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Question and Answer	Notes
An owner/developer (the owner) entered into a contract with an architectural firm (the architect) for design and contract administration services in connection with the construction of a ten story commercial office building. The building was designed to be entirely surrounded by a paved podium concrete deck used for parking and driving, and the design provided for a parking area below the deck. The podium deck was divided by construction joints and expansion joints placed to allow thermal expansion of the concrete as the temperature changed. The land on which the building was located sloped towards a river so the lower parking deck was designed to be partially open to the outside. The architect engaged a structural engineering firm (the engineer), as the architect's sub consultant on the project. The engineering firm, in its agreement with the architect, accepted responsibility for all structural aspects of construction, and also specifically acknowledged responsibility for the design of the paved podium concrete deck and the parking area below. Upon completion of the design and the tendering process, the owner entered into a contract for the construction of the project with an experienced contractor who had submitted the lowest bid. Unfortunately, within two years following construction, a significant number of leaks occurred in the podium deck, which resulted in water leaks in the lower parking garage. The contract specifications called for a specific rubberized membrane to be installed for the purpose of waterproofing the podium deck. However, during construction, at the suggestion of the roofing subcontractor and without the knowledge of the owner, another asphalt membrane product was submitted for the rubberized membrane product specified. Neither the engineer nor the architect objected to the substitution when it was suggested. The roofing subcontractor had suggested membrane because it was more readily available and would speed completion of construction. The design engineer and the architect took the position that they would rely on the subcontractor's recommendation. During the investigation into the cause of the leaks, another structural engineering firm provided its opinion that the rubberized membrane as specified in the contract was a superior product to the substituted membrane; that the substituted membrane was brittle and could fracture or crack under certain circumstances, particularly on podium decks with expansion joints; that the winter temperatures had contributed to the breakdown of the substitute membrane as it became more brittle at colder temperatures; and that the substitute membrane should not have been used over expansion joints on a dynamic surface podium deck. The second engineering firm also expressed the opinion that the designers ought to have taken into account the non-static nature of the deck that featured these expansion joints and should not have accepted the substitute membrane. Ultimately, to remedy the leaks, the substitute membrane had to be replaced by the rubberized membrane originally specified in the contract. What potential liabilities in tort law arise in this case? In your answer explain what principles of tort law are relevant and how each applies to the case. Principles of tort law: "To satisfy the court that compensation should be made, the plaintiff in a tort action must substantiate that: 1. the defendant owed the plaintiff a duty of care, 2. the defendant breached that duty by his or her conduct, and 3. the defendant's conduct caused the injury to the plaintiff." In this case, the architect owed the owner a duty of care in design and construction supervision through his contract with the owner. To satisfy this duty, the architect subcontracted the engineering firm as specialists to ensure all structural aspects of the design & construction. The roofing subcontractor had a duty to form recommendations based on his expertise, and likely fulfilled this duty by presenting his recommendation to switch to the asphalt roof on the grounds that it was more readily available and would speed construction, which were true. In all likelihood, the only breach of a duty of care present in this case occurred when the engineer negligently relied on the subcontractor's recommendation. As a contracted structural integrity expert, the engineer had a duty to ensure the structural integrity of all aspects of the design and construction, and as such, was negligent in this duty when he/she relied on the roofing subcontractor's recommendation rather than performing a structural analysis to determine the consequences of that	2

recommendation. Given the duty of care owed by the engineer, and the breach of this duty in negligently relying on the recommendation of the subcontractor rather than performing sufficient analysis, the engineer should be liable in tort for the resulting damages caused to the owner. The actual compensation for these damages may end up coming not from the engineer him/herself, but rather from his/her firm or insurance company, as those entities are probably in a better position to provide the compensation (see Vicarious Liability in 4.6).

An information technology firm submitted a bid to design software andhardware for an electronic technology process to control the operation of a large scale baggage handling and related security facility for a major airline. The firm's fixed guaranteed maximum price was the lowest bid and the contract was awarded to it. The contract conditions entitled the information technology firm to terminate the contract if the airline did not pay monthly progress payments within 15 days following certification that a progress payment was due. Pursuant to the contract, an independent engineering firm engaged as contract administrator carried out the certification. The work under the contract was to be performed over an 8 month period. After commencing work on the project the information technology firm determined that it had made significant judgment errors in arriving at its bid price and that it would face a major loss on the project. Its concern about the anticipated loss was increased further when it also learned that, in comparison with the other bidders, its bid price was extremely low and that, in winning the bid, by comparison with the other bidders, it had left more than two million dollars "on the table". Three monthly progress payments were certified as due by the independent engineering firm and paid by the airline in accordance with the terms of the contract. However, after the fourth monthly progress payment was certified as due by the independent engineering firm, the airline's finance department asked the information technology firm's representative on the project for additional information relating to an invoice from a subcontractor to the information technology firm. The subcontractor's invoice comprised a portion of the fourth progress payment amount. The airline's finance department requested that the additional information be provided prior to payment of the fourth progress payment. There was nothing in the signed contract between the information technology firm and the airline that obligated the information technology firm to provide the additional information on the invoice from its subcontractor. However, the information technology firm's representative did verbally indicate to the airline's finance department that the additional information would be provided. The information technology firm never provided the additional information relating to the subcontractor's invoice. Sixteen days after the fourth progress payment had been certified for payment, the information technology firm notified the airline in writing that it was terminating the contract because the airline was in default of its obligations to make payments within fifteen days pursuant to the express wording of the contract. Was the information technology firm entitled to terminate the contract in these circumstances? In giving reasons for your answer, identify and explain the relevant legal principle, its purpose, how it arises, and how it would apply to the facts.

