child might go wandering to the back of the gas station.

c) This is a question of fact, not of law. The finding of a court in any particular circumstance is not a binding precedent but is, of course, a guideline. You can use this situation to have the class assume that it is a jury and ask it what they think a reasonable person would have done. There will likely be a consensus that there should have been a fence put around the cesspool and that the fence should be at least eight feet high. You can point out that this is how the jury system works. There is a consensus about certain standards of care. Most will agree that a warning sign or a low fence would not be sufficient.

4. a) This, again, is a question of fact. There will likely be some division of opinion on this. The argument for the contractor would be that it was good for 25 years and also that the owner got a lower price. The cold spell was a freak and hadn't happened for 50 years. Contractors don't look at weather records back 50 years but judge by their own lifetime experience. The homeowner's argument is given in the next question.

   b) The homeowner would argue that freak cold spells were known and therefore reasonably foreseeable, even if only every 50 years.

5. a) Kwan will not be successful because she was the one who was inattentive and caused the accident.

      i) Linden owed a duty to Kwan because it was foreseeable that any lack of care on Linden's part might involve hitting another driver on the road.

      ii) Linden was probably in breach of the standard of care by driving when he had been pronounced unfit to drive because of previous careless acts. It is arguable that on this day, however, he did nothing wrong and so was not in breach of any standard. He was driving within the speed limit on his side of the road. It was Kwan who was careless.

      iii) No, Linden did nothing to cause the accident.

   b) Linden will probably be successful in suing Kwan.

      i) Kwan owed him a duty of care because it was foreseeable that her actions might injure another driver on the road.

      ii) Kwan breached the standard of care because her mind wandered.

      iii) Kwan caused the accident because her car crossed over the center of the road into Lindens' lane.

   c) Even though Linden might very well escape an action based on negligence because his action did not cause the damage, he would still be subject to prosecution under the criminal law for driving while his licence was under suspension. Students may feel strongly that because he was driving without a licence, he should be fully responsible for all the loss. However, his conduct at the time was not the cause of the loss. That important element of causation was missing and so Linden was not negligent even though he broke the law.

   d) Kwan did not breach the standard of care even though she caused the accident. Keeping the windows rolled down would not be a breach of standard practice in driving. See case *Sinclaire v. Nyehold*, [1972] 5 W.W.R. 461 (B.C.C.A.).

6. a) The court would ask whether the damage to the school was reasonably foreseeable. In the reported case, the court did find that damage to the school should have been reasonably foreseen by the boy. (Hoffer *v. School Division of Assiniboyne South, [1973] W.W.R., 765 (S.C.C.)*). The father was also held liable for failure to supervise.

b) The court held that it was reasonably foreseeable by the gas company that if they left a defective pipe in front of the school window, an accident could happen, causing gas to escape into the school. So, it was held partly responsible along with the father and son.

7. a) In terms of causation, the ship captain's actions did cause a change of events that lead to the death of the patient.

   b) This question draws the students' attention to the fact that the chain of causation alone is not enough. The courts don't make the defendant liable for all acts in the chain of causation, but draw the line. In the text, we have suggested the test of reasonable foreseeability. Of course, this test is only one of several that have been used by the courts, others being: possibility; real risk; proximate cause; or direct cause. All of these word formulas have been found to be inadequate. It is a question of value and it is hard to predict at what point the courts will draw the line. In a U.S. case, the court posed the present situation as hypothetical and said that few judges would impose liability on the ship captain. (*Kinsman No. 1, (1964) 338 F. (2d) 708.*)

8. a) The paralysis was not reasonably foreseeable.

   b) This illustrates the thin skull plaintiff rule, one of the exceptions to the reasonable foreseeability or proximate cause test. The courts say that tortfeasors take their victims as they find them, ". . . it is no answer to the sufferer's claim for damage that he would have suffered less injury or no injury at all if he had not had an unusually thin skull or an unusually weak heart." (*Dulieu v. White & Sons [1901] 2 K.B. 669, at 679.*)

   In the *Oak v. Weide* case, the car that tried to pass illegally and got speared by the sign-post was a Volkswagen Beetle which has no engine in the front. The defendant argued unsuccessfully, on this one basis, that there should be no liability because the plaintiff was driving a "thin-skinned car" and would not have been injured if driving a regular car with an engine in the front.

9. a) No, the spectator would not be successful. The spectator would be taken to have known that a puck can stray into the stands and assume the risk. This is a complete defense. (*Elliott v. Amphitheatre Ltd., [1934] 3 W.W.R. 225 (Man.).*)

10. a) This question focuses on the limits to a spectator's consent. The spectator can be taken to have consented to a stray puck or stick during play, but have they assumed the risks created by improper conduct? The Ontario Court of Appeal held not, and awarded damages to the spectator in this situation against a Toronto Maple Leaf player. (*Payne v. Maple Leaf Gardens et al., [1949] 1 D.L.R. 369 (C.A.).*)

11. a) No, the golfer could not recover from the partner. This is the type of risk that could ordinarily be expected. In respect of golf balls that go astray. One judge quipped, "everyone knows that a golf ball does not always go in exactly the direction intended, in fact, for most people, it rarely does." (*Ratcliffe v. Whitehead, [1933] 3 W.W.R. 447 (Man.).*)

12. a) This, again, demonstrates the limit on assumption of risk. A skier will not be taken to have assumed that a ski resort has failed to mark a dangerous trail and the doctrine of *volenti non fit injuria* will not prevent recovery. The skier did not know that the resort failed to mark dangerous trail. (*Wilson v. Blue Mountain Resorts Ltd., (1974) 4 O.R. (2d) 713.*)

   The courts have decided the above cases on the principle of *volenti*. We suggest that they are really saying that such conduct is not negligent in the sense of not

careless. For example, if a golf ball goes wild, that is one of the risks of the sport. A golfer cannot always control the ball even if the golfer is taking care. However, if a golfer tees off when another party is directly in sight and range and the ball accidentally hits that person, that is a breach of a standard golfer's practice and would be negligence.

Volenti only truly applies when a party consents to negligence, which is rare but would apply in the co-operative drinking binge cases.

13. a) This is an occupier's liability action.

    b) The issue is whether or not Giroux was an occupier. The definition of occupier is the right to supervise and control the premises, i.e., the right to admit or exclude entry of others. Giroux would not have enough control to be considered the occupier. The supermarket certainly was an occupier. Since he was not an occupier, he did not have a duty to keep the premises reasonably safe. The supermarket had that duty.

    c) The store could have made sure that a store employee regularly monitored the testing area and told Giroux to inform the store immediately if there was a spill. Adequate garbage cans and cleaning products for spills should have been given to Giroux and he should have been told to be on the lookout for spills. It should have specific store policies for how safety could be maintained when market testing was conducted in the store.

14. a) This is an occupier's liability action. The business has a duty to the customer to protect the customer from other dangerous customers.

    b) Because the business was on notice that Klee was aggressive and did not ban him completely from the club, the business would be liable for the injuries. *Gardiner v. McConnell, [1945] 1 D.L.R. 730 (Ont. H.C.).*

15. a) Yes, under occupier's liability, a business that sells alcohol has a duty to make certain that the customer is not so drunk that they would injure themselves because of this drunkenness when they leave. (*Menow v. Hansburger, [1974] S.C.R. 239.* This was decided under common law and not under *Liquor Licence Act* provisions.)

    Occupiers are only liable for their own premises and not for abutting public property. For example, if a business has a sidewalk that goes from the public sidewalk to its entrance, it is liable only for that sidewalk as it is on the property. It is not liable for the public sidewalk. Municipal by-laws require abutting land occupiers to clear the ice and snow from public sidewalks. This does not create a tort responsibility for the public sidewalk. *Commerford v. Halifax School Commissioners [1950] 2 D.L.R. 207 (N.S.).* If someone slips and falls on the public sidewalk, they cannot sue the occupier.

16. a) Oakley has grounds on the basis that a business which supplies liquor has a duty to its patrons. The issue here would be: Was Oakley so drunk that the business would have realized that she would injure herself? Also, would they have realized that she might try and jump-start a car? This is outside the range of the usual cases where the person was falling down drunk and got injured. There is a good argument that the business would not be responsible for this type of injury. There is also the question of contributory negligence.

    b) A business owes a duty to someone who was injured by a patron who got drunk on the business's premises. Of course, the question would be whether the damage was foreseeable. The same argument as in (a) would apply. Would the business have

foreseen that Oakley would try and jump-start her car while drunk and injure a passer-by? Unlikely, however the possibility of a finding of liability cannot be ruled out.

17. a) Rob would definitely be liable for negligence for the deaths and injuries. Laura and William may possibly also be liable under social host liability. They provided all the alcohol that Rob drank and they knew he was drunk by the way he spoke and when he knocked over the lamp. They didn't take any steps to prevent him from driving and they knew he was drunk. The court may rule that they "created and exacerbated" the situation so this may be the fact situation that results in liability being imposed on a social host.

    b) They will look at how much Rob drank, whether the hosts knew he was drunk and whether the hosts took reasonable care to prevent him from driving and creating a reasonably foreseeable accident.

    c) Punitive damages are not usually awarded in drunk-driving cases, the exception being the *McIntyre v. Grigg* case, so it is unlikely here. But if the court wanted to deter other drunk drivers and even social hosts from this behavior, it could be a possibility if the court finds they showed a conscious disregard for the life and safety of others.

18. a) This is a review of the principle of *Donoghue v. Stevenson* with a slight variation. By tort liability, Mbele owes a duty to Rumi.

    b) This is a practical matter. People often feel that if they get a judgment, somehow it will be paid. It must be stressed that there is no magic in obtaining one, it does not pay itself. If the person sued is insolvent, the judgment is worthless. The plaintiffs have to look for a deep pocket.

    c) This is a review of *Donoghue v. Stevenson* which is the foundation of product liability law.

19. a) This question focuses the students' attention on the difference between suing for the cost of repair and personal injury. If you wish, you can use this to draw attention to the fact that contract law respecting business products was developed historically on the basis of actions for costs of repair, while tort was developed on the basis of personal injury. In contract, there would be the *Sale of Goods Act* implied condition of merchantability. In the present time, the distinction between tort and contract is disappearing. There is now precedent for personal injury damages arising out of a breach of an implied condition of merchantability.

    b) This question distinguishes between the purchaser's and a third party's right for personal injury. It is reasonably foreseeable by a manufacturer and a dealer that a defective bike would injure a passer-by.

    c) There is no special rule. The previous doctrine of *res ipsa loquitor*, would have automatically shifted the proof burden to the defendants. Now the plaintiff has to rely on the evidentiary principle of circumstantial evidence. That requires the plaintiff to prove that there is no other reasonably likely cause of the accident than a manufacturing or an assembly defect. This is a matter of a finding of fact. A trial judge, or the jury, would first have to make this funding. It is likely that this would be found against the retailer, who may have either been the assembler or charged with responsibility for checking the bike before selling, and the manufacturer. Also, there is the unwritten rule, that judges are sympathetic to consumers and usually try to make findings (and influence juries) that assist the consumer against manufacturers.

A consumer in a position of the pedestrian, here, faces legal fees of at least $200,000, including expert fees, to pursue a case against 3 defendants. Although a products liability lawyer can likely be found to take it on a contingency basis, there would still be considerable legal expense given the value of the claim as to make it unprofitable to pursue. Judges recognize this and that the retailer and manufacturer will have insurance. So these are also factors that will influence the judge who will know that every such case gives a message to business people about product safety.

d) If the defendants cannot determine how the accident occurred, they will be unable to prove they were not at fault. In this case, liability will be placed on all three equally.

20. a) Mark can sue New-Lite for manufacturer's negligence even though there is no contract between them as Mark bought the fan from a store. New-Lite is liable for all component parts provided by outside suppliers included in the product. The court can divide up the liability among the parts supplier and the manufacturer. Since the fuse was made in China, Mark will probably collect from New-Lite. Mark must show on the balance of probabilities that the fan caused the fire, causation and fault must be established.

b) Strict liability does not apply in Canada for defective products and manufacturer's liability. Mark will have to try to succeed in a negligence action proving causation and fault by New-Lite.

21. a) Electro may fail in its claim against Chemtar for negligence as Chemtar had taken reasonable care. It had new proper storage tanks and a working alarm system so it had met its duty of care to its neighbor.

b) Electro may also sue Chemtar under the tort of strict liability. Chemtar had brought onto its property dangerous chemicals and they had escaped through no fault of Chemtar's. Even though Chemtar had done nothing wrong, under strict liability Chemtar would probably be held liable for Electro's damages.

22. a) What the auditor believes is not really relevant. To succeed the buyer has to first establish that the auditor owed the buyer a duty of care. Was the buyer someone that the auditor should reasonably have foreseen would be affected by the auditor's actions? Since the auditor knew the business was up for sale the buyer may be a "neighbour" to the auditor, so a duty of care is owed.

b) If the court believes that the auditor owed the buyer a duty of care, then the next question is did the auditor meet a reasonable standard of care? The buyer will claim that just getting a letter from the bank on a blank sheet of paper was not adequate care. They will insist that the bank's opinion should have been on proper letterhead and done properly. The bank will insist that it is not liable as the statement was not done on its letterhead. The accountant will insist that it had met a reasonable standard of care as it had asked for the amount from the bank and it was the bank's carelessness that caused the wrong value to be on the financial statements. The auditor will insist that the letterhead is irrelevant, and the bank manager had signed the letter so that was all that was required. The buyer will insist that the standard practice requires a bank statement to be written on proper letterhead and the auditor failed to obtain that.

c) The buyer may not necessarily be successful as the court may rule that the financial statements were not prepared for the buyer and the buyer was not a direct client of the auditor. For policy reasons as outlined in Hercules Management, the court limits the liability of accountants to people they had a close proximate relationship

with. However, if the auditor had prepared these financial statements for the purpose of selling the business, then the buyer could say that they were within that close proximate category and the auditor is liable.

23. a) The customer does not have a contract with the engineer. However, the customer could bring an action based on tort. It is reasonably foreseeable by an engineer that if an inferior covering is used, a member of the public will slip on it.

    b) The exemption clause is contained in the contract between the business owner and the engineer. The customer is not a party to that contract and is not suing on it; therefore, the engineer cannot rely on the exemption clause.

24. a) Rowshan can state clearly on his report that the information is to be used by Takach only and it cannot be given to any other party without his express consent. He can also insert a very clear and broad disclaimer to state that he is not responsible for any losses that could result from the use of his opinion. He also should have malpractice insurance.

    b) If he was an accountant and if he follows the standard practice of the profession, it may protect him even if he makes a negligent error, as often, but not always, the standard practice is considered a reasonable standard of care. He also can try to use the *Hercules Management* decision to say that he only owes a duty to those people in a direct proximate relationship with him (Takach) and for policy reasons, his liability should not be extended to a limitless number of people for an unlimited amount of money. He should also be aware though that the court could follow *Kripps* and say he is liable for negligence even if he followed the industry standard. The decision in *Micron Construction v. Hong Kong Bank* could also be used to say that there was a reasonable or justified reliance and that way Rowshan could still be held liable for negligence.

25. a) The auditor's belief is not relevant. This is not an action for fraud, but negligence.

    b) The test the court would apply is: What would a careful accountant have done in the circumstances? The envelope returned was on plain paper which obviously no auditor would accept. The students should be able to recognize that that is below the accepted practice of what an auditor would accept.

    The auditor's practice is to have the client send the request to the bank but to ask the bank to mail the response directly to the auditor so that the client cannot tamper with it. Most students will not know that this is the auditor's standard of practice. The way it would be established is to have another auditor testify in court and give an account of what the auditor would do in this situation.

Section 2 Answers to Closing Questions

1. a) The patient must prove there was a duty on the part of Sullivan to take care and that it was reasonably foreseeable that the plaintiff would be injured by his act if he failed to meet the standard of care required in the circumstances, and that failure led to the plaintiff 's injury.

   b) The correct answer is ii) that of a reasonable dentist.

2. a) The correct answer is ii). Based on the doctrine of vicarious liability Frank's would be responsible for injuries suffered by Mrs. Hall caused by its employee, Jackson. It may be necessary to explain to the students that both Jackson and Frank's heating

would be required as defendants in the court, but on the basis of vicarious liability the employer will be responsible for the tortious actions of its employee.

b) Mrs. Hall must prove there was a duty on the part of Frank's Heating, through its employees, to take care and that it was reasonably foreseeable she would be injured by Jackson's act if Jackson failed to do what a reasonable person would do in the circumstances.

3. a) Selma will have to establish causation to succeed in a negligence claim, did the implant cause the cancer? Without that proof, she could not succeed.

b) Selma would have to show that the auditor owed her a duty of care. She would have to show she was in a close proximate relationship with the auditor and that there was reasonable reliance by her on the financial statement he prepared. It is unlikely that she will succeed as she was not a client of the auditor's and her reliance was not reasonable. Also for policy reasons enunciated in *Hercules Management* a duty of care would not be imposed on the auditor and Selma's claim against the auditor would fail.

c) The owner of the fence could sue Selma for negligence. She will claim that she is only liable for damages that are reasonably foreseeable and since she was healthy and a heart attack was not reasonably foreseeable she should not be liable for the damages.

d) The issue here is also causation. If there is a continued risk of heart attacks even after she has stopped taking the drug she may be able to join the class. If the risk occurs only when people are actually on the drug, since she did not have a heart attack while taking it, and no longer takes it she could not join the class. She may try to say that she has suffered some upset from the news of the drug's effects, but that is a weak claim.

4. a) The courts place the duty on commercial hosts because they make money from selling customers alcohol and their servers receive particular training in how to serve customers and monitor how much they have consumed and what to do if they are intoxicated. It is their business to profit from selling alcohol so they have a high duty of care to the customers they serve. For social hosts they are not paid to give their friends alcohol, and are not trained to monitor their consumption and behaviour. A big concern is that if social hosts are held liable for drunk guests then home insurance rates will increase greatly and shift the burden onto everyone for the cost of drunk drivers.

b) In the *Zoe Childs* case the Supreme Court denied the injured woman the right to claim against the host of the party the drunk driver had left. However, the court left the door open somewhat when it said that given a different fact situation, where the host was involved in the "creation or exacerbation" of the guest's drunken state, the court may then find the social host liable. So possibly if the host provided all the alcohol, knew the guest was very drunk and planned to drive and the host did nothing to stop them from driving (i.e. failed to offer them a taxi, a sober driver or the option of sleeping at the home) then the social host might be held liable.

5. a) The issue here is did John the host owe a duty of care to Diane?

b) Under the present law social hosts have not been held liable unless under age children are drunk, but assuming these people are all of legal drinking age, then no case has held the social host liable. The *Childs* case did suggest that social hosts

could be liable if they were involved in the creation or exacerbation of the drunken state though. If John provided all the alcohol and he did know she was planning to drive drunk, the court may impose a duty of care on him and by not doing anything to try to prevent her from driving he might be held liable.

c) Even if John was held liable unless he has home insurance, which he may not have given his poor financial shape it may make no difference to her as he appears to have no money to pay for her damages. She is better collecting from the car insurance that Brittany had.

d) Given that about 4 Canadians a day are still killed by drunk drivers and some of them have left social host settings, the courts should impose the duty on social hosts and insurance rates should adjust accordingly. It is society's problem and everyone should try to help. It might make many people more responsible drinkers and lead to safer roads. The courts could establish guidelines for when the host owes the duty of care and what steps they must take to fulfil their duty of reasonable care. They do no have to tie their guests up as John sarcastically said, but the taxi or sleeping it off option could become standard behaviour in our society and save many lives. It is the next step in social responsibility that is needed when it comes to drunk drivers.

6. Although the stadium management may attempt to use the defence of voluntary assumption of risk to preclude any action for damages by Dubrovnik, it is unlikely the court would see him as having assumed the risk or having clearly appreciated the nature and character of the risk of deafness which he was running. The courts have been particularly sensitive to situations in which the defendant, for example the cases involving taverns or parties running sporting events, is obtaining a financial benefit through the operation of the activity that has caused the injury/damage.

   It may be argued that Dubrovnik has contributed to the injury through his actions of remaining in that location for that period of time, particularly without using earplugs or some other form of protection to lessen the severity of the sound impact. This argument may or may not be successful depending on how the courts view the actions of the management in having opened up seats within this particular area, given the nature of the exposure to high volume sound and proximity to the source of the sound. These would all be matters for discussion with the students in resolving the issue of whether these defences would be available to management.

7. a) In this case the defence of voluntary assumption would likely be successful given the video that was screened prior to the registration form being signed, as well as the question of his having read and understood the clause prior to signing. It would appear from the facts that Basset has consented to the risk of injury, clearly knowing and appreciating the nature and character of the risk to be run. Note that he is an experienced scuba diver and able to assess the risks involved.

   b) To try and circumvent voluntary assumption, Basset might argue that the nature of the injuries was such as not to be covered by the waiver. However, it would appear that the risk of running low on air and surfacing too quickly is something that would be anticipated as a result of a dive and very likely covered by the waiver. This is an opportunity to explore with students the issue that the injury must be something reasonably foreseeable from the activity to be covered by the waiver.

c) Rather than voluntary assumption of risk, the club would be arguing contributory negligence as both the club and Basset have played a part in the injuries suffered. It would remain for the court to apportion liability according to the degree of responsibility/fault of the parties.

8. a) The waiver will not act as a defense because the nature of the injury is not one normally arising from the ordinary course of the game.

b) Although Bart voluntarily assumed the normal risks associated with participation in the paint ball games as explained at the promotion meeting, Bart could not be seen as voluntarily assuming the risk involved with using toxic paint in the paint balls.

c) Bart would bring a tort action based on negligence and would be required to prove a duty on the part of the hunting organization and that its failure to act reasonably has resulted in his injury. The evidentiary rule of circumstantial evidence might assist in the proof of the breach of standard. Vicarious liability would also enter the discussion in determining which defendant would be responsible for Bart's injuries.

9. a) Defendants are Bill Smart, the school, Bower Equipment Ltd., Sports Distributors Inc., and Riverside Arena Inc.

b) —Bill Smart, the school, and the school's hockey coach: an action based on negligence.
—Bower Equipment Ltd. and Sports Distributors Inc.: an action based on manufacturer's liability/product liability.
—Riverside Arena Inc.: an action based on occupier's liability.

c) —Bill Smart. The standard of care expected is that of a child of like age, intelligence, and experience. The question is whether Smart has breached the standard of care expected from a child of 15 years of age.
—The school through its hockey coach and the hockey coach himself/herself are expected to meet the standard of a reasonable coach and the same standard of care a parent would take for his/her family. They appear, from the fact situation, to have met that standard unless the failure to inspect the hockey stick blades used by participants is seen as a failure to do so. Would a reasonable parent or coach have inspected the blade of the hockey sticks prior to their use? While supervisors must follow normal practice, they will not be responsible for the unexpected acts of participants, in this case high sticking by Bill Smart.
—Bower Equipment Ltd. and Sports Distributors Inc. may have breached the standard based on negligent design or failure to warn in the area of manufacturer's liability.
—Riverside Arena Inc. has breached the standard required for occupiers liability: to take reasonable care that the property is safe.
—The school, the hockey coach, and Bill Smart might argue the defense of voluntary assumption of risk by Angus King in taking part in a hockey game.

d) The waiver signed by King appears to be a document that is directed specifically to exempting the sponsor of the event, the school, from liability, and was signed prior to King taking part in the game. However, King is a minor and it may be of doubtful value. The defendant that would rely on the waiver is the school and the school's hockey coach.

e) As a risk-management consultant for Bower Equipment and Riverside Arena, recommendations would include the formation of a risk committee or a risk-management board, the institution of policies to deal with on going maintenance of product or premises and the regular review of insurance coverage for its effectiveness and adequacy. The appropriate use of posted signs on the premises and warning labels or manuals would also be worth considering.

f) Manufacturers, retailers, and parties sponsoring an event or earning money from the sale of a service or product are the ones with the best ability to insure for acts of this nature. In this case, Bower Equipment, Sports Distributors, and Riverside Arena. The ability of a party to insure for injuries caused in the process of earning profits is undoubtedly an encouragement to the courts to impose a very strict standard of care test on those parties. Class discussion could centre on whether or not this is an appropriate observation and if it is believed accurate, whether or not it should be encouraged.

10. a) This is not a consumer situation; therefore, it is more likely that the court will uphold the waiver, especially since Gauley was not a minor it was on a separate form, and there was no misrepresentation involved.

11. a) Not likely, because he was unable to fully accept and/or appreciate the risk.

    b) Yes, because there were in a reasonably foreseeable class of persons that could be injured.

12. a) No, the occupier is liable. Sometimes an owner may be jointly liable but there does not seem to be any basis for making the owner liable here. For example, an owner may be liable if the accident happened on some adjoining part of the property such as a parking lot.

    b) Koziar has the defense that his premises are reasonably safe. It is not foreseeable that a person would put gasoline-soaked clothes in a washing machine and that the fumes would be ignited by the electricity in the motor. The occupier is not an insurer. This situation is one of those freakish accidents beyond foreseeability. *Rae v. Koziar*, [2000] A.J. No. 1390 (Q.V.).

13. a) Contributory negligence. The owner is claiming that the plaintiff was not watching what he was doing. This defense may not be complete but could reduce the award.

    b) A fact that would help the owner would be that firstly it had a policy in place to inspect the parking lot and keep it safe, and secondly, that policy was in force that day. It may be that a contractor could give evidence of how often a parking lot has to be inspected. Perhaps a daily inspection would not be necessary. In contrast, it would likely be necessary to inspect the floor of a supermarket every few hours.

14. a) The potential defendants in an action by Marchand would be the airline, Luft Aircraft Company in Canada, Nowsky Manufacturing, and Oshiana Transportation Ltd. Since the cause was determined to be a loose bolt the evidentiary rule of circumstantial evidence might shift the burden to the defendants to prove which defendant would be responsible because of design defect, assembly or maintenance.

    b) Unless the defendant companies were able to prove their innocence, they would all be held equally liable and the responsibility for Marchand's damages apportioned accordingly.

    c) The passengers, injured by the same act by the same defendant, would bring a class action suit.

15. a) Keewatin's ability to show its bottling processes exceed provincial standards would not be an absolute defense. The doctrine of *res ipsa loquitur* would shift the burden to Keewatin to prove it was not negligent and, given the strictness the courts are using in imposing the standard of care test on businesses making money by supplying products to consumers, the presence of glass would probably be seen as indicating negligence even though there was no explanation as to how the glass came to be in the milk bottle. As there is no likely explanation of how the glass could have gotten into the milk bottle without a breach of the standard of care, the rule of circumstantial evidence would shift the onus of proof onto the bottling company to prove it had not reached the standard of care required by the tort of negligence.

16. a) The defendants in this action would be the health club which had kept the owner's manual containing the warning in the manager's office without, apparently, posting a warning, and Oars Inc., the designer and manufacturer of the rowing machine.

    b) The correct answers are (ii) negligent design, if it can be shown that the product could be designed more safely, for example a protective cage around the revolving wheel; and/or (iii) Duty to Warn. Users should have been warned about the dangerous properties of the rowing machine, and that warning should have been reasonably communicated in a clear fashion.

    c) The defendants would argue contributory negligence on the part of the club member who had used those same fingers to measure a vodka and tonic into her water bottle.

