**REVIEW QUESTIONS**

l. Contractual capacity generally refers to the ability to comprehend the nature and consequences of one’s acts. The issue of contractual capacity is made more difficult by the fact that some groups are presumed to lack the capacity to contract even though individuals within that group may well have the ability to comprehend the nature and consequences of their acts. This difficulty is significant, as a person must generally be seen to have capacity in order to enter into an enforceable contract.

2. Though perhaps overprotective in some instances, the law’s approach shields minors from exploitation and the consequences of their own inexperience. Some contracts entered into by minors (other than contracts for necessaries) are voidable at the minor’s option in order to protect minors from exploitation. By putting into place a rule that allows a minor to avoid certain contracts, those with whom they contract will have an incentive to ensure the contracts are fair and desirable.

3. Contracts for necessaries will be enforced regardless of whether a person has attained age of majority, so long as the goods and services are to the minor’s benefit and the minor does not already have a sufficient supply. Necessary goods and services include food, clothing, education, medical treatment, and legal advice.

4. A contract entered into by a mentally disabled adult who is not able to comprehend the nature and consequences of their acts will have no legal effect. In order to protect this group, its members are not afforded an election. Minors, on the other hand, are able to create legally enforceable contracts, although some of them are voidable. Only upon an election to avoid the contract does a minor’s contract lack legal effect.

5. A contract made while in a state of intoxication is presumed to be binding unless the person trying to avoid contractual liability can prove: (i) that their state of inebriation rendered them incapable of knowing or appreciating what they were doing, and (ii) that the other party was aware of this incapacity but entered into the contract regardless. Once sober, the party seeking to avoid liability must make a prompt election to avoid the contract. One example would be a situation where two friends are drinking heavily at a wedding reception all night, consuming large quantities of alcohol in a short period of time. Each is aware of how intoxicated the other is, yet they strike a deal where one will purchase the other’s car. The next morning, one of the parties realizes what he did and immediately calls his friend to cancel the deal. If the regretful individual neglects to quickly retract his promise, he or she may be bound to it.

6. A chartered corporation has the same capacity to contract as an individual who is of the age of majority. Even contracts in breach of its charter will be binding, although they might forfeit the charter. On the other hand, a statutory corporation is a creature of statute. Its capacity to contract is limited to the authority given by its relevant enabling statutes and thus may be more limited in its ability to contract than a chartered corporation.

7.Since most associations are not independent legal entities, they do not have capacity to contract. Certain types of association are exempted from this rule by legislation in various jurisdictions. A business person must be prudent when contracting with an association because usually the contract will be with an individual on behalf of the association. A prudent business person will ensure that the association’s representative is in a position to assume personal liability for the contract in case the association does not perform its end of the deal. Likewise, a prudent person entering a contract on behalf of an association should understand clearly his or her responsibility and liability for the contract, should a dispute arise.

8. An Indian band (iea body of native persons whose land and money are held by the Crown) is one kind of unincorporated association that does have the legal capacity to contract. They can sue or be sued. This is not always so for individual native persons who are protected from exploitation by legislation that limits their capacity to contract. As soon as a native person leaves their band area and becomes “enfranchised”, they will have a limited capacity to contract.

9. Most contracts are not required to be evidenced in writing. The *Statute of Frauds* imposes written formalities in the following kinds of contracts:

* Guarantees, which are conditional promises to be responsible for another person’s debt if they fail to pay (see Chapter 23).
* Contracts for the sale of an interest in land. It is sometimes difficult to distinguish contracts that concern an interest in land from those that do not. Please see You Be the Judge 10.1.
* Contracts that are not to be performed within a year of their formation. The courts tend to interpret these narrowly because this requirement often runs contrary to the express expectations and agreements of parties. The relevant question in most cases is whether the contract was *capable* of being performed within a year.

Most provincial statutes require writing in other circumstances, including (i) ratifications of contracts made by minors upon reaching age of majority, (ii) promises by executors or administrators to be personally liable for the debts of a testator or intestate, (iii) contracts made upon consideration of marriage, (iv) assignment of express trusts, (v) creation of trusts of land, and (vi) leases or agreements to lease land for a term exceeding three years.

Some consumer protection legislation also requires certain contracts to be in writing. For instance, in Ontario all personal development services contracts (diet, fitness, talent, sports, etc.) must be made in writing in cases where the consumer’s payment in advance is required under the contract.