1

In this case, the contracted party has attempted to escape performance on a bad contract by tricking the contracting party into defaulting on the contract by agreeing to provide information on an invoice before a scheduled payment (making a gratuitous promise, as they stood to gain nothing by providing the information, and were not obligated to do so by the contract) and then terminating the contract after the payment lapses, having never provided the information (breaking the gratuitous promise). Normally, gratuitous promises are not contracts (lacking consideration or a seal on the part of the party making them), and so are not legally binding. However, where those gratuitous promises are made to allow flexibility on previously agreed on legal technicalities of an existing contract, the promisor is likely to be equitably estopped from backing down from them after the promisee has already acted on them. Hence, the contracted firm's action of terminating the contract in this case is likely to be equitably estopped, just as in the 1979 decision by Ontario Court of Appeal in Owen Sound Public Library Board v. Mial Developments Ltd. et al. In that case the owner's payment date was extended gratuitously by contractor. The owner then requested a sealed document confirming it, and contractor agreed to produce it. However, time lapsed and still the contractor did not produce the document, but instead attempted to enforce original contract date. To resolve the issue, the Court of Appeals ruled the action (trying to enforce an agreement which lapsed because of one's own tardiness) inequitable. The situation at hand is entirely analogous, and as such, the contracted firm will not be successful in its attempt to terminate the contract: it will be equitably estopped from this action. That is, the airline will be successful in suing the information technology firm for the costs of its unjustified breach: that extra cost beyond the original contract price of hiring another firm to complete the job plus any quantifiable indirect damages directly attributable to the breach.

A $30,000,000 contract for the design, supply and installation of a cogeneration facility was entered into between a pulp and paper company (Pulpco) and an industrial contractor. The cogeneration facility, the major components of which included a gas turbine, a heat recovery steam generator and a steam turbine, was to be designed and constructed to simultaneously generate both electricity and steam for use by Pulpco in its operation. The contract provided that the

electrical power generated by the cogeneration facility as not to be less than 25 megawatts. A liquidated damages provision was included in the contract specifying a pre-estimated amount payable by the contractor to Pulpco for each megawatt of electrical power generated less than the minimum 25 megawatts specified. Other provisions specified additional liquidated damages at prescribed rates relating to other matters under the contract, including any failure by the contractor to meet the required heat rates or to achieve completion of the facility for commercial use by a stipulated date. However, the contract also included a maximum liability provision that limited to $5,000,000 the contractor's liability for all liquidated damages due to failure to achieve (i) the specified electrical power output, (ii) the guaranteed heat rate and (iii) the specified completion date. The contract clearly provided that under no circumstances was the contractor to be liable for any other damages beyond the overall total of $5,000,000 for liquidated damages. Pulpco's sole and exclusive remedy for damages under the contract was strictly limited to the total liquidated damages, up to the maximum of $5,000,000. The contract specified that Pulpco was not entitled to make any other claim for damages, whether on account of any direct, indirect, special or consequential damages, howsoever caused. Unfortunately the contractor's installation fell far short of the electrical power generation specifications (achieving less than 25% of the specified megawatts) and the heat rate specifications provided in the contract. The contractor was paid $27,000,000 before the problems were identified on startup and testing. Because of its very poor performance, the contractor also failed to meet the completion date by a very substantial margin. Applying the liquidated damages provision, the contractor's overall liability for all liquidated damages under the contract totaled $4,000,000. Ultimately Pulpco had to make arrangements through another contractor for new equipment items and parts to be ordered and installed in order to enable the cogeneration facility to meet the technical specifications, with the result that the total cost of the replacement equipment and parts reached an additional $15,000,000 beyond the original contract price of $30,000,000. Explain and discuss what claims Pulpco could make against the contractor in the circumstances. In answering, explain the approach taken by Canadian courts with respect to contracts that limit liability and include a brief summary of the development of relevant case precedents. This question probes the question "to what extent can one limit one's liability in contract?" In 1979, as applied in the decision by Ontario High Court of Justice in Murray v. Sperry Rand Corporation et al., the drastic failure of the power plant to meet its specifications would likely be viewed as a fundamental breach of contract, and as such, the exemption clause limiting the contractor's liability to not more than $5M for liquidated damages would not apply; the contractor would likely be liable for the costs of $15M to bring the power plant up to its contractually required potential. However, the 1989 decision in Hunter Engineering changed things significantly. From that decision, it is now "the practice of Canadian courts, even in the event of a fundamental contract breach, to resolve matters according to the true intentions of the parties at the time the contract was negotiated, based on the precise wording of the contract." Based on this principle, resolving contract disputes by interpreting the precise wording of the contract based on the most likely intents of the parties entering it, certainly one could argue that the contractor intended to limit liability to the maximum extent by the clause "Pulpco was not entitled to make any other claim for damages, whether on account of any direct, indirect, special or consequential damages, howsoever caused." More explicitly, the contract "clearly provided that under no circumstances was the contractor to be liable for any other damages beyond the overall total of $5M for liquidated damages" and the liquidated damages specifically addressed any failure to achieve specified electrical power, heat rate, and completion date, and this is exactly the breach that the contractor committed. Since the liquidated damages provision has explicitly specified the remedy to be paid in such a situation as $4,000,000, that is exactly the amount that Pulpco can claim from the contractor: The breach is entirely anticipated and covered by the liquidated damages provisions. The only possible argument Pulpco would have against this liability limit would be that the liquidated damages provisions themselves were not accurate representations of the costs of the breaches they covered, meaning that courts would not enforce them. This is unlikely however, as in light of Hunter Engineering, the freedom to contract reigns supreme where the contract is sufficiently clear, as is the case in this problem. To summarize: since the contract clearly specifies the damages to be awarded for the breach at hand via the liquidated damages provisions as $4M, Pulpco can only make a claim for $4M from the contractor, and if Pulpco does not pay the remaining $3M owed on the contract, would be found in breach of contract by the contractor. The net claim Pulpco could make is only $1M.	1
Provincial Life of Ontario Inc. ("Provincial"), an insurance company, retained an architect, to design a new corporate head office in North York, Ontario. Provincial, as client, and the architect entered into a written client/architect agreement in connection with the project. According to the agreement, the architect was to prepare the complete architectural and engineering design for the project. In order to carry out the structural engineering aspects of the design, the architect engaged the services of a structural engineering firm. The architect and the structural engineering firm entered into a separate agreement to which Provincial was not a party. To determine the nature of the soil on which the project would be constructed, two shallow test pits, each about 1.25 meters	