17. a) Not in tort. Although Alex may want to argue there is a defect in the manufacturing process, given the paint's inability to bind to material in humid weather, there has been no personal or property injury caused by the paint's failure to bind, so it would appear he does not have any grounds in tort for an action.

    b) Warranties or conditions implied by provincial sale of goods legislation would probably provide Alex with grounds to bring an action against the paint manufacturer and/or supplier based on fitness for use or merchantable quality. Reasonable foreseeability would determine the extent to which he would recover for his loss of profit and the purchase of further paint to rectify the problems with the buildings and docks.

18. This question again demonstrates the difficulty of proof of a business's breach of standard. The student should realize the first issue is: are there realistic possible explanations other than the defendant's breach of standard. If not, the circumstantial evidence rule will apply.

19. a) Yes, Lyon, Singh's employer, has an operating line of credit with the Industrial Bank, creating a proximate relationship.

    b) No, Singh does not owe a duty to the Commercial Credit Bank as he had no actual knowledge that this class of person would be relying on the financial statements. As indicated, Lyon's decision to raise money for a new project by approaching Commercial Credit was unknown to Singh.

    c) Whether it be generally for supporting existing lines of credit, the sale of a company, or for a specific project, it would be reasonably foreseeable that third parties would rely on the financial statements provided by the company for whom Singh works. The test is not whether Singh was aware of the specific project and the specific third party.

d) Singh had actual knowledge of the loan by the Industrial Bank as the financial statements were simply used to increase the existing line of credit. He was unaware of the loan made by the Commercial Bank.

e) The statement as written may not assist Singh as Lyon Steel is using the financial statements for their purposes. Singh's purpose would have been better served if he had also included the statement to the effect that the financial statements are not to be disclosed to any other person except with his consent. However, as an employee of Lyon Steel it would probably not have been acceptable to his employer to add this type of limitation clause to the financial statements.

20. a) Schnarr or the local Chamber of Commerce through Schnarr may have a liability problem if seen as having given business advice to Schnee.

b) Schnee would need to show that a proximate or special relationship existed and that Schnarr, as representative of the local Chamber of Commerce, provided business advice knowing that it would be relied upon by Schnee.

21. a) West has no legal remedy as there appears to be no special or proximate relationship between her and Senza. She had asked for information about investment opportunities and not specific investment advice. There was no contract between the two of them either and any advice, if it was advice, was not given in a business context, but rather casually at the opening night party.

b) Senza owes Jensen a fiduciary duty as there is a proximate relationship of advisor to client in this situation. As such, Senza had an obligation to disclose his interest in Stellar Productions Inc. and not to put himself in a conflict of interest.

c) Jensen may bring an action in tort for breach of fiduciary duty due to Senza's failure to disclose and conflict of interest as 60 percent shareholder of Stellar Productions. Senza would be responsible to Jensen for the loss that Jensen has incurred.

22. a) Walmsley can take a very practical approach and speak to Nehru's employers to attempt to remedy the problem that has been created. Failing that, he could bring an action for breach of contract and/or breach of fiduciary duty.

b) Breach of contract has arisen since Walmsley had specifically told Nehru to keep no more than 10 percent of his portfolio in medium-risk shares. Although Nehru made recommendations to Walmsley who then followed that advice, Walmsley was inexperienced in the stock market and Nehru was aware of that fact. Breach of fiduciary duty has occurred then when, aware of Walmsley's inexperience, Nehru made inappropriate recommendations for whatever reasons. Knowing his client's circumstances, Nehru's actions were not such as to put his client's interests first.

23. a) The accountant will be liable to the Investment Club. There is a contract to provide investment advice and he failed to meet the standard of competence expected under that agreement. The accountant would be liable for the losses experienced because his recommendation, although an opinion as to what would be a good investment, was wrong due to carelessness on his part in not having properly investigated the company.

The accountant would also be liable to Smith's friend in Riverbridge as he had actual knowledge that Smith's friend, a non-client, was receiving his newsletter and relying on his advice. The nature of the action would be based on tort, and again it is not the fact that his opinion was wrong but rather the fact it was made carelessly or below standard practice since he failed to properly investigate the company in which he was recommending they purchase shares.

b) It would make no difference to the answer if Smith re-typed the newsletter onto her computer to transmit over the Internet as the advice was still being provided by the accountant on a faulty basis, and Smith had merely copied it when she had re-entered it on her computer.

24. a) No, the area of law is negligent misstatement.

b) Is Jane within the class of persons Wallace Buffer could reasonably expect would be relying on this information for investment purposes? Not likely, and therefore there would be no duty of care to her.

Chapter 5

Making Enforceable Business Agreements

Section I Answers to Business Law—Applied Questions

1. a) John's promise is probably not enforceable as it is an interest in land and the Statute of Frauds requires that to be in writing.

   b) She has a better claim to the coin collection as it does not have to be in writing under the Statute of Frauds.

2. a) The business did have to return the money. This was a contract with a minor. The minor has the choice of going through with the contract or getting out of it. Even though the minor lied, the contract can still be cancelled. The business would have to return the money and take back the goods. The concept of necessities is not in issue here, and is dealt with later.

   The question of a criminal charge may be raised. Theoretically, this is possible, but realistically it would only happen if the lie had caused serious loss to the other party.

3. a) The issue here is necessity. Clothes needed for a job would be necessities as long as the prices were not exaggerated and the quantity excessive. Dahl would not be able to cancel the contract.

   b) The contract is not enforceable because the friend was a minor, and betting on a hockey game is not a necessity.

4. a) Yes, it was illegal at the time it was made because the builder was prohibited by statute from selling any houses unless the builder was registered with the Home Warranty Plan.

   b) However, the builder had rectified the illegality before closing. The Court permits such change to establish that the builder had no intent to violate the act. Here, no harm was done as the purchaser got the warranty that was required by law. The technical name for this defense is Locus poenitentiae, movement to a place of penitence. Beer v. Townsgate Ltd. (1997), 36 O.R. (3d)136 (Ont. C.A.).

5. a) Yes, the Browns have a defense because civil enforcement of this type of agreement is specifically prohibited by statute- s. 6 The Assisted Human Reproduction Act S.C. 2004, c. 2. Also, while there does not appear to be any direct case law, it could also be argued that such a contract was illegal for public policy reasons under common law, (this topic is discussed in the next section on legality).

   b) No, the parties have not committed an offense. The restriction is only civil not criminal. While the statute prohibits the making of a contract, it does not prohibit the conduct. However, the agreement will not be enforced by law.

6. a) Yes, this would be illegal as it is higher than the maximum legal interest rate allowed under the Criminal Code of 60 percent per year.

   b) Originally the courts would just strike out ("blue pencil") the illegal interest clause; however, in the Transport North American Express case, the concept of notional severance was created by the Supreme Court. The court may, if it thinks it appropriate, rewrite the interest rate clause and set the interest rate at 60 percent instead.

   c) If this was a $500-pay-day loan, then the maximum interest rate allowed is much higher in provinces that have passed laws to regulate pay-day loan companies. For example, so long as the interest rate is below 546 percent then this would be legal for a pay-day loan in Ontario.

7. a) i) Both agreements restrict competition.
      ii) Both agreements are for five years.
      iii) Both agreements restricted competition within five miles.

   b) In the Musasi case, the Vendor, Guzzo, got value for goodwill. If such clauses were not enforced, an owner would be severely limited in the value obtained for a business—goodwill could not be sold. In the Lyons case, an employee's right to earn a living was at stake. An employee usually has less bargaining power in entering an employment agreement. Courts are more protective of an employee's right to earn a living.

8. a) The restraint clause in the sale agreement is necessary to protect the goodwill of Fieldstream Arms.

   b) In this question, the students should begin to discuss the three tests of subject matter, time and geography. While, in general, the clause would appear to be reasonable on all three, it should become clear that there are different considerations with respect to Frank and Joanna.

   c) Frank being a super salesman and having built a personal relationship with the customers was a very great danger to Fieldstream Arms. Joanna, however, being the company accountant and business manager, was not likely to have had much contact with the customers and could not take business away. It is also unlikely that she had access to any trade secrets or special business systems; so, the clause is not necessary to protect Fieldstream Arms respecting Joanna, while it is for Frank.

   d) From the analysis in (c), the clause is likely enforceable against Frank but not against Joanna.

9. a) No, the courts have held that displaying an object for sale even though the price is fixed so that all terms of sale are specified is still not an offer. This is an exception to the general finding of what constitutes an offer and is done to protect businesses in situations such as the one given.

10. a) This was not an offer by Rychjohn because there was an essential term asking, i.e., how the balance was to be paid, cash, installments, etc. Therefore, there was no meeting of the minds.

    b) The tenant should have had the method of payment of the installments specified.

    c) Rychjohn could have made the offer to the tenant conditional upon the acquisition of the other properties. This is frequently done in land assemblies. (*Rychjohn Investments Limited v. Hunter*, (1979) 100 D.L. R. (3d) 652.)

11. a) Yes, she could cancel. The second extension was an offer but not an option. There was nothing paid for it, so she could revoke it.

    b) Rei-Mar should have paid something for the extension. It could have gotten it under seal, but that is not likely in a business situation. (*Rei-Mar Investments Limited v. Christie* (1974) 48 D.L.R. (3d) 314.)

12. a) Dodd was entitled to revoke the offer before the date but the revocation had to be communicated to Dickenson.

    b) Revocation can be communicated by a third party. The communication can be by inference. It would be obvious to a reasonable person that Dodd no longer intended to sell the property. (*Dickenson v. Dodds*, (1976) 2 Ch. 463.)

    A variation on this situation could be put to the students. What if Dickenson had not learned of the sale, and walked up to Dodd and handed him a letter accepting the deal before Dodd had a chance to say anything. Dodd would then be bound and have two deals.

13. a) No, Tran couldn't accept the offer. By adding a shrub, Tran offended the mirror image rule and therefore he made a counter-offer, which was rejection of the landscaping company's offer, putting it to an end.

    b) Therefore, the landscaping company could simply walk away.

    c) If Dickerson had paid even $1, then he would have paid for an option and Dodd's offer would be irrevocable.

14. a) No, the purchaser could not cancel because of a decrease in the market price. The clause used the term "deficiencies." That is an objective term; there must be some actual deficiency to trigger the clause.

    b) A phrase could be inserted such as: provided that the purchaser can only rescind the agreement if the deficiencies combined would cost more the $10,000.00 (or some such amount) to repair.

15. a) Sharma did not make reasonable efforts. Reasonable efforts would have been to apply to several potential mortgage lenders.

    b) Because he did not act in good faith, he could not use the condition to escape the clause.

16. a) In provinces where negative option marketing is permitted, this is an enforceable agreement. In addition, if the book was mailed and the subscriber accepted the delivery of it and put it on a bookshelf, that would be acceptance by conduct at common law.

    This situation can be contrasted with a situation where a book is sent completely unsolicited. This type of business practice is prohibited by consumer protection laws in almost every province.

17. a) Submission of purchase—Offer
Confirmation—Counter-offer
Taking delivery—Acceptance by conduct of counter-offer

    b) The purchaser bears the loss because the terms of the manufacturer's confirmation form the contract, and it says the purchaser is to insure, and it also contains an exemption clause in favor of the manufacturer.

18. a) and b) Yes, Torres was bound. Although an agreement between friends, and not a formal business situation, it would be obvious to a reasonable person that both parties intended to go through with their agreement. Certainly, if the situation had been the reverse, Torres would be insisting on part payment. Even though they were friends, this was not a family or social situation, such as an Uncle saying, "I'll give you $100.00 if you get an 'A' on your next report card."

19. a) This type of clause is frequently found in franchise agreements. The intent is to take advantage of the principles of "intention to create legal relations" and "freedom of contract" to make a completely one-sided contract. The authors know of no decided case on point. On a strict application of the principle of intention to create legal relations, this clause would be enforceable. Undoubtedly, the unfairness of it would motivate the court to find other grounds for invalidating it. Other possible legal escapes would depend on the circumstances. Lack of notice of an unusual clause is a possibility.

20. a) The Red Cross is not able to have the agreement enforced. It is a gratuitous promise, not supported by consideration.

21. a) By agreeing to a specific price, Gilbert Steel assumed the risk that it would have to absorb the cost of rising steel prices.

    b) It could have negotiated a term so that the price of steel supply under the contract would vary with the market price of steel.

    c) The clauses will vary; the wording is unimportant. The point is to have a clause that varies the price of steel under the contract with the change in the wholesale market price of steel. Gilbert Steel might draft a clause that provided only for increases, University Construction would want a clause that also allows a reduction in price if the market value drops.

    d) This is a matter of opinion, which may vary. The argument in support of fairness is that Gilbert Steel could have negotiated a term to provide for increases in the contract price in proportion to increases with the wholesale market price. University Construction will have entered into a further contract with the project owner based on a standard price of supply. If the contract of supply with Gilbert Steel had contained a flexible price clause, University Construction would have negotiated a different contract with the owner.

        Fairness is not a factor in a contract. In fact, the opposite is true, a business is entitled, and the law protects this interest, to take full advantage of the opposite business party (as opposed to consumer transactions). So University Construction negotiated the better deal, as it was entitled to.

    e) University Construction had already committed to a contract with the owner, and was in the middle of that project. If it had not agreed to the change in price, Gilbert Steel may have refused to supply, and University Construction may not have been able to get another source quickly enough. So University Construction may have had little real choice.

If it had defaulted on its contract with the project owner, the project owner could have sued University Construction for all losses caused by the breach of that contract. In turn, University Construction would have had an action in breach of contract against Gilbert Steel. That lawsuit would probably take about three years to come to trial and cost University Construction a few hundred thousand dollars. Additionally, there would be damage to its reputation in the marketplace as being unable to fulfill its contracts.

22. a) On delivery.

    b) No consideration was given, so the extension of time is not enforceable for lack of consideration. Payment for the extension is taken as evidence that the supplier intended (duly considered) to be bound by the extension.

    c) Yes, promissory estoppel. The elements to establish promissory estoppel are set out in the critical concepts. Further, while in a commercial situation, a mere indulgence is assumed, here the continuous acceptance of late payments would support the estoppel.

    d) Deluxe could have given notice of at least a few days (perhaps a week) that it would require payment on delivery. (*Deluxe French Fries Ltd. v. McCardle* (1976), 10 N. & P.E.I.R. 414 (P.E.I. C. A.)).

Section 2 Answers to Closing Questions

1. a) Maggie will not have to make the car loan payments for Kenneth. Maggie, as a third party, had guaranteed her brother's loan, but this agreement is only legal if it is done in writing as required by the Statute of Frauds. Also, Maggie did not receive any consideration for this promise, so for that reason as well, it is not a valid contract. If it had been in writing and sealed (and there is a further requirement she had independent legal advice), then the guarantee could be legal. Oral guarantees are not valid.

2. Jill will not be successful if she sued Sam for breach of contract as the deal was for the sale of real estate (a condo) and the contract was made over the telephone. The Statute of Frauds requires that a contract for the sale of real estate has to be in writing to be valid. Though Sam did send a certified check there is no written document that included all the key terms of the deal, so no valid contract had been formed. Oral contracts cannot be used for the sale of real estate.

3. a) This will depend on whether the contract was one for necessities. The students should analyze the fact situation and discuss the issues related to establishing necessities for a minor. From the facts it would appear that the contract for tuition would meet the definition for necessities, and Boris would be responsible for paying the balance of the tuition.

    b) Yes, Boris will only be required to pay "a reasonable price" which would be the lower, average tuition of the welding schools. The school would have to establish other consideration, or additional benefits not coming from the fact situation given, in order for the Cabbage Town School of Welding to show that its tuition is reasonable.

    c) Yes, these would be materials required for the course and therefore necessities. Students might be encouraged to establish certain assumptions related to the manuals

and textbooks for this fact situation in order to explore whether the money would be paid over and above the tuition. One assumption the students might make is that the cost of the textbooks and manuals is identical for all schools. A second assumption might be that the tuition charged by the other welding schools included the cost of the textbooks. On these assumptions, Ivanovich would not be required to pay that amount over and above the Cabbage Town School's tuition.

d) The school would probably not be successful in suing for the balance of his tuition as it would be very difficult to show the course in Japanese Paper Folding to be a necessity within the legal definition.

4. a) As a resident of B.C., Maclinsky could use the grounds of being a minor to void the contract. As an alternative, he could base it on his apparent drunkenness.

b) Drunkenness would be the stronger ground on which to argue lack of capacity, as Maclinsky repudiated the contract on sobering up. If Maclinsky's age is put forward for repudiating the contract, the store might try the argument that the skates fall within the definition of a necessity and Maclinsky would be obligated. A further issue which students might raise is the use of the credit card. As a minor, Maclinsky would not have had the capacity to enter into a contract with the credit card company to possess a valid credit card. Discussion might then center on whether or not Maclinsky could repudiate his contract with the credit card company along with all charges that had accumulated on his credit card.

This question requires the students to be aware that different jurisdictions have varying standards or legal requirements which a business person should recognize in doing business. It is an opportunity for the student to compare different reasons for repudiating the contract and make a decision as to whether one or the other approach would be the most effective, rather than taking what seems the most obvious approach when one party is a minor.

The issue related to the credit card is not flagged in the questions or the fact situation itself. It is there to give the students an opportunity to have a sense of accomplishment by picking up an issue that seems to be overlooked by the authors.

A general discussion related to the grounds of drunkenness and to what degree drunkenness would or should serve as an opportunity to repudiate a contract could be generated within the class. Students often have varying and strong opinions as to what state of drunkenness should exist before it can be used to repudiate a contract.

5. a) This is an illegal contract as it goes against public policy.

b) Contract law was developed from commercial practices and with no consideration for non-commercial factors, so it is often not appropriate to Family Law.

c) This is a political question and students will have various opinions. Some of the common positions are as follows:
Pro—it is a woman's body let her decide and do not be paternalistic.
Contra—it offends public morality and only women in low-income positions would ever do such a thing, so it enhances the actual exploitation of women.

The National Post, Saturday, October 30, 1999, p. A-15, carried the story of an auction site, ronsangels.com. where eggs from fashion models were put up for auction by a fertility clinic. Even though the law of illegality would very likely make any contract involved unenforceable, it does not prohibit the activity. The newspaper

report said that the Federal Trade Commission advised that there were no regulations prohibiting this activity.

6. Apprentice can raise the defense of illegality, since the agreement was done to avoid paying GST, which is tax fraud. Surprisingly, at least to the authors, research did not disclose any GST/illegality cases. Perhaps the amounts are usually so small that they are not worth litigating; or perhaps there is honor among thieves.

7. The Depot can raise the defense of illegality. It does not matter that the Depot representative suggested the schemes. Both participated equally. It is unlikely that the customer would have the defense of being less guilty [not in pari delicto]. This defense appears to be restricted to cases where the aggrieved party is a member of a group protected by special legislation such as the Residential Landlord and Tenant Act, which forbids the landlord demanding key money. Kiriri Cotton Co. v. Dewani, [1960] A.C. 192 (P.C.).

8. a) Eisenstein would argue the contract is legal and enforceable on the basis that the car was a prize in a race and no gambling was involved with the contractual arrangement. Leforge would argue the contract is a statutory illegality being based on a wager and therefore a contract for gambling and unenforceable.

   b) Eisenstein's argument that the car was a prize would appear the stronger of the two, particularly if the contract is looked at as a competition with the car as a prize rather than the car as a wager. The contract itself appears not to be offensive to public policy or the public's interest. Nor does it violate the common sense of morality in society.

   This question could be used as a lead-in to a discussion on the nature of a wager, public policy, and the common sense of morality in society relating to various topics. This question uses gambling as its focus but a number of other examples could be found from the students' experiences. For example hockey pools, contests where you guess the number of beans in a jar, etc. all could be used as a means of forwarding a discussion relating to the nature of gambling and the reflection of public policy through the application of law.

9. a) Illegal.

   b) Public good.

   c) Public good.

   d) Illegal.

   Like the previous question, this one might be used to stimulate discussion amongst the students concerning various activities and whether they appear to be illegal or based on public policy concerns. Students might be asked to come up with other examples they have read of, or from their own experience. Other examples might be a contract with another student to write a term paper for submission in a course, or an agreement between two students working for the summer painting houses in a community in which they agree not to quote below a certain price for various types of painting contracts.

10. a) The issue is unreasonably wide geographic limitations. The store was located only in Sydney; the restriction across Canada is too wide.

    b) The restriction clause is not valid.

11. a) The law initially presumes a restrictive clause to be invalid.

    b) The three factors a business has to prove are set out in the Critical Concepts on the following page:

i) The term must be necessary to protect the business. Here, there is an argument that it is not necessary to protect the business since she had no contact with customers or suppliers. She would be taking with her only her skill and not confidential information. On the other hand, if it was assumed that she had knowledge of suppliers and this gave her employer a competitive advantage, there may be justification for the clause.

ii) It must be reasonable as to subject matter, time, and geography. The period of five years for an employee seems excessive. Six months is likely enough to protect the business. With respect to geography, it is arguably reasonable since Allandale is a suburb of a large metropolitan area, and she could work in other sections of the metropolitan area.

iii) It must not be against the public interest. In this case, it must not restrict the employee's ability to work to the extent that she would be thrown on the public purse.

c) She could rely on *Lyons v. Multari*. In that case the court said that non-competition clauses should be enforced only in exceptional cases against employees. Persaud did not have contact with either clients or suppliers, so protection for the employer was unnecessary.

12. a) The courts' values are different for each of the situations:

The *Payette v. Guay* situation primarily involves the sale of a business, the restriction on the former owner still is part of the sale of the business. A restrictive covenant protects the goodwill of a business. Without this protection, the goodwill would have little value on a sale and so the courts tend to uphold the noncompetition clause as was the case with Guay.

The *Lyons v. Multari* case deals with an employee's right to earn a living after leaving a business. Multari did not own part of the business, he was just an employee. The courts are less likely to enforce these clauses. The trend of recent decisions appears to suggest that these clauses will be severely limited in their effect on employees.

13. A "sign back" is a counteroffer. This is an opportunity to show that a legal term is a category or class that will govern a number of terms used in business.

14. a) No, this is an application of the retail exemption principle. Exposing an article for sale in a retail situation is an invitation to treat.

15. a) A good answer would be "it all depends." If Stein lives in any of the provinces in which negative option marketing has been made illegal by statute then she has no obligation to pay for the book. If she is in a province that has not brought in this type of legislation, the common law rule states that if items are in fact used by the recipient that is acceptance by conduct.

b) Unless the particular provinces dealt with the issue by legislation, the common law rule is that in starting to read the book she has accepted it by her conduct and must pay for the book.

Negative option marketing and acceptance by silence are issues the students may encounter fairly frequently and are not always easily answered or understood. This question helps to illustrate the question of when silence will become acceptance through a negative option marketing campaign as well as stimulating discussion concerning the merits of such marketing. An example of this is the response received by the cable companies when they attempted to use it to introduce the new specialty channels on television, which is referred to in the text.

Other elements to this question are the requirement for the students to determine the status of this type of marketing in the province where they reside as well as the need to keep in mind that the law will vary in different jurisdictions should they decide to carry on business in this fashion.

16. Options (a) and (b) are correct. The unknown sale to another does not revoke the offer.

17. a) Zimmer can raise illegality as a defense because the second agreement was used to defraud the credit union. Each party is equally guilty and it does not matter that Zimmer gets a windfall in keeping the deposit. The courts will not interfere at all in the arrangement. (*Letkeman v. Zimmer*, [1978] 1 S.C.R. 1097.)

    Zimmer can also raise the defense that Letterman was under a duty to act in good faith in attempting to find financing and failed to make reasonable efforts in that regard. The condition on financing clause would be unenforceable.

    b) No, the intention to contract for illegal purposes in enough.

18. a) Yes, the offer may have expired by a lapse of time. A reasonable time to accept might be a few days, even a week, but three weeks is probably too long, so the offer had expired.

    b) He could have included an expiry date with the offer, example: This offer is open for two days.

19. a) No, the names on the document do not govern the legal category. In spite of what the document says when the purchaser alone signs it, it is an offer in law.

    b) This type of clause is called a conditional clause. It makes the offer a conditional offer.

    c) The fact that there is a conditional clause does not void an agreement in itself. It depends on the wording. If the clause indicates that the party is leaving it open to renegotiate the terms, the clause makes the offer invalid. However, this clause can be reasonably interpreted as simply letting the purchaser consult with her lawyer and either accept or reject the terms as is without trying to renegotiate them. It is likely enforceable.

20. a) Restrictive covenant.

    b) Restrictions necessary to protect the business, geography, and time. Five mile and five years is a standard clause for small businesses in certain urban areas. The instructor will have to comment as to whether similar criteria are used in local areas. Benoit can open up on the other side of the town outside the five-mile limit, so he has the ability to earn income immediately.

    c) This is an illegal term as prohibited by the Worker's Compensation Act. While not asked in the question in the text, it may be severable as it relates to a separate issue. It would not be enforced, but the rest of the agreement likely would be.

    d) No, because he is under the duty to make reasonable efforts to obtain a zoning change.

21. a) Likely not. The court assumes that parties in a family agreement do not intend to be legally bound. However, if you can show that "a reasonable person" in similar circumstances might think there was an intention to be legally bound, then you would be able to win the Bahamas trip.

22. The correct answer is (d).

23. a) The principle that there must be consideration for an agreement. A term cannot be added by one party later since past consideration will not support the subsequent term.

    Note: "This clause" refers to the clause on page 42 of the text. This supplier will likely be successful in enforcing the exemption clause and in avoiding liability for damages.

    b) Global Village is attempting to use "acceptance by conduct." This is the open question. In the U.S., one case said that this is an effective way to make the terms in the shrink-wrap effective. Pro CD in the Zeidenberg, U.S. Seventh Circuit Court C.A., 1996. There, the contract was held to have been entered into when the purchaser read the terms before use.

    c) Types of loss. Any number of types of loss could occur. You might suggest different type of businesses and see what types of loss could occur in the various businesses. Here are some examples:

        i) Contractor preparing tender that had a deadline at 3 p.m.—loss of profit.

        ii) Accounting firm preparing accounting statements for the annual general meeting of a large international corporation. They are late. This embarrassing event is published in all the papers. Loss of fees and good-will.

        iii) The program causes a network of computers to freeze, so an office shuts down—the loss of fixed costs such as wages to employees, rent, as well as profits.

    d) The answers will reflect individual values. If a business must assume the cost of liability, it must add the cost of insurance regarding all of the above scenarios and similar ones and pass this cost to the customers. Otherwise, the customers must insure for the types of risk especially business interruption loss. This is largely a question of identifying the risks and knowing to insure. Small businesses often are not sophisticated enough to realize the risk assumption factor in the purchase of a product.

24. No, the seal is taken as evidence that the person seriously considered the agreement before signing it. There is an assumption that no one would lightly sign next to a legal seal.