10. The *Statute of Frauds* still has effect in much of Canada. It has been repealed in B.C. and Manitoba, and amendments have been proposed in other provinces. Requiring evidence in writing was intended to prevent people (plaintiffs) from fabricating oral testimony about promises that were never made. It was thought that perjury would be more easily committed by oral testimony alone than if written evidence were required.

11. An unenforceable contract still has legal effect. Although a plaintiff who is unable to adduce evidence of writing cannot bring an action against the other party for breach of contract, the mere existence of the contract will, in many instances, still affect the legal relationship between the parties. For example, a party can effectively rely on the existence of the contract as a defence. Unenforceable contracts can also affect legal relations when people discharge obligations owed under a previous contract by entering into a new oral contract.

12 The main difference is the time when the mistake occurs. A mistake about the existence of the subject matter of a contract is made at the time when the contract is formed (i.e. the parties are under the mistaken impression that the subject matter currently exists). Frustration deals with the future destruction of the subject matter. The parties are correct in believing that the subject matter exists when the contract is formed, it is only after contract formation that the state of the subject matter changes.

13. Where one party is mistaken about the identity of the other, and that person’s identity is somehow material to the contract, the mistaken party will be in a position to argue that the mistake prevented the parties from forming a contract. The party seeking to employ the defence will have to demonstrate that, besides being material, the mistake was known to the other party. In the case where the mistaken party has sold goods to a rogue (usually for a bounced cheque) who in turn has sold them to an innocent third party, the court will have to weigh the interests of the seller against those of the innocent purchaser.

14. If one of the parties is responsible for the event that makes performance impossible, the doctrine of frustration does not apply and that party will bear the risk. If both parties are innocent, the contract might indicate who will bear the risk. The contract may have accounted for the frustrating event through a force majeur clause, in which case one of the parties will contractually bear the risk. If the parties cannot determine who bears the risk, then the court will be asked to decide. Any applicable provincial statutes or the common law will govern the court’s decision.

15. *Non est factum* literally means “it is not my deed.” The plea is available only when there is a radical difference between what a person signed and what that person thought she was signing. It is part of the law of mistake because when a person signs a document completely by mistake it is rendered defective, thus relieving the mistaken party from certain contractual obligations.

16. Illegalagreements are those that are expressly or implicitly prohibited by statute and are therefore void. Other agreements, though not strictly prohibited, come into conflict with a common law rule or offend public policy. See also the extensive discussion of covenants in restraint of trade above, which illustrates how certain restrictive covenants in contract may be illegal for public policy reasons. Your students should be aware of the discretionary and possibly arbitrary nature of the “doctrine of public policy.”

Where a contract violates a regulatory statute, the intent of the statute is not usually to punish those who make the contracts, but to achieve some governmental purpose. In such cases, a court will not automatically set aside an infringing contract, but will assess the following:

* the seriousness of the consequences of invalidating the contract
* the social utility of those consequences
* the purpose of the statute and who it was intended to benefit or otherwise affect

Sometimes a court will invalidate some aspects of a contract but not others – for example by declaring that a particular interest rate is illegal while the underlying loan is still binding.

17. The doctrine of public policy is a notoriously vague doctrine that allows a judge to enforce or strike down a contract on the basis of what the judge considers to be best for society. It could be a concern for risk management where a business relies on the enforceability of a contract that is unexpectedly “unmade” by the court.

18. There are three main parts to the answer.

* *Economic Duress* A party, acting on another’s fear of impending financial injury, coerces that party to enter into a contract unwillingly.
* *Undue Influence* The use of any form of oppression, persuasion, pressure or influence which overpowers the will of a weaker party and induces and agreement. The law imposes a presumption of undue influence whenever a fiduciary is involved in a transaction.
* *Unconscionable Transactions* An agreement that no right-minded person would ever make and no fair-minded person would ever accept. The weaker party must prove that there was an improvident bargain and that there was an inequality in the bargaining position of the two parties. The stronger party then has the onus to rebut the presumption of unconscionability.

While the common thread among the three is unfairness during bargaining resulting in some vitiating of consent, it is worth noting that economic duress is a common law notion with a common law remedy, whereas undue influence and unconscionability are developments in the law of equity with equitable remedies.

