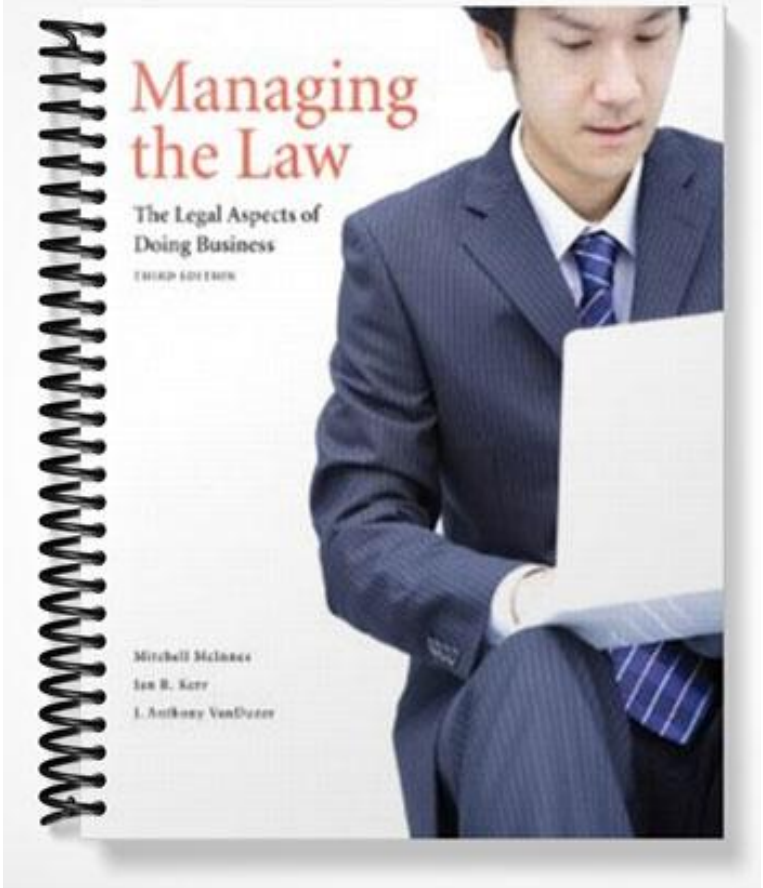
TEST BANK


Managing
the Law
The Legal Aspects of
Doing Business
THIRD EDITION
Mitchell McInnes
Ian R. Kerr
J. Anthony VanDuzer

MULTIPLE CHOICE. Choose the one alternative that best completes the statement or answers the question.

1) Hughes Inc hired Liz to act as the chief architect for a major shopping development. After about a year, however, the parties' relationship began to deteriorate and the situation quickly became intolerable and irreparable. Each side blamed the other. Hughes Inc sued Liz for breach of contract. Liz defended that claim and started a counterclaim in which she alleged that Hughes Inc had broken their agreement. The dispute was eventually resolved through arbitration. Which of the following statements is TRUE? 1) _____
   A) Some provinces require the parties in commercial disputes to participate in a mandatory arbitration program before taking a case to trial.
   B) Assuming that the parties served a complete set of pleadings on each other, Hughes Inc would have used a document called a reply in order to respond to Liz's counterclaim.
   C) Even if both parties are based in Manitoba, even if the contract was signed in Manitoba, and even if the shopping development was intended to be located in Manitoba, the arbitration could have taken place in a different province.
   D) The parties probably used arbitration, rather than litigation, because a judge decided that the issues were too complicated to be understood by jurors.
   E) Although the arbitration would not have taken place in a court, it was probably conducted by a judge.

   Answer: C

2) Demartini Inc sued Bentley Regehr for breach of contract. Demartini argued that it was entitled to receive a payment of $50 000 from Regehr. After failing to reach a settlement, the parties took their case to court. Which of the following statements is TRUE? 2) _____
   A) If Regehr offered to settle the claim out of court for $30 000, and if the judge eventually decides that Demartini is entitled to receive $35 000, the judge may award an unusually large amount of costs against Regehr in order to punish him for making an inadequate settlement offer.
   B) While the courts generally refuse to receive hearsay evidence, the judge in this case will probably allow expert witnesses to provide such evidence.
   C) In several jurisdictions in Canada, a claim for $50 000 or less can be heard in a Small Claims Court.
   D) The parties' case will almost certainly be heard by a judge of the Provincial Court of whichever province has the closest connection to the parties and their agreement.
   E) If the court finds Regehr liable for $50 000, Demartini may try to obtain payment from Regehr by garnisheeing money that Regehr is entitled to receive from his employer.

   Answer: E

3) Wolodko Engineering Inc sued Dhaliwal Ltd for the tort of negligence. At one point during the litigation process, an examination-in-chief occurred. That means that 3) _____
   A) the case must have been heard by at least one appellate court.
   B) questions were answered under oath.
   C) the judge asked one of the parties a direct question.
   D) one of the parties asked the other party's witness a question during examination for discovery.
   E) one of the parties hired an expert witness to conduct a scientific investigation on a piece of physical evidence.

   Answer: B

4) A court recently held Acme Corp responsible for spilling pollutants into a stream. Which of the following statements is most likely TRUE? 4) _____
   A) If the court required proof beyond a reasonable doubt, the claim against Acme Corp arose

in private law.

B) If the court required proof beyond a reasonable doubt, Acme Corp was called the accused.
C) Since Acme Corp is not a human being, the case was heard in a special court called the Commercial Court of Canada.
D) If the claim against Acme Corp arose in private law, it almost certainly was heard by a jury, as well as a judge.
E) If Acme Corp is dissatisfied with that decision, it is entitled to appeal, but only if it is willing to pay for the other side to bring its witnesses back into court.

Answer: B

5) The doctrine of precedent 5) _____

A) draws a distinction between binding authorities and persuasive authorities.
B) prevents a judge from resolving a dispute on the basis of a decision from another jurisdiction.
C) requires the Supreme Court of Canada to follow decisions of the Judicial Committee of the Privy Council in England.
D) is never relevant if the resolution of a case involves the interpretation of a statute.
E) prevents the Supreme Court of Canada from relying on a decision of a lower court.

Answer: A

6) A trial judge in Manitoba has heard a case dealing with a particular issue. Which of the following statements is TRUE according to the doctrine of precedent? 6) _____

A) If there are conflicting precedents from the Court of Appeal of Ontario and a trial court in the Bahamas, the judge must follow the former, because it is Canadian.
B) If there are no precedents, the judge is not entitled to decide the case, and therefore must refer the matter to the legislature because of the doctrine of parliamentary supremacy.
C) If there are no binding precedents, the judge may consider cases from anywhere in the world.
D) If there are conflicting precedents from the Court of Appeal of Ontario and the Court of Appeal of Saskatchewan, the judge must follow the former, because it comes from a jurisdiction with a larger population.
E) If there are no other precedents, the judge is required to follow a decision of the Alberta Court of Appeal.

Answer: C

7) Jinyan has been involved in a law suit for several years. She recently sought "leave" from the Supreme Court of Canada. That means that she 7) _____

A) wants to appeal the court's decision in her case to another court.
B) wants the court to hear her appeal.
C) wants the court to appoint a new lawyer to work for her.
D) wants the court to release her from jail.
E) wants the court to reverse its own decision in her case.

Answer: B

8) Justice Major dissented in the case of *Dobson v Dobson*. That means that 8) _____

A) was unable to decide the case because he had some personal connection to it.
B) he was hearing the case as a trial judge and rejected the plaintiff's claim.
C) he held that a statute was invalid because it violated the *Charter*.
D) he disagreed with the result reached by most of his colleagues in an appeal that they heard together.
E) he rejected a party's application to appeal an earlier decision.

Answer: D

9) Which of the following statements is TRUE? 9) _____

A) The judges of the superior court in each province are appointed by that province's government.
B) The phrase "court hierarchy" refers to the fact that the courts must obey the words of a valid statute.
C) The phrase "rule of law" refers to the fact that a law must contain a rule that either prohibits someone from doing something or allows someone to do something.
D) The phrase "court hierarchy" refers to the fact that the Supreme Court of canada contains one Chief Justice and eight puisne justices.
E) Arbitration is often binding.

Answer: E

10) At the end of a case, a court awarded costs against Craig. Which of the following statements is TRUE? 10) _____

A) Craig must pay money to the other side, even if he won his case.
B) The court almost certainly awarded costs against the other party as well.
C) Craig probably was convicted of a serious crime.
D) Craig necessarily must reimburse the other party for all of the expenses that it incurred in connection with the case.
E) Craig probably won a private law case.

Answer: A

11) Which of the following statements is TRUE? 11) _____

A) The decision received from an arbitrator is frequently immune from appeal.
B) ADR stands for "additional decision resolution."
C) Mediation is normally binding, unless the parties agree otherwise.
D) The process of negotiation tends to correct any imbalance in bargaining power, and therefore is usually preferred if one party is a consumer and the other is a large corporation.
E) ADR, by its very nature, can be used in private law, but not in criminal law.

Answer: A

12) The front window of Polly's Flower Shop was recently broken when someone threw a rock through it. Which of the following statements is TRUE? 12) _____

A) The person who threw the rock may be sued even if that person worked for the government.
B) If the person who threw the rock is insane, Polly's Flowers will not be able to sue unless it receives permission from the Public Trustee.
C) If the person who threw the rock is thirteen years old, there will not be a law suit because children under the age of majority cannot be sued.
D) because a law suit can be brought only by a human, the plaintiff named in the statement of claim cannot be the corporation that owns Polly's Flower Shop
E) If the person who threw the rock is a European who is visiting Canada for less than a year, the case will have to be heard in the International Court of Justice.

Answer: A

13) Which of the following statements is TRUE? 13) _____

A) A young child who is sued will be represented by an adult who acts *in parens patriae.*
B) Foreign corporations, like Canadian corporations, have an absolute right to sue in Canadian courts.
C) In order to sue in Canadian courts, a person must either be a Canadian citizen or be

represented by a lawyer who is a Canadian citizen.

