BUSI 112
Suggested Answers to Review and Discussion Questions

Lesson 1

1. (a) Stare decisis means "to stand by a previous decision". The theory of precedent or stare decisis requires that judges follow decisions of an equal or higher court within the same jurisdiction when considering a similar case. The lawyer will look at similar cases, and if necessary, try to distinguish them or use the decision to support the case at hand.

   (b) (i) persuasive but not a precedent case
   (ii) a binding precedent case
   (iii) persuasive but not a precedent case
   (iv) a binding precedent case
   (v) persuasive (see page 1.15 of Chapter 1)

2. If successful at trial, the court may order the unsuccessful party to pay court costs, which usually only cover part of the fees a lawyer actually bills their clients. You will have to pay your lawyer the difference between the actual costs and the court award, which can be significant in a major trial.

3. The parties are different:
   - Criminal cases are between the Crown & the Accused.
   - Civil cases are between the Plaintiff & the Defendant.

   The burden and standard of proof is different:
   - In criminal cases the Crown must prove guilt beyond a reasonable doubt.
   - In civil cases the Plaintiff must prove his/her case on the balance of probabilities.

   The classification of law is different:
   - Criminal law is public law.
   - Civil law is private law.

   The remedies/objectives are different:
   - Criminal law is punishment and deterrance, including imprisonment.
   - Civil law is compensation, a court order such as an injunction, or a declaration as to rights. (You can no longer be put in jail for failure to pay debts.)

4. Commencing the Action
   - Written pleadings exchanged
   - Discovery of witnesses and documents

   The Trial
   - Witnesses called by the Plaintiff
   - Witnesses cross-examined by Defendant
   - Witnesses may be re-examined by the Plaintiff
   - Witnesses called by the Defendant
   - Witnesses cross-examined by the Plaintiff
   - Witnesses may be re-examined by the Defendant

   Both parties address the judge
   - Summarize the evidence and the law, referring to precedent cases

   Judgment
   - The trial judge gives his decision.

   Order as to costs
   - Usually to the successful party, or each party can be ordered to bear their own costs

5. Criminal trial for theft
   - Charges brought by the Crown

   Civil trial for return of the funds
   - Claim brought by the agency for reimbursement

   Disciplinary Hearing
   - Brought by the governing provincial real estate body, which has power to penalize the agent/broker, including suspending or cancelling their license.

6. (a) Criminal action in the provincial Criminal Courts — *Regina v. Frank Enstein*
   (b) Civil action in Small Claims Court — *Mavis Brown v. Happy Tappers Ltd.*
   (c) Civil action in Supreme Court — *Mavis Brown v. Seal It Up Ltd.*

   (Note: the names of the individual courts may vary from province to province.)

7. The Multiple Listing Service is operated by the local Real Estate Board. The Board will also:

   (a) Promote and develop post-licensing education.
   (b) Work with members regarding the Canadian Real Estate Associations Code of Ethics & Standards of Business Practice.
   (c) Enhance the public's view of the real estate industry.
   (d) Actively participate in changes in legislation which would affect the real estate industry.

8. All provinces require there be two categories of licensing. The names of the two categories differ between provinces, however, the two common categories are:

   (a) Broker or agent: can act independently in real estate transactions, for a fee, gain, or reward.
   (b) Salesperson or representative: are employed by a broker to perform certain real estate functions. This is the starting position to a career in real estate.

9. *Facts*
The plaintiff seeks to terminate rights claimed by the defendant, pursuant to a document signed by the defendant and the former owner of the plaintiff's property. The document, signed in 1953, was described as a lease, and allowed a right of way through the plaintiff's property to the gas pumps operated by the defendant, for the sum of $5 per year. The plaintiff accepted $15 worth of rent, but then refused to accept a payment in 1968, and revoked what he called the licence under which the defendant operated the pumps.

Issue(s)
Is the agreement entered into in 1953 a licence, and therefore not binding upon subsequent owners of the lands, or is it a lease? If not a lease is it an easement, or a licence with a grant, therefore creating an interest which binds the plaintiff?

Decision
The defendant can succeed on two grounds. Action brought by the plaintiff dismissed.

Reasons
1. It is a lease, as there is exclusive possession of a piece of land sufficiently described by the location of the pumps.

   There is a definite rent for the use of the land.

2. In the facts in this particular case, it was found that it could be an easement even if no dominant tenant was specified.

Ratio = principles decided
Here the plaintiff purchased the land with the knowledge of the 99 year agreement, and he accepted those terms by taking the equivalent of a 3 year rent. The evidence shows the original parties to the agreement intended that the agreement carry on beyond their lives. The law supports the decision that a lease was entered into, and is binding on subsequent parties.

Lesson 2

1. (a) A joint tenant can sever a joint tenancy by a disposition of his interest during his lifetime. However, a disposition by will is ineffective to sever a joint tenancy because no transfer takes place until the joint tenant's death, at which time the right of survivorship of the other joint tenant takes effect immediately. Therefore, Phillip's attempted bequest in his will, even though it was dated prior to the conveyance to Phillip's mother, did not effect a severance. However, the joint tenancy was severed by the conveyance to Phillip's mother.

   (b) Phillip's mother now has Phillip's interest in the property. Because there is no unity of time or title between Phillip's mother and Estella, the two of them are tenants in common.

2. It is necessary to decide if this is a valid easement since Casy would not be bound if it were not, despite the registration. Tom will have difficulty in proving an easement exists. Certainly Lot 2 is the servient tenement, but where is the dominant tenement? If it is deemed to be Lot 3, how does the easement enhance that lot? If it is deemed to be Lot 1, the argument can be raised that Lot 1 is too far away or that the benefit is to a use on the lot rather than to the lot itself. A court might decide either way on these points.