19. Courts decide whether to intervene in a contract that was formed under economic pressure by assessing these five factors:

* *Bad faith*: it is one thing for a party to honestly say that it cannot perform without more money; it is another to apply pressure on someone simply because they are vulnerable. The latter constitutes bad faith.
* Whether or not the victim of the pressure *could reasonably have resisted*. Sometimes, it is reasonable to resist by bringing the matter to court; sometimes the situation requires a much quicker response.
* Whether or not the victim started *legal proceedings promptly* after the effects of the pressure passed.
* Whether the victim *protested* when presented with the pressure. However, a failure to protest is not necessarily fatal if doing so was obviously futile in the circumstances.
* Whether the victim *succumbed to the pressure without legal advice*; otherwise, agreement to a contractual proposal tends to look more like a sound business decision.

20. In a fiduciary relationship, one party is demonstrably dominant over the other. This usually occurs in a relationship of trust or confidence. Fiduciary relationships generate a special kind of duty that requires the more powerful party to subordinate personal interest in favour of the interests of the weaker party. Examples include parent/child; trustee/beneficiary; lawyer/client; and financial advisor/client, but these categories are not closed and a court may find such a relationship among other sorts or persons or organizations. Consequently, contracts for the sale of goods do not establish fiduciary relationships *per se*. But where the elements of such a relationship exist between the parties, the law imposes a presumption of undue influence on a contract, and the fiduciary party may be required to demonstrate that the bargain was struck with due care for the interests of the weaker party.

# CASES AND PROBLEMS

1. At the time that Erin entered into the contract, she was a minor. Consequently, if the car is found to be a “necessary”, the contract will be enforceable. The question, then, is whether the car is a necessary to Erin. The dealership wants to claim that the car is a necessary and that Erin therefore cannot back out of the contract. The rule that makes contracts for necessaries enforceable is premised on the need to ensure that people are willing to sell the necessities of life to a minor without having to worry that the minor will renege on the deal. One can imagine that if every 17 year old had the ability to avoid payments for every car that they decided to buy, car dealers would not stay in business very long. However, this factor does not by itself make a car a necessary. The relevant question is whether Erin could survive without the car. Is the car like food, shelter, or education? Or is it more like a luxury item? It is unlikely that the court will see this car as an item necessary to Erin’s life. Although the car might be necessary to some livelihoods, the fact that Erin has decided her business no longer requires a car is persuasive of the fact that the car is not a necessary. For the above reasons it is likely that Erin will be permitted to avoid her contract with the dealership. This is especially true if the burnt out bearings were the fault of the dealership.

[Based on *Pyett v Lampman* (1923) 53 OLR 149 (Ont CA)]

2. Elwood’s ability to avoid liability will depend on whether he was sufficiently intoxicated to render the contract defective. At issue is whether Elwood entered a state that rendered him incapable of knowing or appreciating what he was doing. As well, he will have to prove that Hank was aware of this incapacity but entered into the contract anyway. Although, on the facts, Hank knew that Elwood had been drinking, Elwood’s state of inebriation did not prevent him from winning at darts and having lunch. Thus it is unlikely that Elwood was incapable of appreciating what he was doing, nor would Hank have perceived it that way. As well, Elwood remembered and acknowledged the contract afterwards and made no attempt to repudiate it until the price shot up. For these reasons, Elwood will not be able to avoid contractual liability.

[Based on *N Bawlf Grain Co v Ross* [1917] 3 WWR 373 (SCC), reversing [1917] 1 WWR 1169 (Alta SC AD)]

3. These facts are loosely based on *CIBC v Milhomens* (see brief below). In order to determine whether a contract is voidable for mental incompetence, the court must determine whether the party was incompetent at the time the contract was entered into and whether the other party was aware of this incompetence. Michael has medical evidence to show his incompetence, but there are no facts to suggest that the bank was aware at the time. It seems as though Michael filled out the application forms on his own and did not communicate with anyone at the bank. In this case, the bank will likely be able to sue for the outstanding balance. However, it would be very helpful to have confirmation that the bank did not know of Michael’s incompetence in order to make a conclusive determination.

[Based on *Canadian Imperial Bank of Commerce v. Milhomens* [2004 SKQB 168, 2004 CarswellSask 304](http://canada.westlaw.com/find/default.wl?serialnum=2004376608&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLCA11.04&db=6407&findtype=Y&fn=_top&mt=LawPro&vr=2.0&pbc=97FB93DB&ordoc=0343730303) (Sask QB)]

4. Mistaken identity is often used as a contractual defense. A mistake as to a person’s identity — where the person’s identity is somehow material to the contract — makes a contract defective and therefore voidable at the mistaken party’s option. Usually, mistaken identity cases involve a rogue who is purposely trying to trick the other party into thinking that he or she is someone else. In this case, the mistake is that Nunzio is the owner of the restaurant when in fact he is not. It is arguable that this is a mistake as to attributes rather than a mistake as to identity. You were not under the mistaken impression that Nunzio was someone else, only that he was in fact the owner of the restaurant. In any event, the doctrine of mistaken identity is inapplicable here because the mistaken party is seeking to enforce the contract, not avoid it. At best, mistaken identity gives rise to a contractual defence.