D) Trade unions sometimes can sue or be sued even though they are unincorporated associations.

E) A law suit may be brought against human beings, corporations, and unincorporated associations.

Answer: D

14) Geetha has been diagnosed with skin cancer. Based on her physician's diagnosis, she believes that her condition was caused by SofSkin, a lotion that she used for many years. She wants to sue the manufacturer of SofSkin, but she realizes that a law suit would require a great deal of complicated evidence, and therefore would likely be long and expensive. Which of the following statements regarding class actions is TRUE in this situation? 14) _____

A) Even if a court allowed a class action to proceed, it would be possible for other people in the same situation as Geetha to sue by themselves.

B) By participating in a class action, Geetha almost certainly would be able to avoid any expense if the claim failed.

C) A class action is possible only if Geetha's lawyer works for a contingency fee.

D) A court would not allow a class action to proceed unless Geetha was joined by a substantial number of other people with virtually identical claims against the manufacturer of SofSkin.

E) Regardless of which province or territory the class action occurred in, it would be governed by statute.

Answer: A

15) Class actions have become more common in Canada in recent years. That increase in popularity can be explained, at least in part, by the fact that 15) _____

A) lawyers conducting class actions must work on a contingency fee basis, with the result that their clients are liable for their expenses only if the case is won.

B) they save society money by eliminating the need for similar actions to be brought to court separately.

C) liability in a class action can never be appealed.

D) the Supreme Court of Canada recently said that, in contrast to the past, class actions can now be certified even if success for one claimant does not necessarily mean that all of the other claimants will also enjoy success.

E) the rules governing class actions are now contained in statutes in every province.

Answer: B

16) The requirements for certification in a class action include 16) _____

A) proof that the class action will be substantially less convenient than individual proceedings.

B) proof that every potential member of the class has been personally notified of the proceedings.

C) a clearly defined class and issues that are common to every claimant.

D) a payment of bond money to the court, to be used to pay for the defendant's costs if the claim is unsuccessful.

E) proof that all of the claimants are being represented by the same law firm.

Answer: C

17) A company that manufactures cigarettes has been named as the defendant in a class action. Which of the following statements is TRUE? 17) _____

A) The fact that the defendant has been sued in a class action necessarily means that other companies have also been sued in the same action.

B) the class action will be certified even if some other form of litigation is the preferable procedure.

C) The company will likely place notifications in newspapers in an attempt to avoid certification.
D) The company will probably have to pay costs on a solicitor-and-client basis if it loses the case.
E) because they have sued by way of a class action, the plaintiffs necessarily have hired lawyers on a contingency basis

Answer: B

18) Which of the following statements is TRUE with respect to representation in legal disputes? 18) _____
A) In-house counsel refers to a situation in which a law firm that has been sued is represented by one of its own lawyers.
B) Communications between a paralegal and a client are confidential and privileged.
C) The Law Society of Canada has the responsibility of regulating lawyers across the country.
D) A lawyer who acts against a client's interests may be investigated by a law society.
E) Litigants are entitled to represent themselves in trials, but not in appeals.

Answer: D

19) Herbert & Hart Inc, an accounting firm, was legally represented in a recent dispute by Alan Munt, who is a lawyer. Herbert & Hart have now learned that Munt misbehaved by passing confidential information to the other side in the dispute. Herbert & Hart consequently lost approximately $12 000 000. Which of the following statements is TRUE? 19) _____
A) Herbert & Hart very likely violated the law society's code of conduct.
B) Munt may be investigated by the law society only if he is an articling student.
C) Munt probably does not have liability insurance that will help to pay for his liabilities.
D) If Herbert & Hart are unable to recover their loss from Munt, they may be entitled to receive compensation from the law society's assurance fund.
E) Munt may be sued, but his behaviour cannot be investigated by the law society.

Answer: D

20) Kirndeep recently received a Bachelor of Business Administration. She has, however, always dreamed of representing people with legal problems. She has come to you for advice and guidance regarding the various possibilities. Which of the following statements is TRUE? 20) _____
A) Paralegals are permitted to help clients draft legal documents, but they are never entitled to appear in courts or tribunals.
B) Paralegals are more heavily regulated than lawyers.
C) Paralegals are allowed to represent clients in small claims courts.
D) Lawyers always make more money than paralegals.
E) Before starting a private practice, a paralegal is required to complete a period of articles with a law firm.

Answer: C

21) Which of the following statements is TRUE with respect to pleadings? 21) _____
A) A demand for particulars is always created by a plaintiff.
B) The party that creates a reply is usually the same party that created the statement of claim.
C) Each pleading must be filed with the opposing party and served on the court.
D) The purpose of a counterclaim is to counter, or contradict, a statement of claim by alleging facts that have the effect of denying liability.
E) The party that creates a counterclaim is usually also the same party that creates the statement of claim.

Answer: B

22) Rawls Inc recently sued Nozick Ltd. As Nozick has pointed out, however, Rawls' statement of clai m was

not filed within the limitation period. Which of the following statements is TRUE? 22) ___ ___

A) The primary purpose of limitation periods is to save society money by reducing the number of cases that need to be heard by courts.
B) The length of the limitation period depends upon the nature of Rawls' claim.
C) If Rawls' claim was for breach of contract, the limitation period was probably ten years.
D) There would not be a limitation period if Rawls sued the government.
E) If Rawls' claim was for breach of contract, it was probably extinguished once the limitation period lapsed.

Answer: B

23) Fuller Inc has sued Perdue Corp. Which of the following statements is TRUE? 23) _____

A) If the case goes to court, it will likely be heard by a jury.
B) The judge may draft a demand for particulars in order to receive more information regarding Fuller's claim.
C) All of the parties' pleadings must be stamped and issued by the court.
D) If Perdue counterclaims, Fuller will use a reply in order to deny Perdue's allegations.
E) A counterclaim usually is used if the plaintiff wants to change the details in a statement of claim.

Answer: C

24) Examinations for discovery 24) _____

A) take place after a jury has decided a case.
B) usually discourage settlement by demonstrating the weaknesses of each party's arguments.
C) are conducted under oath.
D) take place before the plaintiff drafts a statement of claim.
E) are designed primarily to determine the defendant's financial situation, and therefore to help the plaintiff decide whether or not it makes sense to sue.

Answer: C

25) Hobbes has sued Kant for breach of contract. The facts and issues are very complicated. Which of the following statements is TRUE? 25) _____

A) Hobbes must prove his cause of action on a balance of probabilities.
B) A pre-trial conference will require the parties to explain their arguments to a mediator, who has the power to decide the case in favour of the defendant if the plaintiff's evidence is very weak.
C) Although it would be quicker and less expensive to have the case decided by arbitration, arbitrators usually have less expertise than judges.
D) because they occur outside of court, examinations for discovery are entirely voluntary and neither party could be compelled to answer the other's questions
E) If Hobbes wins the case at trial, but is awarded less than Kant offered in a formal settlement, the court will probably award costs against Hobbes on a solicitor-and-client

basis.

Answer: A

26) Justice Veritas is hearing a case in court. Which of the following statements is TRUE? 26) _____

A) If the case involves a minor crime, Justice Veritas will require proof on a balance of probabilities.
B) If the case involves a civil matter, rather than a criminal matter, the plaintiff must prove the elements of the cause of action on a balance of possibilities.
C) The rules regarding hearsay apply to both oral testimony and written evidence.
D) If the case involves a civil matter, rather than a criminal matter, the only party entitled to conduct a cross-examination is the plaintiff.
E) Justice Veritas will allow an expert witness, but not an ordinary witness, to present hearsay evidence.

Answer: C

27) Arvid Dunston was severely injured when a large rock tumbled off a steep cliff and crashed through his windshield as he drove. Arvid sued the company that manufactured his vehicle on the basis that it had tortiously failed to use a type of glass that might have prevented the rock from entering the vehicle. He also sued the provincial government on the basis that the government had tortiously failed to inspect the area for rocks that might fall onto the road and hurt motorists. Which of the following statements is TRUE? 27) _____

A) The limitation periods that are applicable to the two claims will almost certainly be the same.
B) Even though one of the defendants is a private company and the other is a government, both claims will require Arvid to prove his allegations on a balance of probabilities.
C) Arvid's two claims cannot be heard together because all claims against the government must be heard in a special type of court that is not available for disputes between two private parties.
D) In order to sue both the company and the government at the same time, Arvid will be required to satisfy the rules governing class actions.
E) While the common law traditionally said that "the King can do no wrong," the relevant rules have been changed so that the same rules will govern both of Arvid's claims.

Answer: B

28) Which of the following statements regarding the right to sue and representation in court is TRUE? 28) _____

A) Trade unions can sue or be sued even though they are unincorporated associations and therefore are not a type of legal person.
B) A lawyer who acts for the plaintiffs in a class action must work on a contingency fee basis.
C) because they are legally incapable of providing consent, children and people with mental disabilities cannot be members of class actions
D) Paralegals are entitled to appear in a Provincial Court, but not in a Superior Court.
E) For public policy reasons, a person who wants to sue the government cannot hire a lawyer on a contingency fee basis.

Answer: A

29) Retailers Inc hired Clean Air Services (CAS) to develop and install an air conditioning system in a large office complex. The system that CAS installed turned out to be grossly inadequate, largely because, contrary to the terms of its contract, it used inferior materials. It did so in order to save money and increase its profits. A court has found CAS liable for breach of contract. In terms of a remedy, the judge 29) _____

A) assuming that it is entitled to receive money from CAS, Retailers Inc will be classified as a

judgment debtor.

B) award nominal damages if the defendant's breach of contract did not actually cause any loss.

C) may hold CAS liable for a payment of money, in which case Retailers Inc may have some of CAS's assets seized and sold under the garnishee process.