   If this is a valid easement, then failure to specify the dominant tenement will not defeat an easement if evidence will indicate what that tenement was: *City Meatmarket (Sault) Ltd. v. Hagen*.

3. The life estate is valid, so the property will pass to the surviving grandchildren, who will be joint tenants due to the four unities of possession, time, title, and interest being present. Better legal wording would replace "then" with "remainder", as title reverts to the "remainderman" at the end of the life estate.

   However, each and every one of the grandchildren may sell or dispose of their interest, so the property may not be passed on and remain in the family as intended. Note that if any grandchildren decide to sell their portion, this does not affect the joint tenancy of any of the other joint tenants, who will remain as joint tenants of the remaining portion.

4. The common law position that a person who owns lands owns also to the skies has been altered by modern usage of airspace. An owner's right to airspace is limited to what they can effectively use, and an action for trespass is allowed where reasonable use is interfered with. Here, the neighbour's use of their yard is altered, both visibly and by the shadow caused by your use of their airspace. A court would probably rule that the overhanging 5 feet was not allowed, but no action would be allowed for the shadow from any portion of the satellite dish on your property.

5. (a) The four tests used are :

   - Articles attached only by their own weight are not considered part of the land unless circumstances show that they were intended by the owner to be a part of the land.
   - Articles affixed to the land in some degree are considered fixtures, unless circumstances show a different intention, particularly where their removal would cause damage to the building.
   - What was the purpose of the affixation — to enhance the land or to enjoy the article?

- Upon termination of the tenancy a tenant has the right to turn fixtures back into chattels by removing them from the property. If land is sold, the tenant's fixtures, which have formed part of the land, pass to the purchaser, subject to the tenant's right to remove them.

(b) (i) chattel — it is not attached other than by weight.

(ii) fixture — if removing them could damage the floor, then they may be considered fixtures. However, if they were not bolted and are moveable, that is, they are only attached by their own weight, then they could be considered as chattels, unless circumstances show a different intention. Notice here how what is intended to be a removable item could become a fixture due to the requirements of a third party.

(iii) fixture — the sink is plumbed in and affixed to enhance the use of the property. The property would be damaged by its removal.

(iv) chattel — while these are plumbed for water they are only affixed by weight, so can easily be removed.

(v) chattels — as they can easily be removed.

Lesson 3

1. (a) This agreement is not enforceable since neither party has the intent that the casual offer and acceptance will give rise to legal consequences. In social surroundings the courts will presume a lack of intent unless proved otherwise — there is no such possible proof here. In commercial situations the converse holds true, the courts will presume intent unless the contrary is proved.

   (b) If the promise to pay $2,000 is viewed as consideration for painting the house, the consideration is likely past consideration and would not lead to an enforceable contract. Since the house has already been painted, the promise to pay is viewed as a gratuitous promise, a promise not given in exchange for something. Such a promise would only be enforceable with the use of a seal. Alternatively, it could be argued that the promise and the act of painting the house should be considered as one transaction, thus forming an enforceable contract. For example, if the promisor has requested that the house be painted, a court may imply a promise in return for the act. Without more information, it cannot be determined for certain.

   (c) Provided the offeree agreed to paint the house, there would be an enforceable contract since there would be mutual promises. The court could determine a reasonable amount as consideration, under the principle of *quantum meruit*.

   (d) A court will not normally review the adequacy of consideration so in theory the contract is enforceable. The $10.00, however, might be regarded as evidence of fraud, insanity or undue influence, any of which would affect the validity of the agreement. In the absence of fraud, insanity or undue influence, it is a perfectly enforceable contract. Such a low amount could also be evidence of a joke — that is, a lack of intention to create legal relations.

   (e) Again, this is a gratuitous promise, so the agreement cannot be enforced. Should the charity promise to put a nameplate on a bed, it might be argued that there was consideration.

   (f) This contract probably could not be enforced as, on an objective view, the offeror would not be deemed to have intent. A very old case, in which a man promised to pay $100 to any man who married his daughter with his consent, held that the promise could not be sued upon as the offer was made in a fit of irritation, and no intent to give rise to legal consequences existed. The test for whether the parties intended to be bound to the contract is an objective test — what would a reasonable person conclude that the parties intended? Here, it is unlikely that intent to sell the horse was present.

2. Generally speaking, an offeror is free to impose any kind of condition for acceptance and the offeree must comply exactly, if the acceptance is to be valid and give rise to a contract.

   In this instance, the offer expired on Monday at 1:00 p.m. and cannot be accepted after that time. Legally, Frank made a new offer on Tuesday which must be accepted by the manager before a contract could come into existence.

3. The issue here is whether there has been any consideration exchanged for the increased price of the lot. Consideration is what the parties exchange in a contract — the mutual benefits and detriments, or as is sometimes referred to, the mutual gains and losses.

Although the courts will not usually examine the adequacy of consideration, it must have some value. However, sometimes gross inadequacy of consideration can be evidence of fraud. Here there was valid consideration for the purchase of the lot for $25,000. There was no new consideration offered by Dan for the increase in price. Dan was under an existing legal duty to sell the lot for $25,000.

A new bargain requires new consideration, which was not present here. Due to a lack of consideration, the increased price is not binding. Dan is required to sell the lot for $25,000. While not specifically mentioned, the offer would be unlikely to have lapse in the course of one day. It is reasonable to assume that the offer would remain open as land is a non-perishable good.

4. Two main elements of a contract are offer and acceptance.

SFU made you an offer by mail on August 20th which you were to return by August 25th. You accepted by mail. The acceptance was sent on August 24th and received on August 28th. Was acceptance effective before the offer lapsed?