[Based on *551969 Alberta Ltd v Olasker* (1995) 176 AR 1 (Alta Prov Ct)]

5. The answer to this question depends in part upon the jurisdiction. For this answer, we will assume the scenario takes place in Ontario, a province in which the *Statute of Frauds* is in force. Because this is a contract for the sale of an interest in land, s.4 of the *Statute of Frauds* requires that it be evidenced in writing and signed by the parties to the contract. Consequently, the Agreement of Purchase of Sale, which contained LCE’s “essential” amendments and was not signed by HIO, is probably not sufficient to meet the terms of the statute. However at times, courts have held that the writing requirement is satisfied by the combined effect of several documents. One question here is whether the tape-recorded conversation can constitute such evidence. In *Neighbourhoods of Cornell Inc.*, an Ontario court held that a tape-recorded conversation cannot substitute for a written document in a contract for the sale of land. Likewise, given that LCE (the plaintiff here) considered the amendments to the draft agreement to be essential, it can hardly claim that HIO was bound to agree to them and that the sale was therefore a done deal. In contract law terms, the amended agreement can be characterized as a counter-offer, which HIO was entitled to accept or reject at its own option. Consequently the putative agreement is not enforceable.

6. In this contract, the parties agreed that Waggles would provide X amount of lentils from its farm to L&L, a human food distributor. Through no fault of either party’s, the performance of the contract became impossible when weather conditions destroyed the crop. When some event makes performance impossible or radically undermines the purpose behind the agreement, a contract is said to be frustrated, with the result that both parties are relieved of having to perform the relevant terms unless there is an express term in the contract outlining their respective responsibilities under such circumstances. In this case, neither party conferred any benefit to the other, so the legislation on frustration of contract does not come into play, but the common law may still apply.

The doctrine of frustration, like the law of mistake, tries to strike a fair balance between the parties. The main question here is whether Waggles is correct in saying that L&L is bound to accept any kind of lentils, in which case the contract would not be frustrated. On a purposive construction of the contract, a court is likely to find that L&L, a health food distributor, would never have agreed to a term that bound it to buying cattle feed. On these facts, a court is likely to find that, due in part to a lack of clarity in the contract, neither party has a claim on the other and the contract is frustrated. In forming contracts, risk managers should consider including clauses that define what constitutes a breach and what consequences will follow – otherwise it is left to a court to determine.

7. There are a number of different ways that this problem could be addressed. The first is that students might try to apply the law of misrepresentation from the previous Chapter. On this approach, the issue will be whether the representation that the land title was for about a thousand acres is a representation of fact, opinion or law. Some students will say that it is a statement of law and therefore not actionable as misrepresentation as everyone is presumed to know the law. To determine the nature of the misrepresentation, one would need to know more facts. Was Golden Joe sure that he had acquired all of the rights to the land including the mineral rights? It will also be important to know whether Prospectus cared about having a thousand acres or was only concerned about getting the land with the diamond stash. Were the diamonds on the saleable part of the land or on Crown land? Perhaps the most appropriate answer to this question is to view it as a mistake rendering impossible the purpose of the contract. Whether one views this as a mistake about the existence of the subject matter (it turned out that there did not exist non-Crown land with a diamond stash) or frustration (because the Crown revoked Joe’s title, he was no longer in a position to perform as promised), both parties made a mistaken assumption about the future. Given the 90 per cent reduction and the likelihood of losing the diamond stash, it is clear that the mistake was a material mistake. On either analysis, Prospectus would likely succeed in proving that the contract was defective. Joe could have protected himself in a couple of different ways. The first thing that he could have done was to ensure that there would be no mistake by obtaining a proper legal opinion on the title to the land (or by insisting as a term of the agreement that Prospectus satisfy itself about title to the land). The second thing Joe could have done (if he did not want to ensure title) is to contemplate and allocate the risk as to title and specify who in the contract bears that risk. Just as parties use *force majeure* clauses to allocate the risk of unforeseen events beyond their control, a clause with a similar purpose might have been utilized here.