D) will probably impose a conditional sentence, unless CAS's breach caused someone to suffer an injury, in which case the judge would probably prefer imprisonment.

E) cannot hold CAS liable for damages unless Retailers Inc has demonstrated that CAS has sufficient assets to satisfy judgment.

Answer: B

30) Kirndeep Khan wants to sue her employer for sexual harassment. She has therefore hired Rory McAngus to represent her. Which of the following statements is TRUE? 30) _____

A) If Kirndeep loses her case against her employer because of Rory's incompetence, and if Rory is bankrupt, Kirndeep may eventually be entitled to receive compensation from an assurance fund.

B) If Rory is a lawyer, then Kirndeep's conversations with him will be privileged, meaning that Rory cannot reveal what Kirndeep said to him unless a judge orders him to do so.

C) Whether he is a lawyer or a paralegal, Rory cannot act for Kirndeep unless he has completed a period of articles.

D) If Kirndeep hired Rory on a contingency fee basis, and if she wins her case, then the judge will increase the measure of damages to ensure that Kirndeep receives full compensation even after Rory has received payment of his fee.

E) Rory is probably the employer's in-house counsel.

Answer: A

31) A number of commentators have referred to litigation as a "lottery." By using that word, they are suggesting that 31) _____

A) there are far more losers than there are winners.

B) the government heavily regulates trials in the same way that they heavily regulate lotteries.

C) the results are often unpredictable.

D) many cases involve the enforcement of gambling debts.

E) jurors are selected in a random manner.

Answer: C

32) Which of the following statements is TRUE with respect to remedies? 32) _____

A) Nominal damages are awarded if a case involves several plaintiffs and the court must decide, or nominate, which plaintiff is entitled to enforce a remedy.

B) Punitive damages are available only in criminal proceedings.

C) Nominal damages are defined as damages that are awarded against a named defendant, rather than against a corporation.

D) If a judgment debtor is bankrupt, a claimant who is entitled to a trust may be able to fully enforce a judgment, even if other creditors are forced to accept something less than full payment.

E) Each law society has an assurance fund in order to provide a source of compensation for claimants who are unable to fully enforce their judgments against bankrupt judgment debtors.

Answer: D

33) Marisa successfully sued Ivan, a stockbroker who works for Blue Sky Investments, for breach of contract. The court held that Ivan's breach caused Marisa to suffer a financial loss of $50 000. The court also held that Ivan is personally liable to pay that amount to Marisa. Which of the foll owi ng stateme nts is TRUE?

33) _____

A) An award of damages for breach of contract is the same as an order for specific performance.
B) because Ivan acted wrongfully, the damages are properly classified as punitive damages
C) Once judgment has been decided in her favour, Marisa became a judgment debtor.
D) Marisa may garnish Ivan's income if he does not otherwise pay his debt.
E) If necessary, Marisa is entitled to have all of Ivan's assets seized and sold in order to pay for the judgment.

Answer: D

34) Kaelen works as a sales representative for a large book publisher. She was recently held liable in tort and ordered to pay $35 000 to Antony. Which of the following statements is TRUE? 34) _____

A) The garnishee process will allow Antony to seize and sell some of Kaelen's assets in order to satisfy judgment.
B) If Kaelen wants to appeal the trial judge's decision, she normally must do so within one year of that decision.
C) Antony may be able to directly receive money that Kaelen normally would receive as income from her employer.
D) If Kaelen does not have enough money to fully pay her debt to Antony, Antony will be entitled to collect the remainder either from Kaelen's lawyer or, if Kaelen's lawyer does not have sufficient funds, from the law society's assurance fund.
E) The court's award can be classified as nominal damages because Antony is entitled to receive damages of a certain denomination in money.

Answer: C

35) Josie lost a breach of contract case against Charles. She has now launched an appeal of the trial judge's decision. Which of the following statements is TRUE with respect to that appeal? 35) _____

A) If Josie loses her first appeal, she has a right to appeal to the Supreme Court of Canada as long as her claim is worth at least $100 000.
B) Although the appellate court is always entitled to apply its own view of the law, the trial judge's finding of facts can be overruled only if the members of the appellate court are unanimously agreed that the trial judge made a mistake.
C) Although an appellate court is entitled to award damages, it cannot order specific performance of a contract.
D) The appellate court may accept or reject the trial judge's decision, but it cannot vary the terms of the trial judge's final order.
E) Josie's first appeal will likely be heard by three judges of the appellate court.

Answer: E

36) Which of the following statements is TRUE with respect to small claims courts? 36) _____

A) In order to minimize costs and delays, small claims court judgments cannot be appealed.
B) Cases heard in small claims courts are decided by magistrates, rather than judges.
C) A plaintiff has the right to have a claim heard in the small claims court that is closest to his or her home.
D) Small claims courts are a type of superior court.
E) The fee for filing a document in a small claims court often depends upon whether or not the party is classified as a frequent claimant.

Answer: E

37) Which of the following statements is TRUE with respect to small claims courts? 37) _____

A) Assuming that the amount in dispute is under $10 000, a taxpayer has the right to recover an improperly collected tax in the federal small claims court.

B) The only remedy that may be awarded in a small claims court is an order that requires the defendant to pay money to the plaintiff.
C) If a claim exceeds the monetary limit of a small claims court, the plaintiff is entitled to use the small claims court for part of the claim and another court for the remainder of the claim.
D) Although small claims courts often hear contractual cases, they may also resolve some types of personal injury claims.
E) because small claims courts often hear contractual disputes, they have the ability to order specific performance

Answer: D

38) Rejean is a world class athlete, who was was recently suspended by the Canadian Athletics Association. If that suspension remains in place, Rejean will not be allowed to compete in the upcoming world championships. Rejean therefore hopes to quickly and conclusively have the suspension overturned. The contract that Rejean had signed with the Canadian Athletics Association gives him the right to choose any form of dispute resolution. Which of the following alternatives is likely his best option? 38) _____

A) negotiation
B) small claims court
C) arbitration
D) mediation
E) litigation

Answer: C

39) Which of the following statements regarding the Supreme Court of Canada is TRUE? 39) _____

A) Each member of the court was appointed by the premier of the judge's home province.
B) In addition to appeals, the court occasionally hears references for the purpose of advising governments on the constitutional status of laws.
C) The court is never required to hear an appeal unless it has granted leave.
D) Unless a member voluntarily retires, he or she is entitled to hold office for life during good behaviour.
E) The court consists of the Chief Justice and eight Filial Justices.

Answer: B

40) Which of the following statements is TRUE with respect to alternative dispute resolution? 40) _____

A) While negotiation and mediation are confidential procedures, arbitration is not confidential because arbitrators' decisions are always reported in public documents.
B) Arbitration is often preferred to mediation when the parties want to receive a binding decision from a third party.
C) Negotiation is often considered a binding process when used by large corporations.
D) because they work outside of the regular court system, small claims courts are considered a form of binding arbitration
E) Arbitration cannot be used unless the parties previously created a contract that required all disputes to be sent to arbitration.

Answer: B

TRUE/FALSE. Write 'T' if the statement is true and 'F' if the statement is false.

41) Longhorn Inc has served a statement of claim on Trojan Ltd for breach of contract. Given the current trends in Canadian litigation, there is approximately a 1 in 4 chance that the case will eventually be resolved by a judge. 41) _____

Answer: True False

42) Screaming Eagle Inc, a company based in Los Angeles, wants to sue Canuck Manufacturing Inc in a court in Vancouver. While the American company is entitled to sue in Canada, it must be represented by a litigation guardian. 42) _____
Answer: True False

43) Although trade unions are unincorporated associations, and therefore are not legal persons, they generally can sue or be sued. 43) _____
Answer: True False

44) The Crown can be sued only if a statute allows an action to be brought against the Crown. 44) _____
Answer: True False

45) Morley suffered a minor injury as a result of using a toothbrush manufactured by DentPlus Inc. The evidence indicates that the type of toothbrush in question suffers a from a design defect and therefore is likely to have injured every person who used it. In the circumstances, Morley wants to bring a class action against DentPlus. Class action proceedings are, however, available only if certain requirements are met. Morley must, for instance, satisfy the court that he has developed a workable plan for notifying all of the other members of the class. 45) _____
Answer: True False

46) Geeta was one of several hundred people who received tainted blood from a hospital that carelessly collected and stored blood. Although each of the victims will be able to make essentially the same arguments against the hospital, a court will not certify a class action unless each of the victims also intends to claim roughly the same amount of damages. 46) _____
Answer: True False

47) A person generally is not entitled to act as a lawyer in Canada unless they have completed a "period of articles." That phrase refers to the fact that admission to the bar depends upon proof that a person went to law school for a certain length of time. 47) _____
Answer: True False

48) Citizens are protected from shady lawyers by the law society's assurance fund. That fund consists of the professional liability insurance that each lawyer is required to hold while practicing. 48) _____
Answer: True False

49) Makayla was recently served with a statement of claim that alleges that she committed a breach of contract. Makayla simply denies that allegation. She will likely present her arguments against the allegation by using a document called a counterclaim. 49) _____
Answer: True False

50) While a cross-examination usually occurs in court, examinations for discovery occur outside of court. 50) _____
Answer: True False

51) Katrina has sued Bensam Inc, her former employer, for unfairly firing her from her job. The company denies that it has done anything wrong. The parties have exchanged pleadings and are now preparing to participate in a pre-trial conference. That means that they will meet with a mediator, rather than a judge, for the purpose of discussing their case and possibly reaching a settlement. 51) _____
Answer: True False

52) Scalia Inc sued Ginsberg Ltd in tort. Scalia claimed that it was entitled to receive $15 000 in compensation. Ginsberg denied liability, but in an attempt to resolve the issue quickly and quietly, formally offered to settle the claim for $9000. Scalia rejected the offer and took the case to trial in the Federal Court. The trial judge has now decided the case in favour of Scalia, but damages were limited to $8000. In the circumstances, the trial judge is also likely to award party-and-party costs against Ginsberg for the period up to the day when the settlement offer was made, and double party-and-party costs against Ginsburg for the period between that day and the end of the trial. 52) _____

Answer: True False

53) Even if a cause of action is not caught by any statutory limitation period, a plaintiff who waited many years before attempting to sue may be prevented from doing so by the equitable doctrine of laches. 53) _____

Answer: True False

54) Kabesa Inc sued Mahuja Ltd. The court held in favour of the defendant. The court probably also ordered Kabesa Inc to pay Mahuja Ltd's costs. 54) _____

Answer: True False

55) A contractual dispute has arisen between Jyoti and Arlen. She believes that he owes her money, but he disagrees. The parties do, however, agree that it would be desirable to resolve the dispute as quickly and as amicably as possible. For that reason they should use litigation, rather than negotiation. Negotiation tends to take much longer, and is much more likely to generate hostility, because it requires the parties to discuss the matter between themselves, rather than through their lawyers. 55) _____

Answer: True False

ESSAY. Write your answer in the space provided or on a separate sheet of paper.