When it is reasonable to accept by mail, acceptance is effective when sent, rather than when received. This is due to the postal acceptance rule. Usually it will be reasonable to accept by mail if the offer was made by mail. In this case SFU said that the offer had to be returned by August 25th, which would mean that acceptance would not be effective until received. Well written offers often specify that they must be returned by a specific date in order to get around the postal acceptance rule. Acceptance was effective August 28th, when the letter was received by SFU, after the offer had expired. You therefore have no contract with SFU.

5. A misrepresentation is a false assertion of a material fact that induces a party to enter into a contract.

Barry committed a misrepresentation when he said that the car had never been in any accidents when it had been. Here it was a fraudulent misrepresentation as Barry made a false statement prior to the contract which induced the other party to enter into the contract, and he knew the statement was false when he made it. If John can prove this to a court, he would likely be entitled to financial compensation.

Lesson 4

1. Candid can get Greenacre back, free from the mortgage granted to Trusty Trust. Since Cheater McRogue was a fraudulent registered owner, Trusty Trust cannot rely on the land title system to protect its interest. Furthermore, Trusty Trust cannot rely on the Assurance Fund to recoup its loan; it must bear the cost itself.

2. Adrienne, who bought the property bona fide and for value from Gordon, is protected by the B.C. land title system; as a result, Fred cannot have his property restored to him. Fred should try to make a claim against the assurance fund. In order to be successful, he must satisfy the four criteria listed in the solution for Question 1.

3. Yes, it is only interests in land that can be registered in a land title office. A manufactured home, unless affixed to the land, is a chattel. Only once it is affixed does it require registration in the land title office.

   The purchaser of a manufactured home can buy it using a conditional sale agreement, which means the seller retains title to the manufactured home until all payments are made, at which time the seller must transfer legal ownership to the buyer. This could be the situation at hand. Alternatively, the manufactured home may have been used as security for repayment of other debts.

   In any case, many provinces (such as British Columbia) have a central registry for security interests. Thomas should have checked under the Personal Property Registry to see if there was any security interests registered against the manufactured home, since it was still a chattel at the time of the purchase.

4. No, the properties properly passed to Willie.

   In Alberta, a transfer is valid only if registered, even between the original parties. The nephews would have had no claim against Bessie, even if she were still alive and denying the transfer.

   In B.C., an unregistered transaction is valid and can be enforced between the two parties before registration. Therefore, prior to Bessie's death, the transaction would have been between Bessie and her nephews.

   In the case at hand, at the time of Bessie's death the properties were registered to Bessie. Therefore the executor of her estate can transfer the property to Willie, and the properties will not be subject to any prior interests.

5. An equitable mortgage can be formed by depositing the duplicate certificate of title with the intent that it should form a security for a loan. Before banks could advance monies on mortgages of real property, this was a common transaction.

   Complete security is lacking because this type of mortgage cannot be registered. However, an equitable mortgage does offer some security, given legislation preventing the property from being sold or mortgaged if the duplicate title has been removed from the land title office. That being said, holding

the duplicate title does not prevent some documents from being registered during that time, including short term leases, easements, certificates of pending litigation, or builders' liens.

Given the value of the property and the size of the loan, this would appear to be a decent form of security despite the lack of formal registration.

Lesson 5

1. Dave might have an action in misrepresentation. He could attempt to prove innocent, fraudulent, and/or negligent misrepresentation. Innocent misrepresentation is actionable in contract, not tort, so you should only discuss fraudulent and negligent misrepresentation.

   Normally, a statement predicting the future value of land would be an opinion. But in this case, Val is an expert, so her statement of opinion would be actionable if it is unfounded or exaggerated. An opinion given by an expert is treated as a fact, so can form the basis of a misrepresentation. Since this statement falls within the sphere of tort it does not matter that it was made in reference to a future event. The statement probably does not amount to a fraudulent misrepresentation because Val believed it to be true. Hence, she did not make it recklessly, without caring whether it was true or not.

   It appears from the facts that Val should have investigated the truth of her statement. A reasonable investigation would probably have shown that prices were overvalued. Since Val gave an unqualified opinion she is deemed to have accepted the legal responsibility to give the opinion using such special care as the particular circumstances required. She knew Dave would rely on her statement, which he did, and should have made sure that her statement was accurate, which she did not. Atticus' statement provides evidence to show that Val should haven known the property values were likely to decrease rather than increase. So, Dave will likely succeed in an action for negligent misrepresentation. The statement was made by Val in her capacity as an expert in land not in her capacity as agent for the vendors of the properties so Dave may sue Val for his losses resulting from his reliance on her expert opinion but may not use the statement as a means to avoid the sales.

   Dave would be entitled to damages for his loss since he cannot avoid the sale contracts for the land into which he entered on the basis of Val's statements. Dave relied on Val's statement in making his investment so his damages are those losses he has suffered with respect to his investment. If Dave mitigates now by selling the properties he will be entitled to the decrease in value since he purchased the lands. Since there is no fraud here, he will not be entitled to punitive or exemplary damages.

2. This set of facts is taken from *Nasser v. Rumford* (see Online Readings for Lesson 5). In that case, the home owners were found liable under section 5 of the Alberta Occupiers Liability Act. This section requires an occupier to take such care as in the circumstances of the case is reasonable to ensure that a visitor is reasonably safe in using the premises. The Court found that the habits of the dog made the type of accident clearly foreseeable. By failing to restrain the dog, Curtis and Mats were in a breach of duty as occupiers under the statute. In this case, Quinn will probably be awarded damages.