[Based on *Barron v Morgan* [1930] 4 DLR 985 (SC)]

8. In this case Emond is trying to argue that after the contract was formed, the low supply of fish frustrated the contract. As stated in the textbook, the doctrine of frustration is not triggered where an event simply makes performance of the contract more onerous. In this case, Emond could have gone to another location to perform the contract and collect all of the fish. This may have been more onerous, but as the court found in *Delta Food Processors*, the added time and effort to collect fish elsewhere did not substantially alter the nature of Emond’s obligation under the contract. Emond will not succeed in his defence of frustration.

[Based on *Delta Food Processors Ltd. v. East Pacific Enterprises Ltd*. (1979), 1979 CarswellBC 326, 16 BCLR 13]

9. Mr. Bundy’s *non est factum* defence is unlikely to be upheld by a court. This defence requires Mr. Stone to show that the agreement of purchase and sale was fundamentally, radically or totally different from what he thought he was signing. On these facts, Bundy claims only that he did not read the agreement, essentially out of carelessness. He has not indicated that he had no opportunity to read, or was prevented by his nephew from reading the contract, or in fact that the document he signed is in any way different from the one being used to enforce the contract. As a general rule, a party seeking to rely on the *non est factum* principle must not have been careless or negligent in the execution of the agreement, and consequently the principle does not apply here.

As we saw in the sections and questions relating to mistake and rectification, Bundy could argue that his nephew was aware that the purchase price was a mistake and did not reflect the bargain they had negotiated before putting it into writing, and that the nephew had “snapped up” the deal. In such circumstances, following *Performance Industries,* a court might be prepared to rectify the contract. However, this does not appear to be the case here, since Mr. Bundy claimed that *he* made a huge mistake, not that the contract was mistaken as regards the bargain they had struck.

10. Given that the parties had originally agreed to a flat rate and only later amended that agreement, it is necessary to look at the circumstances surrounding the amendment in order to determine whether Mind Games is obliged to pay the additional amount. At issue is whether Marinka was under economic duress when she agreed to the amendments. On the facts, it is arguable that CompuNerd was acting on Marinka’s fear of impending financial injury and thereby coerced her to enter into the amendment agreement against her will. Given her reluctance to amend the original agreement and her unwillingness to honour it, Mind Games will be in a position to claim that the economic duress applied by CompuNerd vitiated her consent to the amendments and that the amendment agreement can therefore be avoided.

[Based on *Gotaverken Energy Systems Ltd v Cariboo Pulp & Paper Co* (1993) 9 CLR (2d) 71 (BCSC), additional reasons at (1995) 9 BCLR (3d) 340, affirmed (17 June 1994), Doc CA016816 (BC CA)]

11. Maya’s claim is based on the doctrine of undue influence. Undue influence involves the use of any form of oppression, persuasion, pressure, or influence — short of actual force though stronger than mere advice — which overpowers the will of a weaker party and induces an agreement. In this case, Maya’s husband is acting as her physician and thereby owes her a fiduciary obligation. As a result, the transaction entered into with her husband will be presumed to be the result of undue influence and it will be up to Coby to rebut that presumption. He will need to demonstrate that Maya entered into the separation agreement freely. Given that she was heavily sedated and that the agreement was improvident from Maya’s perspective, the presumption will not easily be rebutted. Coby will have to show that agreement was reached freely and independently. Such proof is highly unlikely on the facts.

[Based on *Droit de famille* — 1918 (1993) [1994] RDF 68 (CS Qué)]

12 This question raises the issue of unconscionability. A number of factors point to the contract being improvident: the purchase price to be paid five years in the future was almost half the value of the land at the time of entering the contract, no interest was to be paid on the unpaid purchase price, and the purchase price was to be paid out in small installments over a very long period of time meaning that the vendor would be 113 years old by the time the price was paid. The value of the land at the time of exercising the option was more than quadruple the purchase price. There is also evidence of an inequality of bargaining power given the respective ages and states of health of the parties and the evidence suggesting that Mr. Bonli had no idea what he was signing. Mr. Turner could not rebut the presumption of unconscionability because there is no evidence suggesting that the bargaining process was “fair, right and reasonable”. Not only did Mr. Turner not encourage Mr. Bonli to obtain independent legal advice, he appears to have discouraged it by having Mr. Bonli attend at his office to sign the contract that he wrote early in the morning when no one else was around.

[The facts of this question are derived from *Turner Estate v Bonli Estate*, [1989] SJ No 342 (Sask QB), aff’d [1990] SJ No 313 (Sask CA) where the court found that the contract was unconscionable].