56) Briefly explain the rules that determine the circumstances under which the following types of parties can sue or be sued: (i) children, (ii) adults suffering from a mental incapacity, (iii) corporations, and (iv) unincorporated associations.

Answer: (i) While a child may sue or be sued, they must act through an adult representative, such as a parent or litigation guardian.

(ii) Similarly, while a person suffering from a mental disability can sue or be sued, they must act through a representative who is of sound mind, such as a court-appointed representative.

(iii) As a matter of law, a corporation is a type of person. A company may therefore sue or be sued. There are, however, restrictions on foreign corporations, which may need to be provincially licensed before they can use Canadian courts.

(iv) In contrast to corporations, unincorporated organizations (such as clubs and church groups) are not classified as legal persons. As a result, they normally cannot sue or be sued. Instead, it is necessary to sue the individual members of those organizations. In some provinces, however, there is an important exception to that rule. Although trade unions are unincorporated organizations, they can sue and be sued directly.

57) In the context of the ability to sue or be sued, what is the meaning and effect of the doctrine that "the King can do no wrong"?

Answer: The doctrine that "the King can do no wrong" traditionally meant, quite literally, that the courts would not accept the suggestion that the king had acted unlawfully or illegally. As a result, it was impossible to sue the king unless the king gave his permission to be sued. That doctrine was extended to mean that the king's representatives in government similarly could not be sued without their permission.

That traditional rule has now been changed by legislation. As a result, it generally is possible for the government to both sue and be sued. The governing statutes are, however, complicated and they often introduce unusual restrictions. They need to be read very carefully.

58) Chad purchased an economics text book online from Shady Press Inc for $40. While the information contained in the book appears to be correct and current, the book itself began to fall apart almost immediately. After he complained about the situation in an electronic chat-room that had been set up by his course instructor, Chad discovered that a large number of other students had suffered through the same experience. Chad then emailed Shady Press to register his complaint and to ask for a rebate on at least part of the price. The company responded by saying that, as a matter of policy, it would not provide any sort of financial relief unless ordered to do so by a court. Although he is now even more annoyed at Shady Press than before, he assumes that he is, practically speaking, powerless to do anything. He has heard that litigation is expensive and he is unwilling to spend a lot of money in the hope of getting a refund on a book that cost only $40. Assuming that the company will not pay unless compelled by a judge to do so, what advice can you offer to Chad? Suggest, and briefly describe, several strategies that might overcome Chad's concerns about costs. (You need not go into great detail on each strategy.)

Answer: Because Shady Press Inc refuses to pay anything in the absence of a court order, Chad will need to proceed by way of litigation, rather than some form of alternative dispute resolution. Within that context, his financial concerns might be overcome by various means: (i) class action, (ii) contingency fee, (iii) costs, and (iv) small claims court.

Class Action Chad could minimize the expense to himself by participating in a class action. Although that class action would involve many (perhaps all) of the people who purchased Shady Press books that fell apart, only one lawyer would be needed. Consequently, because the expenses of the action would be spread amongst all of the claimants, each claimant would likely stand to gain more than he or she lost in litigation costs.

Contingency Fee Whether or not he participated as a member of a class action, Chad could further reduce the expense associated with litigation by hiring a lawyer to act on a contingency fee basis. If so, Chad would need to pay his lawyer's fees only if the claim was successful. In that event, the lawyer's fees would be paid out of a judgment that the court awarded against Shady Press.

Costs Regardless of whether he participates in a class action or a contingency fee arrangement, Chad should be informed that the winning party usually has costs awarded against the losing party. That means that if he won his case, Shady Press would have to pay for *some* of his litigation expenses. At the same time, however, Chad should realize that (i) judicially-awarded costs seldom cover *all* of a party's actual expenses, and (ii) if he loses his case against Shady Press, he would likely have to pay for some of the company's litigation costs.

Small Claims Court Finally, because his individual claim is worth only $40 at most, Chad would be entitled to bring his action against Shady Press in a small claims court. Litigation in that type of court requires far fewer resources in terms of time and money.

59) Until recently, Enya did all of her banking at the Bank of the Prairies (BOP). She transferred her business to a different bank when she discovered that BOP had been systematically overcharging for a number of services. Enya was, for instance, charged excessive amounts every time that she wrote a cheque or withdrew money at an ATM. She knows that friends and relatives were similarly overcharged when, for example, they paid bills by telephone or received payment by way of direct deposit. Enya suspects that she personally was overcharged about $750. While that represents a substantial amount for her, she also realizes that litigation against BOP might involve a great deal of time and expense. She consequently wonders if her case might be a suitable candidate for a class action. She would like to participate in a class action alongside all (or many) of the other people who have been overcharged by BOP. What requirements must be satisfied before a court will grant certification to a class action?

Answer: Class actions are governed by statute in some provinces, and by common law in others. In either event, however, the criteria are much the same.

- *Common Issues*: There must be *common issues* amongst the various members of the class. In this case, the court would have to be satisfied that all of the class members were subject to the same type of systematic overcharging by BOP. It is not necessary, however, for every claim to be identical. Even if the court allows a class action to occur, it may set up a process to deal with the special circumstances that affect some claimants. Consequently, it would not necessarily be fatal that different members were overcharged for different types of services.
- *Representative Plaintiff*: The plaintiff must qualify as a *representative plaintiff*. He or she must demonstrate a workable plan for fairly representing the interests of the class members. That will not be true, for instance, if the plaintiff wants the court to rely on a rule that will help his or her claim, but that will also hurt other claimants.
- *Notification*: A representative plaintiff must also have a workable plan for *notifying* potential class members. In this case, class members might, for instance, be notified by way of notices in newspapers and magazines. Those notices are very important. In most situations, a class action automatically includes every claimant who has not expressly *opted out* within a certain length of time. And every member of that class will be bound by the decision that the court gives at the end of the trial. People who have not opted out cannot bring separate actions on their own.
- *Preferable Procedure*: The court must be convinced that a class action is the *preferable procedure* for dealing with the claims. It will, for instance, consider whether a class action will become too complicated, and whether there are enough similarities between the class members.

60) List and briefly describe the options that are available in terms of legal representation.
Answer: We discussed three basic options in the text. (i) A person always has the right to *self-representation*. That approach is most common in relatively simple matters, such as cases in small claims courts. (ii) Particularly in more complex cases, it is common to hire a *lawyer*. As a variation on that theme, many companies retain *in-house counsel* to provide legal services on an on-going basis. (iii) In some situations, it is possible to receive excellent legal services, at a fraction of the cost of a lawyer, by hiring a *paralegal*. A paralegal is a person who is not a lawyer, but who nevertheless specializes in providing legal advice or guidance.

61) There is no guarantee that things will go well merely because you hire a lawyer. There are, however, certain factors that provide some assurance that (i) a lawyer is competent, (ii) a lawyer will act ethically, and (iii) compensation will be available if you suffer a loss as a result of a lawyer's careless or wrongful behaviour. Identify and briefly describe the relevant factors for each of those three propositions.
Answer: *Competence* In order to practice law in Canada, a person must (i) hold a *law degree*, (ii) serve an apprentice *period of articles* with a law firm or other legal organization, and (iii) *pass the bar* by successfully writing a number of examinations.

Ethical Behaviour Although nothing can ensure that a person will always act ethically, lawyers are subject to *codes of conduct* that are administered by provincial and territorial *law societies*. The codes of conduct establish rules governing the behaviour of lawyers. A lawyer who is found guilty of misconduct can be punished in a variety of ways, including fines, suspension, or disbarment (*ie* being deprived of the ability to practice law).

Compensation Every practicing lawyer is required to carry *professional liability insurance*. If a lawyer is found liable for professional misconduct, the insurance company will be required to pay damages to the plaintiff on the lawyer's behalf. As added protection against un-compensated losses, law societies maintain *assurance funds*, which can also provide compensation to people who are hurt by lawyerly misconduct.

62) As a result of recent events, Marshall requires legal representation. Because he has limited knowledge of the

law, he has ruled out the possibility of self-representation. He realizes that he therefore must hire someone to act on his behalf. In choosing between hiring a lawyer and hiring a paralegal, what factors should he take into consideration?

Answer: There is no magic formula for determining whether legal representation should come in the form of a lawyer or a paralegal. The decision depends upon all of the circumstances, and a few factors in particular.

Cost As a general rule, paralegals charge considerably less than lawyers, even when providing exactly the same service. Consequently, if, for instance, Marshall requires someone to process a simple land transfer, he might consider hiring a paralegal.

Expertise Because paralegals tend to be confined to certain tasks, they naturally have no expertise in some areas of law. Often, however, lawyers and paralegals deal with precisely the same types of files. And in those areas, paralegals frequently have as much expertise and experience as lawyers. (Indeed, because lawyers often delegate administrative tasks and paper work to assistants and secretaries, paralegals sometimes have more hands-on knowledge than lawyers.)