25. The correct answer is (d). Normally you will find money being exchanged in a contract which is coming from a commercial rather than a social situation. However, students may also argue that (c) would be correct, in as much as it is unlikely that the issue of whether there was an intention to create legal relations will arise in a commercial situation.

26. a) No, the promise made by Morris to pay the $100.00 was made after the act of pulling him from the river. So, it was a gratuitous promise made by Morris.

    Students might also examine this question in light of the issue that an offer must be communicated prior to acceptance occurring or again a gratuitous promise has occurred. This issue could also be explained as past consideration which is in essence no consideration in as much as the act required by the promisor was done prior to the promise being made.

27. a) No, Sylvan does not have to pay the money claimed by Bolts. Two issues might be brought forward by the students in explaining the memo that was drafted to back up this position. The first would be based on the concept of consideration known

as promissory estoppel, or detrimental reliance. Sylvan has acted on Bolts' agreement to extend payment from 30 days to 120 days. This would be an exception to the concept of consideration and result in an enforceable contract between the parties.

An alternative argument might be made by Sylvan that Bolts has received consideration because Sylvan has not switched to a cheaper plastic material available from the competitors of Bolts, but rather has remained with Bolts based on the new re-structured payment plan of 120 days following delivery.

28. a) Yes, there is consideration. The purchaser is agreeing to pay money and the vendor is agreeing to sell the business.

    b) Consideration means something of value. Usually the consideration is money or goods or services performed but it can include other things that have value.

    c) It makes a promise and an agreement enforceable, and that is a contract. Without consideration, a promise and an agreement likely are not enforceable in a court.

    d) While this is a repeat of (a) above, it reinforces that consideration is not money alone. The consideration at this point is an exchange of promises. The purchaser is promising to pay money, and the vendor is promising to sell the business.

29. a) i) Capacity. Maria is under-age.
    ii) Illegality. The contract, while legal on its face as being the sale of a business, is to be performed illegally (violation of Canadian immigration laws).
    iii) Restraint of trade (which is another form of illegality). This is a non-competition clause. It has to meet the test of reasonableness. This clause appears to be too wide because it is not limited to time or geography. There is a new issue with respect to web-site businesses. Courts may accept wider terms respecting geography because they are exposed worldwide.
    iv) There is an intention not to create legal relations. Technically such clauses are enforceable but all case law on point involves sophisticated businesses. Whether they would be enforced in this situation is debatable.
    v) Selling of the deal is an assignment of the contract.

    b) i) No, for lack of capacity, the business is not a necessity.
    ii) There is an express intention not to create legal relations and this clause could possibly be enforced against Bill.
    iii) The agreement is to be performed illegally in violation of Canadian immigration laws and the courts would likely not enforce it.

    c) The selling of this deal is the assignment of an executory contract. To be safe, Maria should follow the steps for a statutory assignment, i.e., assignment must be unconditional (absolute), in writing, and notice must be given in writing to Bill by Maria.

30. N/A.

Chapter 6

Important Terms and Contract Interpretation

Section I Answers to Business Law—Applied Questions

1. a) Yes, "end of the winter season."

   b) No, this was not a standard form contract drafted by one party. Compare this situation to one where the average customer signs an agreement to buy insurance. The insurance company will have had a battery of lawyers from large downtown firms draft the contract and revise it every time there is a case decided against it. This may have been going on for at least a hundred years. The average customer does not have a lawyer to review the contract and probably has little idea what the terms mean.

   c) The owner could argue that a reasonable person would have understood that end of the winter season in the context of snow removal meant until last snow fall. That is what most people would understand by winter.

   The contractor could argue that by both a dictionary and astronomical definitions winter ended before the end of April. The dictionary is a good guideline for what a reasonable person would understand by the use of a term.

   This fact situation is useful for showing the discretionary element in a lawsuit. Ask the students what they think would be reasonable here and see if there is a division of opinion. The same uncertainty faces a lawyer in advising his client about the outcome of the lawsuit. Much depends upon the individual Judge.

   d) The test is: What meaning would a reasonable person understand? As discussed above, this test does not result in any necessary interpretation on the facts given.

   e) The test is to be objective. This means that the Judge in fact takes the role of the reasonable person and decides on the meaning. It is not subjective and the parties are not asked what the term meant to them subjectively because, of course, each party will give an opinion that, with the advantage of hindsight, will benefit themselves.

2. a) The key factor was whether there was a term, for the personal guarantee by a principal of the corporation, Nader Gerhmazian, in addition to what was written in the printed agreement.

   b) The key legal issue was whether the parol evidence rule excluded the admissibility of any external evidence which was, in this case, a written undertaking.

   c) The entire agreement clause states that there are no additional terms such as the personal guarantee. The parol evidence rule is that no evidence can be led to contradict the entire agreement clause. The principle was applied strictly in *Hawrish v. Bank of Montreal*, which may be the high water-mark case in applying entire agreement clauses. Trial judges had been uncomfortable with the harsh results of a strict application of *Hawrish* and there are many incidents of trial judges finding ways get around *Hawrish*.

   d) Basically, she ignored the strict application of the entire agreement clause and said that it was "preposterous" to accept that there were no other terms in face of the strong, written evidence that there were. She called the present circumstances exceptional to imply that *Hawrish* could be distinguished on the facts. In Hawrish, the personal guarantor had only his oral evidence.

3. a) The first issue was whether she is responsible for the husband's debts in addition to the term loan. The standard form says "all debts" and so, on that wording she is liable for the mortgage debt of $50,000.00. This is a surprising result to most readers, but it is what the banks intend. The authors know of no case in which this has been interpreted.

   The wife has to get the statement by the bank manager into evidence. From a factual point of view, it is only her word against the bank manager's word. From a legal point of view, she faces the combination of the entire agreement clause and the parol evidence rule. On the basis of *Hawrish v. Bank of Montreal* she would lose.

   Hawrish is not well liked by trial judges, and in the opinion of counsel who frequently litigate in this area, trial judges try to avoid this case by using one of the grounds discussed under exemption clauses for avoiding those clauses. However, while the attitude towards *Hawrish* may be changing, it remains the law today. The practical lesson from this case is to realize that the guarantees are all inclusive of debts, and that bank managers, sometimes innocently, dismiss that clause in a guarantee. But when it comes to enforcement, the decision is not the local branch manager's, but that of an officer at a higher level.

4. a) No, there was no express term

   b) Yes, by the officious bystander test. A court will imply a term that an employer would not raise prices above market to make it impossible for commission employees to earn wages. The application of the necessary implication test probably is consistent with the average student's concept of fairness. (*Long House Trading Co. v. Nagaard Saw Mills Ltd.*, B.C.S.C., *Lawyers Weekly*, April 25, 1997.)

5. a) In *Triggs* a man shipped his cars to Ireland and shipping company said it was liable if the cars were damaged due to their negligence. The cars sustained over $54,000 in damages due the company's negligence, but the company then tried to rely on the limitation clause which limited their liability to $940. In *Solway*, a couple had their goods moved by a moving company, and they were aware of the limitation clause. The trailer with all their belongings was stolen after the company had not

kept it in a secure location. The couple lost goods worth $750,000 but the company said it was only liable for $7,000 due to the limitation clause.

b) In both cases the legal issue is: Are the limitation clauses enforceable? It was a company and an individual consumer and there was unequal bargaining power.

c) In both cases the consumers won, the clauses were not enforced. In *Triggs* case, the court ruled that the company had not adequately brought it to the attention of Mr. Triggs, so the company could not then rely on the clause. In *Solway*, the court ruled that it would be unfair and unreasonable and unconscionable to allow the moving company to use the clause.

6. a) In *Fraser Jewelers*, a security company had a limitation clause in its contract to provide security to a jewelry store that limited its liability to $890 if it was negligent. A robbery occurred and the security comapny was negligent as it didn't call the police soon enough and the thieves got away with $50,000 in stolen jewelry. In *Plas-Tex*, Dow Chemical sold plastic resin to a pipe manufacturer and the contract stated Dow was not liable for any damages that resulted from the use of their resin. Dow knew that the resin would cause the plastic to break down and the plastic pipes it knew were to be used to deliver natural gas would crack and explode and cause serious dangers to the public.

b) The issue in both cases was should the limitation/exemption clause be enforceable. Here in each case, it involved two companies who had freely made these contracts and there was equal bargaining power, should the court enforce the terms they had agreed upon.

c) In *Fraser Jewelers*, the limitation clause was enforced. It was a commercial relationship, and it would not be fair to make the security company effectively an insurance company for the jeweler for a mere $890 per year. The jeweler should have bought his own insurance. The limitation clause worked. In *Plas-Tex*, the court was clearly shocked by Dow's conduct and felt it would clearly be unconscionable to enforce their limitation clause when they knew their product was defective and dangerous. The exemption clause did not work, there was a fundamental breach and Dow was fully liable for the $3 million Plas-Tex claimed.

7. a) In *Tercon Contractors*, a contractor bid on a B.C. government contract to build a highway. The contract stated that no bidder shall have any claim for any compensation as a result of submitting a bid. The government stated there were six companies that could bid. It then narrowed it down to the Tercon bid and another company. The government then awarded the contract to the other company. Tercon then sued the government for breach of contract because it had awarded the contract to an ineligible bidder. The government admitted it had broken the bidding contract rules, but the government relied on the exemption clause that clearly stated bidders cannot make any claims for compensation as a result of submitting a bid.

b) The legal issue is whether the exemption clause should be enforced. These were two sophisticated business parties and they had freely agreed to these terms. Should the court strike down a clause they had agreed to? Was it a fundamental breach? Or are there other reasons why the clause should be struck down?

c) Tercon Contractors won and the court refused to enforce the exemption clause and the B.C. Government was liable for the $3 million that Tercon claimed in damages.

d) This case hopes to end the concept of fundamental breach because it has caused too much inconsistency in the past as you could not predict with any certainty

when a court would call a breach a "fundamental" breach. So instead the Supreme Court stated the analysis should focus on three issues: (1) Does the exclusion clause apply to the specific fact situation (which in Tercon it ruled it did not, so the clause did not work)? (2) Was the clause unconscionable when the contract was formed (e.g. unequal bargaining power)? and (3) Is there a public policy reason why the clause should not be enforced (e.g. fraud or criminal behavior)? This should end fundamental breach and its application to exclusion clauses, but there can still be some confusion as courts can still play games on whether the clause does or does not apply to these specific facts and what is or is not unconscionable or what would be an overriding public policy issue.

8. a) If the renewal clause is effective, Nelson does owe almost three years. The contract is automatically renewed for the entirety of 2001 and 2002.

   b) This is an unusual and onerous clause. If Nelson can prove, which is very likely, that this clause was not brought to her attention specifically at the time that she signed the agreement, the courts will not enforce it based on the *Trigg v. M.I. Movers case*. While the renewals would be void, she would still owe for one year. She should have negotiated for a right to cancel on one month's notice at anytime.

   This is a common clause used in health club contracts. In Ontario, there is *The Pre-Paid Services Act* designed for health clubs among others, which says that all businesses that offer services must give an optional monthly installment plan. The spa found a loophole in the act by using the automatic renewal provision. The statutory requirement that there be an optional one month payment plan is really not of much assistance here. Health clubs know that there is a large part of the market that signs up for a one-year contract but who will never attend more than two or three times. These people often forget about this obligation and so they end up owing at least one additional year because they do not cancel.

   c) If the spa had contacted her in May, she would have canceled then, so her contract would have ended in the first year.

   d) The reason for the 90-day cancellation period is that even if people are aware of the need to cancel the contract, they usually think of it only close to the end of the contract period, which in this case is probably about 30 days before the end. By making it a 90-day period, the business is probably hoping that the customer will miss that period and be stuck for an additional year.

9. a) This is a liquidated damages clause.

   b) The court would apply the reasonable pre-estimate of damages.

   c) If the $10 per unit was a reasonable pre-estimate, then New East could not claim a $50 per unit loss. The question would have to be determined at the time of the contract. The actual loss would not be considered.

10. a) The landlord did not have to return the deposit. The deposit is forfeited if the deal is not completed by the choice of Ranieri. The landlord does not have to prove any loss. $100.00 is a reasonable pre-estimate, so it probably cannot be attacked as a penalty.

    b) If Ranieri had paid the first and last month's rent, the landlord would have been limited to proof of actual loss. The landlord would have to refund the balance. If the landlord re-rented immediately without any loss, the landlord would have to refund the full amount.

11. a) Thomas paid a deposit of $1,000 and it is not refundable as he breached the contract. It was not so large as to be considered a penalty. It does not matter what the car resold for, Sophia keeps the deposit, but she cannot sue him for any more money and he can't get any money back.

    b) Had it been a down payment, he may get it back, but first Sophia could deduct her losses, which were $500 when she resold the car for $500 less than Thomas had agreed to pay. So Sophia keeps $500 and Thomas gets back $500 if it was a down payment.

    c) If it was resold for $7,500 and Thomas had paid a $1,000 deposit, it would not change the original answer. Sophia keeps the $1,000 but again she cannot sue for any other money, not even the extra $500 she lost. If the $1,000 had been a down payment and the car resold for $7,500, then Sophia keeps the full down payment and Sophia can sue Thomas for the other $500 she lost due to his breach.

12. a) Yes, Sookraj Deva has two grounds on which to challenge the interest charges. The first is that there was no agreement for the payment of interest. Although businesses often add 2 percent per month on to their invoices, it is not part of the original agreement, and it is not enforceable. Also, the interest rate is not expressed as a per annum rate and therefore, only 5 percent can be charged.

13. a) and b) The first rule is that the cancellation fee may not be a part of the original contract but may be added only at the time of the request of cancellation and is therefore not enforceable. A second rule would be that it may be a penalty. In the case of the cancellation of an insurance policy, a $100 fee is probably reasonable if only to cover administrative costs.

    c) This would establish that the cancellation term was liquidated damages and not a penalty as the $100 damages would be a pre-estimate of the damages.

14. a) i) There is a contract of purchase and sale of the car. The parties are Markelj and Zawada.

        ii) The second contract is the assignment of the first contract. The parties are Markelj and Richler.

    b) Richler probably cannot sue alone. Markelj did not give notice of the assignment to Zawada in writing. Hence, the assignment does not meet the requirements for a statutory assignment. However, it is an equitable assignment but Markelj would have to either get Richler to join as a plaintiff, or to make Richler a defendant to extinguish Richler's interest. As this example shows, it may be financially prohibitive to enforce an equitable assignment. Therefore, care should be taken to comply with the formalities of a statutory assignment.

Section 2 Answers to Closing Questions

1. a) Parol evidence rule. At the time of the dispute, the parties will give an interpretation which benefits themselves financially.

    b) See Critical Concepts in the text.

    c) Contra proferentem. The ambiguity is construed against the drafter. For example, if a customer and an insurance company disagree over the meaning of a term of insurance contract and there are two or more possible meanings to that term, the customer will be given the interpretation beneficial to him/herself.

2. The conundrum is that if he doesn't pay, the professor will not teach the student further. He must sue for breach of contract. If the student sues, he will win the law suit but lose the real bargain—no payment until he finishes his course.

3. Firstly, the parol evidence rule will help to assist by having the court rule that the evidence of any agreement about the piano is inadmissible especially in view of the entire agreement clause. Secondly, the agreement was done orally to avoid the HST and is illegal.

4. a) *Parol* means oral.

   b) Firstly, to exclude evidence of alleged additional terms. Secondly, to exclude external testimony (usually from the parties) as to the meaning of a term. A contract's term is to be interpreted primarily within the four corners of the document if possible. Extrinsic evidence is admitted only according to the various exceptions to the parol evidence rule such as expert's testimony.

5. In a standard form contract, normally one party, who is very sophisticated, had a team of lawyers drafting the agreement and knows what the terms mean. The other party, especially in a consumer situation, is usually an inexperienced person signing without legal advice.

To assist the students in grasping what is at issue here, it may be helpful to direct them to the situation of an average person signing an insurance policy with an insurance company. Review with them how the versions of the insurance policy came into the existence, and the likely number of revisions over the last 100 or 200 years, and compare that with the knowledge of the average homeowner about coverage, risks, and language of the policy.

6. a) An entire agreement clause is a clause that states only the terms in a written agreement can be considered and no extrinsic evidence will be taken into account by the court.

   b) A limitation clause attempts to limit the liability of a company when a breach occurs and an exemption clauses attempts to completely exclude any liability of the company if a breach occurs.

   c) In exceptional circumstances, the courts will ignore an entire agreement clause and let in other outside evidence to achieve a fair result as shown in the Corey Developments case. The court will not let this clause be used to unfairly take advantage of the other side. There must be very strong evidence to allow this exception.

      In limitation and exemption clauses, the courts tend to uphold them if the contract is between two companies as they have equal bargaining power and the freedom to contract should be upheld. But if there are important public policy reasons why it should not be enforced, such as fraud or other illegal activities, then the clause will be unenforceable. In cases involving an individual consumer and a company, the courts are more easily convinced that the clauses should not be enforced if the company did not adequately bring the clause to the attention of the individual person. There is unequal bargaining power in these situations and the company cannot use the clause unless the consumer was aware of the exclusion clause.

7. a) The main issues intended to be identified that are relevant to this part of this text are those relating to exemption clauses. The ASP may be negligent and make mistakes or lose data; it may go bankrupt without warning and without protecting the data or providing backup copies and everything is lost in the bankruptcy. There may be other issues such as privacy and security but these are not relevant to this part of the text.

b) There will very probably be an exemption clause saying the ASP is harmless from all risks.

c) A legal solution would be to negotiate for a warranty regarding negligence, or inaccuracy however caused. A warranty would be effective only if the ASP stayed in business. The ASP probably would not negotiate to vary its standard exemption clause. If the ASP goes bankrupt, it would not have any assets to pay for any loss. A warranty to provide the data in the event of termination of the contract would likely be useless if the ASP went bankrupt.

A business solution to prevent the loss of data could be to require the ASP to provide CD-ROMs every week/month with all relevant information to the accounting firm so that the firm would have an independent backup copy. If the ASP went bankrupt or terminated the contract, the accounting firm would have the data.

8. In the *Trigg v. MI* case, Mr. Trigg was a consumer dealing with a business which uses the standard form contract. In this type of situation, the business has to bring any unusual or other clause specifically to the attention of the consumer.

In the Fraser Jewelers case, the contract was made between two businesses. A business person is expected to read a contract before signing it.

9. The possibilities are endless:

—Airline ticket, especially re: baggage loss claims

—Ski toll passes

—Purchase of sports equipment

—School athletic participation

—Car rental agreements

—Notices on the back of hotel/motel rooms

—Software licences

—Receipt from cleaners

10. a) The risks cannot be exhaustively listed and students will come up with original ideas, but some risks are:

—Software freezes at critical time. For example, a construction business is calculating a tender, but cannot submit it on time because the software freezes at the last moment. The business had the lowest bid but lost because it was late.

—Software makes error. A business sends out an account for one thousand dollars due to software error, but the account is actually $10,000 dollars. The customer paid the $1,000 dollars but now the record of the payment can't be found.

—Software glitch. The software cannot operate and it takes three days to repair the system. The business sues for down time losses.

—Software conflict. The software causes communications software to malfunction. E-mail doesn't get to sales representatives just before a big promotion, causing loss of the promotion expenses and expected profits.

b) The wording is not, of course, important, but the students should be able to identify the risks and try to describe them in general categories such as repair/replacement (direct damages) and claims for loss of profit as set out above (consequential damages). You might want to take the exercise further and have students estimate the cost of the various risks and legal and business ways to limit them. For example, how much is the estimated cost of giving a one-year warranty as contrasted with a two-year one?

11. a) Ralph's opinion of exemption clauses is not accurate. A discussion of Ralph's attitude should include an examination of the purposes behind exemption clauses as detailed in the text.

    b) Information that would help in determining whether Ralph's assessment is accurate would include:

    —whether any statements were made as to the effect of the clause when it was pointed out;

    —is the exclusion, which the exemption clause is aimed at, stated explicitly, or is the exemption clause ambiguous, confusing, vague, or too broad;

    —is the bargaining power and knowledge of law equal between the parties;

    —whether consumer protection legislation applies.

12. a) Issues:

    i) Sale of Goods legislation. From the facts, there is a much stronger argument that the implied condition of fitness for use would be present and Yevtoshenko should be able to cancel the contract and receive her money back.

    ii) Fundamental Breach. Was the failure by the printer to achieve the advertised specifications of five pages per minute with clear color separation such a significant departure from what would have been expected that it would constitute a fundamental breach or non-performance by the vendor under the sales contract? If so, then Yevtoshenko would be entitled to rescind the contract and receive a refund of her money.

    iii) Exemption Clause. This clause appears to relate to the issue of damages suffered by the injured party and not the exemption of the *Sale of Goods Act*. The issue then becomes to what degree this exemption clause would protect the vendor from the damages suffered by Yevtoshenko for her lost contracts and business reputation.

    b) Consumer protection legislation would apply to the sale of a printer for personal use.

    c) Yes, under consumer protection legislation, the vendor is unable to contract out of the implied warranties and conditions and so the exemption clause would be of no effect as it relates to the item purchased. The issue of how far the vendor would be liable for the damages. Here, the loss of an annual salary of $40,000 would need to be addressed in terms of the issues of whether the exemption clause was specifically brought to her attention at the time the contract was made and was the damage that occurred not expressly covered in the clause.

13. a) The dry cleaner could not rely on the exemption clause because the sales person misrepresented the effect of the clause. That is one of the grounds for making an exemption clause ineffective. (*Curtis v. Chemical Cleaning and Dying Company [1951], 1 All E.R. 631 H.L.*)

    b) This is an added twist to *Curtis v. Chemical Cleaning*. An entire agreement clause says that there are no oral statements on which the person signing is relying. The misrepresentation principal in *Curtis* would probably still be applied to make the clause ineffective.

14. a) The deposit is completely forfeit but the down payment can be recovered if the actual loss does not exceed the amounts paid by the purchaser. In this case, the purchaser paid $30,000 but the real loss was only $10,000. Because the deposit is completely forfeit, the purchaser gets none of that back, but can recover the down payment of $5,000 in full. It is possible to argue that the deposit is a penalty. However, the loss of $25,000 on the resale of a truck worth $100,000 is probably a genuine pre-estimate of damages.

    b) i) $5,000.

15. a) The law of B.C., assuming that California accepts the principle of private international law that the parties can determine governing law.

    b) No, governing law does not determine venue. The primary consideration for determining venue is the place of acceptance of the contract which here, is likely California. Let California be assumed as the venue for the purpose of illustrating the point of the question, particularly forum conveniens, is outside the scope of this text. The critical point here is that a governing law term does not determine venue. This is a significant point often missed by drafters which will become important in the age of cross border deals.

    c) This is an open question. There is no consideration for the licence agreement, so by the present law, it is not effective. However, the shrink-wrap problem may change the law in this area. See the discussion of the shrink-wrap rule under "Past Consideration" in the text.

    d) They could have a clause saying the trial must take place in B.C.; however, this would probably not be acceptable to the other party. A more neutral solution is to have the dispute settled by arbitration. Such an agreement would mean that there would not be a local jury trial and eliminate that possible bias. Additionally, the parities could select the arbitrator themselves.

16. a) and b) He technically violates the Federal *Interest Act* by not stating an annual rate, but the *Interest Act* rate is the same. He did not disclose the administrative and insurance charges as required by various consumer "truth in lending" statutes. By the terms of most of such legislation, those charges then cannot be enforced if complete disclosure is not given to the consumer.

17. A diagram on the board has been useful for this type of question.

    a) i) Manufacturer sale to importer
    ii) Importer sale to distributor
    iii) Distributor sale to retailer
    iv) Retailer sale to customer

    The ultimate user has no privity with the manufacturer who has the greatest opportunity to make the product durable and safe.

    b) The claim of the workman is even more remote and not in the chain of contracts.

    c) Yes, because the sale of goods legislation in those provinces gives a direct right of a customer against the manufacturer. The legislation does not likely cover the case of the injured workman though. Additionally, there is a question of governing law which is discussed in the next chapter and referred to below.

    d) New Brunswick and Saskatchewan legislation make the manufacturer directly responsible and ultimate purchaser would not have the direct way to claim the

warranty against the manufacturer. However, there are additional problems of governing law and venue, discussed more fully in the next chapter. Suing in Mexico is likely too expensive. Law would apply in that Mexican law would be similar to Canadian law.

This issue is becoming very important for purchases on the Internet. In the United States, some states have passed legislation setting out that the venue and governing law are those where the purchaser resides. An offer for sale on any media which can be seen in the state is submission to that state's jurisdiction. The authors know of no such legislation or proposals in Canada.

In this question even if the contract was accepted in, for example, Saskatchewan, the purchaser might have to sue in Mexico. Although Saskatchewan law may apply by conflict of laws, the expense of litigating in Mexico would be prohibitive.

18. a) Correct, the "or" is usually the active party.

    b) Incorrect, the debtor must pay on whichever transaction he got notice first.

    c) Correct.

    d) Incorrect, the debtor's consent is not required.

19. Option (c) is correct; see the above question which is the same in another format.

20. a) It is not a valid statutory assignment because the notice had to be in writing to Amy. It does not matter that Amy objects. However, it is a valid equitable assignment. The advantage of the statutory assignment is that the original creditor (assignor) need not be a party to any lawsuit to collect. To enforce an equitable assignment, both assignee and assignor have to be a party. That may or may not be an easy matter as the assignor may be unavailable or demand payment for the effort, etc.

    b) Yes, the assignee (Factor Finance) takes "subject to the equities."

21. a) i) The entire agreement clause is number 3.

        ii) There are two possible disclaimer clauses, number 2 if applicable and number 4. Clauses are often called "warranty clauses" when they are really limitations on warranties. Clause number 4 must be read with the provision called "dealer guarantee" on the face page of the bill of sale. Used car dealers often try to sell external warranties from a warranty plan.

    b) Respecting clause number 7, the consequences are clearly set out. The purchaser must pay the loss on the resale including any costs of disposition. The deposit, at common law, would be all that the dealer could claim except for this clause. This does not seem out of line with actual loss and probably could not be a penalty clause. The test is whether or not the clause is truly a liquidated damages clause, i.e., a true estimate of the actual loss at the time the contract was made.

    c) Respecting paragraph 9, this is an acceleration clause. The entire purchase price is accelerated, so it becomes due and payable. The purchaser has agreed that the dealer can repossess the car without notice. Ordinarily a notice would have to be given at common law, unless of course there was some other instrument such as a chattel mortgage that was put on the car.

    In some circumstances, the acceleration clause could amount to a penalty clause. For example, if the purchaser had paid off $9,000 on a $10,000 car, leaving a balance owing of only $1,000, and the car was sold for $5,000, there would be no real loss and hence, this could be a penalty clause. See this topic discussed under

Leasing in Chapter 10 for an example of a case, *Unilease Inc. v. York Steel Construction*, in which an acceleration clause was struck down as a penalty clause.