deep, were dug on the site at locations selected by the architect. The architect telephoned the structural engineering firm's vice-president and requested that the form send out a professional engineer to examine the soils exposed in the test pits. Based on information received from the professional engineer sent to examine the soil, the vice-president of the structural engineering form reported to the architect that the test pits had revealed a silty clay. The vice-president also recommended to the architect that a soils engineer be engaged to carry out more thorough and proper soils tests. The architect rejected the recommendation stating that there was not "enough room in the budget" for more soils test. The architect succeeded in persuading the vice-president to send a letter to Provincial giving a "soils report" based on the examination of the shallow test pits. The vice-president stated in a letter to Provincial, that based on it's examination of the test pits, the soil was a fairly uniform mixture of clay and silt which would be able to support loads up to a maximum of 100kPa. The structural engineering firm then completed its structural engineering design on the basis of the maximum soil load reported to Provincial. The project was constructed in accordance with the plans and specifications. Subsequently, the building suffered extensive structural change, including severely cracked and uneven floors and walls. On the basis of an independent engineering investigation by an engineer retained by Provincial, it was determined that the extensive structural change in the building resulted form the substantial and uneven settlement of the building. The investigation also determined that the subsoil in the area of the building consisted of 30 to 40 meters of compressible marine clay covered by a surface layer of dryer and firmer clay two meters in depth. The investigation also revealed that the test pits that were dug had not penetrated the surface layer into the lower layer of compressible material. What potential liabilities in tort law, arise from the preceding set of facts? Please state the essential principles applicable to a tort action and apply these principles to the facts above. Indicate a likely outcome of the matter. Principles of tort law: "To satisfy the court that compensation should be made, the plaintiff in a tort action must substantiate that: 1. the defendant owed the plaintiff a duty of care, 2. the defendant breached that duty by his or her conduct, and 3. the defendant's conduct caused the injury to the plaintiff." In this case, the architect breached his contractually-owed duty of care by ignoring the engineer's recommendation and not doing a detailed enough soils test for building construction. The engineering firm breached its implicit engineering duty of care by submitting a soils report based on inadequate data. The combination of these actions indeed caused financial injury to Provincial: as such, the architect and engineer could be found concurrent tortfeasors. This case is very similar to the 1979 decision by British Columbia Court of Appeal: Corporation of District of Surrey v. Carrol-Hatch et al.: An architect designed a police station which was built and later required extensive structural changes due to soil problems. Engineers working for the architect recommended doing deep soil tests, but the architect rejected the request. The engineers then submitted a soils report to the owner based on two shallow soil tests. Result: engineers 40% liable, architect 60% liable to the owner for structural changes. As such, the result for this case will likely be similar. (See section 4.7)	1
A "high tech" telecommunications development company leased an outdated and unused underground pipe system from an Ontario municipality. The developer's purpose in leasing the pipe was to utilize it as an existing conduit system in which to install a fibre optic cable system to be operated by the telecommunications developer during the term of the lease. All necessary approvals from regulatory authorities were obtained with respect to the proposed telecommunications network. The telecommunications development company then entered into an installation contract with a contractor. For the contract price of $4,000,000, the contractor undertook to complete the installation of the cable by a specified completion date. The contract specified that time was of the essence and that the installation was to be completed by the specified completion date, failing which the contractor would be responsible for liquidated damages in the amount of $50,000 per day for each day that elapsed between the specified completion date and the subsequent actual completion date. The contract also contained a provision limiting the contractor's maximum liability for liquidated damages and for any other claim for damages under the contract to the maximum amount of $1,000,000. Due to its failure to properly staff and organize its workforce, the contractor failed to meet the specifled completion date. In addition, during the installation, the contractor's inexperienced workers damaged significant amounts of the fibre optic cable, with the result that the telecommunications development company, on subsequently discovering the damage, incurred substantial additional expense in engaging another contractor to replace the damaged cable. Ultimately, the cost of supplying and installing the replacement cable plus the amount of liquidated damages for which the original contractor was responsible because of its failure to meet the specified completion date, totalled $1,800,000. Explain and discuss what claim the telecommunications development company could make against the contractor in the circumstances. In answering, explain the approach taken by Canadian courts with respect to contracts that limit liability and include a brief summary of the development of relevant case precedents.	2

The issue in this case is whether an exemption clause can protect a contractor in the event of negligent underperformance. Two cases are particularly relevant: 1) 1979 decision by Ontario High Court of Justice: Murray v. Sperry Rand Corporation et al.: Adopted in Canada the Doctrine of Fundamental Breach, established in England in Harbutt's Plasticine: Exemption clauses fail in the event of a fundamental breach of contract. 2) 1989 decision by Supreme Court of Canada: Hunter Engineering Company Inc. v. Syncrude Canada Ltd.: Largely overthrew the Doctrine of Fundamental Breach, mostly following precedent established in England in Photo Production: It is now the practice of Canadian courts, even in the event of a fundamental breach of contract, to "resolve matters according to the true intentions of the parties at the time the contract was negotiated" based on the precise wording of the contract. This is the "True Construction Approach": exemption clauses (where sufficiently clear) are to be interpreted and upheld in their as-written form (constructed in their true form), trumping any implicit responsibility beyond the exemption clause, even the event of a fundamental breach of contract on the part of the party the clause protects. The telecommunications development company could claim (rightly) that the contract for the installation of the cable had an implied term that the installation would not involve doing significant damage to the cable, and therefore, that the contractor's doing this damage (to the point that it required immediate replacement) constituted a fundamental breach of contract. The contract contained a provision "limiting the contractor's maximum liability for liquidated damages and for any other claim for damages under the contract to the maximum amount of $1,000,000." Since this exemption clause seems clear and specifically crafted to protect the contractor in just such a breach, the exemption clause will hold: the telecommunications development company can only make a claim for the amount of the liability limiting provision: $1,000,000.

A mining contractor signed an option contract with a land owner which provided that if the mining contractor(the "optionee") performed a specified minimum amount of exploration services on the property of the owner (the "optionor") within a nine month period, then the optionee would be entitled to exercise its option to acquire certain mining claims for the optionor. Before the expiry of this nine month "option period", the optionee realized that it couldn't fulfill its obligation to extend the required minimum amount by the expiry date. The optionee notified the optionor of its problem prior to expiry of the option period and the optionor indicated that the option period would be extended. However, no written record of this extension was made, nor did the optionor receive anything from the optionee in return for the extension. The optionee then proceeded to perform the services and to finally expend the specified minimum amount during the extension period. However, when the optionee attempted to exercise its option to acquire the mining claims the optionor took the position that, on the basis of the strict wording of the signed contract, the optionee had not met its contractual obligations. The optionor refused to grant the mining claims to the optionee. Was the optionor entitled to deny the optionee's exercise of the option? Identify the contract law principles that apply, and explain the basis of such principles and how they apply, to the positions taken by the optionor and by the optionee.