Accessibility Accessibility in this case will depend upon the nature of Marshall's needs. Some types of cases (*e.g.* murder trials) are handled only by lawyers. Other types of cases (*e.g.* house transfers) are handled equally by lawyers and paralegals. And in a third category of cases, lawyers are entitled to provide services, but often refuse to do so (unless, perhaps, they are paid very hefty fees). In those situations, paralegals may be far more accessible than lawyers.

Training Although most paralegals are well-trained and thoroughly-experienced, they are not, in contrast to lawyers, subject to mandatory educational requirements. (There is, however, a growing movement to impose standardized educational requirements upon paralegals. If that movement is successful, paralegals will more closely resemble lawyers.)

Regulated Profession Similarly, while every practicing lawyer must be a member of a law society, paralegals are not currently subject to the same requirement. (Once again, however, the situation may change in the near future.)

Mandatory Codes of Conduct Although every practicing lawyer is subject to his or her law society's code of conduct, paralegals are not currently subject to any parallel regime. (But again, the situation may change in the future.)

Privilege Whether he spoke with a lawyer or a paralegal, Marshall's conversations would be *confidential*. Consequently, neither a lawyer or a paralegal would generally be entitled to disclose the content of those communications to some third party. In contrast, communications with a lawyer would be *privileged*, but those with a paralegal would not be privileged. A privilege would ensure that, unless Marshall agreed, his lawyer could not be judicially compelled to disclose the content of those communications in court.

63) Your company has purchased a wide variety of supplies from Acme Inc over the course of many years. Much to your surprise, Acme has just served a statement of claim on your company. You are puzzled and annoyed. First, you are puzzled because while the statement of claim clearly alleges that you owe Acme $15 000, the precise basis for that allegation is unclear. Given the amount of business that your company does with Acme, that claim might be made in reference to any one of literally dozens of recent transactions. You are quite sure, however, that you have not done anything wrong under any of those transactions. Second, you are annoyed because, in the interests of goodwill, your company has often accepted from Acme goods that were somehow defective. In the past, you said nothing to Acme about those problems because you did not want to create bad feelings. But now that Acme has sued your company, you are feeling far less lenient. You are, in particular, dissatisfied with a shipment of shelving units that you received from Acme last week. Those shelves stand only 1.8 metres high, even though Acme promised in the contract of purchase and sale

that the shelves would stand two metres high. In the circumstances, you have decided that you should sue Acme for breach of contract. Identify and briefly explain the pleadings that you will need to serve on Acme Inc in the near future.

Answer: Your choice of pleadings is determined by the actions that you want to take with respect to Acme inc. You will need to issue and serve three documents.

Demand for Particulars Because you require further information in order to understand the allegation contained within Acme's statement of claim, you will need to serve Acme with a *demand for particulars*.

Statement of Defence Because you reject the suggestion that you are liable, you will need to serve a *statement of defence* on Acme. That document should be served promptly. If you fail to do so in a timely manner, Acme may be entitled to obtain default judgment against you.

Counterclaim Because you want to sue Acme for breach of contract with respect to the defective shelving units, you will need to serve Acme with a *counterclaim*. That counterclaim is, in effect, your own statement of claim. You most likely will include your statement of defence and counterclaim in the same package of documents.

64) Briefly explain the difference between (i) examinations-in-chief and cross-examinations, (ii) direct evidence and hearsay evidence, (iii) ordinary witnesses and expert witnesses, and (iv) proof on balance of probabilities and proof beyond a reasonable doubt.

Answer: *Examinations-in-Chief and Cross-Examinations* These concepts pertain to the manner in which evidence is tested in court by a lawyer. An *examination-in-chief* occurs when a lawyer questions a witness who is favourable to that lawyer's side. A *cross-examination* occurs when a lawyer questions a witness who is appearing for the other side.

Direct Evidence and Hearsay Evidence These concepts pertain to the type of evidence that may or may not be allowed in court. *Direct evidence* occurs when a witness testifies and provides evidence with respect to an event that he or she personally experienced. The evidence is "direct" in the sense that the witness is testifying as to his or her *own* experience. Direct evidence is, as a rule, admissible in court. *Hearsay evidence* occurs when a witness testifies and provides evidence with respect to an event that he or she learned about from another party. The witness does not, therefore, have personal knowledge of the events in question. As a general rule, hearsay evidence is inadmissible. The courts normally do not want to rely upon evidence that the witness cannot discuss from personal experience and that lawyers consequently cannot directly test and assess.

Ordinary Witnesses and Expert Witnesses These concepts pertain to the type of people who may testify and provide evidence. An *ordinary witness* testifies with respect to facts with which he or she has first-hand knowledge. An *expert witness* provides opinions and assessments on the basis of information provided by ordinary witnesses. For instance, an ordinary witness may testify that she served the defendant with six glasses of wine during a dinner and an expert witness may offer an opinion as to the possible intoxicating effects of those drinks.

Proof on Balance of Probabilities and Proof Beyond a Reasonable Doubt These concepts pertain to the degree to which a court must be satisfied that a claim has been established. In private law, the plaintiff has to prove its claim on a *balance of probabilities*. That means that every important part of its claim must be *probably* true. While it is impossible to accurately measure these things, it may help to think of a set of scales. At the end of the trial, the defendant will be held *liable* only if the scales are tipped in the plaintiff's favour. If the scales are either evenly balanced or tipped in the defendant's favour, then the defendant will be *not liable*. In criminal cases, the standard of proof is much higher. The Crown has to prove the accused's guilt *beyond a reasonable doubt*. If that standard is met, then the accused will be found *guilty*. If not, the verdict will be *not guilty*.

65) In a case filed in a superior court, Alpha Inc sued Beta Ltd for breach of contract. Alpha claimed damages of $250 000. Although Beta denied liability, it formally offered to settle the claim for $100 000. Alpha rejected that offer, but in response, it formally offered to settle its claim for $200 000. Beta rejected that offer. The case has now gone to trial. Explain what order the judge will likely make with respect to costs if (a) Beta is liable for $150 000, or (b) Beta is liable for $50 000?

Answer: As a general rule, the party that wins a private lawsuit is awarded *costs* against the losing party. Those costs are calculated, under the heading of *party-and-party costs* (or *partial indemnity costs* in Ontario), on the basis of standardized tariffs and only rarely cover the winning party's actual legal costs.

The applicable rules may be different, however, if one of the parties formally offered to settle out of court. In that situation, the judge may award costs in a way that punishes an unreasonable refusal to settle a case and encourages parties in future cases to offer and accept reasonable settlement offers.

(a) The first part of the question assumes that Beta is held liable for $150 000: *ie* more than Beta's settlement offer but less than Alpha's settlement offer. In that situation, it is clear that Alpha acted unreasonably in rejecting Beta's offer. A superior court judge may therefore order Alpha (even though Alpha won its case) to pay Beta's costs on a party-and-party basis.

(b) The second part of the question assumes that Beta is held liable for $200 000: *ie* more than Alpha's settlement offer. In that situation, it is clear that Beta acted unreasonably in rejecting Alpha's offer. A superior court judge may therefore order Beta to pay Alpha's costs on a *solicitor-and-client* basis (or, in Ontario, in a *substantial indemnity* basis). Although Alpha still will not be reimbursed for all of its actual legal costs, it will enjoy costs calculated on a tariff that is significantly more generous than the party-and-party tariff.

66) In a case filed in the Federal Court, Gamma Inc sued Delta Ltd for breach of contract. Gamma claimed damages of $500 000. Although Delta denied liability, it formally offered to settle the claim for $200 000. Gamma rejected that offer, but in response, it formally offered to settle it claim for $400 000. Delta rejected that offer. The case has now gone to trial. Explain what order the judge will likely make with respect to costs if (a) Delta is held liable for $450 000, (b) Delta is held liable for $100 000, or (c) Delta is held not liable?

Answer: As a general rule, the party that wins a private lawsuit is awarded *costs* against the losing party. Those costs are calculated, under the heading of *party-and-party costs*, on the basis of standardized tariffs and only rarely cover the winning party's actual legal costs.

The applicable rules may be different, however, if one of the parties formally offered to settle out of court. In that situation, the judge may award costs in a way that punishes an unreasonable refusal to settle a case and encourages parties in future cases to offer and accept reasonable settlement offers.

Although that is true generally in Canada, special variations on the rules apply in this case because it is being heard in the Federal Court.

(a) The first part of the question assumes that Delta is held liable for $450 000: *ie* more than the amount contained in Gamma's formal offer to settle. In that situation, it is clear that Delta acted unreasonably in rejecting Gamma's offer. The judge may therefore (i) award party-and-party costs to Gamma for the period leading up to its formal offer of settlement, and (ii) *double* party-and-party costs to Gamma for the period after its formal offer of settlement.

(b) The second part of the question assumes that Delta is held liable for $100 000: *ie* less than the amount contained in Delta's formal offer to settle. In that situation, it is clear that Gamma acted unreasonably in rejecting Delta's offer. The judge may therefore (i) award party-and-party costs to Gamma for the period leading up to Delta's formal settlement offer, but (ii) *double* party-and-party costs to Delta for the period after its formal settlement offer.

(c) The third part of the question assumes that Delta was held liable for nothing at all: *ie* less than the

amount contained in Delta's formal settlement offer. In that situation, it is clear that Gamma acted unreasonably in rejecting Delta's offer. The judge may therefore (i) award party-and-party costs to Delta for the period leading up to Delta's formal settlement offer, and (ii) *double* party-and-party costs to Delta for the period after its formal settlement offer.