22. a) The court gives little weight to the parties' versions of what the terms mean because each party will tell a story that supports that party's position. After the dispute has arisen and litigation has commenced, each party will likely speak in its own financial interest.

    b) The courts will not impose a duty to act in good faith in negotiations because the ruling principle is competition. Everyone is entitled to get the best deal possible, limited only by restrictions such as misrepresentation, duress, undue influence, and the very limited ground of obvious mistake.

    This is the foundation of our economic system. However, once a party has made a deal, that party is expected to act in good faith in carrying out the transaction. For example, if a real estate deal is made conditional on a purchaser obtaining financing within ten days, the purchaser has to make bona fide efforts to obtain that financing. If the purchaser does not obtain the financing because he or she did not make any application, that is not acting in good faith.

    c) An express term is one that the parties have actually agreed upon. For example, John agrees to pay Mary $500 for her computer. Price is an express term. An implied term is one that is put into the contract by the statute or the courts even though the parties did not actually agree to it. John's computer must be good in working order. The *Sale of Goods Act* implies a term of merchantability into the contract even though John and Mary had said nothing about it or perhaps not even thought about the warranty.

    d) Any extrinsic evidence is excluded from interpreting a contract. That means that the contract terms alone are looked at and no other evidence is admitted.

23. Clauses from standard form agreements that apply to Lindner's concerns are:

    i) An entire agreement clause will give some protection against sales representatives making statements that are not written down. Entire agreement clauses are sometimes graphic and specifically state that no one can alter the agreement on behalf of the company except named persons or persons holding a certain job title.

    ii) A limited warranty will give the three-month limitation. Later, the students may learn of implied warranties for consumers and retail sales that may override a three-month warranty clause.

    iii) An exemption clause or disclaimer will completely exempt a claim for a loss of profits. An acceleration clause will make all payments due if there is one default. He might also want rights to repossess the product. The right to repossess has not been covered up to this point.

    iv) To ensure that disputes are held locally in according to local laws, he can insist on venue and governing law clauses. He might also consider international arbitration to be held according to the laws of his province. To have no responsibility for the goods after leaving the transportation company, he will have to include a specific clause. The most common one now is called "ex works."

Chapter 7

Contract Defects and Breach of Contract

Section I Answers to Business Law—Applied Questions

1. a) i) This is an innocent misrepresentation.
   ii) This is a negligent misrepresentation. A careful homeowner would make efforts to find the reason that sawdust was accumulating.
   iii) This is fraudulent misrepresentation.

2. a) and b) The fact that the statement about annual sales was not a part of the contract is not a defense. Misrepresentation relates to statements made during the negotiation process. Lack of intention is not a defense. There was negligent misrepresentation. (*Esso Petroleum Co. v. Mardon [1976], Q.B. 801 C.A.*).

3. a) This case touches on the distinction between permissible self-interest and deception. There is no duty on Claus to reveal information detrimental to his own interest. It is up to Gustaffson to do his own investigations. In this sense, Claus can take advantage of Gustaffson. This can be contrasted to consumer sales under the *Business Practices Act*, where there is a duty to disclose.

   b) Since Claus said nothing, there was no misrepresentation.

   c) Claus did not have a duty to reveal the plans of the highway to the purchaser. There is no duty to reveal harmful information in the ordinary business situation.

   d) The purchaser could have specifically asked Mr. Claus for his information about any change in zoning and to warrant that he had no such information. The purchaser could also have made inquiries himself through his real estate agent at the city council office. The clerks are usually quite helpful in advising regarding proposals for zoning changes.

4. a) This question is designed to help the students categorize facts according to their legal relationship. It may help to diagram the situation. The first contract is between Bolatta and Berry. The second contract is between Berry and Gibson.

   b) Berry made a fraudulent misrepresentation to both.

c) Bolatta did ask for identification but accepted something unusual, being a pass to a local stadium. Certainly, no bank would accept such identification. Perhaps Bolatta was "snowed" by the alleged sports connection. While Bolatta's actions may have been what the average person would do, they were not what the careful person would have done.

d) Bolatta could have insisted on standard identification such as a driver's licence, but the best protection would have been a certified check.

e) Gibson did see the motor vehicle with Bolatta's name and address on it. This is usually a sign that the person bearing the certificate is the owner. This would have been reasonable.

f) Gibson could have asked for identification such as a driver's licence and compared the driver's licence with the name on the ownership. Granted this is not usually done in a private car sale and would have been socially awkward.

g) For fraudulent misrepresentation, Bolatta could have claimed rescission or damages.

h) A declaration of rescission would mean that no contract had ever existed so that, even though the ownership registration was changed, that registration would be ineffective. This latter remedy would be the only one that would help Bolatta but it would not be given because Gibson was a bona fide purchaser for value without notice.

5. a) This is a representation because it is a statement of fact made before the contract that was intended to be relied upon, and because it induced Bertram to enter into the contract.

b) No, because it contradicts the true facts. There was a representation made.

c) Yes, the various Business Trade Practices Acts all override the entire agreement clauses and make all representations enforceable in consumer transaction usually by deeming them to be terms of the contract.

d) No, the Trade Practices Acts only apply to consumer sales. Businesses are believed to be sophisticated enough to know how to protect themselves.

e) They should negotiate for an express warranty to cover what they want and get it in writing.

6. a) Stephen's has the remedy of unilateral mistake.

b) This is a completed contract, so the contract can be set aside only if Stephen's can prove that the other side knew of the mistake.

c) The client denies knowing of the mistake. However, the size of the mistake may have put the client on notice. The client would argue that it thought it was getting a good deal. When the plaintiff has to rely on inference, the defendant will always come up with an argument to the contrary.

d) Some surrounding circumstances might help, for example, if this were a quote for seven people for one week round trip to Singapore, the fee would be impossibly low and even $17,500 would be a cut-rate fee. The client should know something was wrong.

e) This notation has no legal effect.

7. a) Economic duress is possible here. The shareholder undoubtedly knew that the corporation was about to make a public offering and could not disclose a lawsuit in its

prospectus without seriously harming the result of the public offering. The delay of four years, combined with the timing of one week before the IPO, suggested blackmail.

b) The directors will have to check with the promoters about the effect of such a lawsuit. From a legal point of view, the lawsuit should be commenced as soon as possible because delay may be taken as an indication that the corporation is not sincere. However, the promoters will not want to have a lawsuit until well after the stocks are established in the market.

8. a) The facts are: she was in a special relationship with her husband in that she entrusted financial affairs completely to him. The evidence of this is that she did not even have a credit card in her own name. She was in a traditional marriage. Note: After the text went to press, the law was changed so that every married woman is now presumed to have been unduly influenced by her husband. See case *Royal Bank of Scotland v. Etridge* [2001] 4 All E.R. 449 (H.L.). This was adopted in *CIBC Mortgage Corporation v. Rowatt*, Ontario Court of Appeal, October 31, 2002 [further note: Mrs. Row is based on Rowatt].

b) The bank was on constructive notice of the special relationship because it knew that the couple was married.

c) The bank cannot use plea of I.L.A. because no I.L.A. was given; but it can lead evidence to show that the wife made the decision free of her husband's influence. On the specific facts given here, it would not be likely be able to do so. The bank would have to show based on other evidence that she made independent decisions in financial matters. For example, she might have negotiated the terms for the mortgage for their house.

d) In *Row*, the woman was a school teacher and her husband was the person sophisticated in financial affairs, as he was a lawyer. In *Duguid*, the husband was a school teacher and the wife, as a real estate agent, was the more sophisticated in financial affairs.

9. a) Inga can claim that the mortgage is void due to non est factum, undue influence, unconscionability, and misrepresentation. She will claim that she does not understand the contract at all as she cannot read English and she only understands Swedish, so the contract is void due to non est factum. She can also say that her son pressured her and she was unduly influenced and did not receive independent legal advice so it is a void due to undue influence. She can also claim that it was an unconscionable transaction and the bank should not be able to enforce it as there was unequal bargaining power and the bank took advantage of her. She can also claim that her son misrepresented the agreement, he lied about a major term, and so it should be rescinded on that basis.

b) The bank will try to assert that she should be bound to her contract as she signed it. The bank will claim that her complaints are against her son, not the bank, so the mortgage should be enforceable. It is unlikely the bank would succeed given the strength of her arguments though.

10. a) Sunray is not liable for breach of contract. The contract is void due to frustration. It is impossible to complete the contract due to circumstances beyond their control, the underground stream.

b) Gina is entitled to her deposit back as the contract is frustrated; however, the cost of the windows will come into play.

c) The court in this case will most likely divide up the costs of the windows. In a similar case, the court held the builder 65 percent responsible for the cost of the windows and the homeowner 35 percent responsible. If the windows could be returned, then it would not be a problem, though this is unlikely with custom-made windows. The parties may try to sell the windows to mitigate these losses, but again because they are custom windows, it would be at a significantly reduced price.

11. a) The court would apply the test of reasonable foreseeability. Since the re-sale contract was private, that loss would not be taken into account.

    b) The damages would be based on the market price of $25,000, and would amount to $5,000.

12. a) The theater would be awarded damages for loss of profit which would be $10,000. In addition, it would recover the cost of replacing the pipes. The principle is that the plaintiff is to be compensated for the loss of what he bargained for. He is to be put in a position as if the contract for repair had been properly performed.

13. a) and b) He would not be successful because the company would raise mitigation in defense.

    c) Carlton has to make effort to find another job since he could do so immediately and suffered no loss, he would not be able to claim damages from the employer.

14. a) The test for punitive damages is "rationality." There must be a separate reason that the compensatory damages are not enough to deter the conduct. Although the employer's actions were reprehensible, an award of $100,000 was thought to be enough to deter this conduct. There is no case on point but courts are reluctant to open the door to U.S. punitive damages. Readers may likely think that an award would automatically be given here, but that is not a certainty.

    b) The conduct was criminal and any decision to punish or not should be left to the criminal courts. Further, the employer would claim that the $100,000 is a large sum and enough to deter the conduct. The case of *Performance Industries v. Sylvan Lake* would support the employer.

    If the employer were charged criminally and given a conditional discharge, the employee could argue that this was too light a consequence and that the civil court should award something for punishment. If the criminal fine was $100,000, this would be sufficient to deter the conduct and therefore there should be no civil award.

Section 2 Answers to Closing Questions

1. a) Grouse Nest Resorts could not rely on the oral representations because of the parol evidence rule. The possible defense of misrepresentation of the effect of the term was not raised in this case as in *Curtis v. Chemical Cleaning.* If it had been raised, perhaps Grouse Nest Resorts would have had a good defense. (Grouse Nest *Resorts Ltd. v. First National Mortgage Co. Ltd. 1 R.P.R. 249 (B.C.).*)

2. a) No, there is not an express term.

    b) It is not likely that in the ordinary computer sale, software worth $10,000 would be supplied, so the term would not be implied by custom and usage. Also, the officious bystander would not say, "of course" if asked if such a term were understood to be part of the agreement.

Assume that the computer company denies the statement by the sales representative, the issue then becomes: How can A.J.M. prove it? There was no entire agreement clause. The parol evidence rule does not exclude representation, so A.J.M. could get the evidence before the court. [Note: The parol evidence rule only excludes evidence of additional terms not representations.]

However, the evidence would be one person's word against the other's. The important point is that no matter how convinced a litigant is of the truth of his/her case, when that person has only oral evidence, it is hard to predict who a judge will believe. Judges are human. There may also be some impatience in some judges with business people who, after so many warnings to get it in writing, still don't and want a judge to sort out the confusion.

3. a) For the sake of simplification, a representation generally means a statement made before the contract which induced the hearer (representee) to enter into the contract. A warranty is usually an express term of the contract.

4. a) The claim was based on negligent misrepresentation, the employees were told they could transfer their government pensions to Loba if they resigned and worked as "consultants" for Loba. Once they worked for Loba for a short time and then quit, they were told they could withdraw their pension money from the Loba plan (at a higher rate or with a cash option). Revenue Canada told the government and Loba that it may not approve this scheme and it should advise employees before they quit their government jobs of this possibility. The employees were not told and were misled by the statements of Loba and the government.

   b) The court ruled that the government as the employer with superior knowledge of pension funds owed its workers a fiduciary duty. The court ruled that Loba also owed the workers a fiduciary duty as it was being entrusted with their pension funds and they were relying on their financial advice for a major decision.

   c) It is difficult to decide who should bear more of the blame in this case. The initial decision made the government 80 percent responsible and Loba and Mr. Parent 20 percent liable. It was changed to 60 percent for the government and 40 percent Loba and Parent by the Court of Appeal. Given that it was Mr. Parent who was to gain the most from this scheme by charging 10 percent on all pension transfer amounts, it is probably more appropriate for Parent and Loba to bear more of the costs. They had the most to gain from withholding the information from Revenue Canada from the employees.

5. a) No, the statement about the value of the land is only opinion. Chomsky, an accountant, is not an expert appraiser. In any event, land values are speculative matters.

   b) It is unlikely to be a warranty. There is no evidence here that Goddard asked Chomsky to guarantee the values or that Chomsky was intending to give a guarantee.

6. a) No, the title/owner passed even though the car was sold pursuant to a misrepresentation. The innocent purchaser-for-values' rights take precedence over the first owner. [Anything close to this is acceptable.]

   b) Yes, title/ownership would not pass because the thief did not get title/ownership. You would get your car back.

7. a) A representation is a statement made before a contract is made/during negotiations, but not made part of the contract. A term is part of the contract.

b) Any 2 of: insurance, dangerous condition of real property/house/building; a change in information provided earlier; fiduciary duty; franchises.

c) Buyer beware.

d) Yes, because it was for personal use, consumer protection acts override/nullify entire agreement clauses.

8. a) No, the seller does not have any legal duty to disclose facts that might affect the buyer's decision to purchase.

b) Possibly. If the contract had been based on good faith, creating a fiduciary obligation, then Cunningham could argue there had been misrepresentation. Another possibility would be to present her statement "This must be a Victorian lamp" as being a question to Scott whose silence was in essence a statement. This might then be seen as a misrepresentation. Cunningham would do well to read this book.

9. a) No, this is not a consumer transaction and the entire agreement clause in the contract signed by Bullen excludes representations other than those in written form.

b) Yes, it may be argued that the representation contained in the brochure regarding gas consumption was part of the terms and conditions of the contract and therefore a breach of contract has occurred.

10. a) Silvermann's possible remedy is misrepresentation.

b) No, there appears to have been no discussion of the rate at which tenant occupancy would be achieved nor had any representations been made by the landlord.

c) The landlord would take the position that Silvermann should have undertaken his own research in determining the risks before entering into the rental of the premises for a restaurant.

11. a) Mendocino will not be successful in having the courts set aside the contract, based on the general rule of *caveat emptor*. There is no special position of trust between the parties, nor was the contract based on good faith. Mendocino at all times had the opportunity to inspect the property for possible contamination prior to purchase in order to inform himself of any potential problems. The vendor is under no legal obligation to disclose facts that might affect Mendocino's decision.

b) The vendor might rely on subparagraph 6 of the Offer to Purchase which allows the purchaser up to and including a certain date and hour to examine title at his own expense to determine whether there are any outstanding work orders or problems with the continuation of the present use of the property. Paragraph 22 also would be relied on. It states that the agreement is the entire agreement and there is no representation or warranty, etc., affecting the agreement or the property other than as expressed in the Offer to Purchase in writing. Since there appears to have been no condition written in under paragraph 2, the vendor could rely on these clauses as an answer to Mendocino's court action.

A number of different factors may impact the type of searches and questions that should be asked or, alternatively, made part of the terms and conditions of a contract. Environmental issues such as those reflected in the fact situation are coming to the foreground as issues of concern to not only the actual purchaser but the financial institutions which might lend money for the purchase. Other examples of this type of concern might be brought in from the students' or instructor's personal experience as well as media sources such as television and newspaper. For example,

if a party were looking to purchase a property for the purpose of opening a restaurant he/she might be concerned to check and see whether there is a local by-law prohibiting the sale of alcohol. In some cities, it might be found that it is prohibited to sell alcohol in specific municipalities while other surrounding areas permit it. A buyer relying on general impressions rather than making this a term of the offer would be in a difficult situation.

12. This is a new issue as it does not apply to the physical condition of the property. There does not appear to be any case law on point. From a child's interest point of view (parens patriae), it would seem that a duty would be imposed when the purchaser had young children, but probably not otherwise. One case, in which this is an issue, that is before the courts as this is written, involves plaintiffs Jason Dennis and Rebecca Bound/lawyer Shari Elliott.

    The duty would raise questions on the scope: what of convictions for break and enter, burglary, or assault, etc. or any criminal offense?

    A further practical question is: What would the damage be apart from moving expenses? Other purchasers without young children presumably would not care. Thus, there may be no depreciation in fair market value. So the issue may not be financially feasible to litigate. The worried parents might just have to resell.

13. a) There does not appear to be a problem of duress or undue influence. Although the accountant is aware of Giordano's financial problems it would be hard to characterize his offer of $20,000.00 for a 25 percent interest as an unfair method since Giordano is free to look elsewhere for the funding. Likewise for undue influence: There appears to be no threat by the accountant of such a nature that it would be characterized as undue pressure.

    b) Assuming there was a problem, independent legal advice for Giordano, prior to his signing the transaction, and a well-drafted contract to reflect the parties' intentions to enter into the transaction should solve any issues of duress or undue influence.

    The fact situation could be modified in class to further the example, creating a situation of duress or undue influence. An example might be to indicate that Giordano was unable to find funding anywhere else and that the $20,000.00 would be the equivalent to a 40 percent interest in the business. This is also an opportunity to distinguish between undue influence occurring in a business relationship and with a person in a position of trust. Students may confuse the issue of a special relationship of trust or confidence such as is found between an individual and a lawyer with that between a client and accountant. If the accountant can be characterized as a person in a position of trust the student might argue that undue influence was present. At the very least a conflict of interest may be brewing.

14. a) *Non est factum*.

    b) The solution is for Simco to bring a court action to have the contract set aside on the basis of non est factum. He appears physically to be a party who would need protection and who had no intention of signing a document of this nature. Rather, he understood it to be something of a completely different nature.

15. a) Olsen would argue on the basis of mistake. This appears to be a unilateral mistake. Bartollini knows Olsen is mistaken and has taken advantage of the situation. The difficulty Olsen will encounter is proving Bartollini knew of the mistake.

    b) Given Olsen's comment on the telephone that she had finished a sailing course and wanted to buy her own boat, she would likely be successful in showing that

Bartollini knew of her mistake. Her remedy would be a declaration that the contract is void (rescinded) on the basis of a unilateral mistake, and the return of her money.

16. a) Yes, it would be through economic duress that Kikuta obtained better terms in the contract, knowing Mair would suffer economically from her actions.

    b) If unsuccessful with duress, the issue of undue influence might be used. Kikuta's statement, that she would advise the art world that she could no longer in good conscience act as agent, would suggest that Mair's consent to the contract was forced from him and not freely given.

    This is an opportunity to explain that if one ground for attacking a contract doesn't work a secondary ground might be raised, and that it is not necessary to make out both duress and undue influence. If one defense doesn't work, the other could be used as a means of avoiding the contract.

17. a) Issues of undue influence. Guarantees have been set aside on the basis that a husband unduly influenced his wife even though the bank had no knowledge of it.

    b) Based on the presumption that there is a problem, the step to take would be to ensure Gina Romero obtains independent legal advice from a lawyer of her choice.

18. a) Thompson could plead economic duress.

    b) He would not be successful in his plea of undue influence. While there is a relationship between an employer and employee, it is not one of trust and confidence as the relationship between, say, a lawyer and client or doctor and patient. In the absence of any very unusual and extreme circumstances, Thompson would not be able to establish that he had placed so much trust in his employer that his own judgment was overcome by it.

    c) He will likely be successful in having the release set aside based on economic duress. He has been cut off from his only income. His wife was no longer working and he had a mortgage and the renovation costs to pay.

19. a) Duress. While it is difficult sometimes to draw the line between legitimate business pressure and virtual compulsion, Mrs. Macdaid would have felt she had no choice but to sign. Once there is no true consent, duress is likely to be found.

    b) It could be argued that this was an ordinary business transaction and that a bank owes no special duty to a customer. However, if there is a long term relationship between the bank and the customer, so that bank knows the customer's affairs intimately over a period of time, there may be a finding of a special relationship in which case the undue influence may be presumed. In particular, the bank officer went right to the home and dealt with Mrs. Macdaid who had no business experience.

    c) The wife has the better case in duress and possibly undue influence.

20. a) This is not a breach of contract, it is void due to frustration, it is impossible to sell the antique car as it was destroyed in the storm, (events beyond their control).

    b) Cheryl is entitled to get her deposit back.

    c) If the storm occurred before the contract was made then the contract is void due to a common mistake, not frustration. The car was destroyed already and neither party knew it, they both made the same mistake, so the contract is void due to mistake. Cheryl can still get her deposit back if it is void due to mistake.

21. a) No, most likely Jason can claim that the contract is void due to frustration. The border guards refusing to allow him to enter the U.S. is an unexpected event beyond his control that makes it impossible for him to perform. The concert promoter may try to claim that it was due to Jason's own fault, but it is the border guard that is preventing him from crossing and in many cases people charged with offences (not yet convicted) are allowed to travel into the U.S.

    b) If Jason had been injured, then the contract could also be void due to frustration.

22. a) Because the message was sent in code, RCA would have no idea that it related to a large business transaction. The damages would not be reasonably foreseeable.

    b) Kerr could have told RCA of the significance of the transaction and asked it to guarantee transmission. Then, RCA could have taken special precautions and charged sufficient to cover the cost of the extra care and even insurance. (*Kerr S.S. Co. v. RCA 1927), N.E. 140 N.Y.C.A.*)

23. a) Economic duress is possible here. The shareholder undoubtedly knew that the corporation was about to make a public offering and could not disclose a lawsuit in its prospectus without seriously harming the result of the public offering. The delay of four years, combined with the timing of one week before the IPO, suggested blackmail.

    b) The directors will have to check with the promoters about the effect of such a lawsuit. From a legal point of view, the lawsuit should be commenced as soon as possible because delay may be taken as an indication that the corporation is not sincere. However, the promoters will not want to have a lawsuit until well after the stocks are established in the market.

24. a) Even though there is no express term, there may be an implied term. One of the tests for an implied term is the officious bystander test. What would a reasonable person who was listening to the making of the contract say if asked what the term of the contract should be if Colwood defaults? A reasonable bystander would probably say that the e-mail account should be shut down so that people sending e-mails would have their mail returned and know that Colwood was not receiving them.

    b) COL would probably raise the defense that the loss of the job opportunity was not reasonably foreseeable. That is arguable and contains a lot of subjective elements. There is no decided case on point. COL would also raise mitigation. This would be a more successful defense. Colwood would have to prove that she made reasonable efforts to find another job. If she found one in three months, that would be the limit of her damages for job loss. If she was not able to find a job at all, then she might well have a claim for a full year's salary but presumably not longer. There would be some limitation on the quantum of damages.

25. The company would plead that the use of the product by a human was not reasonably foreseeable. [Note: This case did not spring from the authors' imaginations but was reported in a newspaper. The report was at the time of the launch of the lawsuit in the U.S.; the results, if it went to trial, are not known.]

26. No, she made the assumption on her own. The gallery is entitled to get the best deal it can. Even if the price was far too high, it is not required to reveal this fact.

27. a) The correct answer is (iv). The nature of the remedy is damages for the benefit of the work done. Here, the benefit of having the exterior walls stripped of paint and

prepared for painting, with one wall completed, would result in damages possibly in the range of $2,500 to $3,000.

28. a) Specific performance. The requirement for the subject matter of the contract to be unique rather than simply difficult to replace or not as advantageous if substituted, sometimes needs to be stressed to students in order to thoroughly ground when this remedy will be available. Various other examples could be used to illustrate this issue. For example, a contract for the purchase of a very rare antique car when similar cars come on the market every year or so; the purchase of an original Picasso painting; or the purchase of one tonne of serpentine marble from Italy which will take eight months to replace from another dealer.

29. a) Clelland would bring an action for damages to put him in the same position he would have been if the contract had been performed. At issue will be whether or not Max Weill had assumed the obligation arising from the special circumstances of the potential three-year contract, so that such losses would be reasonably foreseeable at the time the contract was made.

    Clelland has an obligation to mitigate his damages by seeking out other sources of leather. In answering, the students should recommend that Clelland commence searching for other suppliers and indicate to Weill that he has accepted his breach of contract and will pursue his remedies in court.

30. a) The correct answer is (iii). The court will amend the contract to reflect the originally agreed on price of $1,500 and require Hamada to pay that amount.

31. a) The court will award only the loss of profits after expenses.

    b) The court would not award the retailer any damages. The retailer is required to take whatever steps it can to lessen the loss. If it could avoid any loss, it has to do that.

32. a) The loss of one month's profit was reasonably foreseeable. The damage to the brewery's reputation was also reasonably foreseeable.

    b) When supplying product in the food industry, the standard of care has to be very high. It is well known that the public will react strongly to any suggestion of danger in the food. The reputation loss is well within the reasonable foreseeability test.

33. a) The loss recoverable and damages are:

    i) Cost of repair—$5,000, special or direct damages

    ii) Loss of profit—$10,000, special or direct damages

    iii) Loss of future business—quantified by expert-general or consequential damages

    b) The types of damages are given above. In the authors' jurisdictions, special and general damages relate to civil procedure terminology, direct and consequential damages are terms for the corresponding types of damages in substantive contract law terms.

34. a) The primary topic related to damages is discussed under "Terminology" in the text. There are many other relevant topics discussed throughout the book which students will be able to identify as relating to this clause. Some of the other topics are:

    1) Exemption clauses

    2) Warranties, conditions

3) Reasonable foreseeability/actual notice (Hadley v. Bucksendale)
4) Agency

b) See the answer to Question 1, Closing Questions in Chapter 7.

c) This phrase makes explicit that the price is lower because of the exemption clause.

35. a) The law does not make a person who breached a contract responsible for all damages that occur in the chain of causation. There is a limit on policy grounds by the concept of reasonable foreseeability.

b) *Hadley v. Baxendale*.

c) The party could give actual notice at the time of the contract of the unexpected or unforeseeable consequences, for example, a one time, large contract out of the normal course of business.

36. a) The claim would be for:
1) Cost of repair of the pump (direct)
2) Loss of profit on the gravel pit contract (consequential)

b) He would have to prove that the loss of profit on a gravel pit contract was reasonably foreseeable by the vendor. The purchaser would argue that the vendor knew that the hydraulic lift was going to be used in a business and it was reasonably foreseeable that normal profits might be lost. This gravel pit contract was simply in the normal course of business. Alternatively, he could establish that he told the vendor of this contract at the time so the vendor had actual notice of it.