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Revised answer in Dec 2011 This case is very similar to the 1963 decision by Supreme Court of Canada: Conwest Exploration Co. Ltd. et al. v. Letain: in which an Optionee was working to fulfill series of steps in order to secure a mining contract by the optionor. The optionor learned that the optionee would not be able to complete the steps by the required date, and so extends the date (a gratuitous promise, as they gained nothing by the contract solely to extend the date). On trying to back down from this promise, the optionor was "equitably estopped" by the Supreme Court. Equitable estoppel is an action enforced by the courts where, to produce an equitable result, the courts make a gratuitous promise legally binding. This often happens in cases like this where the promise is made to allow flexibility on a previously agreed-on legal technicality - the promisor cannot back down from it once the promisee has acted on it. This case is entirely analogous to the Conwest case, and so the optionor would likely be equitably estopped from backing down from his gratuitous promise of extra time.

A joint venture consisting of both engineering and contracting firms entered into a contract with an Ontario city to design and build an all-electronic toll highway "expressway" featuring both underground tunnel portions and surface portions of the highway. The contract also required the joint venture to design, install and implement an electronic tolling system to accommodate specified numbers of vehicles, all as specified in the request for proposal for the design and construction of the all-electronic expressway, as published by the city. The contract between the city and the joint venture provided that the all- electronic highway expressway was to be fully operational by a specified date, failing which the joint venture contractor would be responsible to pay to the city liquidated damages (based on lost toll revenues in accordance with the project's feasibility study and financial plan) of $300,000 for each day beyond the specified completion date until the expressway and its all-electronic tolling technology was finally installed and fully operational. The contract also included a provision limiting the contractor's liability for liquidated damages under the contract to the maximum amount of $30,000,000. With the city's approval the joint venture contractor then subcontracted, to a firm specializing in tolling technology, the

obligations to design, install and implement the tolling technology system as required by the city's specifications. The subcontract contained a provision obligating the tolling technology subcontractor to be responsible to the joint venture contractor to provide a fully operational tolling system by the "same specified date and for the same $300,000 of daily liquidated damages (subject to the same maximum amount of $30,000,000 in liquidated damages) as set out in the joint venture contract between the joint venture contractor and the city. Although the expressway was otherwise operational by the specified completion date, the tolling technology subcontractor experienced difficulties in completing the installation and implementation of the tolling technology in accordance with the requirements of the subcontract. In fact, the tolling technology subcontractor was 120 days late in successfully completing the design, installation and implementation of the tolling technology system as required by the subcontract (and the Contract). Explain and discuss what claim the joint venture contractor could make against the tolling technology subcontractor in the circumstances. In answering, explain the approach taken by Canadian courts with respect to contracts that limit liability and include a brief summary of the development of relevant case precedents. The contract and subcontract contained two separate provisions of interest: A liquidated damages provision (AKA, a penalty clause) ("The contract between the city and the joint venture provided that the all-electronic highway expressway was to be fully operational by a specified date, failing which the joint venture contractor would be responsible to pay to the city liquidated damages (based on lost toll revenues in accordance with the project's feasibility study and financial plan) of $300,000 for each day beyond the specified completion date until the expressway and its all-electronic tolling technology was finally installed and fully operational.") and a liability limiting provision (AKA, an exemption clause) ("The contract also included a provision limiting the contractor's liability for liquidated damages under the contract to the maximum amount of $30,000,000.") For courts to uphold a liquidated damages provision, they must be satisfied that the parties made reasonable effort to estimate the damages that would result from the breach the provision covers (Law 19.5). In this case, the damages in the subcontract are exactly the damages the contractor would have to pay to the city if the subcontractor delayed the project, and so are calculated perfectly (note that because the city based the damages on "lost toll revenues in accordance with the project's feasibility study and financial plan" the same provision would hold up in the general contract). As such, and since there appears to have been no unforeseeable interference with the subcontractor's work, the courts will allow at least the maximum liquidated damages claim of $30M. A higher claim could possibly be allowed in the event of a fundamental breach of contract (Law 20) - If the courts establish that the subcontractor's performance (or lack thereof) represented a breach of a term so fundamental to the contract that rigorous adherence to the contract no longer makes sense, the courts could then rule the contract fundamentally breached and all exemption clauses (in this case, the one limiting damages to $30M) void. This principle was established by an English court in deciding the Harbutt's Plasticine case, but was overturned by the English House of Lords in deciding Photo Production, and ultimately clarified in Canada by the Supreme Court's decision in Hunter Engineering. Hunter Engineering established the True Construction Approach: it is now the practice of Canadian courts, even in the event of a fundamental contract breach, to "resolve matters according to the true intentions of the parties at the time the contract was negotiated" based on the precise wording of the contract. The contract here attempts to limit liability from delay-induced liquidated damages to $30M, the amount at 100 days, and we have encountered delay-induced liquidated damages of $36M, the amount at 120 days. It is difficult to imagine a situation that the clause intended to cover more than the current one - the exemption clause was surely intended to protect against damages from additional days beyond 100, and that is exactly what it will be successful in doing via the True Construction Approach: The general contractor is entitled to claim $30M from the subcontractor and no more.	4	
A long-established manufacturing company, XYZ Ltd., contemplating the possibility of a sale of some of its properties, retained an environmental consulting firm, E Inc., to prepare an environmental compliance audit. The Vice-President of E Inc., a professional engineer, responsible for the performance of the environmental compliance audit, turned the matter over to one of E Inc.'s employees who had only recently become licensed as a professional engineer. However, on the basis of previous assignments, the Vice-President had been very impressed by the young engineer's abilities. The Vice-President was also aware that an extremely busy schedule would likely limit the amount of time the Vice-President could spend on the environmental compliance audit and, accordingly, selected the younger employee engineer in the hope that the young engineer's involvement would decrease the Vice- President's supervisory time in connection with the audit. The employee engineer carried out an environmental compliance audit with respect to each of the properties identified and E Inc. submitted its reports on each property. Included at the beginning of each report was the following qualifying statement: "This report was prepared by E. Inc. for the account of XYZ Ltd. The material in it reflects E Inc.'s best judgement in light of the information available to it at the time of preparation. Any use which a third party makes of this report, or any reliance on decisions to be made based on it, are the responsibility of such third		