67) The federal government is concerned about the possibility that one or more provinces might try in the future to separate from Canada and become independent countries. The federal government has therefore created legislation to govern the validity of any attempts at separation. It would like to have the Supreme Court of Canada's advice as to whether that legislation is constitutionally valid. As a matter of fact, however, the legislation is not yet the subject of any lower court decisions. Is there any way in which the federal government can bring its statute before the Supreme Court of Canada? Or is that Court limited to hearing appeals from lower court decisions?
Answer: While the vast majority of the work performed by the Supreme Court of Canada consists of appeals from lower court decisions, the court also has jurisdiction to hear *references*. A reference occurs when a government asks for an opinion on the constitutional validity of a statute.

68) Panaural Inc is a long-established entertainment company. Among other things, it manufactures and sells music CDs. One of its best selling artists is a group called *Funky See Funky Do*. Under the contract that exists between Panaural and *Funky See Funky Do*, copyright in all of the group's songs is held by the company. Panaural was therefore especially upset when it discovered that Noize Records, a small music company, has been manufacturing and selling CDs containing music by *Funky See Funky Do*. Panaural intends to sue Noize Records in an attempt to receive (i) an injunction to stop Noize Record's illegal sales, and (ii) $50 000 in compensation for the losses that it has suffered as a result of Noize Record's breach of copyright. In an effort to keep costs down, however, Panaural wants to bring its case in a small claims court. Is it entitled to do so? Provide several reasons for your answer.
Answer: Panaural cannot bring its action against Noize Records in a small claims court. There are several reasons for that conclusion.
- *Type of Claim* Panaural's claim is based on a breach of copyright. Copyright law is governed by the federal *Copyright Act*. Small claims courts are provincial courts established by the provinces. They consequently have no jurisdiction to hear cases dealing with federal legislation.
- *Types of Remedies* A small claims court cannot grant equitable relief. Consequently, while they can award compensatory damages, they cannot award the sort of injunction that Panaural seeks.
- *Monetary Limit* A Small claims court can deal only with *small* claims. The monetary limit varies across the country from $5000 to $25 000. Panaural is seeking compensation of $50 000, which clearly exceeds the limit of any small claims court.

69) Describe the relationship between the concept of hierarchy and the doctrine of precedent. How are those concepts related to the rule of law?
Answer: For present purposes, the relevant hierarchy consists of the fact that not all Canadian courts have equal authority. Some are more powerful than others. As a general rule, trial courts have the least amount of authority. At the intermediate level, various courts of appeal have relatively more authority. And the Supreme Court of Canada sits atop the hierarchy because it enjoys the greatest authority. It is the highest court in the land.

In fact, there are a number of judicial hierarchies within the country. Each province and territory has its own system of trial courts and appellate courts. An additional system exists separately for certain matters that fall within the federal jurisdiction. There is one constant, however, in that the Supreme Court of Canada is at the apex of each and every hierarchy.

Those hierarchies are essential to the doctrine of precedent. The doctrine of precedent states that a court must adhere to a decision that was given by a court higher above in the same hierarchy.

Consequently, a trial judge in Edmonton must follow a decision of the Alberta Court of Appeal, just as a trial judge in Sudbury must follow a decision of the Ontario Court of Appeal. Significantly, however, because they are not in the same hierarchy, a trial judge in Edmonton does not have to follow a decision of the Ontario Court of Appeal, nor does a trial judge in Sudbury have to follow a decision of the Alberta Court of Appeal. (In such circumstances, a decision of an appellate court in another jurisdiction may be persuasive, in the sense that it inclines the trial judge to adopt a similar approach. It is not, however, binding, and it need not be followed.) Once again, however, since the Supreme Court of Canada sits atop every hierarchy, its decisions must be followed by all Canadian courts.

The rule of law states that disputes should be settled on the basis of laws, rather than on the basis of personal opinions. The concept of a hierarchy and the doctrine of precedent support the rule of law by requiring judges to follow the courts above them. Especially if there is a binding precedent on point, the judge has no choice but to follow the settled rule. And even if there is no binding precedent directly on point, the penumbra of persuasive authorities in the area constrain the judge from simply exercising a personal judgment.

70) Omicron Inc is one of several companies that manufactures widgets. For many years, almost half of its annual sales have been made to Sigma Ltd. Despite those sales, its financial position has always been somewhat precarious. A dispute recently arose with respect to financial losses that Sigma claims to have suffered as a result of a defective widget. Omicron strongly denies that it is responsible for those losses. Sigma, however, has announced that it will not purchase any more items until the matter is resolved. Omicron has asked for your advice. Analyze the situation from a risk management perspective by outlining the advantages and disadvantages associated with the various ways in which the case might be resolved.
Answer: There are at least four possible ways of resolving the dispute: litigation, negotiation, mediation, and arbitration. Each has advantages and disadvantages.

Litigation is not a very attractive option in the circumstances. Given that half of Omicron's sales are to Sigma, and given that Sigma apparently could purchase its supply of widgets from another manufacturer, Omicron probably needs to resolve the issue quickly and amicably. It cannot afford to lose half of its sales, either temporarily while the dispute drags on, or permanently if litigation's adversarial nature causes a rift between the parties. Several other factors also militate against the litigation option.

- To some extent, litigation tends to be something of a lottery. Its outcome is unpredictable. The worrisome nature of that proposition is heightened by the fact that litigation also usually provides an all-or-nothing solution. Omicron might win the case and be entirely absolved of responsibility (but possibly lose Sigma as a customer), but it might also lose the case and therefore be held liable for all of Sigma's losses.
- Since some aspects of litigation are almost always open to the public, the case might create adverse publicity for Omicron. Even if Omicron wins the case, potential customers might recall Sigma's allegations, rather than the actual outcome. The result may be lost profits due to fewer sales.

The other three possibilities are forms of ADR (alternative dispute resolution). Consequently, they all share certain advantages.

- First, since they do not occur in court, they are not generally publicly accessible. Omicron therefore would have to worry less about adverse publicity.
- Second, they all tend to be quicker and less expensive than litigation. There is no need to wait for a trial date to come available, nor possibly to proceed through a series of appeals. Likewise, since they are relatively less formal and protracted, they tend to involve fewer costs.
- Third, since they are not based on an adversarial model, they tend to be less injurious to on-going business relations. That is especially true of negotiation and mediation. That is important to Omicron because so many of its sales are made to Sigma.
- Finally, because ADR generally involves give and take by both sides, Omicron ultimately might be required to pay less money than would be the case if it was held liable at the end of a trial.

There are, however, other features that should be considered with respect to each form of ADR.

- Negotiation is a discussion that leads to the settlement of a dispute. Although the parties may use their lawyers, they are not required to do so. Negotiation may have certain drawbacks in the present case. First, since it requires cooperation, it may not be possible if a dispute has already turned ugly. Second, the parties do not appear to have equal bargaining power because Omicron apparently needs Sigma more than Sigma needs Omicron. It also seems true that Omicron has fewer resources than Sigma. Consequently, Sigma may exploit its advantage to force a harsh settlement on Omicron. Third, if the dispute concerns a loss that is covered by an insurance policy, Omicron will be required to let the insurance company take control of the negotiations. If Omicron attempts to settle the matter itself, it may lose the benefits of the policy. Finally, there is no guarantee of success. Negotiations may collapse and a dispute may remain unresolved. If so, the effort put into the negotiations will be largely wasted.
- Mediation is a process in which a neutral person (called a mediator) helps the parties reach an agreement. Like negotiation, mediation is non-binding. A mediator would bring the parties together, listen to their arguments, outline the issues, comment on each side's strengths and weaknesses, and suggest possible solutions. But the mediator would *not* give a decision and the parties would *not* be required to obey any orders. In that sense, mediation is unlike formal litigation, but like negotiation. It has many of the same limitations and dangers as negotiation, except that it also provides the parties with a neutral perspective.
- Arbitration, in contrast, would look more like court proceedings. It is a process in which a neutral third person (called an arbitrator) imposes a decision on the parties. The fundamental difference between arbitration and mediation is that an arbitrator's decision is almost always binding, in the sense that the parties must obey it. Indeed, Omicron and Sigma might agree beforehand that the arbitrator's decision, unlike a trial judgment, cannot even be appealed. The trial-like features of arbitration may not be very attractive to Omicron. Given its precarious position, Omicron might prefer either negotiation or mediation, which involve greater flexibility and somewhat less likelihood of a devastating result.

Finally, it should be noted that the various forms of dispute resolution could all be used in this case. Omicron and Sigma might try to negotiate a settlement. If that fails, they might seek help from a mediator. If that also fails, they might send their dispute to an arbitrator. And if one party is unhappy with that decision, it might appeal it to a court (unless it had agreed that the arbitration was final and binding).

1) C
2) E
3) B
4) B
5) A
6) C
7) B
8) D
9) E
10) A
11) A
12) A
13) D
14) A
15) B
16) C
17) B
18) D
19) D
20) C
21) B
22) B
23) C
24) C
25) A
26) C
27) B
28) A
29) B
30) A
31) C
32) D
33) D
34) C
35) E
36) E
37) D
38) C
39) B
40) B
41) FALSE
42) FALSE
43) TRUE
44) TRUE
45) TRUE
46) FALSE
47) FALSE
48) FALSE
49) FALSE
50) TRUE
51) FALSE

52) FALSE
53) TRUE
54) TRUE
55) FALSE
56) (i) While a child may sue or be sued, they must act through an adult representative, such as a parent or litigation guardian.

(ii) Similarly, while a person suffering from a mental disability can sue or be sued, they must act through a representative who is of sound mind, such as a court-appointed representative.

(iii) As a matter of law, a corporation is a type of person. A company may therefore sue or be sued. There are, however, restrictions on foreign corporations, which may need to be provincially licensed before they can use Canadian courts.

(iv) In contrast to corporations, unincorporated organizations (such as clubs and church groups) are not classified as legal persons. As a result, they normally cannot sue or be sued. Instead, it is necessary to sue the individual members of those organizations. In some provinces, however, there is an important exception to that rule. Although trade unions are unincorporated organizations, they can sue and be sued directly.