37. a) Yes, Joe's cancellation is a breach of contract. The fact that he can later get a better deal at another place is not justification for cancellation of a contract. Joe's can cancel the contract but as this is a breach, Joe's will have to pay damages.

b) The manufacturer would be able to claim loss of profit relating to the balance of the contract. It would not be able to get judgment for the full contract price, so it should not make the units and attempt to ship them. The manufacturer would not be able to get punitive damages against Joe's Tavern on the basis that Joe's intentionally breached the contract. The test for punitive damages is much higher. In fact, respected judges (e.g., Cadozo) have stated that there is no moral sanction to be given for an intentional breach of contract. Anyone can breach a contract but must pay the economic consequences to the injured party.

c) The principles are intended to achieve an economic result. The manufacturer will get its loss of profit as being in the same position as if Joe had fulfilled the contract. The manufacturer need not make the extra units, which would be a waste. Joe's could, depending on the circumstances, still be better off. The tavern may save enough from the new contract to pay the loss of profits to the first manufacturer and come out ahead.

38. a) i) Used Car Bill of Sale:
—Clause 7 applies if the purchaser refuses to take delivery.
—Clause 9 applies if the purchaser takes delivery but later defaults on an installment payment.
—Clause 10 applies if the agreement is cancelled by mutual agreement.

ii) Purchase Order
—Clause 11. If delivery is delayed, the purchaser can cancel, purchase substitutes, and claim the difference in costs from the supplier. If the purchaser rejects for non-conformance, the purchaser can claim the difference in replacement cost, cost of removing non-conforming goods, and installing replacements.

iii) Courier Bill of Lading—The limitation clause is on the face of the document entitled "Limitation of liability. Important, please read. There is a $2.00 per pound limit." This clause incorporates term 3 by reference.

b) Yes, this term is consistent with the principle respecting remoteness, but goes even further by saying that notwithstanding any notice of possible unusual damage, the courier is not accepting responsibility.

c) The principles of law that apply are those of penalty and liquidated damages. Here the claim is similar to the expectation interest principle, so it is a liquidated damage clause. It does not charge an amount far in excess of the ordinary award of damages as a penalty to ensure performance.

Chapter 8

Special Business Contracts and Consumer Protection

Section I Answers to Business Law—Applied Questions

1. a) The key problem is whether the car has been delivered. If there is any indication that customers should take the procedures Ken did when the shop is closed, then there is likely a delivery.
2. a) Was the failure to install the traps negligence? If so, Li would bear the loss. In this scenario, it may not have been negligence, given the industry standard, but it would depend on what Li ought to have known given this particular building and location.
3. a) Yes, in misdirecting the package.
   b) Yes.
   c) If you can make the argument that the ad formed part of the contract, yes—but this would be a difficult one to make fly. Even if you could successfully argue so, damages would be limited to a refund of the delivery fee.
   d) Likely, the clause would be effective, since there is a signed bill of lading containing a statutory exemption.
4. a) He can go via a court application to post security.
   b) Yes, see above.
   c) Yes, the proceeds are applied to the cost of sale, the custodian's fee, and any left over goes back to the owner.
5. a) This is a question of whether this is a good or service. Based on the ter Neuzen case, it would be viewed as a service, and not covered under the SOGA.
6. a) Depending on the drafting of the particular legislation (leases are covered in the B.C. legislation), this would not be covered unless or until the transaction became a sale.
7. a) Though you could potentially argue either way, this would not normally be viewed as a sale by sample. The inspection of stock is more a matter of seeing the general type of merchandise provided by this seller.

b) There is a potential breach of merchantable quality, though an inspection should have revealed the problem. Nori could avoid liability.

c) The problem is a failure to correspond to the quality of the sample, though again, if the defect was apparent, there would be no breach.

8. a) The *Sale of Goods Act* implies terms in exactly this type of situation.

b) One of the qualifications for the implication of a term of merchantability or suitability for ordinary use is that it is a sale by description. Here, the jam was ordered from a catalog and so it is a sale by description.

c) The fact that the jam was sold at a discount does not displace the implied condition of merchantability. There would have to be an express term excluding the implied condition and there was none in the agreement.

9. a) This is the factual basis of *Donoghue v. Stevenson* placed in a contract remedy situation. Even though the retailer was not negligent, the *Sale of Goods Act* implies a condition of suitability for ordinary use into the contract of sale. Therefore, the store owner is liable. The condition of merchantability has been expanded to include product safety (*Gee v. White Spot*).

b) The fact that the retailer did not bottle the drink is not a valid defence. This highlights the difference between a tort remedy and a contract remedy.

c) Paik would have a contract with the supplier with the same implied terms and could sue the supplier. However, if the supplier is out of the country or is insolvent, the retailer is left without an ability to recover against the supplier. Retailers have to be careful in selecting suppliers. They also must carry insurance for this type of risk.

10. a) There was no implied term of fitness for use. The hardware store was in the business of selling clothesline wire; however, it probably was not in the business of selling wire for use in a lift. Even if it was, the hardware store was not told of the purpose and therefore, Larsson was not relying on the hardware store's advice.

11. a) Yes, the contract contained a condition of fitness for use implied by the *Sale of Goods Act*. The *Sale of Goods Act* applies to used goods. The other conditions for implication of the fitness for use conditions are met. The seller was in the business of selling these types of machines, and the specific use was made known.

12. a) The condition of merchantability under the *Sale of Goods Act* did not apply as it can be excluded by an exemption clause. The "as is" term is such an exemption clause. The *Consumer Protection Act* does not apply to this situation as it is a business purchase. You can contrast this situation with a consumer purchase. In most provinces a car cannot be sold "as is" to a consumer because the consumer protection legislation negates all exemption clauses including the "as is." This is a surprising result because many cars are sold "as is" and consumers do not realize their rights. Private sales are not consumer transactions so cars can be sold "as is" by private sale.

b) Singh should have had the vehicle inspected by his own mechanic. He also should have struck out the "as is" to take advantage of the *Sale of Goods Act* warranty. Even better, he should have bargained for an express warranty as a term of the contract.

It should be noted that certificates of mechanical fitness only deal with certain items; they are not a replacement for a warranty.

13. a) and b) The trademark or brand name purchase exemption is set out in the *Sale of Goods Act*. However, the courts have simply ignored it because brand names were relatively rare in the seventeenth century when the *Sale of Goods Act* provision was drafted. The trademark was then the guarantee of quality. In today's market most products are brand names; and in accordance with commercial practice, the condition of fitness for use is implied here as all of the other qualifications for its implication are met.

14. a) Yes, the exemption provisions are effective. This case does not mention any concerns about notice, strict interpretation, etc., which are ways to avoid exemption clauses covered later in the chapter. It simply focuses on the fact that it is possible to exclude warranties implied by the *Sale of Goods Act* in a business-to-business contract.

    b) The *Sale of Goods Act* applies to used items as it applies to the sale of all goods. Of course, a used item is not expected to be in the same condition as a new one.

15. a) This was a consumer sale. Therefore, the *Consumer Protection Act* applies.

    b) There was an express warranty. However, the warranty excluded any guarantee regarding the filtration system. This question was drafted to draw the students' attention to the importance of reading warranties to see what they cover.

    c) This is a sale of goods, so the *Sale of Goods Act* applies. Both implied warranty conditions might be implied, i.e, merchantability and fitness for use. In any event, because it is a consumer transaction, the exclusion of a warranty of the filtration system is ineffective.

16. a) On the facts, there were no agreed warranties. In the ordinary purchase situation, there may be an express warranty by reason of a claim such as "removes even the toughest stains." However, there was an implied warranty of merchantability, i.e., fit for the ordinary use of a stain remover for clothing.

    b) The discoloration was a breach of the implied warranty since a stain remover should not discolor a garment.

    c) The exclusion clause would not be effective because of the *Consumer Protection Act*. Although not covered in this section, a second reason it would not be effective is that it was not even a term of the contract. To be a term of the contract, the warranty would have to be on the outside of the box and brought to the consumer's attention at the time of the purchase.

    d) The *Sale of Goods Act* makes the retailer liable on the warranty. The retailer cannot pass it off to the manufacturer. In practice, a retailer will take the damaged item and return it to the manufacturer or distributor, and the manufacturer will make the refund. However, if the manufacturer refuses, the retailer will have to pay.

    e) The retailer would have the problem of trying to sue in Mexico City. The damaged garment might only be worth about $100.00. It is hardly worth the cost of bringing an action in a foreign country to recover $100.00. In fact, the legal costs of bringing an action in a foreign country could easily amount to about $50,000.00. So, only an extremely large case would ever justify such an action. In a report done by a judge of the Ontario Court, it was stated that the average legal fees in a civil trial in Ontario in 1994 were $40,000.00.

    f) If the manufacturer sales confirmation clause contains an exemption clause, it may be effective. This is not a consumer sale. This leads to the anomalous

situation that the *Consumer Protection Act* makes the retailer, who is only a conduit, liable but allows a manufacturer to escape. The retailer faces the same practical problems as above. In bringing an action in a foreign country, it is very expensive. Also, the laws may be different and allow the manufacturer protection from foreign companies.

17. a) The representation is: no payments or interest for six months.
    b) The two possible interpretations are:
        i) No interest will be charged over the six-month period. It will begin to run at the seventh month.
        ii) No interest payment will be required over the six-month period but interest will run during it.
    c) The court will apply the test of the credulous and inexperienced consumer.
    d) Likely the consumer's interpretation will win out over the businesses'.
18. a) The representation was: **Great Rates** "$199 to Europe, some even lower call 1-900-555-5555; $10 per call."
    b) It gave the impression of a bargain, of rates that were lower than market rates.
    c) The test is the incredulous and inexperienced consumer.
19. a) This would be a violation because a substantial amount of the product had not been sold at that price over a significant period of time, such as six months.
    b) No, the MSRP cannot be used as the product may never have been sold at that price.

Section 2 Answers to Closing Questions

1. a) The burden is on the custodian to show that there was no negligence, based on the Hogarth case.
2. The correct answer is (a).
3. The correct answer is (a).
4. a) This is a bailment. There was a delivery of goods for some purpose, with the intention that it be returned to the owner later. Wanda is the bailor and Fred is the bailee or custodian.
    b) This may well be viewed as for value, because of the use of the property.
    c) The insurance proceeds.
5. a) Since this is a bailment for value, the courier would have to prove there was no negligence (Hogarth).
    b) Since this is a statutory limitation, you would generally be unable to claim inadequate notice. However, the courts usually require a signed bill of lading to uphold such exemption clauses, so there could be an argument in Cathcart's favor. Also, if the item was never delivered, there could be an argument based on fundamental breach.

6. a) Bailment.

   b) This is not an item of inventory. Electronic Edge has possession only, and not ownership.

   c) To be paid for the repair work and there would be a lien on that basis.

7. a) i) There was never a transfer of possession to Chez Alphred, therefore, no.
   ii) Possibly negligence.

   b) i) There was a bailment. The question is, did the attendant use all reasonable care? It is possible he did not, and Alison would recover damages.

   c) i) This is a bailment. The question is, does the exemption clause apply? Inadequate notice may work in Alison's favor, especially since she noticed the clause after the bailment had occurred.

8. This question is meant to encourage discussion of what should be classified as goods. Since when you buy software, you are buying information, and not the CD per se, it would not be classified as a good.

9. a) Clause 2 is the relevant clause to look at in this question. The car dealership included clause 2 to avoid liability for merchantable quality.

   b) (i) This question is intended to provide practice in reading a contract with a view to SOGA terms. You may want to make special note of clauses 4 and 5, which specifically deal with SOGA issues.
   (ii) This question should read "review paragraph 3." The goods are at the seller's risk until delivery. Otherwise, they would be at the buyer's risk once irrevocably set aside for the contract (rule 5).

10. a) These are definitely goods of questionable merchantable quality. Discussion could also include why this is not a matter of fitness for a particular purpose.

    b) Rescission, because of the length of the contract remaining.

11. a) These goods correspond to any description, and are of merchantable quality. Are they fit for a particular purpose that was made known to the seller? Perhaps, though you could argue they were to go in the house as furniture, which is no particular or unique purpose for such an item.

    b) He can argue that he delivered exactly what was ordered under the contract. Even if there is some argument that the unit is not fit for a particular purpose, Alison did not rely on Harold.

    c) When the unit is in a deliverable state and irrevocably set aside for the contract.

12. a) No, because there has not been any breach of the sales contract.

    b) Arguably yes, since you could claim this creates an obligation to refund under the sales contract.

13. a) No, Gorjeta is not correct. The *Sale of Goods Act* implies a warranty of merchantability in every contract. Consumer protection acts make any attempts to exclude that warranty void. The car must be in good condition for a used car for some time, say, 30 days. The offer of an external warranty does not exclude the implied warranty of the *Sale of Goods Act*.

14. a) Tina will only have to pay $1,000 for her repair as Alliance has exceeded the estimate by 30 per cent. It can only exceed the estimate by 10 per cent and since it is more than that she only pays the original price on the estimate.

    b) Alliance should have told Tina of the problems and had a signed agreement for the price increase.

15. a) If at any date after May 31 John had given Stony Cove a written letter that he wanted to cancel the contract because the delivery of the boat was more than 30 days late he could get out of the deal.

    b) Stony Cove cannot add charge $100 as a luxury tax as it is not a legitimate tax. Stony Cove should also have stated the interest rate as an annual rate, not just a monthly rate. Since it is just a monthly rate, the maximum it can charge is only 5 per cent under the federal *Interest Act*.

16. a) purchase of a time share condominium at a ski resort for 1 week per year -10 day cooling off period

    b) purchase of new computer bought at a flea market – no cooling off period

    c) 2 year lease of a new gas water heater – 20 day cooling off period

    d) purchase of cosmetics from a seller who came to your home to make the sale – 10 day cooling off period

    e) a contract for 3 months of yoga lessons – 10 day cooling off period

    f) purchase of a new house that has just been built – no cooling off period

    g) a contract for a $200,000 mortgage on a condominium – no cooling off period

    h) a $300 loan for a 2 week period from a pay day loan company – 2 day cooling off period

17. a) Richard's actual financial loss was the cost of two years' subscription, likely under $50.

    b) The purpose of the consumer protection act is to protect all consumers so the standard must not be set by sophisticated consumers or even the average consumer, but those of the lowest level of sophistication.

    c) The purpose of the statute is to deter businesses from using misleading advertising and not to benefit any individual consumer.

    d) There is an argument that punitive damages should never go to the individual consumer but only go to fund the relevant agencies such as, in this case, the Québec consumer protection agency. The consumer should get his entire legal costs.

    e) Richard has never disclosed his reasons so any answer is speculative. It appears that this was a business venture in the hope of getting an award of $800,000 or so. The elements that suggest this are: he sued in contract for damages, which could not have been done if he laid a complaint to the Bureau. He likely sued under the Québec statue rather than the Competition Act because he was in Québec and the letter was sent in English only with no French version.

    The legal cost to pursue this matter would be significant. At a minimum they would likely be:

    Trial – $50,000

Court of Appeal – $50,000

Supreme Court of Canada – $100,000

Very likely he would have made an arrangement with his law firm for a contingency arrangement so the lawyers got a share of any winnings.

One factor in influencing the low punitive damages award may have been the Court's desire to discourage civil actions which were not to claim an actual loss but gain a windfall through punitive damages. The costs awards were conservative. It is unlikely that the total of the damages and costs would cover the entire legal bill. This would also discourage lawyers from taking this type of case on a contingency.

18. a) The relevant for provision of the Act would be Predatory Pricing under the Abuse of Dominance provision. Note the criminal section s.50 (1)(c) has been repealed.

    b) The key consideration would be whether this could affect competition by potentially driving a competitor out of business, such as, a below cost price maintained for a lengthy time. The pricing policy under consideration is unlikely to drive a competitor out of the market, but more likely to promote lower prices, which the Competition Bureau wants to promote.

    c) Predatory Pricing under Abuse of Dominance is a Civil Reviewable Matter and subject to a Prohibition Order and possibly an AMP.

19. a) a) Yes, the lists are going to be used to keep prices up. So the exchange could very well violate the Conspiracy section of the Act. It does not matter that representatives of the businesses do not meet or speak. See on the Bureau website its Bulletin: Competition Collaboration Guidelines, Information Sharing Agreements, Competitively Sensitive Information.

20. a) The representation was: no further copies of the group's last CD would be available or would be manufactured after June 30. It was not true because there were already plans for a re-issue.

    b) Yes, misleading advertising.

    c) The interpretation of a credulous and inexperienced consumer.

Chapter 9

The Organization of a Business

Section I Answers to Business Law—Applied Questions

1. a) No, the bakeries are not partners.

   b) Yes, corporations can form a partnership. Corporations are persons and so can form a partnership in the same way as human beings can.

   c) It does not matter if the businesses have no formal partnership agreement or even an informal oral understanding. The law will imply a partnership when one of the three factors in the Critical Concepts is present. However, none are here. Even though there was an ongoing relationship of combining orders, there was no intention to share, or actual sharing of profits and losses.

2. a) Yes, the students are partners. Even though they did not think of becoming partners, the court will imply a partnership because they made a joint contribution of the capital of the business by contributing to the $500.00 deposit. They shared profits and they jointly managed the business.

3. a) DiCarlo was correct. This was a partnership even though there was no written partnership agreement. Therefore, the *Partnership Act* applies. Section 24(1) determines that partners are entitled to share equally in the profits of the business. Even if they contributed unequally as to capital, the sharing of the profits is still equal.

   Simone could require that DiCarlo contribute the $5,000.00, even by way of set-off, but DiCarlo would be entitled to half of the profits. Even though Simone generated far more sales then DiCarlo, Simone is not entitled to any credit for that by Section 24(6) of the *Partnership Act*. A partner is not entitled to remuneration for work done for the partnership.

   b) Simone should have had a written partnership agreement dealing with these points. This would exclude application of the *Partnership Act*.

4. a) No, Section 24(6) applies.

   b) Again, Simone needed a written term in the partnership agreement providing for payment of partners on a time basis.

5. a) X is not a partner. The Partnership Act, Section 24(7), states that a new partner can only be admitted on consent of all partners.

6. a) Tweed had a right to a share in the fee. The Armroster matter was a business opportunity of the firms. Harris owed a fiduciary duty to Tweed to tell him of the opportunity. Even though Harris did the work on his own, the fee has to go to the partnership.

7. a) Ghandi was liable to re-pay the money. This is one of the reasons you have to pick your partners carefully. If one partner fraudulently takes money of a client on deposit, the innocent partner has to pay it back.

8. a) Yes, Pappas was personally liable. This was a contract made by a partner in the ordinary course of business. There is nothing unusual about speculating on an item.

   b) There is a good argument that Pappas was not liable on the contract for the supply of cameras. This is outside the ordinary course of the music store business.

   c) Such a restriction in the partnership agreement would not have helped Pappas unless notice was given to the suppliers. This is the agency law expression of the indoor management rule.

9. a) The record company could seize any assets belonging to Pappas. The half interest in More Music was valueless, but the house or the car could be seized and sold for the amount owing on the record company contract.

10. a) Bereskin does not have a right to become a partner. A new partner could be admitted to a partnership only with the consent of all the other partners.

11. a) No, because by the terms of a shotgun buy-sell, if Castellian offers $10,000.00, Lynkowski can buy the partnership at that price.

12. a) The creditor has a right to the assets of the partnership, which includes the $10,000 capital contribution by C. This apparently has been used up. As a partner, C is also personally liable for the entire judgment of $100,000. The creditor can choose to collect against any or all of the partners. This is the problem if one partner has assets and the other does not, the wealthy partner will end up paying off the whole debt. Of course, a partner who pays can seek contribution from the other partners. But the deep pocket can be made to pay first.

   b) C's liability is not limited because he is a limited partner. He must register that limited partnership in order to gain the protection of a limited partnership.

13. a) Carswell, as president (employee), is an agent of Sunseekers.

   b) The contract made by an agent binds only the principal. This, of course, depends on the other party knowing that the contract is negotiated with an agent. The issue would be whether or not signing the receipt "Sunseekers per Carswell, President" is sufficient notice to Sosnovitch. It probably would be but that is an open question.

   c) Assuming the notice to be sufficient, then Carswell would not be personally liable. An agent is not liable on a contract if the contract is made between the third party and the principal.

   d) Sosnovich could have had Carswell sign personally and not as President of the corporation.

14. a) Kikuta, an employee, was an agent for his employer, Hakimoto Electronics Inc.

    b) Kikuta did not have actual authority because of the restriction. However, Kikuta did have apparent authority based on previous practice. Therefore, the contract signed by Kikuta and Heider was a binding contract between the principal, Hakimoto, and Heider.

    c) Hakimoto's restrictions were not effective because they were not communicated to Heider of Macrosoft (the indoor management rule).

    d) Hakimoto cannot cancel the contract.

15. a) Rob McGregor had actual authority for the first four months. On March 1, he had apparent authority based on the prior activities. The mother did not communicate the revocation of the authority to the tenants, so McGregor was still acting under apparent authority.

    b) The tenants do not have to pay a second time. The mother (principal) was bound by the acts of her son (agent) as they were done on her behalf and in the scope of his apparent authority.

16. a) When Cadillac approved the deal, it ratified it.

    b) The ratification created an agency relationship between Nicola and Cadillac.

    c) The agency relationship established by ratification created a contract between Cadillac and the owner of the machinery.

    d) Since Nicola was an agent, it has to pay a reasonable fee for service even if there was not an express agreement to pay a commission. As the normal finder's fee was 10 percent, she would get that rate.

Section 2 Answers to Closing Questions

1. a) $200,000 and $500,000. The partners personal assets are the car and the inheritance.

    b) This business is economy-sensitive, the price of fuel has an impact on travel, and it is impacted by direct booking over the web.

    c) The risks are the inexperience in travel, personal liability on the loan, and the risk of losing the inheritance due to partnership debt.

    d) Kathryn could be a limited partner if she did not want to participate in the running of the business. Otherwise, they could use some of the creditor-proofing ideas mentioned in the text.

    e) This was not incurred in the normal course of partnership business, and is therefore not enforceable against it.

2. a) Parties can agree to substitute their own agreement for that contained in the legislation.

    b) It goes to some length to uphold freedom of contract between individuals, since their agreement would supercede legislation.

    c) This may actually favor the party with the stronger bargaining position. Consumer protection legislation often does not allow varying its terms by agreement.

3. a) A partnership existed between Harris Investments and Mitsu Enterprises, as they met one or more of the tests the court would use in deciding whether a partnership exists. Harris would then be liable as a partner for the losses suffered by the vendor.
4. The correct answers are (a), (b), and (d).
5. These are important issues if the partnership has no means to pay:
   a) A partner has a fiduciary duty to the other partners.
   b) A partner is liable personally on any contracts made on behalf of the partnership even though that partner did not personally enter into the contract on behalf of the partnership.
   c) A partner is liable for any torts committed by other partners in the partnership business.
   d) The partnership and individual partners are liable for any torts committed by employees of the partnership in the course of the partnership's business by vicarious liability.
6. a) Ally is not bound by the partnership agreement. Since she is a minor, she may repudiate the agreement at any time prior to attaining the age of majority. In doing so she is not liable for the obligations of the partnership.
   b) Taiko, as a partner over the age of majority, is responsible for any outstanding partnership debts.
7. a) Will must tell his partners about the medallion. As a partner he owes a fiduciary duty to the other members of the partnership, and may not personally take advantage of a business opportunity in the same type of business in which the partnership is involved.
   b) If Will proceeds with his current plan he will be liable to the partnership for any profits he might make from sales of the medallion through Loxana Sales. Will may also face damages other than an accounting for profits as a result of his breach of fiduciary duty.
8. a) This is within the scope of authority.
   b) Not within the scope of authority.
   c) Could be within the scope of authority, as ancillary thereto.
   d) Could be within the scope of authority, as ancillary thereto.
   e) Breach of fiduciary duty, by self-profit.
   f) Arguably within the scope of authority, as ancillary thereto.
   g) Possible negligence on the part of the agent.
   h) Breach of fiduciary duty, by self-profit.
   i) Possible negligence on the part of the agent.
9. a) Chin would seek to enforce his contract of insurance with Metro Life. He would bring his action against Metro Life as Geen was an agent for them, and therefore the firm is bound by the actions of the agent who accepted Chin's forms and check.

b) No, Geen has not met the terms of the agency relationship as she has not discharged her task with reasonable care and skill, which a principal would expect from his agent.

c) Geen has breached her fiduciary duty to act in the best interests of her principal, the second mortgage, when she agreed to negotiate the terms of the second mortgage for Chin. Any loss experienced by the second mortgagee would be made up by Geen.

d) Geen, as a real estate agent, must always discharge her task with reasonable care and skill, and not breach her fiduciary duty of acting in the best interest of the principal in any transaction she undertakes. Should there be opportunities that she wishes to take part in, full disclosure and the consent of her principal would be required in order to ensure that she is not in a conflict-of-interest situation.

10. a) Corban has breached his fiduciary duty, which requires him to act in good faith, and in the best interest of his principal/client at all times. Corban has placed him self in a conflict-of-interest situation where his interests are at odds with those of the client because of secret commissions or kickbacks from the mutual fund.

b) Corban owed his duty to Playfair, who was his client.

c) As a result of a court action, Corban would be required to make up any loss suffered by Playfair as a result of the breach of that fiduciary duty.

11. No, she is not. She is only half-right, which is dangerous. While there is no such duty generally, there is a duty on the franchisor to negotiate with a potential franchisee in good faith imposed under the Franchise Acts.

12. No, Mustafa is not correct. A partner has a fiduciary duty to disclose any and all business opportunities of the partnership to the other partners. It does not matter that the opportunity came from a family contact.

Chapter 10

Corporate Law and White-Collar Crime

Section 1 Answers to Business Law—Applied Questions

1. a) The creditor was not correct. A corporation is a separate entity from its shareholders. It does not cease to exist when a shareholder dies. In contrast, a partnership does cease when one of the partners dies.

2. a) This question is designed to bring students' attention to the fact that the execution clause on the document does not clearly show that she was signing on behalf of a corporation. On the basis of the Radocsay case, she may not be able to establish that she was intending to avoid personal liability.

   You might also discuss a practical problem in relying on the finance company representative's testimony. He may have disappeared and be untraceable. Also, if he feels that his job is on the line, he may have a convenient lapse of memory. It is very risky to have written documents that do not reflect accurately the agreement. There is also the problem of the parol evidence rule—if she tried to introduce the statements by the finance company representative, that it was agreed to be corporate liability, the finance company would object, saying that there was no ambiguity on the face of the documents.

   b) To ensure a corporate, not personal liability, Marathon should have the loan repayment agreement execution clause altered to show:

   Marathon Fashions, Inc.
   per:

   *Eleanor Marathon*_____
   Eleanor Marathon, President

3. a) The fact that the profits were paid to Larry by dividends or otherwise is not a basis for piercing the corporate veil.

   b) Fairness is not a ground for piercing the corporate veil.

c) Yes, if it can be established that Larry knew of the problem, selling the property without disclosing this (latent) defect would be fraud. The Corporate form cannot be used to escape liability for fraud.

Note: A possible ground for piercing the corporate veil not discussed in the text is that when the corporation began business, it was undercapitalized so it could not meet obligations in the ordinary course of business. This is a ground that is possibly evolving. It appears to be somewhat established in the US; but not clearly established yet in Canada.