parties. E Inc. accepts no responsibility for damages, if any, suffered by any third party as a result of decisions made or actions based on this report." Some time later, XYZ Ltd. sold two of its properties to Acquisitions Inc. In negotiating the sale with Acquisitions Inc., E Inc.'s reports were shown to Acquisitions Inc., but Acquisitions Inc. had no dealings with E Inc. E Inc. had no knowledge of the sale to Acquisitions Inc. until approximately four years later when Acquisitions Inc. commenced a lawsuit against E Inc. Acquisitions Inc. claimed it had commenced the lawsuit in tort against E Inc. because it had encountered hazardous substances on one of the properties and had subsequently obtained the opinion of another environmental consulting firm who confirmed that the report in question by E Inc. contained negligent misstatements which, in the opinion of the second consulting firm, had resulted from E Inc. ' s representatives having spent too little time investigating the property for hazardous substances. Acquisitions Inc. claimed in its lawsuit that E Inc. was aware that the report might be shown to prospective purchasers and, accordingly, E Inc. should be responsible for damages arising as a result of reliance by Acquisitions Inc. on the negligent misstatements in E Inc.'s report. What potential liabilities in tort law arise in this case? In your answer, explain what principles of tort law are relevant and how each applies to the case. Indicate a likely outcome to the matter. In your answer indicate if your conclusion would differ if the reports by E Inc. had not contained the qualifying statement identified above and, if your conclusion would differ, explain why. E inc. is potentially liable in tort to Acquisitions Inc. for losses required to bring the land from its current state (with hazardous materials) up to the standard implied by E inc. in its audit (no hazardous materials). That said, Acquisitions is quite unlikely to succeed in its claim against E inc., since this case is quite similar to the 1994 Ontario case: Wolverine Tube (Canada) Inc. v. Noranda Metal Industries Ltd. et al., which "clearly confirmed that statements disclaiming responsibility to third parties will absolve the parties making the statements from liability." Though engineers have an assumed duty of care towards users of their report, they also have the ability, as in this case, to "disclaim any assumption of a duty of care", thus removing the first requirement for a claim in tort law. (see sections 4.4 & 4.1). Had E inc. not contained the exemption clause limiting liability to third parties, it would then have had the assumed duty of care applicable to all engineering work. Having broken this duty of care by making negligent misstatements which resulted in damages to Acquisitions Inc., E inc. would likely have then been found vicariously liable for its employee's negligent misstatements in line with the principle that the purpose of tort law is to compensate the damaged rather than to punish the negligent (see section 4.6).	1
A newly formed energy company ("NEWCO") decided to investigate the possibility of developing a liquefaction process to convert coal deposits into oil. NEWCO entered into a contract with a large engineering firm pursuant to which the engineering firm was to carry out a feasibility study to determine, over a period of eight months and by a specified date, the feasibility of the proposed liquefaction process. The contract between NEWCO and the engineering firm expressly provided that should the feasibility study be completed by the "deadline" date specified and should the results of the study indicate that the liquefaction process proposed by the engineering firm would meet the specified quality and volumes of liquefied oil output, then the engineering firm would be authorized to carry out further work to develop the liquefaction process to operate on a commercial basis, all on terms and conditions clearly set out in the contract between NEWCO and the engineering firm. The engineering firm undertook the feasibility study and, although the results of the feasibility study appeared promising and in compliance with the parameters specified in the contract with NEWCO, the engineering firm found that it would be unable to complete the feasibility study by the date specified. The president of the engineering firm explained to the president of NEWCO that the engineering firm would not be able to fulfil all aspects of the feasibility study as required by the specified date. The president of the engineering firm emphasized that whereas the engineering firm would likely be two weeks late in completing its feasibility study obligations, the results of the feasibility study indicated that the liquefaction process would very likely meet NEWCO's requirements for commercial production as specified. The president of NEWCO indicated to the president of the engineering firm, verbally, that the time for completion of the feasibility study would be extended.. The engineering firm completed the feasibility within two weeks after the date specified in the contract. Subsequently, NEWCO took the position that the engineering firm had not completed the feasibility study in time and, accordingly, that NEWCO was not obligated under the wording of the contract to authorize the engineering firm to carry out further work to develop the liquefaction process on a commercial basis. Instead, NEWCO issued a request for proposals from several firms for the development of the liquefaction process to operate on a commercial basis. NEWCO selected another firm that was prepared to undertake the development of the process for a fee substantially lower than the fee that was to have been paid to the original engineering firm had it completed the feasibility study by the date specified in the contract. Was NEWCO entitled to deny the engineering firm's right to develop the liquefaction process to operate on a commercial basis? Identify the contract law principles that apply, and explain the basis of such principles and how they may apply to the positions taken by NEWCO and by the engineering firm.	9