57) The doctrine that "the King can do no wrong" traditionally meant, quite literally, that the courts would not accept the suggestion that the king had acted unlawfully or illegally. As a result, it was impossible to sue the king unless the king gave his permission to be sued. That doctrine was extended to mean that the king's representatives in government similarly could not be sued without their permission. That traditional rule has now been changed by legislation. As a result, it generally is possible for the government to both sue and be sued. The governing statutes are, however, complicated and they often introduce unusual restrictions. They need to be read very carefully.

58) Because Shady Press Inc refuses to pay anything in the absence of a court order, Chad will need to proceed by way of litigation, rather than some form of alternative dispute resolution. Within that context, his financial concerns might be overcome by various means: (i) class action, (ii) contingency fee, (iii) costs, and (iv) small claims court.

Class Action Chad could minimize the expense to himself by participating in a class action. Although that class action would involve many (perhaps all) of the people who purchased Shady Press books that fell apart, only one lawyer would be needed. Consequently, because the expenses of the action would be spread amongst all of the claimants, each claimant would likely stand to gain more than he or she lost in litigation costs.

Contingency Fee Whether or not he participated as a member of a class action, Chad could further reduce the expense associated with litigation by hiring a lawyer to act on a contingency fee basis. If so, Chad would need to pay his lawyer's fees only if the claim was successful. In that event, the lawyer's fees would be paid out of a judgment that the court awarded against Shady Press.

Costs Regardless of whether he participates in a class action or a contingency fee arrangement, Chad should be informed that the winning party usually has costs awarded against the losing party. That means that if he won his case, Shady Press would have to pay for *some* of his litigation expenses. At the same time, however, Chad should realize that (i) judicially-awarded costs seldom cover *all* of a party's actual expenses, and (ii) if he loses his case against Shady Press, he would likely have to pay for some of the company's litigation costs.

Small Claims Court Finally, because his individual claim is worth only $40 at most, Chad would be entitled to bring his action against Shady Press in a small claims court. Litigation in that type of court requires far fewer resources in terms of time and money.

59) Class actions are governed by statute in some provinces, and by common law in others. In either event, however, the criteria are much the same.

- *Common Issues*: There must be *common issues* amongst the various members of the class. In this case, the court would have to be satisfied that all of the class members were subject to the same type of systematic overcharging by BOP. It is not necessary, however, for every claim to be identical. Even if the court allows a class action to occur, it may set up a process to deal with the special circumstances that affect some

c equently, it would not necessarily be fatal that different members were overcharged for different types of l services.
a • *Representative Plaintiff*: The plaintiff must qualify as a *representative plaintiff*. He or she must demonstrate a i workable plan for fairly representing the interests of the class members. That will not be true, for instance, m if the plaintiff wants the court to rely on a rule that will help his or her claim, but that will also hurt other a claimants.
n • *Notification*: A representative plaintiff must also have a workable plan for *notifying* potential class members. t In this case, class members might, for instance, be notified by way of notices in newspapers and magazines. s Those notices are very important. In most situations, a class action automatically includes every claimant . who has not expressly *opted out* within a certain length of time. And every member of that class will be bound by the decision that the court gives at the end of the trial. People who have not opted out cannot C bring separate actions on their own.
o • *Preferable Procedure*: The court must be convinced that a class action is the *preferable procedure* for dealing n with the claims. It will, for instance, consider whether a class action will become too complicated, and s whether there are enough similarities between the class members.

60) We discussed three basic options in the text. (i) A person always has the right to *self-representation*. That approach is most common in relatively simple matters, such as cases in small claims courts. (ii) Particularly in more complex cases, it is common to hire a *lawyer*. As a variation on that theme, many companies retain *in-house counsel* to provide legal services on an on-going basis. (iii) In some situations, it is possible to receive excellent legal services, at a fraction of the cost of a lawyer, by hiring a *paralegal*. A paralegal is a person who is not a lawyer, but who nevertheless specializes in providing legal advice or guidance.

61) *Competence* In order to practice law in Canada, a person must (i) hold a *law degree*, (ii) serve an apprentice *period of articles* with a law firm or other legal organization, and (iii) *pass the bar* by successfully writing a number of examinations.

Ethical Behaviour Although nothing can ensure that a person will always act ethically, lawyers are subject to *codes of conduct* that are administered by provincial and territorial *law societies*. The codes of conduct establish rules governing the behaviour of lawyers. A lawyer who is found guilty of misconduct can be punished in a variety of ways, including fines, suspension, or disbarment (*ie* being deprived of the ability to practice law).

Compensation Every practicing lawyer is required to carry *professional liability insurance*. If a lawyer is found liable for professional misconduct, the insurance company will be required to pay damages to the plaintiff on the lawyer's behalf. As added protection against un-compensated losses, law societies maintain *assurance funds*, which can also provide compensation to people who are hurt by lawyerly misconduct.

62) There is no magic formula for determining whether legal representation should come in the form of a lawyer or a paralegal. The decision depends upon all of the circumstances, and a few factors in particular.

Cost As a general rule, paralegals charge considerably less than lawyers, even when providing exactly the same service. Consequently, if, for instance, Marshall requires someone to process a simple land transfer, he might consider hiring a paralegal.

Expertise Because paralegals tend to be confined to certain tasks, they naturally have no expertise in some areas of law. Often, however, lawyers and paralegals deal with precisely the same types of files. And in those areas, paralegals frequently have as much expertise and experience as lawyers. (Indeed, because lawyers often delegate administrative tasks and paper work to assistants and secretaries, paralegals sometimes have more hands-on knowledge than lawyers.)

Accessibility Accessibility in this case will depend upon the nature of Marshall's needs. Some types of cases (*e.g.* murder trials) are handled only by lawyers. Other types of cases (*e.g.* house transfers) are handled equally by lawyers and paralegals. And in a third category of cases, lawyers are entitled to provide services, but often refuse to do so (unless, perhaps, they are paid very hefty fees). In those situations, paralegals may be far more accessible than lawyers.

Train ing Alth ough most paral egals are well-train ed and thoro ughl y-ex perie nced, they are not, in contrast to lawyers, subject to mandatory educational requirements. (There is, however, a growing movement to impose standardized educational requirements upon paralegals. If that movement is successful, paralegals will more closely resemble lawyers.)

Regulated Profession Similarly, while every practicing lawyer must be a member of a law society, paralegals are not currently subject to the same requirement. (Once again, however, the situation may change in the near future.)

Mandatory Codes of Conduct Although every practicing lawyer is subject to his or her law society's code of conduct, paralegals are not currently subject to any parallel regime. (But again, the situation may change in the future.)

Privilege Whether he spoke with a lawyer or a paralegal, Marshall's conversations would be *confidential*. Consequently, neither a lawyer or a paralegal would generally be entitled to disclose the content of those communications to some third party. In contrast, communications with a lawyer would be *privileged*, but those with a paralegal would not be privileged. A privilege would ensure that, unless Marshall agreed, his lawyer could not be judicially compelled to disclose the content of those communications in court.

63) Your choice of pleadings is determined by the actions that you want to take with respect to Acme inc. You will need to issue and serve three documents.

Demand for Particulars Because you require further information in order to understand the allegation contained within Acme's statement of claim, you will need to serve Acme with a *demand for particulars*.

Statement of Defence Because you reject the suggestion that you are liable, you will need to serve a *statement of defence* on Acme. That document should be served promptly. If you fail to do so in a timely manner, Acme may be entitled to obtain default judgment against you.

Counterclaim Because you want to sue Acme for breach of contract with respect to the defective shelving units, you will need to serve Acme with a *counterclaim*. That counterclaim is, in effect, your own statement of claim. You most likely will include your statement of defence and counterclaim in the same package of documents.

64) *Examinations-in-Chief and Cross-Examinations* These concepts pertain to the manner in which evidence is tested in court by a lawyer. An *examination-in-chief* occurs when a lawyer questions a witness who is favourable to that lawyer's side. A *cross-examination* occurs when a lawyer questions a witness who is appearing for the other side.

Direct Evidence and Hearsay Evidence These concepts pertain to the type of evidence that may or may not be allowed in court. *Direct evidence* occurs when a witness testifies and provides evidence with respect to an event that he or she personally experienced. The evidence is "direct" in the sense that the witness is testifying as to his or her *own* experience. Direct evidence is, as a rule, admissible in court. *Hearsay evidence* occurs when a witness testifies and provides evidence with respect to an event that he or she learned about from another party. The witness does not, therefore, have personal knowledge of the events in question. As a general rule, hearsay evidence is inadmissible. The courts normally do not want to rely upon evidence that the witness cannot discuss from personal experience and that lawyers consequently cannot directly test and assess.

Ordinary Witnesses and Expert Witnesses These concepts pertain to the type of people who may testify and provide evidence. An *ordinary witness* testifies with respect to facts with which he or she has first-hand knowledge. An *expert witness* provides opinions and assessments on the basis of information provided by ordinary witnesses. For instance, an ordinary witness may testify that she served the defendant with six glasses of wine during a dinner and an expert witness may offer an opinion as to the possible intoxicating effects of those drinks.

Proof on Balance of Probabilities and Proof Beyond a Reasonable Doubt These concepts pertain to the degree to which a court must be satisfied that a claim has been established. In private law, the plaintiff has to prove its claim on a *balance of probabilities*. That means that every important part of its claim must be *probably* true. While it is impossible to accurately measure these things, it may help to think of a set of scales. At the end of the trial, the defendant will be held *liable* only if the scales are tipped in the plaintiff's favour. If the scales are either evenly balanced or tipped in

the defendant's favour, then the defendant will be *not liable*. In criminal cases, the standard of proof is much higher. The Crown has to prove the accused's guilt *beyond a reasonable doubt*. If that standard is met, then the accused will be found *guilty*. If not, the verdict will be *not guilty*.