4. a) The common-law remedy is called piercing the corporate veil; the statutory remedy under the Business Corporations Acts is called the oppression remedy.

   b) It is completely unfair that Mary not get paid and has to live at the welfare standard with her three children while Sam lives an upscale life. Justice cries out! But unfortunately that is not a ground for piercing the corporate veil.

   c) Mary would have to prove some use of the corporate form that she could not have provided for, such as, the transfer out of assets or the shareholders starting to put all of their new business through a new corporate form leaving the present form to become insolvent.

   d) She could have asked for a personal guarantee (and if it was refused she should have been highly suspicious), done a credit check on the purchaser corporation, structured the delivery of product so only a small amount went at any one time and was paid for before another shipment was made. In the next chapter, there will be a discussion on registering a purchase money security interest, but this would only be of value to reclaim unsold goods. It would not be of much assistance if the purchaser corporation had sold all of Mary's candles and used the money to pay its normal business expenses.

5. a) Keho does have the right to call a special meeting of the corporation even if the board of directors refuses to do so. However, she requires a certain percentage of the shareholders, which is often difficult to obtain in a large public company.

   b) No, a shareholder has only a limited right to information, and that does not include the company's confidential information by way of business opportunities.

6. a) Cole is a shareholder, and has the shareholder oppression remedy.

   b) There are any number of the items in Section 234(3) of the *Canada Business Corporations Act* that could assist Cole. Because of the animosity, the most common remedy given to shareholders in this type of situation is item (f) requiring the corporation or the other shareholders to buy out the shareholder at fair market value.

      The matter of compensation for possible wrongful dismissal would have to be a separate action. In that status, Cole would not be complaining as a shareholder but as an employee.

7. a) Montgomery has the shareholder oppression remedy.

   b) There are a number of possible remedies; however, the question is drafted to call students' attention to item (h). The court would likely set aside this contract because the other parties are both directors. Depending on the circumstances, it might be appropriate to have Kitchener and Clive buy Montgomery's shares as it would be impossible for Montgomery to trust the other two in any future deals.

8. a) They could base their action on a breach of fiduciary duty owed by a director to the corporation.

   b) It would likely be successful as Arnott would know many of the trade secrets and confidential business plans of his company. The company is certainly at risk of having this important confidential information leaked. It would not be necessary for the company to prove actual leaking of confidential information. The high probability of risk would be enough.

9. a) Yes, Enviro Chemicals would be successful from stopping Elliot and the lab employee and their new company from stealing this trade secret or confidential information. Elliot owes a fiduciary duty as a director of the company whether there is a written confidentiality agreement or not. The employee probably owes a duty as well. However, Elliot's duty is enough for the court to grant an injunction.

   b) The court would also stop Elliot from directly contacting Enviro Chemical's customers in Ontario for a period of about six months. Elliot could put a public announcement in newspapers or do a general mailing to the industry, which includes these customers, but cannot single them out and approach them directly.

10. a) No, lack of negligence is not a defense. The defense is due diligence. This requires positive acts. Williams must have done everything within reason to ensure that the money was in fact remitted. The test of due diligence is a high one.

    b) Use of the money for a proper business purpose is not a defense.

    c) Honest belief is not a defense.

    d) No, on the Soper ratio, Williams would have had to check to see that the checks were actually being remitted. This is an example of the high standard required by due diligence.

11. a) Yes, the corporation is responsible for the torts of its agents committed within the scope of their employment (vicarious liability).

    b) No, Shuster is not liable. He was a director of the corporation, but was not personally involved in committing the tort.

    c) Yes, Russell is liable because she was personally involved. The fact that she was acting in the best interest of the corporation is not a defense. The down side of suing is that she has no money so a judgment against her would be a paper judgment. If the corporation also has no money, the lawsuit would be a waste in that nothing could be collected. Plaintiffs' lawyers often encounter this problem. Plaintiffs believe that if they get a judgment, they will magically get their money. However, if the defendants have no assets, the judgment will be of no value.

Section 2 Answers to Closing Questions

1. Yes, a corporation is a person with all of the rights of a person. Thus, strange as it may seem, Jane Rowe can form a partnership with Jane Rowe Ltd., which is a separate person in law.

2. a) The corporation only is liable. Joe Smith, himself is not liable. The corporation may have no assets and no income with which to pay the rent.

b) Ben, as landlord, should do a credit evaluation the same as a bank would do. Some steps would be:

i) A credit check, credit agencies such as Dunn and Bradsteet will do single credit checks for businesses without the requirement for membership. The going rate is $35.00 per check at the time of publication. Bank managers can also assist with information on how to do credit checks.

ii) Request reference letters from previous landlords and actually call them.

3. a) Brown Corp. (Parent)
White Corp. (Wholly owned subsidiary)
Systems Inc.

No, Systems Inc. has made a contract only with White Corporation (privity of contract).

b) No, even if the salesman's statements were fraudulent, the salesman was an agent of White Corp. There will be personal liability on the salesman for the fraudulent (or negligent) statement as he was personally involved in making them. White Corp. would also be liable by vicarious liability. However, no act of any agent of Brown Corporation was fraudulent.

4. a) A numbered company probably has no assets or income. A thousand dollars' deposit is too low. It amounts to an option to purchase for that price for 90 days in favor of the prospective purchaser. If the market drops, the purchaser could walk away and Eugene would only have a lawsuit against a shell company. The "expensive" look of the purchaser's president should not be taken at face value.

Eugene should demand a significantly higher deposit of at least 10 percent of the sale price and a personal guarantee by the president. He should also do a credit check on the president. The personal guarantee will be useless if the president has a poor credit rating.

You might ask the class if there would be any difference in dealing with this purchaser and purchasers who were a husband and wife with two children.

5. a) i) Corbin is an individual or natural person.

ii) Jane Smart and Daughters, indicates a business name or perhaps a partnership name; neither are legal persons.

iii) Bill and Company same as (ii).

iv) Microsoft Inc. is a corporation and is a legal (artificial) person.

b) *Individual* is a term name for a human and the only one is Corbin.

6. a) In answering, students should review the benefits and liabilities of such issues related to partnerships and corporations as:

- Management
- Decision-making
- Ownership
- Liability
- The creation of the business entity
- The raising of capital (particularly since there is a manager who wishes to invest some money)
- Ownership
- Ownership involvement

- Ownership agreements
- Division of management duties and responsibility
- Limitation of liability

The students should then provide a recommendation as to the type of operation that would be best suited to the needs of the principals. Undoubtedly this would be a corporation, given the exposure that appears to exist in the operation.

b) They are currently running a partnership even though they may not be aware of it.

7. a) i) May Ling will get judgment against Marques for the loss of 50,000.00 paid to the vendor of the house that May Ling purchased relying on the deal with Marques.

ii) Marques will get a judgment for her loss against Madison, which will include the $50,000.00 deposit. However, if Madison Corporation has no assets, Marques will still have to pay Ling.

b) There are no grounds to pierce the corporate veil. All of the "fairness" arguments about Marques being poor and Rick Madison being wealthy are of no relevance here. This illustrates the difference between fairness and law.

c) Yes, Madison did not use the required phrase "on behalf of the corporation to be incorporated" so he is personally liable.

d) Marques could have insisted on a personal guarantee from Rick Madison.

e) Yes, a family is more likely to try harder to close the deal and less likely to walk away from a deal.

8. a) Wally is wrong. The pool table is an asset of the corporation and Wally, as a shareholder, has no direct rights over the assets of the corporation.

9. a) As a 20 percent shareholder of the corporation, Adam could apply to the court for an order under the special sections of the *Corporations Act* relating to shareholder oppression. Failing success in convincing a judge that oppression has occurred and obtaining one of the remedies available under the Act, Adam may have been successfully squeezed out of any active role in the business and unable to sell his shares.

10. a) Yes, very likely since Chung and the corporation are separate persons in law and can contract with each other. Even if the payment of $1,000,000 is exorbitant, that probably would not be a reason in contract law to set the agreement aside. However, this question is not meant to focus on contract law but on shareholders' oppression.

b) As a shareholder he may have the oppression remedy. The $1,000,000 is likely out of all proportion to a normal termination amount and constitutes an abuse of power by Chung which is "oppressive."

11. a) Control will shift from Dvorak to the other three shareholders. This question illustrates the problem of the dilution of share holdings. Because the shares are issued per shareholder and not proportionately per share holdings, Dvorak's majority holding will be diluted and she will lose control.

b) The oppression remedy is not limited to minority shareholders. A majority shareholder can be oppressed and she can seek court assistance under section 234(3)(a) to stop the issuance of the new shares.

12. a) Overall, it appears that Manian has not acted properly in this situation. Consequently, the remedy available to UCM Plastics would be to obtain an accounting of the profits made by Manian's Corporation arising from his breach of fiduciary duty to UCM Plastics as a director. From the fact situation it could be argued that, at the time of taking the vote on whether to purchase the technology, Manian's decision, as demonstrated by his vote, was influenced by other elements since he subsequently incorporated and purchased the process.

    This question could be used to generate class discussion as to the nature and extent of a director's obligation to act in the best interests of the corporation at all times and not to put himself/herself in a position of conflict of interest. The fact situation is sufficiently open that it could be argued Manian had voted appropriately at the time and only subsequently decided to pursue or assume the risk of whether this new technology would be feasible or not. Therefore, he had met his primary obligation at the time of taking the vote and his subsequent decisions were free of that duty.

    Alternatively, it is open to interpretation that at the time the vote was taken Manian had recognized the attractiveness of the new technology, otherwise he would not have purchased it subsequently. Therefore his vote against the purchase, which would have been the deciding vote at the meeting of the Board of Directors of UCM Plastics, was influenced by his self-interest. Students could use this fact situation as a debate format with some students assigned the pro and others the con position relating to whether the director has breached his fiduciary duty.

13. a) Since Dietmar is no longer an officer or director of Soleil, Agrisif would not be able to sue him for breach of his fiduciary duty to Soleil, unless he is using information which became available to him as a director of Soleil. However there may be other grounds for a legal action depending on the elements brought forward by the students in question (b) if the confidential information or trade secrets of Soleil are being used.

    b) Students might bring forward a number of elements that would help to clarify whether their answer to (a) would change. These elements might include: issues related to whether Dietmar's new company is using the exact same software as was being used or sold by Soleil; was the information generally known in the industry; could an injunction be obtained to stop Dietmar and the other ex-employees of Soleil if its effect would be to stop them from earning a livelihood through the application of their skills and knowledge?

    This fact situation, although placed in the chapter on corporations, is an attempt to bring together several issues relating to business situations in which ex-employees enter into competition with their previous employers. It may be worth cross-referencing this question as part of the Closing Questions for the chapters on employment as well as intellectual property to have the students re-visit the issues of this fact situation related to an ex-director who has been operating in the dual capacities of decision-maker and employee prior to becoming a competitor of his ex-employer.

14. a) Yes.

    b) Yes.

    c) No.

    d) Yes.

15. a) Franklin's loan to Thomas's spouse places Thomas in a position of conflict of interest when deciding on competing bids from suppliers. As such, it is a breach of Thomas's fiduciary duty to the corporation. Thomas's conflict of interest exists whether or not Franklin's bid on the contract is successful.

    Issues of ethical corporate behavior often become blurred in the minds of the public. This fact situation presents an opportunity to explore the nature of corporate ethics, as well as when and how conflicts of interest and abuse of position might occur. It helps to illustrate that there is not always a direct link between the individual and the interested party. The conflict may arise as a result of some third party receiving a benefit. This is as valid a conflict as any blatant receipt of benefit by a director or a person subject to a fiduciary duty.

    Students often do not appreciate the breadth to which a fiduciary duty will extend and the types of activities that will fall within the net, creating a conflict of interest or abuse of knowledge situation. This question could be used to generate debate amongst students as to what is or is not ethical behavior or a conflict of interest, sometimes with alarming results as to perception.

16. a) Lebois owed a fiduciary duty to New Inspiration Mines. This was a corporate opportunity at New Inspiration Mines and it did not matter whether it was able to exploit it. Lebois could not touch it unless he obtained the consent of New Inspiration. Circumstances could change, and it could take advantage of the opportunity in the future.

    b) New Inspiration could sue Lebois and claim the $5 million profit.

17. a) The advice is "beware." The title of director sounds good, but directors are increasingly the target for liability both in tort for personal involvement, but also under many tax and similar statutes for not remitting employee's deductions and the like. The latter liability is based on having the position of director alone and does not require any knowledge or personal involvement.

18. a) Sherman will be responsible for the GST and employee's wages. These are based on status alone. He is not responsible for the damages for inducing breach of contract as he was not personally involved.

    b) Galway was only the president and not a director. He is not responsible for the GST and employee's wages. He is responsible for the tort as he was personally involved. All agents of a corporation, whether directors, officers, or employees are responsible for torts in which they are personally involved.

19. The remedy of piercing the corporate veil requires proof of fraud. It is directed primarily of making shareholders liable. Today it is normally used to make a parent corporation liable for the obligations of a subsidiary. In such a case, the parent will not be a director of the subsidiary because a director can only be a human being.

    Director's liability in tort requires only personal involvement in the tort. It is usually easier to establish director's liability in tort (if the factual basis is present) than to establish the grounds for piercing the corporate veil. The courts are still reluctant to pierce the corporate veil.

20. Although both cases dealt with corporations and the liability of human beings associated with the corporations, there were different questions in law. Salomon was a matter of contract law and corporate law. A shareholder has a separate personality from the corporation and could have a valid first charge on the assets of the corporation. Joe Salomon did no wrong (tort).

Valcom concerned tort law. Any agent of the corporation, employee, officer, or director is personally liable for torts committed even acting on behalf of and for the benefit of the corporation. In other words, the directors committed civil wrongs in Valcom.

21.

	Column A	**Answers**
1.	Franchise	Licence
2.	Fiduciary duty	Trust Relationship
3.	Vicarious	Substitute
4.	Corporation	Person
5.	Proprietor	Owner

22. a) The Sarbanes-Oxley Act is directed at auditors' practice. Its aim is to control the inherent conflict between an auditor's duty to be accurate and disclose harmful information about the client when it occurs and possibly lose a substantial fee, and the auditor's obligation to shareholders and the investing public to honestly disclose financial information about a public corporation.

b) The Dodds-Frank Act is aimed at controlling executive compensation.

Chapter 11

Banking Disagreements and Secured Transactions

Section 1 Answers to Business Law—Applied Questions

1. a) Review the opening clause in the bank guarantee form (in Appendix C of the text) with the students. That clause states in effect that all debts are owed to the bank. Clause 2 says there will be a continuing guarantee and the guarantor must pay the ultimate balance due, which is $10,000.

   b) If the common law were applied, the guarantor would only have to pay $5,000. The increase of the loan to $10,000 would not be the guarantor's responsibility.

2. a) No, both clauses referred to, permit the bank to escape responsibility for its negligence. See paragraph 7 "whether occasioned by the fault of the bank or otherwise . . .."

   b) At common law, Keyes would have been given a credit to the extent of the value of the assets, which in this case would mean a complete release. Note that most of the clauses in the bank guarantee form have the effect of exempting the bank from all responsibility. See question 4 of the Closing Questions below for a review of a number of such clauses.

3. Francisco would be responsible for the debt because the guarantee stated: whether incurred by the customer alone or with another or others.

4. a) She would be responsible for the debts from all those sources:
   Wife's credit card debt—"whether incurred by the customer alone or with another or others"
   Vacation loan—"all debts and liabilities…—"At any time owing by the customer to the bank"
   Guarantee on the brothers loan—"whether as principal or surety"
   Balance on mortgage—"all debts and liabilities"
   Legal costs—"including all interest, commissions, legal, and other costs"

   b) Although she would be liable for the debts from all these sources, the limit on the guarantee is $100,000 so that is the amount she would have to pay.

c) Expiry of the limitation period is not a defense because of paragraph 4 of the standard form guarantee.

d) Yes, upon separation she could have given the bank notice that she would not be responsible for any amounts advanced after that date by paragraph 13 of the standard form guarantee.

5. a) The verification agreement is effective.

b) The bank has to pay for cheques on which a signature is forged. The last cheque was within the 30-day notice period and the bank would have to re-imburse Newvest for that cheque. The bank might avoid liability even for the last cheque on the basis that Newvest is a sophisticated customer and should have had systems in place to prevent forgeries. If it did have such systems in place, of course the bank could not be successful on this defense.

c) Newvest should consult with its accountant or auditor as to systems to prevent misuse of funds such as forgery.

6. a) Yes, a stop-payment order can be put on a postdated cheque.

b) Yes, the bank does owe a duty to screen for a cheque even though a detail is inaccurate. The bank must identify cheques that are reasonably close.

7. a) The bank is a holder in due course.

b) Raj Vong cannot raise the defect in the computer as a defense to payment on the cheques. The cheques are negotiable instruments. The bank took them without notice of any defect. This was a business transaction and consumer protection laws, explained later, do not apply.

8. a) The bank is a holder in due course.

b) Pentagon has the defense that it told the bank that cheques would not be honored at the time the bank took the cheques, so Pentagon could raise this as a defense. (*Royal Bank of Canada v. Pentagon Construction Maritime Ltd.*, (1983) 143 D.L.R. (3d) 764 (N.B.Q.B.).)

9. a) This is a consumer transaction because the car was purchased by an individual.

b) The note should be marked consumer note. If it was so marked, all defenses between the original parties would apply to the whole during due course. However, the note was not marked consumer note on its face, so Patel would not get the protection of the Act.

c) Secure financial company would be successful because the note was not marked a consumer note according to a strict interpretation of the Bills of Exchange Act;

d) Patel could sue New Era and claim against it for the loss but since New Era has gone bankrupt, this remedy is of no practical value. Patel could report the officer of New Era who failed to mark the note as a consumer note to the relevant department at Industry Canada. Theoretically, that person should be prosecuted under the Act, but that might not bring any relief to Patel.

10. a) Post-dated cheques are not sufficient. They can bounce. Schmitz should get a chattel mortgage on the equipment. Since she transferred ownership, the purchaser could sell the machines, or they could be seized by another creditor, leaving Schmitz with nothing.

11. a) Students should first list the various possible assets of Phoenix Technologies, for example:

    - A manufacturing plant
    - Manufacturing equipment
    - Raw materials
    - Work in progress on the line
    - Inventory not shipped
    - Accounts receivable
    - A fleet of delivery trucks

    All the different security instruments covered in the text can be discussed. The one instrument that would not be available is a conditional sale since Venture Capital is not selling any items and is investing money.

12. a) The acceleration clause says that all remaining payments on the lease become due immediately.

    b) Bennett and Jones does have the defense that the clause is a penalty because the clause resulted in Bennett and Jones paying damages out of all proportion to the actual damages suffered since Techlease was able to re-lease the unit immediately without loss.

    c) Assuming the acceleration clause is held unenforceable, Techlease can claim the usual damages under the law of contract. The damages awarded would probably be restricted to the cost of re-possessing and of releasing the unit.

13. a) Since more than two-thirds of the loan is paid off, the bank cannot seize the boat by self-help, but must bring a court action (except in P.E.I. and Newfoundland). An alert student may remember the law of penalty/liquidated damages in contract. A similar situation was given in that chapter. Courts have held that clauses permitting repossession when there is only one payment owing are penalties and unenforceable.

    b) There are many provincial variations. P.E.I. and Newfoundland would allow seizure; all other provinces would not. In British Columbia, the bank could not sue for a balance after the seizure of the vehicle; however, there would not likely be a deficiency in the Scott situation.

14. a) The contractor can seize the sweatshirt inventory. When it was delivered, ownership passed to the business so it could put a mortgage on it.

    b) Kipling could have registered a PMSI. The retailer could still have sold the inventory in its course of business but it could not have given it as security in priority to the PMSI.

15. a) It is standard term in a financing lease that the financing company does not warrant that the equipment will work. Therefore, Slim Fitness cannot refuse to make payments on the financing lease because the equipment breaks down. This is a common misunderstanding because of the use of the term "lease." In fact, in its nature, it is more like a chattel mortgage.

    b) Slim Fitness still has an action against the supplier, EMS Systems Inc. (*Canadian-Dominion Leasing Corp. Ltd. v. George A. Welsh & Company; O'Connor Office Machines Ltd., Third Party, (1981) 33 O.R. (2d), 826.*)

16. a) The van that was purchased from a used car lot was sold in the ordinary course of retail business to a consumer, therefore, the lien does not apply.

    b) The sub-compact was not bought in the ordinary course of business from a retailer and therefore the lien is enforceable.

17. a) Gryski did not know of the lien. However, knowledge is not a critical factor; prior registration is.

    b) The bank has a valid lien. The lien clearance certificate is only valid as of the time that it is granted. This question shows the difficulty caused by the fact that the place for search for registration of liens and the place for change of ownership are at two different locations in some provinces. In Ontario, the search can be done at the Motor Vehicle registration Office. With land transactions, the problem does not occur because both ownership and lien registration are at the same place, so a sub-search can be done to update the search before money is released.

    Students could be asked for their ideas of how the purchaser can complete the transaction with a current lien clearance certificate in provinces where the lien search and registration offices are in different locations. The problem is that most people will focus on the change of ownership. The unexpected difficulty will be with a lien. Therefore, the ownership could be transferred first but held by the seller. Both could then go to the PPSA Office. When an updated lien clearance certificate was obtained, the exchange of money could take place.

Section 2 Answers to Closing Questions

1. a) Mair has deposited the money in an attempt to meet the Canada Deposit Insurance Corporation (CDIC) maximum of $100,000 coverage per customer.

   b) Mair would only be able to claim a maximum of $100,000 under CDIC insurance.

   c) There would be no difference if the same arrangement had been made with a bank, as the insurance covers up to $100,000 maximum per customer per institution.

   d) Other than keeping her money in an empty pet food tin on a shelf in the fridge, she should have placed it in three separate deposit accounts in three or more different financial institutions to gain maximum protection under CDIC insurance.

2. a) Students might talk about chattel mortgages or other security instruments; however, the thrust of the chapter indicates Fernandez's best approach would be to take a General Security Agreement, which covers both tangible and intangible items, and then register a financing statement pursuant to Provincial Personal Property Legislation.

   b) Fernandez may seize the assets under the Security Agreement, upon notice, and re-sell them to obtain his funds. Alternatively, Fernandez might appoint a receiver/manager by private arrangement to keep the business going and viable while he finds a purchaser. Another possibility, given the threat made by Foster to leave the jurisdiction, would be to request a court-appointed receiver.

3. a) Konstabul's defense is based on misrepresentation.

   b) Konstabul is unable to rely on the defense as the contract contains an Entire Agreement Clause.

c) Konstabul has no remedy at law concerning Nikki; however, once he has paid the bank, Konstabul can seek recovery from Peter for the debt owed.

4. a) On resignation he could have notified the bank to limit ("determine") his responsibility. See clause 13. Note that the common law says the amount is determined as of the date of the notice but clause 13 delays the effective date for 30 days. What if the bank lent more money after the notice? If the agreement to advance was made before the notice, the guarantor would likely be responsible; but hopefully not if the increase was requested and agreed to after the notice.

   b) No, see clauses 7 and 8, appendix C.

   c) Yes, the opening clause states "all debts . . . at any time owing by the customer to the bank" and clause 2 "ultimate balance."

   d) The guarantee is still enforceable against the guarantor even though the primary debtor's lending by-law was invalid. See clause 11. Clause 10 only applies to a subsequent loss of capacity.

   e) No, see clause 7.

   f) No, see clauses 9 and 12 ". . . postponed to the guaranteed liabilities."

   g) Yes, again the opening clause "all debts" from all sources. Brown probably cannot even set off the fraudulent claim for personal expenses. The wording is very wide ". . . or from other dealings or proceedings by which the bank may be or become liable in any manner . . ." Of course being responsible for fraudulent expenses is quite offensive and the court may find that is outside the meaning of the guarantee agreement no matter how wide that language purports to be.

5. b) The bank is not required to sue both Barry and Denise; however, it may sue either or both of them without first attempting to collect the money from Barden Ltd.

6. Answer: Fraudulent preference.

7. a) You would want to know whether the bank documents opening Borgias account contained a limitation clause, and whether Borgias reporting of the forgery took place after the time specified in that clause.

   b) The bank might raise the defense that its customer, Borgia, is an accountant and as such is a sophisticated party. Furthermore, Borgia could have taken reasonable steps to prevent the forgery occurring by not allowing a temporary secretary access to office cheques.

8. a) Yes.

   b) Yes.

   c) No.

   d) Yes.

   e) No.

   f) Yes.

9. a) Quickin is a holder in due course.

   b) Yes, Quickin could successfully enforce the note provided it is not aware of Napier's actions which, from the fact situation, it appears they are not.

   c) Rufo would be a holder in due course.

d) The elderly gentleman would have a defense to payment on the promissory note. That defense would be based on non est factum. This is dealt with in Chapter 7 (Contract Defects and Breach of Contract). Rufo as a partner of Napier is responsible for the actions of his partner and is deemed to have knowledge of her actions.

10. The correct answer is (a) The vendor.

11. a) Entire agreement—clause 14.

    b) Governing law—clause 15.

    c) Acceleration—clause 6.

    d) Interest default—clause 5.

    e) Material variation—clause 8.

    f) Mail box rule—clause 4.

12. a) Bibaud-drawer.

    Pine Lake–payee.

    Bank-drawer and the contract was to build a cottage for the price of $31,850.

    b) Yes, as between the original parties on a cheque, the drawer and payee, any defense on the related contract can be raised to stop payment on the cheque.

    c) The bank was not only the drawee but also a holder in due course. This position has a special status in that the defenses between the drawer (Bibaud) and payee (Pine Lake) cannot be raised against a holder in due course (unless the holder in due course had actual knowledge of the defense at the time the cheque was endorsed to it.)

    d) He could have written (endorsed) on the back of the cheque: "not negotiable".

13. The argument that would support the bank is that they do offer sound advice to the general public, especially those who are unsophisticated in financial planning and particularly about investing in the stock market. This is the advice they would not otherwise have. Sophisticated investors will not rely on bank employee advice.

    The argument that supports a conflict-of-interest position is that, while banks may help a customer correctly choose between various bank financial products, there may be better alternatives, which the bank does not offer and will not bring to the customers' attention. When they recommend investments in equities or bonds, banks recommend an affiliated stockbroker and do not consider other stockbroker firms who may offer better rates. Similarly when the banks offer insurance, it is their own policies, while insurance companies may offer policies with better terms.

14. a) Intangible (intellectual).

    b) Tangible.

    c) Tangible/personal.

    d) Intangible/personal.

    e) Real property.

    f) Intangible (intellectual).

    g) Real property.

15. a) The lien is not enforceable as these were goods sold in the ordinary course of business.

    b) The lien is enforceable against the sale of the entire inventory of the store as it is being bought outside the normal retail setting anticipated by the security for the loan to the business.

    c) Regona should have searched for liens prior to purchasing and ensured that they were removed or paid out from the money used to purchase the goods.

16. a) Smith might raise the defense that the bank's action is not permitted by law, as British Columbia's Provincial Security Legislation does not permit the bank to sue for the balance of the debt if it has repossessed the car.