This case is very similar to the 1963 decision by Supreme Court of Canada: Conwest Exploration Co. Ltd. et al. v. Letain: in which an Optionee was working to fulfill series of steps in order to secure a mining contract by the optionor. The optionor learned that the optionee would not be able to complete the steps by the required date, and so extends the date (a gratuitous promise, as the optionor gained nothing by this promise to extend the date). On later trying to back down from this gratuitous promise, the optionor was "equitably estopped" by the Supreme Court. Equitable estoppel is an action enforced by the courts where, to produce an equitable result, the courts make legally binding a gratuitous promise which was only verbal, and therefore, not normally enforceable. This case is entirely analogous and so is a prime candidate for an equitable estoppel. Law, 10.2.	
An information technology firm submitted a bid to design and install software and hardware for an electronic technology process to control the operation of large scale sorting equipment for a major international courier company. The firm's fixed guaranteed maximum price was the lowest bid and the contract was awarded to it. The contract conditions entitled the information technology firm to terminate the contract if the courier company did not pay monthly progress payments within 15 days following certification that a progress payment was due. Pursuant to the contract, the certification was carried out by an independent engineering firm engaged as contract administrator. The work under the contract was to be performed over an 8 month period. After commencing work on the project the information technology firm determined that it had made significant judgment errors in arriving at its bid price and that it would face a major loss on the project. Its concern about the anticipated loss was increased further when it also learned that, in comparison with the other bidders, its bid price was extremely low and that, in winning the bid, it had left more than two million dollars "on the table". Three monthly progress payments were certified as due by the independent engineering firm and paid by the courier company in accordance with the terms of the contract. However, after the fourth monthly progress payment was certified as due by the independent engineering firm, the courier company's finance department asked the information technology firm's representative on the project for additional information relating to an invoice from a subcontractor to the information technology firm. The subcontractor's invoice comprised a portion of the fourth progress payment amount. The courier company's finance department requested that the additional information be provided prior to payment of the fourth progress payment. There was nothing in the signed contract between the information technology firm and the courier company that obligated the information technology firm to provide the additional information on the invoice from its subcontractor. However, the information technology firm's representative did verbally indicate to the courier company's finance department that the additional information would be provided. The additional information relating to the subcontractor's invoice was never provided by the information technology firm. Sixteen days after the fourth progress payment had been certified for payment, the information technology firm notified the courier company in writing that it was terminating the contract because the courier company was in default of its obligations to make payments within fifteen days pursuant to the express wording of the contract. Was the information technology firm entitled to terminate the contract in these circumstances? In giving reasons for your answer, identify and explain the relevant legal principle, its purpose, how it arises, and how it would apply to the facts. In this case, the contracted party has attempted to escape performance on a bad contract by tricking the contracting party into defaulting on the contract by agreeing to provide information on an invoice before a scheduled payment (a gratuitous promise: section 10.1) and then terminating the contract after the payment lapses, having never provided the information. The contracted firm's action of terminating the contract in this case is likely to be equitably estopped, as in the 1979 decision by Ontario Court of Appeal in Owen Sound Public Library Board v. Mial Developments Ltd. et al. In that case: owner's payment date was extended gratuitously by contractor; owner requests sealed document confirming it, and contractor agrees to produce it; time lapses and still contractor does not produce documents; contractor then attempts to enforce original contract date. To resolve the issue, the Court of Appeals ruled the action (trying to enforce an agreement which lapsed because of one's own tardiness) inequitable. The situation at hand is entirely analogous, and as such, the contracted firm will not be successful in its attempt to terminate the contract. (section 10.2) Specifically, the relevant legal principal is "equitable estoppel". Equitable estoppel is a court action to stop a party from backing down from a gratuitous promise (which is not normally legally binding) to provide a more fair result, typically arising where the promise has been made to allow flexibility in fulfilling a pre-existing contract and has already been acted on by the promisee. In this case in particular, the IT firm made a gratuitous promise to the courier company when the "information technology firm's representative verbally indicated to the courier company's finance department that the additional information would be provided" prior to the payment of the fourth progress payment; and backed down from it by nevertheless attempting to terminate the contract after the time lapsed, having still not provided the information. As in Owen Sound, this is likely to be equitably estopped.	2

Note - this question appeared recently with the last two sentences added to the question. ACE Construction Inc. is a company primarily engaged in the business of supplying heavy equipment used in construction. As part of the company's economic plan to expand its business, ACE became interested in the rock crushing industry. ACE had become aware that International Metals Company Ltd. ("IMCO") required a contractor to crush, weigh and stockpile approximately 250,000 tons of ore. As ACE believed this was an excellent opportunity to venture into the rock crushing business, it decided to tender on the IMCO contract. In order to tender on the contract, ACE set out to purchase the necessary equipment to crush the material. ACE was contacted by a representative of Rock Busters Ltd., a company which sold such equipment. After visiting the IMCO site and determining the nature of the material to be crushed, the representative discussed the IMCO contract with ACE. After performing a number of calculations, the representative determined and guaranteed that the equipment Rock Busters would provide would be capable of crushing the material at a rate or 175 tons per hour. On the basis of the guarantee, Rock Busters and ACE entered into a contract. Rock Busters agreed that if ACE were successful in its tender to IMCO, Rock Busters would provide the equipment for a price of $400,000. The contract also contained a provision limiting Rock Busters' total liability to $400,000 for any loss, damage or injury resulting from Rock Busters' performance of its services under the contract. Based on the information provided by the representative, ACE prepared and submitted its tender to IMCO. IMCO accepted the tender and entered into a contract with ACE to crush the material. The rock crushing equipment was set up at the IMCO site by employees of Rock Busters and crushing operations commenced. However, from the beginning there was trouble with the operation. One of the components of the crusher, called the cone crusher, consistently became plugged by the accumulation of material. Each time the cone crusher became plugged, the operation would have to be shut down and the blockage cleared manually. In some cases, such blockages caused damage to the equipment. Rock Busters made several unsuccessful attempts to correct the defect by making modifications at the site and at its factory. The crushing equipment was never able to crush more than 30 tons of materials per hour. In order to meet its obligations under the IMCO contract, ACE hired another supplier to correct the defects in the Rock Busters equipment. For an additional $500,000 the supplier replaced the cone crusher with one manufactured by another company. The modified equipment was able to crush the material at the rate of 180 tons per hour. The total amount which had been paid by ACE to Rock Busters was $350,000. Explain and discuss what claim ACE can make against Rock Busters in the circumstances. Would ACE be successful in its claim? Why? In answering, please include a summary of the development of relevant case precedents. In particular, point out how the law changed because of these relevant case precedents. Identify the legal principles on which the precedent decisions were based and apply the appropriate legal principle to the facts.