65) As a general rule, the party that wins a private lawsuit is awarded *costs* against the losing party. Those costs are calculated, under the heading of *party-and-party costs* (or *partial indemnity costs* in Ontario), on the basis of standardized tariffs and only rarely cover the winning party's actual legal costs.

The applicable rules may be different, however, if one of the parties formally offered to settle out of court. In that situation, the judge may award costs in a way that punishes an unreasonable refusal to settle a case and encourages parties in future cases to offer and accept reasonable settlement offers.

(a) The first part of the question assumes that Beta is held liable for $150 000: *ie* more than Beta's settlement offer but less than Alpha's settlement offer. In that situation, it is clear that Alpha acted unreasonably in rejecting Beta's offer. A superior court judge may therefore order Alpha (even though Alpha won its case) to pay Beta's costs on a party-and-party basis.

(b) The second part of the question assumes that Beta is held liable for $200 000: *ie* more than Alpha's settlement offer. In that situation, it is clear that Beta acted unreasonably in rejecting Alpha's offer. A superior court judge may therefore order Beta to pay Alpha's costs on a *solicitor-and-client* basis (or, in Ontario, in a *substantial indemnity* basis). Although Alpha still will not be reimbursed for all of its actual legal costs, it will enjoy costs calculated on a tariff that is significantly more generous than the party-and-party tariff.

66) As a general rule, the party that wins a private lawsuit is awarded *costs* against the losing party. Those costs are calculated, under the heading of *party-and-party costs*, on the basis of standardized tariffs and only rarely cover the winning party's actual legal costs.

The applicable rules may be different, however, if one of the parties formally offered to settle out of court. In that situation, the judge may award costs in a way that punishes an unreasonable refusal to settle a case and encourages parties in future cases to offer and accept reasonable settlement offers.

Although that is true generally in Canada, special variations on the rules apply in this case because it is being heard in the Federal Court.

(a) The first part of the question assumes that Delta is held liable for $450 000: *ie* more than the amount contained in Gamma's formal offer to settle. In that situation, it is clear that Delta acted unreasonably in rejecting Gamma's offer. The judge may therefore (i) award party-and-party costs to Gamma for the period leading up to its formal offer of settlement, and (ii) *double* party-and-party costs to Gamma for the period after its formal offer of settlement.

(b) The second part of the question assumes that Delta is held liable for $100 000: *ie* less than the amount contained in Delta's formal offer to settle. In that situation, it is clear that Gamma acted unreasonably in rejecting Delta's offer. The judge may therefore (i) award party-and-party costs to Gamma for the period leading up to Delta's formal settlement offer, but (ii) *double* party-and-party costs to Delta for the period after its formal settlement offer.

(c) The third part of the question assumes that Delta was held liable for nothing at all: *ie* less than the amount contained in Delta's formal settlement offer. In that situation, it is clear that Gamma acted unreasonably in rejecting Delta's offer. The judge may therefore (i) award party-and-party costs to Delta for the period leading up to Delta's formal settlement offer, and (ii) *double* party-and-party costs to Delta for the period after its formal settlement offer.

67) While the vast majority of the work performed by the Supreme Court of Canada consists of appeals from lower court decisions, the court also has jurisdiction to hear *references*. A reference occurs when a government asks for an opinion on the constitutional validity of a statute.

68) Panaural cannot bring its action against Noize Records in a small claims court. There are several reasons for that conclusion.

- *Type of Claim* Panaural's claim is based on a breach of copyright. Copyright law is governed by the federal *Copyright Act*. Small claims courts are provincial courts established by the provinces. They consequently have no jurisdiction to hear cases dealing with federal legislation.

- *of Remedies* A small claims court cannot grant equitable relief. Consequently, while they can award compensatory damages, they cannot award the sort of injunction that Panaural seeks.
- *Monetary Limit* A Small claims court can deal only with *small* claims. The monetary limit varies across the country from $5000 to $25 000. Panaural is seeking compensation of $50 000, which clearly exceeds the limit of any small claims court.

Types

69) For present purposes, the relevant hierarchy consists of the fact that not all Canadian courts have equal authority. Some are more powerful than others. As a general rule, trial courts have the least amount of authority. At the intermediate level, various courts of appeal have relatively more authority. And the Supreme Court of Canada sits atop the hierarchy because it enjoys the greatest authority. It is the highest court in the land.

In fact, there are a number of judicial hierarchies within the country. Each province and territory has its own system of trial courts and appellate courts. An additional system exists separately for certain matters that fall within the federal jurisdiction. There is one constant, however, in that the Supreme Court of Canada is at the apex of each and every hierarchy.

Those hierarchies are essential to the doctrine of precedent. The doctrine of precedent states that a court must adhere to a decision that was given by a court higher above in the same hierarchy. Consequently, a trial judge in Edmonton must follow a decision of the Alberta Court of Appeal, just as a trial judge in Sudbury must follow a decision of the Ontario Court of Appeal. Significantly, however, because they are not in the same hierarchy, a trial judge in Edmonton does not have to follow a decision of the Ontario Court of Appeal, nor does a trial judge in Sudbury have to follow a decision of the Alberta Court of Appeal. (In such circumstances, a decision of an appellate court in another jurisdiction may be persuasive, in the sense that it inclines the trial judge to adopt a similar approach. It is not, however, binding, and it need not be followed.) Once again, however, since the Supreme Court of Canada sits atop every hierarchy, its decisions must be followed by all Canadian courts.

The rule of law states that disputes should be settled on the basis of laws, rather than on the basis of personal opinions. The concept of a hierarchy and the doctrine of precedent support the rule of law by requiring judges to follow the courts above them. Especially if there is a binding precedent on point, the judge has no choice but to follow the settled rule. And even if there is no binding precedent directly on point, the penumbra of persuasive authorities in the area constrain the judge from simply exercising a personal judgment.

70) There are at least four possible ways of resolving the dispute: litigation, negotiation, mediation, and arbitration. Each has advantages and disadvantages.

Litigation is not a very attractive option in the circumstances. Given that half of Omicron's sales are to Sigma, and given that Sigma apparently could purchase its supply of widgets from another manufacturer, Omicron probably needs to resolve the issue quickly and amicably. It cannot afford to lose half of its sales, either temporarily while the dispute drags on, or permanently if litigation's adversarial nature causes a rift between the parties. Several other factors also militate against the litigation option.

- To some extent, litigation tends to be something of a lottery. Its outcome is unpredictable. The worrisome nature of that proposition is heightened by the fact that litigation also usually provides an all-or-nothing solution. Omicron might win the case and be entirely absolved of responsibility (but possibly lose Sigma as a customer), but it might also lose the case and therefore be held liable for all of Sigma's losses.
- Since some aspects of litigation are almost always open to the public, the case might create adverse publicity for Omicron. Even if Omicron wins the case, potential customers might recall Sigma's allegations, rather than the actual outcome. The result may be lost profits due to fewer sales.

The other three possibilities are forms of ADR (alternative dispute resolution). Consequently, they all share certain advantages.

- First, since they do not occur in court, they are not generally publicly accessible. Omicron therefore would have to worry less about adverse publicity.
- Second, they all tend to be quicker and less expensive than litigation. There is no need to wait for a trial

dated to ugh a series of appeals. Likewise, since they are relatively less formal and protracted, they tend to involve fewer costs.

- Third, since they are not based on an adversarial model, they tend to be less injurious to on-going business relations. That is especially true of negotiation and mediation. That is important to Omicron because so many of its sales are made to Sigma.
- Finally, because ADR generally involves give and take by both sides, Omicron ultimately might be required to pay less money than would be the case if it was held liable at the end of a trial.

There are, however, other features that should be considered with respect to each form of ADR.

- Negotiation is a discussion that leads to the settlement of a dispute. Although the parties may use their lawyers, they are not required to do so. Negotiation may have certain drawbacks in the present case. First, since it requires cooperation, it may not be possible if a dispute has already turned ugly. Second, the parties do not appear to have equal bargaining power because Omicron apparently needs Sigma more than Sigma needs Omicron. It also seems true that Omicron has fewer resources than Sigma. Consequently, Sigma may exploit its advantage to force a harsh settlement on Omicron. Third, if the dispute concerns a loss that is covered by an insurance policy, Omicron will be required to let the insurance company take control of the negotiations. If Omicron attempts to settle the matter itself, it may lose the benefits of the policy. Finally, there is no guarantee of success. Negotiations may collapse and a dispute may remain unresolved. If so, the effort put into the negotiations will be largely wasted.
- Mediation is a process in which a neutral person (called a mediator) helps the parties reach an agreement. Like negotiation, mediation is non-binding. A mediator would bring the parties together, listen to their arguments, outline the issues, comment on each side's strengths and weaknesses, and suggest possible solutions. But the mediator would *not* give a decision and the parties would *not* be required to obey any orders. In that sense, mediation is unlike formal litigation, but like negotiation. It has many of the same limitations and dangers as negotiation, except that it also provides the parties with a neutral perspective.
- Arbitration, in contrast, would look more like court proceedings. It is a process in which a neutral third person (called an arbitrator) imposes a decision on the parties. The fundamental difference between arbitration and mediation is that an arbitrator's decision is almost always binding, in the sense that the parties must obey it. Indeed, Omicron and Sigma might agree beforehand that the arbitrator's decision, unlike a trial judgment, cannot even be appealed. The trial-like features of arbitration may not be very attractive to Omicron. Given its precarious position, Omicron might prefer either negotiation or mediation, which involve greater flexibility and somewhat less likelihood of a devastating result.

Finally, it should be noted that the various forms of dispute resolution could all be used in this case. Omicron and Sigma might try to negotiate a settlement. If that fails, they might seek help from a mediator. If that also fails, they might send their dispute to an arbitrator. And if one party is unhappy with that decision, it might appeal it to a court (unless it had agreed that the arbitration was final and binding).