    Students will need to examine whether or not the bank's court action in Ontario against Smith is appropriate or if it should be brought in British Columbia. They will need to look at the facts in the situation related to his current residence, permanent residence, the bank's location, the location of the loan and such like, in discussing whether or not the Ontario action is appropriate. If appropriate, it may be argued then that Smith does not have a defense to the bank's action.

17. a) Symanski's right to the car does not take priority over the bank's. If she wishes to keep the car she will have to pay the bank the outstanding balance.

    b) No, the repossession charges are part and parcel of the terms of the loan, and therefore would be required to be paid.

    c) The bank, through the bailiff, would require a court order to enter Symanski's garage. This is assuming the garage is kept locked.

    d) The bank would not be able to claim a lien on the car for the $5,000.00 as its registration of the chattel mortgage was subsequent to the search and purchase done by Symanski on August 2. The bank would need to go after the debtor to recover its funds.

Chapter 12
Bankruptcy

Section I Answers to Business Law—Applied Questions

1. a) Aquarius Electronics is a sole proprietorship and it cannot declare bankruptcy.
2. a) The Wellington Corporation can file a notice of intention to make a proposal under the BIA. Prescott would be prevented from taking steps to enforce its debt.
   b) The first stay is 30 days and may be renewed for up to six months if the court believes that Wellington can turn its business around and pay.
3. a) Salvadore can make a commercial proposal under the BIA. The court can order that an essential service, such as electricity, cannot be cut off.
   b) This means the company will have to supply electricity in the future, but on a COD basis.
   c) The same provision will not apply to a supplier of goods. The leather supplier can refuse to supply in the future, even on a COD basis.
4. a) Only the assets of the corporation form the estate in bankruptcy. Nanda's personal assets are separate and cannot be touched by the creditors.
   b) The supplier cannot start or maintain an action against the bankrupt without leave of the court. The court would probably give leave but it is an extra step and expense. This is another example of the application of the doctrine of separate existence of the corporate personality.
   c) Bank: secured.
   Trustee in bankruptcy: preferred.
   Supplier of inventory: unsecured.
   d) Bank: $90,000 (the full amount of the mortgage).
   Trustee in bankruptcy: $10,000 (the full fees).
   Supplier of inventory: $10,000.00.
5. a) This was a transfer to a relative and within one year before the bankruptcy. The BIA identifies this as a transaction that is presumed to have been done to defraud creditors.

6. a) This was a transfer to a relative within one year before the bankruptcy so that it will be identified as a transaction presumed to defraud creditors.

   b) An option to purchase land does have some value.

   c) and d) There may not have been any harm to the creditors but that is not what the court will look at. In fact, in the reported case, the company had tried to sell that property earlier at the request of creditors for a slightly lower price. It is clear that the corporation got fair market value. However, the court obviously was going to cut through this very clever scheme by which the Webbers could profit out of a bankruptcy. It held that if a director of a corporation acquired a right as a result of a disposal of an asset by a company or on the eve of bankruptcy, the director must account to the trustee in bankruptcy for the profit realized from the disposal of that right. The connection between the Webbers personally and the corporation was made by way of fiduciary duty. (*Webber Feeds Limited; Trustee v. Webber (1979), 30 C.B.R. 97.*)

7. a) A wage claimant is a preferred creditor.

   b) The limit is $2,000.00 for wage claimants. The balance of $3,000.00 would be as a general creditor.

   c) Since the aunt is a relative, the BIA deems any payment for services to a related person one year before bankruptcy as a reviewable transaction. The aunt would have to prove that she actually did the work of a normal employee and that this was not a scam.

8. a) and b) Since the corporation went bankrupt within three months of the giving of the chattel mortgage, it would be deemed a fraudulent preference. In order to uphold the transaction, the major creditor would have to prove that it was not a preference and that the creditor gave some value. (*R. v. Spectrum Interiors Guelph Limited (1979), 29 C.B.R. 218.*)

9. a) If Dylan files a Division 2 Consumer Proposal he could avoid bankruptcy. He could work out a plan to restructure his debts with the help of a trustee and it would probably cut his debts to 30 to 50 percent of what he owes and the proposal would only be on his credit record for three years. If he goes bankrupt, many of his debts would be erased and he could start fresh, the bankruptcy would be on his credit rating for six years.

   b) If he goes bankrupt, the Visa debt, pay-day loan debt, landlord debt Rogers debt and the unpaid taxes would be discharged under the bankruptcy. The spousal support debt is never erased in bankruptcy and the student loan debt is not erased until he has been out of school for seven years and he left school only five years ago. The money in his RRSP would not be taken by the trustee except for contributions made within one year of declaring bankruptcy, the government bonds would be taken to pay the creditors. Debtors are allowed to keep a car valued at less than $5,650 and since his is worth $9,000 he may want to sell it and buy one of lower value that he can keep. He can keep his furniture as it is under the protected value of $11,300 and his personal belongings are under the $5,650 limit.

   c) If he makes over $2,006 net per month, then any amount above this is considered surplus income and the trustee takes half of the surplus to pay to creditors and the discharge date is extended to 21 months from the basic 9 months on a first time bankruptcy.

Section 2 Answers to Closing Questions

1. a) The general test for voluntary bankruptcy is that it is absolutely impossible for the debtor to pay the debts owing.

   c) A proposal is designed to keep a consumer or a business from going bankrupt. It is a plan presented to creditors to reduce debts and come up with partial payments over a longer period of time. It may result in creditors getting some money rather than none in a bankruptcy and the debtor's proposal is only on their credit rating for three years as opposed to six years for a bankruptcy. For a corporation, the proposal can allow them to stay in business and hopefully become profitable again. A proposal under the CCAA is especially important for larger corporations that owe in excess of $5 million.

2. b) The Official Receiver,

   d) The Trustee in Bankruptcy.

3. a) The Los Angeles licensor would be an unsecured creditor.

   b) Preferred creditors: the employees, the landlord, and the Trustee in Bankruptcy. General/unsecured creditors: the Los Angeles company, and general trade creditors.

   The total amount owed to unsecured creditors is $37,000.00 and there would be $18,500.00 available to be divided among that class.

   c) Employees may be able to seek the balance of their wages from Tamara Burton if she is also the director of Laffs Ltd. Failing that, the corporate structure would limit Burton's liability for the creditors of Laffs Ltd.

   A dollar figure could be provided in class, for example, $2,500 for the trustee and legal fees, to assist in arriving at the total dollar figure available to be divided among the unsecured creditors. In all likelihood, the Los Angeles company which licensed the use of the name Jocularity Jane's would have included a clause cancelling the license in the event of bankruptcy or insolvency. Although the sale of the trade name by the trustee in the fact situation suggests that it had not been cancelled, in reality this would be one way for a party to protect itself from just such a situation. This element could be raised with the students as an example of the protection available from a well-drafted and negotiated licensing contract.

4. a) Each of the partners must personally be petitioned into bankruptcy. This would follow on an attempt by the creditors to collect from the partners personally. Failure to collect from the partners would be followed by a petition to the court and the issuing of a receiving order. There must be debt greater than $1,000.00 and an act of bankruptcy as detailed in the text for the court to issue the Order.

5. a) The statement is false as Gardener will rank as a general/unsecured creditor for the balance of the mortgage funds not realized by the sale of the asset.

6. a) Is correct.

7. a) Students should refer to Matthew's ability to have the goods returned if delivered to a retailer within 30 days of bankruptcy. The more likely and effective procedure would be a Purchase Money Security Interest (PMSI) which was discussed in Chapter 10 and which can be registered under the Province's *Personal Property Security Act*.

   b) Garden Tools would not be entitled to pick up the entire delivery. Since the cheque for $5,000.00 was cashed and presumably cleared, only the goods supplied and not paid for can be obtained.

8. a) A preferred creditor. It is an amount owed to a government agency for taxes.

   b) An unsecured creditor. The knitting needles and correspondence course are a retail sale.

   c) Secured creditors. The Bank of Central Canada and Lira Trust Company have mortgages registered against the property.

   d) Preferred creditors. The Act defines employees and landlords to rank as preferred creditors up to certain dollar figures.

   e) As defined by the *Bankruptcy Act*:

   - Bankruptcy lawyer and the Trustee in Bankruptcy are preferred creditors.
   - Worker's compensation: preferred creditor.
   - Landlord: preferred creditor.
   - Avarice Financial: secured creditor by reason of PPSA registration.
   - Ferrous: unsecured creditor.
   - Gertrude: unsecured creditor, even though she's the president's mother.
   - Tracy: unsecured creditor, family members should know better.

9. a) Mastercard debt is discharged.

   b) Unpaid taxes are discharged on a first bankruptcy usually, but may not be on subsequent bankruptcies if the court thinks debtor is doing it to as a pattern of tax avoidance.

   c) Student loans are only discharged if the debtor left school seven years ago or longer.

   d) Hydro debt is discharged.

   e) Child support debts are never discharged.

   f) Debts due to a breach of contract are usually discharged so long not as due to fraud.

   g) Traffic fines are not discharged.

   h) The condo will probably be sold by the trustee and the money distributed to creditors.

   i) The debtor can only keep a car worth $5,650 or less.

   j) If the computer and office equipment are tools of the trade for the debtor he can keep them as they are under the limit of $11,300.

   k) This income is over the threshold amount of $2,006 for a single person, so the surplus amount is $2,000 so the trustee will receive half of the surplus so $1,000 per month to distribute to the creditors and the debtor keeps half of the surplus.

   l) The threshold for a family of four is $3,728 and the debtor in this example makes $4,728. So the monthly surplus amount here is $1,000 so the trustee will get $500 per month and the debtor keeps $500 of the surplus plus the first $3,728 for a total of $4,278 per month.

Chapter 13
Employment Law

Section 1 Answers to Business Law—Applied Questions

1. a) Drug addiction is a prohibited ground of discrimination under human rights legislation as it is considered a disability. This point is covered in Chapter 1. Harris can object to the test on this basis.

   Later, drug testing for sensitive positions, being justified as a BFOR will be reviewed. The present question gives no factual basis for justifying the testing. The only issue in this question is the fact that drug addiction is one of the prohibited grounds of discrimination.

2. a) Mohamed is probably not correct. The issue here is whether the manual is part of the employment contract. He was told of the manual on the day of hiring and that likely made it part of the employment contract. If he had not been told of it but simply handed it on the first day, it would not be part of the contract. The fact that he had not read it is of no consequence.

   From an employer's point of view, it is safer to give a copy of the manual on hiring so that the employee has a chance to review it. Notice is likely enough, but it does leave an opening for argument by the employee that the manual is not part of the contract.

3. a) Goodman's grounds for refusing to work are that the Jewish holy day begins Friday evening. The act of requiring him to work is discrimination on the basis of religion.

   b) If other employees could substitute on that evening, then the employer would have to make that type of arrangement to accommodate Goodman.

4. a) Drinking on the job on one occasion is not just cause for dismissal. Repeated drinking on the job would be.

   b) The company is required to give Suarez a warning that it should not be done again. This is conduct that can be remedied, so a warning would be required. The company also could impose some form of lesser discipline such as docking pay in circumstances that are less than just cause.

5. a) Stolzak does not have to accept the position. This is a substantial change and would amount to constructive dismissal.

b) She can leave her job and sue her employer for wrongful dismissal. She can also accept the position and look for another job. If she does this, she has lost her right to sue for constructive dismissal. What happens when an employee is required to accept a lower position, or look for another job according to the principle of mitigation, is discussed later.

6. a) According to the chart, reasonable notice would be in a range that centered around 15 months.

   b) This is an open question. There are two possible grounds for attacking the contract. One is economic duress. However, that does not seem to be a ground in this circumstance. The other is that it is a penalty as it is not a reasonable pre-estimate of the employee's damages. If reasonable notice is 15 months, then 4 months is certainly not a reasonable pre-estimate.

   c) Even though the CEO may feel embarrassed, he has to consider that Devon may be quite upset by having a letter sent to his home. In the *Bohemier* case, the court said this was not acceptable. Bohemier should have been told at work and in private. If the CEO sends this letter and it causes mental distress, the company may be liable.

7. a) Constructive dismissal.

   b) An employee is required to accept the lesser position while looking for alternative employment, if relations are amicable. In the situation given, there is nothing to suggest friction and so she would likely be required to accept the position.

8. a) The company has just cause. Dishonesty is considered not to be remedial. Dishonest people will usually steal again and an employer need not trust them.

   b) Mednic could claim damages for wrongful dismissal.

   c) The common law notice period is based primarily on three factors: age, level of position, and length of service. Using the chart published by Harris which gives only length of service, the number of months is 11.66. Our estimate of a 30-year-old accountant with ten years of service is a range of nine months to one year, so the damages would be in the area of $52,000.00. The statutory provisions vary among the provinces; however, one week for year of service to a maximum of eight weeks is a common requirement. The amount here would be $8,000.00. The Ontario Court of Appeal has surprised lawyers by stating that the reasonable notice period and the statutory notice period should be added together. (*Stevens v. Globe & Mail, Lawyers' Weekly, May 31, 1996 16.04-032*)

   d) This will vary with the students' experience. There is no definitive answer.

   e) No, at common law, the courts will not order re-instatement. Re-instatement is a possible order under some labor statutes and also human rights legislation.

9. a) Economic necessity is not just cause.

   b) The length of notice is primarily determined by three factors: age, length of service, and level of position.

   c) According to the *Bohemier* case, the court will consider that as one of several factors.

   d) Of course, this is a finding of fact. It is hard to predict how an individual judge would decide this. According to the chart in the text, the average award for 16 years employment is 13.67 months and since Miccelli is 45, she would probably

attract that level. However, weighing the factor of economic necessity, the notice period might be reduced by a few months to perhaps ten months.

10. a) Khalsa has a high level position with responsibilities. Therefore he is a fiduciary and has an implied duty in law not to compete for a reasonable period. The case law is not clear on what the basis is for determining this reasonable period, so it was not discussed in the text. One line of cases suggests that the duty is determined by how long it takes to find and train a replacement. Case decisions range anywhere from a minimum of six months up to a year or year and a half.

    b) Raj is a low-level employee and does not have any duty not to compete with Think Prudent on the basis of the *RBC v. Merrill Lynch* case; his only duty is to give reasonable notice which he has done.

    c) Think Prudent could have put a non-solicitation clause into Raj's agreement which, if restricted to a reasonable time such as three months or six months, would likely be upheld.

    d) Think Prudent may be able to obtain a civil search warrant to search Raj's house and seize the list. It is called an Anton Pillar Order.

11. a) The strike was not legal because the union had not gone through the proper procedure such as bargaining, strike vote, giving notice of the strike vote, etc.

    The employees at risk should have filed a grievance. There is additional protection under occupational safety legislation which provides that an employee need not do a task that is dangerous to his health. (*United Steel Workers of America L.7917 v. Gibraltar Mines Ltd.*)

12. a) The Codvill employees did not have the right to strike at Dussessoy's IGA since it is not a related business. The employees have the right to strike only at the Codvill plant. Where secondary picketing is allowed, they may have had the right to strike any Codvill-run businesses. However, Dussessoy's was a completely independent business.

    b) Dussessoy's IGA could seek a court injunction to stop the picketing.

Section 2 Answers to Closing Questions

1. a) This fact situation and the report would be based on an analysis and analogy to the Toronto-Dominion Bank Canadian Human Rights Tribunal Ruling discussed on p. 438. Students should examine the concept of a Bona Fide Occupational Requirement (BFOR) and whether there are justifiable reasons or occupational requirements to merit this type of testing. The students should indicate that the circumstances of the testing can only take place on new employees, not at the point of interviewing but subsequent to hiring. One factor that also influenced the Federal Court of Appeal was scientific evidence that the drug tests were not reliable.

2. a) The issue which Computoch's request is aimed at relates to confidential information and trade secrets. Andersson cannot be compelled to sign the agreement, although the Common Law protection of confidential information and trade secrets will be in place whether she signs it or not. To terminate Andersson would appear to be a retaliatory action by Computoch and would constitute dismissal without cause.

b) It would make no difference whether this confidentiality agreement was being required of all its employees or only those in the sales department, the issues remain the same.

3. a) Human rights legislation would deal with any complaints related to sexual harassment, while occupational health and safety legislation would deal with issues relating to the adequacy of washroom facilities.

   b) i) Morty Lake would be personally liable for his conduct.
   ii) The director would not be personally liable for Lake's conduct, although internally he would be responsible for his employee's actions as a director of the not-for-profit organization.
   iii) The not-for-profit organization would be liable under human rights legislation for the acts of its employee and for not having taken pro-active steps in dealing with sexual harassment issues.

   c) In answering this part of the question, students should raise such issues as creating a sexual harassment policy which would be posted in a conspicuous place, development of a clearly detailed complaint procedure, and discipline procedure for offenders.

   d) Although the not-for-profit organization has grounds for dismissing Lake for cause, to avoid liability it should proceed through written warnings and follow-up to determine whether the employee has complied with the warning and requirement to change his conduct.

4. An employee is not required to take another day off in compensation for working on a statutory holiday. A premium rate must be paid to the employee.

5. a) Students should refer to Human Rights Legislation and Charter of Rights and Freedoms in listing the laws dealing with this type of question.

   b) Alexander has the remedy of seeking damages from the firm for breach of human rights legislation.

6. a) Technically Waleed's employment could be terminated.

   b) Technically Waleed has made a misrepresentation of the material fact in his application for employment and he may be immediately dismissed on that ground.

   c) Waleed might argue that his termination is based on retaliation and therefore not for cause. As well, he might argue in his defense that he did not commit a misrepresentation but rather omitted information that was not necessary for the position applied for. In this regard, students could argue that an analogy exists to the Pillato case in which the courts indicated that not all lies are equal. The argument might be that this lie, if it was a lie, was not one such as to merit just cause for dismissal.

   d) In this case, damages for mental suffering/distress based on mental stress and humiliation in front of his co-workers would be available. Reference again can be made to the Pillato case in which damages of this nature were awarded.

7. Availability and ease of access to safety equipment would result in the answers being yes to the first fact situation, no to the second fact, and no to the third fact situation.

8. Not necessarily. The court will look through the terms of the contract and apply the common law tests for employer/employee relationships to see if she was in fact an employee by those tests.

9. a) Keach's employment would be terminated on the basis of conflict of interest with his employer.

   b) The firing would be with cause.

   c) Keach would not have any legal rights regarding his termination, although for public relations purposes, the college might choose to handle the situation in a less legalistic approach and attempt to find a practical solution to it.

10. a) Frequent lateness is just cause for termination of employment.

11. a) Dooley's refusal would not permit termination with cause.

    b) In determining what information would assist in advising Dooley, students would be looking to obtain information relating to the level of his employment within the college: his age, length of service, the availability of similar employment considering his training, experience and qualifications, as well as any health issues, to name a few amongst any other information which the students can justify as being relevant in this situation.

    c) The information would assist in determining Dooley's profile for comparison to the charts provided in the text as well as previous awards made for similar situations of this nature.

12. a) DeSouza is relying on Common Law while Arbour is relying on Statutory Law for the necessary period of notice.

    b) Arbour may be preventing itself from being able to argue that it was influenced by the actions it considered as just cause in DeSouza's previous employment conduct.

    c) DeSouza is attempting to mitigate his damages by seeking other employment.

    d) DeSouza is not required to accept employment that would be demeaning or humiliating but, provided it does not meet these criteria, he might be required to accept an offer while looking for employment more in line with his current level.

    e) Arbour should consider the fact that the tribunal may be employee sympathetic and, more importantly, that the tribunal decision will be final with no recourse to a court if Arbour is unhappy with the decision.

13. a) The type of union shop operated here is a Rand Shop/Rand Formula shop.

    b) Details related to the union and its shop would be found in the Collective Agreement.

    c) The union does not represent Berlioz as he is not required to join the union, but simply pay the union dues. However, it might be argued the union does represent him as he is part of the bargaining unit whether a member or not, and is subject to the collective agreement negotiated by the union. In this situation the collective agreement is already in place and, more to the point, Berlioz does not have to join the union to be employed at the company.

    d) and e) These are opportunities for the students to voice their opinion as to the fairness of the circumstances, while the reference to the Charter of Rights follows on the case referred to in the text of a Humber College instructor who objected to the Ontario Public Service Employee Union's use of union dues.

14. Match the following:

Column A	**Correct Answers**
Constructive dismissal	Demotion
Termination	Firing
Just cause	Valid grounds for firing
Mitigation	Reduction of loss
Trade secret	Confidential information

Chapter 14

Intellectual Property and Computer Law

Section 1 Answers to Business Law—Applied Questions

1. a) The common law tort of misappropriations of personality.

   b) No, because Chrysler is not suggesting that Krouse is endorsing its product. It is taken in public.

   c) This is just a general photograph of football (not of Krouse) of the type that benefits the game by promoting the exciting events that happen in it. It centers on the game not on any player, even though Krauss can be identified.

   Krouse v. Chrysler Canada Ltd. et al., 1973 CanLII 574 (ON CA). This was the first case that established the tort of misappropriation of personality in Canada.

2. a) The student should first identify which IP right is applicable. The issue is ownership of intellectual property rights, in particularly here, copyright. It should then become clear that no, all that the auditor did was irrelevant. Possession of physical films is not evidence of the right to copy. Proof of ownership of the copyright is required, such as an assignment of ownership of copyright, or a license-discussed later.

3. a) The issue is whether the model, would be considered an artistic work, sculpture, within the meaning of the Copyright Act, or an Industrial Design. An argument favoring copyright would be that this product is not useful in the sense it could not be worn. If it is an Industrial Design, protection may have expired.

   b) There are conflicting decisions on point, one in the U.S. and one in the U.K.

   c) While neither of the above noted cases are *stare decisis* in Canada, their reasoning would be reviewed. While it is hard to predict which reasoning would be preferred, it is likely that of the U.S. case; but until there is an actual decision, it is an open question. An argument in favor of copyright protection might be that in this small version, they are not meant to be utilitarian.

4. a) Washington holds the copyright. Copyright is based on a "first to create" system. Even though Cordeiro registered first, that did not give Cordeiro copyright ownership above the first creator in Canada. The fact that Washington did not put a © 1995 Washington on the pamphlet does not prevent him from claiming copyright ownership in Canada. One purpose of registration is to establish evidence of the date of creation. At trial, Cordeiro simply has to show the certificate of registration; however, Washington has to prove his earlier creation by direct evidence and he may not be able to do that.

5. a) Leibovitz could argue that the value in the Nielsen image depended entirely on the publicity surrounding her own photo of Demi Moore. Without reference to that image, the Nielsen image will have no impact. It is not a parody. A parody is a critique, i.e. some form of social criticism. This was not done by a critic, but by a business in an attempt to make money not to add social commentary.

   b) Paramount could argue that in essence Leibovitz was trying to protect an idea. The new photo did not copy her work but it did copy the idea. Further, it was a parody, a humorous alteration of the original idea.

   c) At the time, Canada did not have the parody/fair dealing exemption. A U.S. court agreed with Paramount and dismissed Leibovitz's claim. One of the judges, not without a sense of humor, quipped that there is a vast difference between a pregnant woman and a pregnant man. (*Leibovitz v. Paramount Pictures Corp.,* 137 F. 3d 109—Court of Appeals, 2nd Circuit 1998.) The definition of parody under the Canadian Act is still an open question. Many late night television comedy shows, morning radio shows, and print and online publishers rely on parodies and satires of creative works to develop their own material. Will parody be limited to social critique or will any humorous expression fit within the fair dealing exemption? Commentators think the U.S. precedents will have great weight in the future Canadian cases.

6. a) Yes, the brother infringed the copyright of the software manufacturer by copying it onto his own computer and making the copies which he sold to friends at school.

   b) The back-up copies were not copyright infringements. Software programs invariably carry the same licence that permits purchasers to duplicate the software on their hard drive and make a few back-up copies, but not to provide disks to any other person for use.

   c) Edna infringed the copyright by lending the disk to her brother for copying.

7. a) The members of the club had no right to make copies. There is some question as to whether lending CDs in this fashion might be a copyright infringement. Lending a copy to a friend would not, but an organization designed for frequent lending may be. However, the copying is definitely an infringement.

   b) The fact that Myers did not do the copying himself may be a defense. On the other hand, he did set up a system that he knew was being used for copyright infringement. In an American case where a store sold blank tapes and machines designed for tape duplication in an obvious invitation to have customers buy them to copy commercially recorded tapes, the court held that the store was not liable of participating in copyright infringement.

8. a) —The stylized line drawing can be registered and the words "Trader John's" could be registered provided there is not a prior registration.

—The words "delicious thirst quenchers" are merely generic or descriptive words and are not capable of being registered. A brand name such as "Molson's Golden" has been registered but as a combination. Molson's do not have the exclusive right to use the word "Golden" in respect of beer. Labatt's has registered "Winchester Gold" as a trademark over Molson's objection. The federal court said that Molson's could not appropriate any ownership of the word "gold," as it was a descriptive or generic word.

—Shaka is the name of the Chief during the early colonial times of South Africa and has been dead for more than 30 years.

—Likewise, King Tut has been dead for more than 30 years.

—"The Grape Gretsky" refers obviously to Wayne Gretzky. It is primarily a surname and therefore could not be registered without the consent of Gretzky. Also, Gretzky could restrain the use of this based on the law of personality rights.

9. a) This symbol suggests an association with the charitable organization, The Red Cross. Undoubtedly, they have registered as a trademark already, as well.

   b) Elvis Presley has not been dead for more than 30 years; so, his portrait cannot be used without the consent of his estate.

   c) The Canadian Coat of Arms cannot be registered as part of a trademark without the permission of the Canadian government.

   d) This stylized download could be registered.

10. a) No, the trademark does not meet any of the criteria of actual use, proposed use, or foreign registration.

    b) Yes, on two bases: foreign registration and being known in Canada.

    c) Yes, proposed use within six months.

11. a) New Tech can attack the trademark registration. Registration is not final.

    b) New Tech can attack it on the basis of prior actual use. New Tech can have the registration set aside. Not covered in the text is a remedy such that the Trademark Registration Board could limit the first registrant to the area of actual use, i.e., Saskatchewan, and permit New Tech to register the same trademark but limit its use to New Brunswick. The point of the question for the students is simply that trademark protection is given on the basis of actual use and not on the basis of registration.

12. a) No, a principal of construction cannot be registered as an industrial design.

13. a) This is the proper subject matter for registration as an industrial design as it will be used to produce 50 copies or more.

    b) Registration must be made and completed within one year of the design being known to the public.

    c) The protection will last for five years subject to one further five-year renewal period.

    d) No, she could not obtain a copyright on this design. Since it will be used to produce articles in quantities greater than 50, it cannot be registered under the *Copyright Act*.

14. a) No, McIvor was not the inventor. Also, the product was in use by others.

15. a) Yes, the water filtration system is a proper subject for a patent as it is an invention. She cannot obtain a patent because the system has been sold in Canada for more than two years prior to the application.

    b) The New Brunswick manufacturer also could not obtain a patent because it has been selling the product publicly for more than two years.