3. In order to have a successful claim against A, B, & C, Loans R Us will have to prove negligence. In order to prove negligence, it must be shown that a duty of care was owed to the person harmed. For negligent misrepresentation, the tort possibly committed here, it must be shown that Loans R Us was in a special relationship with A, B, & C. A professional does not owe a duty of care to all users of his or her advice, just those with whom they are in a special relationship. For a special relationship to exist, the professional must know that the harmed party, or someone within a group of people that the harmed party is one of, would be using the information, and they must be using it for the purpose for which the material was prepared.

   Here A, B, & C did not know that Aqua Adventures would be using the audit for obtaining a loan, and the audit was not prepared for that purpose. So, even though the standard of care owed was breached in this circumstance, A, B, & C would not be liable to Loans R Us.

4. The issue here is vicarious liability, and whether Rico is vicariously liable for the acts of his employee, Keith. The law is that an employer is vicariously liable for the negligence of an employee if the negligence occurs during the course of the employment. Here Keith is an employee, and was performing his work-related duties at the time of the accident. Keith caused the accident due to his negligence. As Susan was in a crosswalk at the time of the accident, it is unlikely that she contributed to her loss, so would not be considered contributorily negligent.

   If the accident had occurred while Keith was driving his son to soccer, even though he was driving a car belonging to Hot to U Pizza, the courts would probably not hold Rico vicariously liable, as the act complained of must have occurred while the employee was engaged at work. The test used is whether the act complained of is closely connected with a duty being carried out in the authorized course of employment and not when the servant has divested himself of his duties. Here it could be argued, probably successfully, that Keith was not working at delivering pizza at the time of the accident, rather, he was transporting his son to a soccer practice, so the loss did not occur during the course of his employment.

   Whether Keith was delivering a pizza or taking his son to soccer, he would be personally liable for his negligence. The distinction is only relevant for the issue of vicarious liability. Note also that the employer may have limited ability to recover losses directly from the employee.

5. The issue here is whether the trees created a nuisance, which you would be entitled to abate. A private nuisance occurs when the reasonable use and enjoyment of a person's property is interfered with. The courts will look at whether the supposed nuisance has caused harm, or whether proprietary rights have been interfered with. If no harm has occurred, it may be more difficult to prove nuisance. Whether the interference with the use and enjoyment of the property is sufficient to constitute a nuisance is a question of fact which must be determined in each case, and depends on what is considered reasonable in all the circumstances.

   It is unlikely that a neighbour's hedge, which does not encroach over the property line, would be considered a nuisance. There are many cases of interference with light and sunshine which have occurred due to the ever-changing landscape in areas where the houses are close together, and these cases are not actionable in nuisance. You could therefore be held liable for damage caused to the hedge, as it is unlikely you could prove it to be an actionable nuisance.

Lesson 6

1. This fact pattern is taken from *Ocean City Realty v. A & M Holdings* (Appendix 4 in the Course Manual).

   In order to render the principal liable to pay a commission it would be necessary to prove:

   (a) that there was a valid listing contract between OJ Realty and the vendor;
   (b) that the contract provided for payment of the commission upon certain conditions; and
   (c) that those conditions had been fulfilled.

   To resist such a claim, AB Vendor (the principle) would try to show that there had been a breach of fiduciary duty by the salesman or the agent sufficient to discharge AB Vendor from any liability.

   The listing contract creates the relationship of agent and principal. From this agency relationship arise certain contractual and fiduciary obligations which are owed to the principal by BOTH the agent AND its salesperson by virtue of their employer-employee relationship. Saul is not a "sub-agent"; he is an employee of the listing agent. On this basis, the salesperson owes the same duties to the principal as does his employer.

   The decision in *Ocean City Realty* indicates that the agent (and its employee) has a duty to disclose "everything known to him respecting the subject matter of the contract which would be likely to influence the conduct of his principal". On these facts, the arrangement between Saul and the purchaser indicates two things that the vendor should know: (1) the financial strength of the purchaser is doubtful, and (2) the trustworthiness and honesty of the purchaser is questionable. These are important factors which are likely to influence AB Vendor Ltd.'s decision whether to have business dealings with this particular purchaser.

   Because the agent is primarily responsible for the actions of its salesperson, the salesperson's breach of the fiduciary duty of disclosure is imputed vicariously to the agent. As a result both agent and salesperson are disentitled to commission. In conclusion, the vendor is not liable to the agent and salesperson because no commission is owed to them for the foregoing reasons.

2. (a) Some possible obligations which were breached by the agent in this situation are:
   - the duty not to act for another principal without full disclosure and consent,
   - the duty not to buy principal's property without full disclosure,
   - the duty not to use or misuse confidential information,
   - the duty to disclose material facts (which continues up to the completion date).

   (b) The vendor could bring a civil lawsuit for accounting for any profits received as a direct result of the licensee's breach of fiduciary duty. A breach of agency relationship disentitles the agent to the fee and the licensee would be liable to the vendor for the value of any benefit gained on the property (if any existed).

3. A "fiduciary" is someone who owes a duty of loyalty to another person, who is their principal. An agent owes their principal the fiduciary duty arising out of the trust relationship that exists between them: the duty of absolute loyalty. From the duty of loyalty arise other duties: not to act for two principals, to account, not to purchase the principal's property, etc.

   A real estate salesperson is a fiduciary of the vendor, as is the salesperson's employer real estate agent. This agreement occurs at the latest when the listing contract is signed.

4. *Open or General Listings*
   An open listing allows the owner or another agent to sell the property - with this type of listing the principal agrees to pay the agent a commission upon actual sale or other event as agreed upon. In the event of a dispute, the commission goes to the agent who was the "effective cause" of the sale. There is no obligation on the principal to sell the property to any prospective buyers introduced by an agent and the owner is free to sell the property themselves.