This question probes the question "to what extent can one limit one's liability in contract?" The ability to limit one's liability in contract has a colourful history which began with an English court's decision in Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.: In this case, the contractor designed and installed a heating pipe to liquefy stearine and maintain it as a liquid for transport from one point to another. However, the pipe was unsuitable for the purpose, and it cracked, releasing and igniting the stearine, causing a fire which gutted the owner's plant. The contract for the pipe design and installation contained a clause limiting possible damages to ?2300, but the court ruled that installing a pipe and thermostat wholly unsuitable for its known intended purpose was a "fundamental breach" of contract, and awarded ?170 000 in damages. This established the "doctrine of fundamental breach": exemption clauses are void if the person protected by them breaches a "fundamental term" of the contract (any foundational term to the contract; one at the heart of the basic agreement the contract is for). The doctrine of fundamental breach was applied a number of times in Canada until the 1989 Supreme Court decision in Hunter Engineering: Syncrude contracted with Hunter and Allis Chalmers to provide gear boxes, which failed after the warranty clause in their contract had expired, but before the expiry of the statutory warranty of fitness contained in the Ontario Sale of Goods Act (i.e., the contract's shorter warranty than the default warranty was effectively an exemption clause). The Supreme Court ruled that the failure of the gear boxes at the time they failed did not constitute a fundamental breach and as such the warranty in the contract applied. More importantly though, the Supreme Court established the "True Construction Approach": exemption clauses (where sufficiently clear) are to be interpreted and upheld in their as-written form (constructed in their true form), trumping any implicit responsibility beyond the exemption clause, even the event of a fundamental breach of contract on the part of the party the clause protects. In contrast, ambiguous exemption clauses are subject to the Rule of Contra Proferentem and so will be interpreted against the party that drafted them: the one who's relying on the exemption clause. Based on this principle, our first job is to determine whether Rock Busters' exemption clause was sufficiently clearly worded to cover the breach they committed. We're told that the contract contained "a provision limiting Rock Busters' total liability to $400,000 for any loss, damage or injury resulting from Rock Busters' performance of its services under the contract" Rock Busters' breach of contract was certainly a result of their performance: they did not 1 meet their guarantee to provide equipment "capable of crushing the material at a rate or 175 tons per hour ... for a price of $400,000". In light of this clear exemption clause, ACE would likely succeed in a claim against Rock Busters for a maximum of $400k. The direct damages Rock Busters caused to ACE equal the amount paid by ACE to get the system installed ($350k + $500k = $850k) less the amount Rock Busters originally contracted to install it for ($400k): $850k-$400k = $450k. Since this alone is greater than the maximum amount Rock Busters is limited to pay by their exemption clause, ACE will likely succeed in a claim of the full exemption clause value from Rock Busters: $400k. Results: ACE pays $450k for the system Rock Busters promised for $400k. ACE cannot claim any indirect damages from delays etc. caused by Rock Busters' breach. Rock Busters suffers a net loss of $50k (plus expenses!), but their clearly-worded exemption clause successfully shields them from paying an extra $50k of the direct damages, plus any indirect damages.

An Ontario municipality (the "Owner") decided to update and expand its water treatment facilities. To do so, the Owner invited competitive tenders from contractors for the construction of the new water treatment facility. The Owner's consultant on the project, a professional engineer, designed the facility and prepared the Tender Documents to be given to potential contractors interested in bidding on the project. Each of the bidders was required to be prequalified and approved by the Owner for participation in the bidding. The Tender Documents included the Plans and Specifications, the Tendering Instructions which described the tendering procedure and other requirements to be followed by the bidders, the Tender Form to be completed by the bidders, the form of written Contract that the successful contractor would be required to sign after being awarded the contract, and a number of other documents. According to the Tendering Instructions, each tender bid as submitted was to remain "firm and irrevocable and open for acceptance by the Owner for a period of 60 days following the last day for submitting tenders". The Tendering Instructions also provided that all bids were to be submitted in accordance with the instructions in the Owner's Tender Documents and that the Owner was not obligated to accept the lowest or any tender. Tenders were submitted by five bidders. All bids were submitted in accordance with the Owner's Tender Documents. The lowest bid was well within the Owner's budget. Within the 60 days specified and before the Owner's consultant had made a recommendation to the Owner as to whom the contract should be awarded, the consultant was called to a meeting with a prominent member of the Municipal Council who noted that the lowest bidder was not one of the bidders who were "local bidders" from within the Municipality. The Councillor expressed a very strong view that the contract should in fact be awarded to a local bidder. The Councillor also noted that if one item that had been included in the specifications was deleted from the bids the result would be that the bid of the lowest "local contractor" would become the lowest bid overall and the Councillor's preference for awarding the contract to a "local contractor" could be satisfied. There had been no reference in the Tendering Instructions to any preference being shown to local contractors. How should the consultant deal with the political pressure being applied by the Council member? If the contract is awarded to the lowest local bidder what potential liabilities in contract law may arise? If the consultant engineer recommends to the Owner that the contract be awarded as the Councillor suggests what liabilities may arise for the engineer? Please provide your reasons and analysis. 1

This question deals with implied terms in Contract A. As mentioned in Chapter 16, there are cases which establish that in the absence of explicit statements to the contrary, calls for tender imply both that the lowest compliant bid will be selected and that there will be no secret criterion for bid selection, such as use of local contractors. If the municipality fails in this regard by selecting a bidder other than the lowest because they use more local contractors, it will likely be found liable to cover the lost profits of the true lowest bidder if taken to court. To further illustrate the point, consider the quite similar case of the 1989 decision by the BC Court of Appeals: Chinook Aggregates Ltd. v. Abbotsford (Municipal District): Municipality had a preference for local contractors, but didn't want to alert contractors to their favouritism, and so put a provision into the request for tenders reading "the lowest or any tender will not necessarily be accepted", and then gave favour to bids within 10% of the lowest that had more local contractor use. The court rejected this, stating that the municipality had an implicit duty to accept the lowest bidder, "unless the tender documents expressly stated that the bids would be evaluated on other criteria." The municipality here included an identically vague express statement ".the Owner [is] not obligated to accept the lowest or any tender", and so the same decision will apply here: Accepting the lowest compliant bidder is a legally binding implied term in Contract A which can only be removed by quite clear explicit statements to the contrary. Note that "the owner will not delete requirements" is also an implied term in Contract A, so the counsellor's suggestion to simply delete a requirement to make a local bidder the lowest would result in an identical court case by the true lowest compliant bidder. As such, the consultant should point out to the council member that in light of Chinook Aggregates and similar decisions, breaking implied terms in Contract A by selecting the nonlowest bidder, by deleting requirements or otherwise, would likely result in a successful claim for lost profits by the true lowest bidder. The consultant should recommend selecting the lowest bidder and putting such a preference for local bidders explicitly in the tender documents on future projects. If the contract is awarded to the lowest local bidder, the true lowest bidder will be successful in a claim for lost profits from the municipality for breach of Contract A. If the consultant engineer recommends awarding to the nonlowest bidder, he will likely be found liable for the owner's damages for breaching of his duty of care by making this negligent recommendation.