16. a) Designing this type of machine was the reason he was hired by the company. The company can obtain the patent. It does not matter that the inventor did the work at home on his own time.

17. If Laura discloses the idea about the solar panel umbrella, she will have to apply for a patent within one year of the disclosure.

    The chemical formula may not be a subject matter of any of the statutory intellectual property protections, most relevant being patent and copyright. In making her pitch, she cannot disclose any of the specifics of the formula. If one of the Dragons wants to see it, she should make certain that a non-disclosure agreement is signed.

18. Night club. There is no case on point yet. There is an American case with similar facts that said the information is possibly a trade secret but that has not gone to trial as of publication of this text. The court in that case held that it could possibly be a trade secret because of the password protection, the fact that it was equivalent to a customer list and it was accumulated at some expense. ***Christou v. Beatport, LLC*** No. 2010-02912 (D. Colo. Mar. 14, 2012)

19. i) Canard did not commit theft. The disk was his own and information is not property.

    ii) He did not commit fraud because he did not obtain the information by deceit or dishonesty even though he did cause a loss.

    iii) Jody probably did not commit the unauthorized use of a computer since he was given the right to use it as an employee. It is possible to argue that because he was fired, that implied withdrawal of the consent. However as this is a criminal offence, even though the implication of reasonable withdrawal is reasonable, it would not likely result in a conviction under that section, especially when another section more easily applies to the acts.

    iv) Yes, he would be convicted of mischief related to data. This section fits the facts most easily.

20. Yes, this is an invitation to participate in a commercial activity, which is a CEM. It doesn't matter that the business may have gotten the email addresses directly from the customers. The customers did not expressly consent to them being used for a bulk email mailing list.

    The employer will be responsible for the employee's conduct unless it can show a due diligence defense which would mean, at least, a written policy that employees cannot send out CEM's.

Section 2 Answers to Closing Questions

1. Re-selling a textbook is not a copyright infringement because the re-seller is not copying it.

2. a) Yes, Paik would be able to enforce a patent against Cooke as the patent system, based on a first to file system, grants an exclusive property in the invention. Students may wish to discuss the fairness of this element of Paik's rights.

   b) Paik's patent is effective for 20 years from the date of application. The date given in the fact situation of July 16, 1996, is the date of granting and is of no effect in determining the commencement of the 20-year period. The time of application by Paik is suggested by the fact situation as sometime in the fall of 1994. She had independently discovered the same process as Cooke at about the same time as he did in his experiments.

3. The correct answer is (c). To be registered in Canada, a trademark must be in actual use or proposed to be used in the following six months.

4. a) The legal remedies available for Basset to pursue are:

      1. Injunction to restrain violation of the copyright by the use of his music

      2. Damages, a sum representing his financial loss caused by the station's illegal use of his music.

   An accounting/disclosure of profits arising from the infringement would not appear to be an appropriate remedy in this situation. His legal action would be based on copyright infringement.

   b) In answering this part of the question, students should begin by defining copyright ownership, as detailed in the text through the sections of the Copyright Act which are reproduced there. They should also discuss registration of the original creation.

   Having determined that ownership is in the author of the work immediately upon creation and not following registration, the students should examine whether that ownership has been transferred to the radio station by Basset. For this they would have to look at whether the ownership of the copyright has been assigned or licensed to the radio station as a result of the statement on the entry form, "entries become the property of the radio station." The students will need to explore whether this statement on the entry form entailed ownership of the physical material sent in, or ownership of the copyright in the original music recorded on the tape which was submitted.

5. a) Students in answering this question should recognize the designs as being protected under copyright and suggest that Tokay register her designs or, alternatively put her name and the date on her sketches and mail them to herself in a sealed envelope. If she is concerned about international protection, Tokay should put a small c within a circle (©) followed by her name and the year of creation.

   For her business name, students should recognize this as an issue of trademark protection and the decision then would be to determine whether it would be financially worth it for Tokay to register her trademark or simply proceed to use it and create a reputation associated with that trademark in a particular area of business.

   b) Tokay's court action would be based on copyright infringement. Students, in analyzing and giving their reasons as to whether Tokay has the legal right to stop the sweatshirt company from selling their product, should examine the question of

copyright ownership and infringement. From the fact situation it appears the designs are not an infringement of the expression used by Tokay in her designs either in the colors or in the design of having the elaborate tails of the exotic birds wrap around the back of the shirt.

People are very quick to claim copyright infringement whenever they see an item of similar design. These questions are directed at having the students clearly delineate the nature of the ownership of copyright and what will or will not constitute an infringement. To some degree this will involve interpretation depending on the vehicle of artistic expression, be it music, artistic composition, design expressed through various media, or writing.

6. a) In determining whether Squange ball will be the proper subject matter for a patent, the students will need to examine it in light of the three qualities of ingenuity, utility, and novelty. While it does appear to possess, the two elements of utility (practical use) and novelty (not already in the public domain) it could be argued that it lacks ingenuity in as much as its creation would not necessarily be more than just an obvious step that a person with reasonable skill would have taken.

   b) In answering this part of the question, students should identify the areas of Industrial Design, Copyright, and Trademarks as offering protection from competitors. The actual shape and design of the foam sponge items for games would probably receive protection under Industrial Design, while the actual designs, illustrations, photographs, and the like would be protected by copyright. The name, "Squange," could be protected by trademark from competitors.

   The area of trade secrets and confidential information would also be a very important element of intellectual property protection from competitors, protecting the marketing plans and other proprietary information in his new business. These are the elements of his business that he should be looking to protect in as much as the trade name, the material used and his marketing plans and forecasts all would be of great interest to competitors.

7. a) Yes, registration is not required for copyright protection under the *Copyright Act*.

   b) Aurora and Sonia should give thought to the international protection of their copyright. Under the Berne Convention, protection arises automatically due to automatic copyright protection in Canada. Under the Universal Copyright Convention, a copyright notice must appear at the beginning of their manual along with their names and the date. They should be placing a small c within a circle (©) followed by their names and the year of creation. Although the U.S. has recently ratified the Berne Convention, it is often recommended that a copyright notice under the UCC appear at the beginning of a work to assure protection in the U.S.

   c) The correct answer is (iv), January 30, 2065, 50 years after the death of Sonia, the survivor of the two co-authors.

8. No, the best protection in this case would come from the sections dealing with Distinguishing Guise in the *Trademarks Act*.

9. a) Carmen does have a right to have the lights removed from the trees in her mural. Her entitlement to this remedy is based on her moral rights in the artistic work, provided under the *Copyright Act*. As indicated in the text, while ownership of copyright can be assigned, moral rights cannot be assigned and must be specifically waived by the author of the artistic work. This is a reference to the Michael Snow case involving the Eaton Centre flying geese.

10. a) From the fact situation, Industrial Design does not appear to be an issue as there is no description of the stroller/chair as possessing a unique visual pattern, shape, or design, which could be the subject matter of registration under that Act.

    b) Trademark: 15 years, renewable indefinitely, for the name given to her creation.

    c) Patent: 20 years from date of application. Her invention appears to carry the three qualities of ingenuity, utility, and novelty.

    d) Copyright: 50 years from the death of Wong. This would apply to any illustrations, designs, renderings, and the like created by Wong in the process of designing and inventing the item.

    e) Trade secret: On-going protection provided the information remains confidential/secret and has not been made known to the public. Protection is through Common Law.

11. **Ownership.** The business that manufactures and markets the game is likely the owner. If it was made by an employee or employees, the ownership belongs to the business and not the employees who did the actual creative work.

    Assignment. If the videogame was not made in-house, the business may have bought the ownership rights from an independent contractor by way of an assignment. An assignment transfers the rights of ownership.

    License. Lee Park bought a license to use the game.

12. a) There is no IP protection for Jane. She is not a celebrity. Although not an IP issue but a separate one, there is no common-law right of privacy as she is in public.

    b) Celine Dion is a celebrity but was also in public. Misappropriation of a celebrity's personality only applies if it is used to promote a business. A photograph of the celebrity's daily public activities is not protected, that is considered news.

    c) The artist, or owner if there was an assignment, of the mural does have a copyright interest. Publicly displaying our work does not give any right to reproduce it.

13. a) Any playing over a sound system to the public is copying and subject to a royalty payment.

    b) She could play a radio station, a solution small restaurants use. The radio station has paid the royalties to broadcast.

14. a) Yes, arguably it would be within her moral rights to object to the use of her song to support a business she believe is harmful to the environment.

15. All of the above are intellectual property. All are subject to copyright. This example is to draw students' attention to the fact that many businesses have intellectual property rights that are unrecognized.

16. a) The statutory IP types are: copyright, trademark, patent, and industrial design.

    b) No, there is no statutory IP protection available at the idea stage for a business plan.

    c) Unlikely, because it was still in idea form not yet in a software form used on a computer. It would eventually involve computer use, but it hadn't yet.

    d) The brothers could have had Zuckerberg sign an NDO. It could've been a simple letter type agreement in their own language, or they could have downloaded one from the Internet.

17. a) The plaintiff sued for breach of fiduciary duty and breach of confidence.

    b) Breach of fiduciary duty was unsuccessful. One of the elements of establishing fiduciary duty is some dependency, a weaker party status, on the aggrieved party relative to the breaching party.

    The negotiations of the joint venture regarding gold mining claims are by sophisticated businesses. It could not be said that the plaintiff was in any way dependent on the defendant. There is an overriding principle that in negotiations, businesses do not owe any obligation to the other party (apart from controls such as misrepresentation and fraud), but, rather under the competition model, are permitted to get the best deal for themselves. It would be very unlikely, as contrary to the competition principle, to introduce a fiduciary duty into the negotiation process.

    c) The plaintiff was successful on breach of confidentiality because the disclosure during negotiations for a joint venture satisfied the three elements to establish that there was confidentiality when the information about a potential mining claim was disclosed.

18. a) Civil Remedies. Rex has infringed the copyright on the program by copying it onto the Internet. There is copyright on the software even if it is not registered. Rex has also breached the Common Law duty of confidentiality. There would be an action for damages for loss of profit, but realistically Rex probably has no money and civil remedies are not of much benefit to an employer in a situation like this.

    b) i) Copyright. The owner of the copyright does not lose copyright simply because the matter is exposed to the public. Most copyrighted material is eventually exposed to the public such as a song or a book, so the owner has copyright protection for future sales.

    The difficult question is whether the owner has any rights to retrieve the downloaded copies, since they were obtained innocently. The owner probably does but would have no other remedy against the innocent Internet users.

    ii) Confidentiality. Because information was given out without notice to the people receiving that it was to be kept in confidence, there is no Common Law remedy of breach of confidentiality in these circumstances.

    c) The employer warranty to the conditions of the *Sale of Goods Act* would not apply because this was not a sale. Also, there is some question as to whether this pure information is a good.

    d) Rex faces two possible criminal charges. The first is fraud because Rex used the information without authorization and caused financial loss to the owner. He also faces the charge of unauthorized use of a computer.

Chapter 15

Real Estate and Insurance Law

Section I Answers to Business Law—Applied Questions

1. a) Bennett is the owner in fee simple.

   b) Bennett is the landlord and holds a right of reversion. Dodd has the leasehold estate.

   c) Bennett only has the right of reversion. She has no right to enter the property. She was a trespasser. Landlords have been charged and convicted of trespassing in such situations.

2. a) Barnes is not correct. Land includes all the structures affixed to it. So, the garage was considered land and went with the sale of the property. It did not have to be specifically mentioned in the Agreement of Purchase and Sale.

3. a) No, the half interest in the house ceased and the surviving joint tenant, Jon Davis, became the sole owner. There was nothing to pass to the son.

   b) Yes, that transfer would have been effective. Joint tenants can deal with their interest.

   c) The son would have a tenancy in common. When a joint tenant deals with his half interest, the joint tenancy is severed and a tenancy in common is created.

4. a) No, a person cannot benefit by his criminal act. Donald would not acquire Bondi's half interest in the property.

5. a) No, the son does not become the owner of the half-interest that Ron Starr had in Lot A. The wife becomes the sole owner. Technically, Ron Starr's interest ceases. In any event, the point is that the interest of a joint tenant cannot be dealt with by will.

   b) Yes, the daughter becomes the owner of an interest in Lot B. This highlights one of the differences between ownership and joint tenancy and tenancy in common. The interest of the tenant in common does not cease upon his death. Therefore, the tenant in common can deal with that interest by will.

6. a) Bello does not have the right to leave the garbage can on his own side of the driveway. Even though he owns the property, he has given an easement to Coombes to allow Coombes access. Bello therefore cannot put anything on the easement area.

   b) Likewise, Coombes has no right to block the driveway. Bello has an easement for that part of the drive way on Coombes's property and Coombes only has the right to use the easement on Bello's property for access and not for parking.

7. a) Bo's Bootery gave Carr a licence to use the front of the store.

   b) The owner can revoke this right. There was nothing paid for the licence.

8. a) The family assets would include the matrimonial home that is now worth $800,000.00 and the $100,000.00 increase in Tina's investments. The total value of family assets is $900,000.00, so each one gets $450,000.00.

   b) If Tina can prove that her signature is a forgery on the mortgage, then the mortgage is void. The bank cannot force the sale of the home. The bank can sue Jeff for the forgery and the money he borrowed.

   c) If there was a marriage contract that excluded the house, then the family assets are just $100,000.00 and they split equally. The house belongs to Jeff.

9. a) No, because Filbert did not register his interest at Land Titles, and therefore he can not enforce it against third parties.

   b) Register at Land Titles.

   c) A search should have been done at the relevant Land Titles Office, to see who else, had a potential claim and what interests they were claiming in the property.

10. a) Reich could have negotiated an exclusive use clause in his lease. He then could have brought an application for an injunction on his own based on the *Spike v. Rocca* case.

    b) The landlord may have a right to stop the pharmacy from selling newspapers based on the permitted use clause. The technical name for the remedy the landlord would seek is an injunction.

    c) The pharmacy would probably argue that it is normal pharmacy business to sell newspapers and magazines these days. You might ask the students to draft a permitted use clause on behalf of the landlord that would protect Reich's business assuming Reich had negotiated an exclusive use clause.

11. a) The lease clause is ambiguous. Most of the pipe runs in between the wall which is neither interior nor exterior. There are any number of cases disputing interpretations of such clauses. Nothing can be said with certainty. The question points out that certain clauses can be ambiguous and difficult to resolve.

    b) Rather than a word formula, the clause should refer to architectural drawings or plans.

12. a) No, the tenant is not correct. The landlord does not have to give notice of a default in the rent and can lock the tenant out. Practically, of course, this is not often done because the landlord wants the money. Also, the courts are quick to give relief from forfeiture.

    b) The tenant does have a defense in that the tenant has until 11:59 p.m. on the day the rent is due to pay and not simply until the close of business. The landlord went in too soon.

13. a) The notice was inadequate. A notice must specify the breach, for example, that the tenant had to cease selling dairy products. Also, three days notice is not a reasonable time.

14. a) The question is whether the landlord gave the tenant a reasonable time to repair. On the landlord's side, he was worried about serious damage to the unit and the fact that the tenant could not pay for this. On the tenant's side, the tenant has the need to carry on business in order to earn income. Locking a tenant out is quite drastic and a court is unlikely to find the landlord's actions reasonable unless they were absolutely necessary. Here, the landlord could have asked the tenant to be allowed access to make the repairs. The landlord could then sue the tenant for the cost of the repairs. If, however, the tenant refused to allow the landlord entry, the landlord's lock-out might be justified.

15. a) Yes, distress.

    b) The seizure is not proper. A landlord cannot change the locks and distrain. Distress is a remedy open to the landlord only if it keeps the lease open. It is possible to change the locks but the landlord must give the tenant notice, a new key, and permit entry.

    c) The tenant could sue the landlord in trespass and the damages would be the loss of profit. For simplification, that would be the $5,000.00.

    d) The landlord could have simply removed the goods. Alternatively, the landlord could have changed the locks but given the tenant notice, a new key, and permitted entry.

16. a) and b) The termination by the landlord is proper. The tenant cannot deduct amounts owed by the landlord from the rent.

    c) The tenant can sue the landlord for the cost of the repairs. The tenant also has the right of relief from forfeiture. However, if a court application is required, the tenant will have to pay the arrears of rent, the landlord's legal costs, and the costs of the seizure which will be the Bailiff's costs, usually about $300.00, and locksmith charge, usually about $100.00.

17. No, the insurance company was not correct. The test is not ownership but insurable interest. Patel is a person who could suffer financial detriment from the loss or destruction of the property and hence had insurable interest.

    BTW: Most people think that the ownership permit is proof of ownership. In fact, that is incorrect. The provincial governments only issue a license to own a vehicle, they do not guarantee that the person on the document that they issue is, in fact, the owner of the vehicle. In the U.S., the automobile ownership permit is a title system similar to our land title system.

    In practice in Canada, people do rely on the motor vehicle ownership permit as proof of good title. However, it is not a guarantee of title by the government.

18. a) None of the grounds will be successful. Sam is under a duty of utmost good faith to reveal anything that might be relevant to the insurance company in assessing the risk. It does not matter that he was not specifically asked or that he did not sign the application form. Sam has a positive duty to speak up and reveal the information. Non-disclosure of any material fact voids the policy. It usually does not matter that the undisclosed fact does not relate to the peril which caused the loss.
    It could be argued on the basis of the night watch men/day theft case that an

undisclosed fact, which does not relate to the loss, should not result in a denial of coverage; but traditionally any undisclosed fact, even if unrelated to the peril, voids the insurance policy.

Section 2 Answers to Closing Questions

1. The central air-conditioning unit would be considered a fixture and part of the real property. Real property includes land and all things affixed to it.
2. a) The plants and shrubs that have been removed form part of the land. Consequently, Jones' right would be to bring an action for breach of contract and damages arising from that breach.
3. The correct answers are (a) and (c).
4. a) An express term is an actual term.

   An implied term is one put into the lease by the court based on the officious bystander test. If some meddlesome bystander had been eavesdropping on the parties when they were negotiating the lease, would he have said, obviously they intended this to be a term.

   b) It will only be permitted when there is a covenant restricting that other tenant's use in its lease

   c) The three grounds discussed in the text are:

      1. Community of interest

      2. Nuisance

      3. Fundamental breach

5. a) No, it is not an interest that is registered on title.

   b) Yes, because a lease of less than three years binds subsequent owners, even if not registered on the title (a statutory exception to the regular Land Titles rules).

6. a) Chierne can bring action against Covert Ltd. (the management of the shopping centre) and Pushkin (proprietor of Exotic Pets and Fish). Students should refer to the case of *Spike v. Rocca Group* in the text for a similar fact situation.

   b) Chierne would be asking for an injunction related to Pushkin's operation and possibly for damages for breach of contract (lease) from Covert Ltd.

   c) Chierne should have negotiated an exclusive use clause at the time of finalizing her lease with Covert Ltd. as well as having the lease reviewed by an experienced leasing lawyer.

   d) The purpose behind this part of the question is to indicate to students that definition might become critical in determining whether Chierne has a remedy available to her. If Pushkin is permitted under his lease to sell "exotic pets and fish," what would be the definition of exotic for these purposes, and would a Shar-Pei qualify as an exotic pet?

      Students could be asked how they would go about arriving at definitions in this regard and could be referred back to the concept of stare decisis/precedent. Students might be guided through the process of looking at previous decisions of judges to see if these issues have been previously considered and, if unsuccessful in

that area, looking at case decisions from other jurisdictions. Failing to find a relevant case, they could go to authorities in the area for a definition or look for trade/dictionary definitions or, finally, argue from analogy to some other field.

7. a) Other than the standard issues concerning rent, maintenance, insurance, and so on that would be part of the negotiations with the landlord, the particular terms and conditions for this retail operation would relate to permitted use (since there will be a combined book store/café use), exclusive use or non-competition clauses as well as anything that may specifically relate to the operation of a café such as health regulations, licensing, insurance, or municipal use/zoning requirements.

   b) As a landlord wishing to take part in the success, the rent clause should include a percentage of annual sales as part of the definition of rent. This broadens the remedies available to the landlord in the event of breach.

8. The correct answer is (d).

9. a) Ritche can choose to make a demand under the promissory note and if the Schwarz's are unable to pay, then he can choose to sue for breach of the promise to pay or proceed under the collateral mortgage. Students should refer back to Chapter 11 (Dealing with Banks and Other Financial Institutions) for principles of law relating to the giving of security and in particular promissory notes.

   Under the collateral mortgage, Ritche can go by way of power of sale or foreclosure by giving the appropriate notices and filing the appropriate legal documentation.

   In a bankruptcy situation he would rank as a general creditor under the promissory note but with the collateral mortgage he would be a secured creditor and take priority over preferred and general creditors. In a bankruptcy situation, he would be required by the trustee to proceed by power of sale or by judicial sale in order to obtain the best price for the property. Any money in excess of the mortgage funds would be made available to the other creditors of the bankrupt. If no bankruptcy occurs then, given the potential value of the property once the new car manufacturing plant is completed, Ritche may want to give serious thought to going by way of foreclosure rather than power of sale to maximize the return on his loan.

10. a) Priority is determined by timing of registration:

      1. First: Cross Town Credit Union
      2. Second: Canadian Commercial Bank
      3. Third: Kiva Sivananda.

   b) Assuming the property is under the registry system, the nature of the interest transferred is:

      1. The Canadian Commercial Bank: equity of redemption
      2. Cross Town Credit Union: legal title
      3. Kiva Sivananda: equity of redemption.

   c) The financial result for Canadian Commercial Bank and Kiva Sivananda is that any money received in excess of the $55,000.00 owing to Cross Town Credit Union would be first applied to the mortgage held by the second mortgagee, Canadian Commercial Bank ($100,000.00) and any money left following the retirement of the second mortgage would be applied to the third mortgage held by Kiva Sivananda

($30,000.00). Any shortfall in the amounts owing to the second or third mortgagees once the sale proceeds have been exhausted could be made up by suing Montell personally on his promise to pay contained in the mortgage documentation.

d) Canadian Commercial Bank has the options of keeping the mortgage in good standing by paying out Cross Town Credit Union and becoming the first mortgagee, or, alternatively, taking over the sale of the property and handling the sale proceedings itself. Since it ranks second in priority, its best course of action might be to pay out the first mortgagee, Cross Town Credit Union and then proceed by power of sale itself if it has belief in its appraisal of the property at $175,000.00.

e) Kiva Sivananda has the same options as the Canadian Commercial Bank should Cross Town Credit Union proceed by power of sale. A further alternative, if it believes that Cross Town Credit Union will attempt to get a fast sale, would be to request a judicial sale of the property, thereby ensuring that there would be a strong attempt to obtain market value. Sivananda would also have the remedy of suing Montell personally for any money outstanding if the sale proceeds from the house do not match the outstanding third mortgage balance.

f) If this fact situation took place in Alberta, it may not be possible to sue the owner for the shortfall on the promise to pay. The option then becomes to go by way of foreclosure or, alternatively, judicial sale with the opportunity to sue for the shortfall. Again, students are being reminded that a business must keep aware that when doing business in another jurisdiction/province, the laws may vary.

11. a) Magee is liable for the balance due under the mortgage as, from the fact situation, no notice has been given to the bank concerning his retirement from the partnership. Partners are jointly and severally liable for the debts of the partnership. Students will need to draw on the principles detailed in Chapters 9 (The Organization of a Business) and 11 (Banking Agreements and Secured Transactions) to answer this question.

b) Magee should have provided notice to the creditors of the partnership of his retirement from the partnership that stated he would no longer be responsible for its debts. He should also have obtained a release from the bank for all obligations under the mortgage.

12. a) Grant should immediately give notice to the mortgagors of their default under the terms and conditions of the mortgage which requires them to keep the property in good condition and prevent waste. The damage and destruction to the property has affected its value and the mortgagor/borrower had a positive obligation under the mortgage not to allow that to happen.

If the mortgagors do not respond and bring the mortgage into good standing, Grant would be able to go to court and obtain an order for possession under the terms of the mortgage. He may then evict the mortgagors and proceed by power of sale or any of the other remedies discussed in the chapter.

13. The correct answer is (e).

14. a) An interior inspection—because that would require the appraiser to make an appointment with the occupant by phone and then attend and meet the occupant. It is most likely that the occupant would be the owner, except in the case of a tenancy. But then the owner would be required to accompany the appraiser. Alternatively, the drive-by appraiser could be asked to check on the occupant by a simple knock on the door, which would not add anything to the cost.

b) You could recommend that the insurance policy contain a clause that any mortgagee who made a claim must prove due diligence in identifying the true owner, which could be satisfied by proof of an interior inspection.

c) It does appear that the type of fraud in the *Maple Trust* case could be severely reduced by the requirement of either an interior inspection or at least an attendance by the appraiser or even the mortgage broker, where there is one, who would then certify that they had spoken to the occupant and checked the identification.

15. a) The risk of loss is shifted from the insured to the insurance company. The insurance company then spreads that risk by selling policies to a large number of people who have the same risk. Only a few of these people will actually experience a loss such as a fire. The insurance company uses statistical figures to calculate how many of that group will likely experience the loss and in what quantity. It then sets a premium that the entire group pays which will be sufficient to cover the loss and make a profit for the insurance business.

b) An insurance agent works directly for one insurance company while a broker is independent and may have arrangements with a number of insurance companies to sell their policies. The agent owes a duty only to its company, while a broker owes a duty to the insured.

c) An insurable interest means that the insured has a real risk of loss which it shifts to the insurance company. For example, if John bets Mary that there will be a traffic accident at a certain corner within 30 days and there is an accident within that time, that is a wager. John has suffered no real loss because of that accident.

16. a) The fan cannot insure the life of Celine Dion without her consent.

b) The mortgagee does have an insurable interest because he would lose his security if the building burned.

c) A partner has an interest because he may have to find and train a replacement person to do the job of the deceased partner.

d) The British citizen would need HMQ's consent

17. The answers to the matching question are as follows:

Column A	**Column B**	**Column C (Right Answer)**
deductible	risk transfer	risk retention
risk	consideration	chance of loss
liability	extent of protection	obligation
insurance	prevention	risk transfer
premium	risk retention	consideration
coverage	obligation	extent of protection
risk management	chance of loss	prevention

18. a) Utmost good faith is the way a fiduciary duty is explained. It means that the person who has the duty must put the opposite party's interest above its own.

b) When a person is applying for an insurance policy, that person must disclose everything material to the insurance company that might affect the insurance company's decision to accept the risk.

c) Since a policy of insurance is to give peace of mind when there is a loss, the insurance company has an obligation to pay a proper loss and not use the expenses and delays of a litigation process to force an insured to take less than what is actually due the insured.

19. Match the following terms:

Column A	**Column B**
An insurance broker puts an ad in a paper indicating he has the best rates	invitation to treat
A customer sends an application to an insurance company	offer
After an insurance company issues a policy, the insured agrees to pay premiums	acceptance (consensus)
A mortgagee's interest as shown on an insurance policy	insurable interest

20. Yes Amit does. The clause effectively negates the coverage. Note: This was a real provision in a policy. The insurance company backed down.