   Exclusive Listing Agreements or Exclusive Agency Agreements
   An exclusive listing agreement would not be a good idea in these circumstances as it gives the agent the right to a commission if the property is sold, even if sold by the owner. An exclusive agency agreement is similar, but here the agent is entitled to commission if the property is sold by themselves or any other agent, but not if the owner is the "effective cause" of the sale.

   Multiple Listing Service (MLS)
   This type of listing service is a form of exclusive listing, but it allows other agents to sell the property. If this occurs the commission is split between the listing and selling agent. The main advantage to this type of listing is the listing receives more exposure. For this reason, the commission paid is usually a bit higher. Since your client feels he has an extensive network of acquaintances who may be interested in his house, this may not be the right listing type for him.

5. If a condition precedent is too subjective, the courts may hold that it is no more than an offer. But here, the condition precedent is fairly clear. A party to a contract is under an obligation to make his or her best efforts to remove the condition, and act in good faith in trying to do so. The test used by the courts, as set out in the course manual is:

   > "The courts will imply an obligation on the part of the party for whose benefit the subject clause was inserted to do all that a reasonable person in similar circumstances would do to satisfy the clause. If a party could have, using its "best efforts," managed to comply with the condition precedent, the courts will hold that party to its contract as if that party had indeed complied with the condition precedent and completed the contract."

   In the case at hand you have made no effort to obtain financing. As well, if you complete the transaction on your current home, you will have more cash than needed to buy the house mortgage free. You therefore have suitable financing available. And, if you do not complete the sale of your own home, the purchaser may also have a claim against you, as you have found a home suitable for your family needs and therefore could remove the condition precedent on that sale as well.

   Unless a condition precedent is too subjective, the courts will not allow a party to avoid fulfilling the terms of it through inaction.

Lesson 7

1. (a) Hella has priority over Lucy's mortgage only for the $250,000 advanced prior to the registration of Lucy's mortgage. If the mortgage required her to make the further advances as opposed to leaving it to her discretion, then Hella would have had priority also with respect to the further advance of $50,000.

   (b) The answer to this question depends upon the jurisdictional legislation. In B.C., section 24 of the Property Law Act provides in part, that further advances made by a prior registered mortgagee will rank in priority to subsequent mortgagees if, at the time the further advance is made, the mortgagee has received no notice in writing of the registration of the subsequent mortgage from its owner. For example, if Lucy notifies Hella of the second mortgage by telephone but does not provide written notification as is required by s.24, Hella will have priority for the full $300,000. Here, it does not matter that Hella had the sole discretion to make further advances. For her to have priority, only one of the conditions in s.24 must be justified. In Ontario, written notice is not required.

2. Yes, Rehka may exercise her option under section 10 of the Interest Act to prepay the mortgage. Because the original date of the mortgage has remained unchanged and five years have passed since that date, Rehka has the right, confirmed in the Potash case, to tender payment.

   Section 10 permits the lender to take a penalty of three months' further interest in lieu of notice. So, Rehka must tender a further three months' interest. She cannot avoid paying this penalty if she exercises her option because it is expressly authorized by the Act. The penalty operates even if the borrower gives notice of her intention to exercise the s. 10 option; the penalty is in lieu of notice. Section 8(1) of the Interest Act does not apply to this penalty because (1) the s. 10 penalty is statutorily authorized and (2) since the principal and interest is being paid out in full the penalty does not have the effect of increasing the charge payable on any amount in arrears because there is no amount in arrears.

3. *Foreclosure*
   A mortgagee may bring an action for foreclosure. Foreclosure can occur when a mortgagor defaults on the mortgage. The mortgagee brings a court action to have the mortgagor's equity of redemption end. A judge first grants an order nisi and sets a date when the final order of foreclosure will occur. During this redemption period the mortgagor can redeem the property by paying the amount due into court. At the end of the redemption period (usually 6 months) the mortgagee can ask for an order absolute, which, if granted, forces the mortgagor to give possession and indefeasible title to the property to the mortgagee.

   Judicial Sale
   A judicial sale, or court ordered sale, can be advantageous to either the mortgagee or the mortgagor, depending on the value of the property compared to the mortgage debt owed and any costs incurred. If the property is sold through a judicial sale, and the sale yields more than the amount due, the excess is given to the mortgagor. If the amount is less, the mortgagee is still able to sue the mortgagor on their personal covenant for any amount owing. (After a foreclosure a mortgagee can no longer sue on the personal covenant if they recover less than the amount owed.)

   A judicial sale is usually sought after the order nisi has been granted, or at the expiry of the redemption period.

Action on the Personal Covenant
In most provinces, a mortgagee may bring an action based on the mortgagor's personal covenant, that is, the mortgagor's promise to pay the mortgage debt. This option can be used where it is no longer possible for the mortgagee to restore the property to the mortgagor.

Possession and Sale
Most mortgages contain a possession clause which allows a mortgagee, upon notice to the mortgagor, to take possession of the property and use the property for their own purposes or rent it out and receive the rental income themselves. They must account to the mortgagor for the rental funds, but possession and rental does ensure the mortgagee receives some payments from the property. The mortgagee has the further right to sell the property, after sufficient notice. However, the contractual right of sale is typically not used, rather a foreclosure action or judicial sale is commenced.

Receiver
Most mortgages contain a term that a court-appointed receiver may take possession of the property and take control of the property, including all contractual obligations such as rental of the property. Any revenue obtained from the property is, after paying expenses including the receiver's fee, put towards the amount owing under the mortgage.