An information technology firm assigned to one of its junior employee engineers the task developing special software for application on major bridge designs. The employee engineer had recently become a professional engineer and was chosen for the task because of the engineer's background in both the construction and the "software engineering" industries. The resulting bridge software package was purchased and used by a structural engineering design firm on a major bridge design project on which it had been engaged by contract with a municipal government. Unfortunately, the bridge collapsed in less than one year after completion of construction. Motorists were killed and injured. The resulting investigation into the cause of the collapse concluded that the design of the bridge was defective and that the software implemented as part of the design did not address all of the parameters involved in the scope of this particular bridge design. The investigators concluded that although the design software would suffice for certain types of structures it was not appropriate in the circumstances of the particular subsurface conditions and length of span required for this particular application. The investigators' report also indicated that the design software package was not sufficiently explicit in warning users of the software of the scope of the design parameters addressed by the software. The investigators' report also stated that even an experienced user of the software might reasonably assume that the software would be appropriate for application on this particular project and that too little attention had been paid to ensuring that adequate warnings had been provided to software users of the limitations on the application of the software. What potential liabilities in tort lawyer in this case? In your answer, explain what principles of tort law are relevant and how each applies to the case. Indicate a likely outcome to the matter. Tort law fundamentals (See section 4): 1. "the defendant owed the plaintiff a duty of care, 2. the defendant breached that duty by his or her conduct, and 3. the defendant's conduct caused the injury to the plaintiff." In this case, the engineer who designed the software owed a duty of care to the users of the software (the structural engineering design firm) and those who relied on the users of the software (the motorists on the bridge). The structural engineering design firm owed the motorists a duty of care. The software engineer breached his/her duty of care by not placing adequate warnings on the limitations of the software, and the structural engineering design firm breached its duty of care by not ensuring that the software it was using was adequate for the task it was employing it for; or even that it was using the software correctly by doing calculations to check the work done. The combination of these actions caused injury to the motorists. To further establish the negligence in this case, consider Lambert vs. Lastoplex: manufacturers have a duty of care to exercise in creating warnings; particuarly they must not only instruct users in how to use their products correctly, but warn of the consequences of improper use. In this case, arguably the software company failed to warn that the software was not appropriate for this kind of bridge design, and also failed to warn of the dire consequences of using the software beyond its capabilities. Thanks to the satisfaction of the tort law principles, the software engineer and structural engineering design firm will likely be found concurrent tortfeasors in this instance. I would expect that more responsibility for the damage would be placed on the design firm, as software reliance is a very poor excuse for engineering failure. In remembering that the purpose of tort law is to compensate the victims rather than punish the negligent, the engineers' companies (or insurance companies) will likely be found vicariously responsible for them in this instance.	9
Clearwater Limited, a process-design and manufacturing company, entered into an equipment-supply contract with Pulverized Pulp Limited. Clearwater agreed to design, supply, and install a cleaning system at Pulverized Pulp's Ontario mill for a contract price of $800,000. The specifications for the cleaning system stated that the equipment was to remove ninety-eight percent of certain prescribed chemicals from the mill's liquid effluent in order to comply with the requirements of the environmental control authorities. However, the contract clearly provided that Clearwater accepted no responsibility whatsoever for any indirect or consequential damages, arising as a result of its performance of the contract. The cleaning system installed by Clearwater did not meet the specifications, but this was not determined until after Clearwater had been paid $720,000 by Pulverized Pulp. In fact, only seventy percent of the prescribed chemicals were removed from the effluent. As a result, Pulverized Pulp Limited was fined $60,000 and was shut down by the environmental control authorities. Clearwater made several attempts to remedy the situation by altering the process and cleaning equipment, but without success. Pulverized Pulp eventually contracted with another equipment supplier. For an additional cost of $950,000, the second supplier successfully redesigned and installed remedial process equipment that cleaned the effluent to the satisfaction of the environmental authorities, in accordance with the original contract specifications between Clearwater and Pulverized Pulp. Explain and discuss what claim Pulverized Pulp Limited can make against Clearwater Limited in the circumstances. In answering, explain the approach taken by Canadian courts with respect to contracts that limit liability and	

include a brief summary of the development of relevant case precedents.

This question probes the question "to what extent can one limit one's liability in contract?" The ability to limit one's liability in contract has a colourful history which began with the English court's decision in Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.: In this case, the contractor designed and installed heating pipe to liquefy stearine and maintain it as a liquid for transport from one point to another. However, the pipe was unsuitable for the purpose, and it cracked, releasing and igniting the stearine, causing a fire which gutted the owner's plant. The contract for the pipe design and installation contained a clause limiting possible damages to ?2300, but the court ruled that installing a pipe and thermostat wholly unsuitable for its known intended purpose was a "fundamental breach" of contract, and awarded ?170 000 in damages. This established the "doctrine of fundamental breach": that exemption clauses are void if the person protected by them breaches a fundamental term of the contract. The doctrine of fundamental breach was applied a number of times in Canada until the 1989 Supreme Court decision in Hunter Engineering: Syncrude contracted with Hunter and Allis Chalmers to provide gear boxes, which failed after the warranty clause in their contract had expired, but before the expiry of the statutory warranty of fitness contained in the Ontario Sale of Goods Act. The Supreme Court ruled that the failure of the gear boxes at the time they failed did not constitute a fundamental breach and as such the warranty in the contract applied. More importantly though, the Supreme Court established the "True Construction Approach": exemption clauses (where sufficiently clear) are to be interpreted and upheld in their as-written form (constructed in their true form), trumping any implicit responsibility beyond the exemption clause, even the event of a fundamental breach of contract on the part of the party the clause protects. Based on this principle, resolving contract disputes by interpreting the precise wording of the contract based on the best interests of the parties entering it, certainly one could argue that Clearwater intended to limit liability to the maximum extent by the clause "Clearwater accepted no responsibility whatsoever for any indirect or consequential damages, arising as a result of its performance of the contract." In light of this clear exemption clause, Pulverized Pulp would likely succeed in a claim against Clearwater for the cost of only the direct damages: the cost to install the system correctly, and not for any indirect damages (such as the $60k fine and lost profits during the shut-down) due to the exemption clause. If a party is reimbursed for all direct damages, then at the end of the day what they pay to get a system working properly is the amount originally contracted for, ignoring any consequential damages paid. Pulverized Pulp paid $720k + $950k = $1670k for the system that Clearwater contracted to install for $800k, and so the amount of direct damages it is entitled to claim is $1670k - $800k = $870k. 1

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