Assignment of Rents
If the property is a revenue-producing property, it can be arranged that the rental income will be assigned by the mortgagor to the mortgagee to be used to reduce the amount due under the mortgage. This also ensures that the mortgagee receives some, if not all, of the amount owed under the mortgage.

4. You could suggest that your son and his aunt enter into an Agreement for Sale.

An agreement for sale is similar to a mortgage, but with an agreement for sale, the vendor gives the purchaser possession of the property, which remains in the vendor's name. The purchaser makes payments to the vendor (often monthly), and when the full purchase price, plus any amounts due for interest, has been paid, the property is transferred to the purchaser. There is no financial advantage to the vendor in agreeing to an agreement for sale rather than a mortgage. The benefit to a purchaser is that they can enter into terms with the vendor that are satisfactory to both parties, in a situation where the purchaser might not have qualified for a mortgage. For example, it could be negotiated that no payments are due in July and August, if the purchaser was a school teacher with no income during those months.

A benefit of such an arrangement for an elderly person is that they get a set income from the agreement, determined by the payment schedule, rather than one lump payment which, depending on the investing/spending habits of the senior, may not be as beneficial in the long run. For someone needing a lump sum to use as a down payment on another property, a private agreement for sale may not provide enough cash so this method of financing may not be feasible for them.

5. No, you do not need to pay this amount. The federal Interest Act, s. 8(1), sets out that the mortgagee may not charge a greater rate of interest after default than was due before. This clause would therefore be void, as contrary to s. 8(1) of the Act. Such a clause is unenforceable, even where agreed to between the parties.

Lesson 8

1. (a) The lease entered into by Pym and Helen is a term certain lease for 48 months. This is because the term is expressed in months, not years, and the rent is calculated on a monthly, not yearly basis for a specified length of time. At the end of 48 months the lease will automatically terminate.

   (b) The legal effect of Pym paying, and Helen accepting rent after the end of the term, which is referred to as "overholding") is to create, by implication of law, a new periodic tenancy on the same terms as the original lease. The period of the new tenancy will depend on the term of the original lease. Here, because the original term was for a number of months, the period of the new tenancy will be monthly. This means that the tenancy will continue to renew itself at the end of every month until either Pym or Helen gives at least one period's notice of their intention to terminate.

   (c) In the commercial context, the only requirement of the notice period is that it be "reasonable". This is usually interpreted as one period in the case of a monthly tenancy, with the end of the notice period normally coinciding with the end of a period of the tenancy. Given the amount of work involved in removing restaurant equipment, it is unlikely that an abbreviated notice would be reasonable. Helen ought to have given the notice to elapse at the end of June at the earliest, rather than the third week. As far as the form of the notice is concerned, there is no specific form that must be used with commercial tenancies as long as the content of the notice is clearly communicated. Therefore, writing the notice on the back of a letter is in itself acceptable.

2. Paul could probably give Alice notice of termination for "reasonable cause" under the Residential Tenancy Act. Although, "reasonable cause" is not a defined term, it might cover this situation of habitual late payment of rent. Unfortunately for Paul, the notice period required in B.C. in this situation is two calendar months. If notice is given to Alice now (July 10), the earliest date on which she must vacate is September 30.

3. Commercial tenancies are not subject to a requirement of using a prescribed form, rather, the common law dictates what is required for termination of a commercial tenancy. The intention to terminate must be clearly indicated. A lease can be terminated by giving "reasonable" notice, which is usually one rental period, unless stated otherwise in the lease agreement. Less notice than one rental period has, in certain circumstances, been considered reasonable by the courts.

   For residential tenancies, legislation requires that a landlord must give a tenant notice using a required prescribed form. The date of termination and a description of the premises are required. In most jurisdictions the reasons for termination by the landlord are also required.

   In most provinces, a tenant in a residential tenancy may give notice in any form, but the notice must include all the necessary details. Some provinces now have a requirement that notice by a tenant be in writing and signed by the tenant.

4. An assignment is a transfer of all interests under a lease to a third party. Both a landlord and tenant may assign their interests under a lease. Once the interests under a lease are assigned, the new landlord or tenant is bound by the lease. Since all the interests under the lease have been assigned, the original party is no longer obligated under the lease nor do they have any reversionary rights or interests. There is now privity of contract between the landlord and the new tenant.

   A sub-lease occurs when a tenant transfers less than the full interest or a portion of the leased property to a third party. Because the tenant has retained some interest in the lease, there is no privity of contract between the landlord and the sub-tenant. Any issues regarding the lease are still the responsibility of the original tenant. The tenant may then have a cause of action against the sub-tenant.

   Both a sub-lease and assignment of a lease are usually allowed under a lease agreement, but a provision in the agreement that the landlord must consent will be upheld. Permission cannot be unreasonably upheld, according to recent court decisions.

5. John and Jenn can sub-let the top of the house to Jenn's brother, with the consent of the landlord. By doing this, however, John and Jenn will remain liable for any breaches of the lease by both Jenn's brother and his cousins, including missed rental payments and damages if caused. Given the propensity for the premises to be a "party house", this could put John and Jenn in an unfavourable position.

   John can also obtain the landlord's consent to assign the lease to Jenn's brother, who could then sub-let the basement to the cousins. The landlord would then have privity of contract with the brother, but John and Jenn would still have contractual liabilities with the landlord.

   Given that John and Jenn need to get consent of the landlord to either sub-let or assign the lease, and both of these options do not free up John and Jenn entirely, it is perhaps best that John and Jenn terminate their tenancy agreement and introduce the brother to the landlord and hope things work out for the brother and the cousins.

   John and Jenn must also remember to give notice to the landlord. They must do this on or before the last day of a rental payment period to be effective on the last day of the ensuing rental period. John and Jenn must include all necessary details in the notice — the date and address in particular. As well, depending on the province he and Jenn live in, there may be a requirement that the notice be in writing (for example, this is the law in British Columbia and Nova Scotia.)

Lesson 9

1. What you are proposing is called a phased strata plan, which allows phases of a development to be built and sold, and the capital then used to develop the next phase of the development. By building and selling in phases, you have the safeguard of developing at a rate based on marked absorption rates.

   Each phase of the development must be approved to ensure it meets the requirements of the applicable provincial strata property legislation. The developer must file a form which clearly sets out the proposed phases of the development. This form must also set out proposed common areas, and include a sketch plan showing all the areas to be developed. A developer can be required to post a bond or provide other such security to ensure that the common area, as proposed, is completed. In many cases, the common area amenities will not be developed on schedule or the early phase unit owners will face higher maintenance fees due to fewer units -- posting this security may help alleviate these problems.

   The developer must provide the dates when the building of each phase will start, and the proposed completion date, plus the number and type of units for each phase. A certificate of approval is provided for each phase and these certificates must be filed upon completion of each phase of the strata development.

   So, it is possible to build a condominium project as you have envisioned, but you must meet legislative requirements for each phase. However, if you are short of cash, the phased strata plan is a suitable way to complete the project.

2. When submitting a strata plan in British Columbia, you must include the following documentation:

   - The mailing address of the strata corporation.
   - Any bylaws which differ in any respect from the standard bylaws concerning strata corporations.
   - The number of copies of the plan required by the registrar.
   - A schedule of unit entitlements, which sets out each owner's share of the monthly fees and contributions, based on the square footage of each owner's unit.
   - A schedule of voting rights, which gives the number of votes per strata lot -- this is only necessary for developments where there is both non-residential property and residential property. Where there is only residential properties, the legislation allows for one vote per strata lot.

3. Both condominiums and cooperatives allow for multiple people to live together in a development that allows for both individual and shared space. Cooperatives are set up differently than condominiums, in that a cooperative is owned by a corporation which issues shares in the land or buildings, so that an owner has an undivided joint ownership in the property, typically shares with a long-term lease. A condominium is created through the filing of a strata plan which is filed in the appropriate land title office; a condominium owner owns a fee simple interest in a strata lot plus a share of the common property.

   Due to the set-up of a cooperative, a unit in such a building may be more difficult to sell, as financing can be more difficult to obtain. Usually a purchaser is required to give a chattel mortgage or a security interest based on the shares, which often means higher interest rates than would be given on a standard mortgage based on a fee simple title. The share entitlement of a cooperative is transferred upon a sale, and the rights to the long term lease are assigned. A condominium owner can sell their fee simple interest, and a loan to purchase the unit can be secured through a mortgage on the property.

There is also a difference in the rules governing the two types of units. A cooperative cannot usually be sold without approval of the board of directors of the cooperative, whereas a condominium owner is unrestricted as to whom he or she can sell to. A cooperative is governed by legislation based on corporate law, as well as legislation, if in place, affecting cooperative associations or societies, and a shareholders' agreement if in effect. A condominium is based on provincial legislation concerning strata corporations, as well as any bylaws, rules, and regulations regarding the complex in question.

Therefore, while a cooperative may be a good purchase for a purchaser who plans to live in the building indefinitely, it may not be as good a purchase for someone who intends to live in a unit temporarily, perhaps as a step towards further real estate purchases. Cooperatives may be difficult to sell quickly enough, should the purchaser need to act immediately in order to buy another property.

4. If Barb and Dan were owners at the time the by-laws were amended to limit the number of rental units allowed, they should have been given notice and been able to attend the meeting and vote. A special resolution is required for a strata corporation to amend their by-laws. Barb and Dan may have a right to bring an action to have the by-law set aside if their one vote would have meant the difference as to whether the by-law was passed or not. If it was properly passed, they can appeal to the strata council for permission to rent their unit, and if refused, they can further appeal to either an arbitrator or through the courts.

   A thorough review of the by-laws and rules and regulations of the strata corporation will determine if the strata council can make rules about the drapes and storage units. The $25 moving in fee is debatable — if allowed, it should only apply to renters, as an owner has a right to possession of their unit. Barb and Dan can raise this point with the strata council.

   If Barb and Dan suffer a loss as a result of any of the items mentioned in the minutes, if these items were misrepresented by their agent, they may have a claim for damages for misrepresentation from their agent. If not, and all the bylaws were properly passed and in place, they will be required to adhere to them. The lesson learned is that by-laws, rules and regulations of strata corporations must be carefully reviewed before a purchase of a strata unit is completed.

Lesson 10

1. (a) Provincial Real Estate Acts normally give broad powers to the Real Estate Councils to conduct investigations in specified circumstances, including;

- breaches of the Act or Regulations; or
- misconduct as an agent (broker or managing broker) or salesperson (representative).

An inquiry may be instituted upon receipt of a complaint from the public, or the Council may institute an inquiry of its own motion where it considers some act which it has jurisdiction to investigate may have occurred. Here, an official complaint to the Council has not been made, but the Council has been made aware of possible wrongdoing and it is entitled to investigate the allegations.

(b) Regulations prohibit the advertisement or circulation of any false statement concerning a real estate transaction. It appears that Lizzie has breached a regulation, which grants jurisdiction to the Council.

(c) Alexandra appears to be in breach of the provincial real estate legislation. An agent is required to be in regular attendance at the office, and in active charge of the business conducted there. Alexandra does not seem to be meeting this requirement. Legislation requires an agent to comply with the requirements of the provincial real estate act, and see that all those over whom the agent has control also comply with the Act. Alexandra does not appear to be fulfilling her obligations under this section, since she is not supervising the office and actually seems to be counselling her employees to breach their obligations.

(d) A broker (agent) can be liable for the wrongful acts of his or her employees in two ways:

- at common law, under the principle of vicarious liability
- statutorily, under provisions of provincial Real Estate Acts

At common law, an employer is responsible for all acts of her employees committed with the scope of their employment. Under real estate legislation a broker (agent) is deemed to be a party to offenses committed by licensees working under the broker, in the absence of evidence to the contrary. This means that when a licensee commits an offence, unless the broker establishes that he or she is not responsible, the broker will be personally liable, along with the licensee.

(e) Real Estate Councils generally have the same authority as the Supreme Court to compel the attendance of witnesses, and witnesses can be required to produce documents or other evidence. This means that Alexandra can be forced to attend the hearing just as if it were a case in court.

(f) If Lizzie is disciplined by the Council and is not satisfied with the decision, she may appeal the decision. The appeal procedures vary between the provinces. For instance, in British Columbia she would first appeal to the Financial Services Tribunal whereas in New Brunswick her appeal would be made directly to the Court of Queen's Bench of New Brunswick.

2. Fred should not succeed in recovering commission. The sale did not come about in the manner contemplated in the listing contract, so no commission will be payable. Quantum meruit is not available where:

   - there is a valid contract;
   - the contract provides for payment in certain circumstances which have not occurred; and
   - the contract specifies the calculation of commission.

   On these facts, Fred will not be allowed to recover on a quantum meruit basis, since the above three conditions are satisfied.

3. The licensee has likely contravened the federal Competition Act, which deals with false or deceptive advertising. Section 52(1)(a) makes it very clear that no person shall make a representation to the public that is false or misleading in a material respect, which occurred here. The advertisement was misleading in a material respect, and it was relied upon in making the purchase. The licensee could be liable for a fine of up to $200,000 and/or jail for up to 1 year if the Crown were to proceed summarily, and a fine of any amount and /or jail for up to 5 years if the Crown were to proceed by indictment. (This is an area of criminal law not covered in the course materials, but in general, more serious offences or repeat offenders are dealt with by way of indictment.)

   The licensee defended himself by pointing out that the ad clearly discusses a waterfront view, which in the trade is different from waterfront, and that it says “the dock”, not your dock, and the ad does not mention a dock in the description of the property. In certain circumstances a licensee will not be convicted under the Competition Act it he or she can prove, on a balance of probabilities that he or she:

   - exercised due diligence in ensuring the representation was accurate;
   - was without fault and honestly believed the representation to be true; and
   - had no opportunity to prevent the harm which resulted from the representation.

   Here, given that the licensee knew you wanted only level waterfront which would be safe for your children, it is unlikely that he can claim he was without fault and had no ability to prevent the harm caused. So, in all likelihood, he will be found to have contravened the federal Competition Act.

4. Disclosure is required by a broker or representative (agent or salesperson) who is either buying or selling real estate which they have a personal interest in. This is to avoid a position of unfair advantage and/or a conflict of interest. Disclosure must be made in writing and include whether the purchaser will use the property for an investment (re-sell or “flip” the property), whether any negotiations have already occurred, and the commission that will be received.

   The following list contains some of the situations where disclosure must be made:

   - where a licensee personally is offering to purchase the real estate;
   - where a company in which the licensee owns at least 10% of the shares is offering to acquire the real estate;
   - where a company of which the licensee is a director or officer is offering to purchase the real estate;
   - where a licensee is presenting an offer to purchase on behalf of an unlicensed purchaser who owns at least 10% of the shares of a licensed company;
   - where a licensee is presenting an offer to purchase on behalf of an unlicensed person who is a director or officer of a licensed company; or

- where a licensee is presenting an offer to purchase on behalf of an unlicensed person who is a partner in a licensed partnership.

If a sale is concluded where a purchaser is a licensee, and he/she does not disclose their interest in the property, the contract is not required to be upheld. The contract is voidable at the option of the vendor, who may decide that the contract should remain in force despite the lack of disclosure.

5. A real estate professional must be aware of all pertinent facts and information, and be able to relate all current information regarding a transaction. There is a "positive duty to investigate", which means that a real estate professional must be knowledgeable as their advice is being relied upon - the duty of a real estate professional extends to not only what they know, but what they ought to have known.

   This duty is similar to the standard test for whether a professional has been negligent. In order to decide whether the standard of care required has been breached, the test is whether the level of service provided:

   1. met prevailing professional standards; and
   2. was it of the standard which could be expected of an expert in their profession

   In other words, was the skill and care used commensurate with that which a competent member of their profession would use for the task undertaken?

   Many professions have similar internally-developed and maintained standards in place. For instance, engineers in Canada receive an iron ring at a very special ceremony. This ring serves as a reminder to them of their pledge to meet professional standards and their obligation to never compromise safety for the sake of time and financial constraints.

6. The main difference between the two ethical standards appears to be the way the ethical duties are set out. CREA takes a positive position, AIC a negative position. For example, CREA sets out that a licensee must be "zealous to maintain, and continually strive to improve, the professional standards of his or her calling." On the other hand, the AIC Ethics Standard sets out what it is unethical for a member to do. CREA states that there must be loyalty to the licensee's professional organization, whereas the AIC Standard states it is unethical to refuse to co-operate with the Appraisal Institute. One of the main similarities is that both standards set out responsibilities based on protection of the public and a need to maintain a high level of trust.

7. CREA is allowed to levy a fine against a member, as well as make the member pay for the costs of the hearing. These two disciplines are not set out as part of the AIC disciplines. However, AIC can censure a professional, as well as publish the results of a discipline hearing.