In caring for our health, conducting research and creating new products and processes—from appliances to automobiles, from electronics to nuclear diagnostic methods, from pharmaceuticals to energy sources—people engaged in business, marketing and health care have a huge potential to improve the quality and length of our lives. They also have the opportunity to reduce or restrict our negative impact on the environment. In the quote above, Thoreau challenges us all not only to refrain from unethical behaviours, but to make a positive difference in the world.

**BUSINESS ISSUES**

In addition to the workplace issues common to all professions that we covered in Chapter 5, there are issues that are specific to business. These include ethical competition with other companies offering similar products or services,
quality control (including recalls), insider trading and corporate responsibility in protecting the environment.

In these issues there is some overlap between business and marketing, as obviously marketing is a part of any business. But marketing is often contracted out or at least a separate division within a company. In these situations, developing a product and ensuring its quality and safety is the responsibility of the business owners or managers, and the marketing agency is responsible only for selling the product or service. Therefore, the ethical issues that apply more specifically to marketing will be dealt with later on in this chapter.

Competition is a way of life in North America. We compete in our leisure as well as in our work. List all the competitive activities you have engaged in during the past week.

___________________________________________________________________
___________________________________________________________________
___________________________________________________________________

List all the times you have felt competitive in the past year.

Work: ____________________________________________________________
___________________________________________________________________
___________________________________________________________________

Leisure: __________________________________________________________
___________________________________________________________________

Education: _________________________________________________________
___________________________________________________________________

Honest competition in business is intended to improve the market for everyone, particularly clients and customers. Competing for consumers is intended to result in lower prices and higher quality goods and services. But these results happen only when competition is fair and honest and consumers take the time to be informed about their buying choices and are given honest information about the products and services they are interested in.

Because competition is so deeply ingrained in our culture, there is a specific term for unethical competition: cheating. An athlete taking steroids to increase her physical prowess, a student taking crib notes into an exam and a businessman or politician spreading false rumours about his competitors are all trying to gain an edge by cheating. They are taking shortcuts to beat the competition and will win not by being genuinely better but through some form of dishonesty.

The federal Competition Act establishes the laws of fair competition. The purpose of this Act is
to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

(The Competition Act, 2005)

The federal competition bureau administers and enforces the laws set out in the Competition Act. The bureau investigates complaints based on the five following principles: confidentiality, fairness, predictability, timeliness and transparency. In cases where an investigation reveals some level of wrongdoing, the competition bureau has the power to impose upon the guilty party a wide range of reprisals including mandatory education, written undertakings and prohibition orders, and referring civil matters to the Competition Tribunal or criminal matters to the Attorney General of Canada.

EXERCISE 6.1

Analysis of the Competition Act

In small groups, students will download and read the Canadian Competition Act. The teacher will assign each group an issue from the Act to review and report back to the class on. For example, one group might analyze the laws on multi-level marketing and pyramid selling in section 55 of the Act.

Each group should research the following aspects of their topic:

How does the Act define the issue you are researching?

What restrictions does the Act impose on your issue?
Ethical competition in business is most likely to slip in the areas of pricing and advertising, which rely on product comparisons. This problem will be discussed later in the chapter under marketing issues.

At one time, the attitude of business toward product control was *caveat emptor.* This is a Latin phrase which means “buyer beware.” In other words, the seller accepts no responsibility for the quality, reliability, performance or potential for harm of his product. When we buy an item “as is,” or with a “no returns” label, we are entering that type of agreement. Even in such a situation, however, if an item causes buyers actual harm, we hold the business that produced or sold the item responsible. The caveat emptor attitude strikes us as unethical in such a situation.

We expect businesses to be conscientious in the manufacture of their products. We assume that they will not cut corners in their production process or purchase cheap or shoddy materials. Moreover, we expect them to test the products for quality and safety, to correct any faults which show up, and to report the results of their tests in an honest manner.

This may sound like a wish list rather than a realistic assessment of modern business practices, but it is the standard of ethical behaviour which companies can be held up to. Often we don’t find out that a company has failed to live up to these expectations until something goes very wrong—until its product or service causes consumers to suffer either physically or financially. When this happens, companies stand to lose far more than they would have gained by unethical production methods. They lose customer confidence and support, they often have to pay huge fines or settlement fees, and if they are not already under government regulation, they risk losing their self-regulatory status.

Consider the following examples.

In late February 2007, reports of kidney failure in pets began arriving at Menu Foods, a pet food producer based in Mississauga, Ontario. On March 16, 2007, Menu Foods recalled about 60 million cans and pouches of wet pet food manufactured between December 3, 2006 and March 6, 2007. While Paul Henderson, CEO of Menu Foods, claimed the company had looked into the earlier reports, it wasn’t until eight animals died following routine taste tests of Menu’s products that the recall was made (*The Record*, 2007). Reports from the U.S. Food and Drug Administration indicate that the company knew as early as February 20, 2007, that there were issues with its products. The company later instructed retailers to remove all of the suspected variety of pet food from their shelves, regardless of the...
production date. By April 2, the tainted pet food was suspected of having killed “hundreds, if not thousands of cats and dogs,” according to a Canadian Press news story (The Record, 2007). Consumers blamed Menu Foods for not issuing the recall sooner, and called for government regulation of pet food. Currently, the Canadian Food Inspection Agency governs food for livestock, but not for pets. Menu Foods faced several class action lawsuits and an estimated $30 million to $40 million in losses due to the recall. Wheat gluten imported from China was the ingredient blamed for the deaths.

On November 7, 2006, Schneiders, a meat-processing plant in Kitchener, Ontario, voluntarily issued a massive recall of five varieties of ham and turkey products after finding an empty syringe casing inside its plant on three separate occasions. The Waterloo regional police and the Canadian Food Inspection Agency were contacted and the recall initiated when the third syringe, the only one found in contact with the meat products, was located. One of the casings was found to contain a saline, or salt solution; no illnesses were ever reported. The Kitchener Schneiders plant also issued a voluntary recall in March 2005 after it omitted listing sesame seeds as an ingredient in two products. Despite the recalls, or perhaps because of them, consumer confidence in Schneiders in North America is extremely high (McMahon, 2006).

The first thing a company must do when confronted with a possible product safety issue is determine the cause of the harm. In the case of Menu Foods, the company contacted the veterinarians who treated the first pets that died. Since these pets had been outdoors, Paul Henderson, chief executive of Menu Foods, said that the pets could as easily have become ill by rooting through garbage as by eating their pet food (The Record, 2007). He decided to ignore the complaints. Schneiders, on the other hand, did not wait for complaints. Two of the syringe casings were found a distance from any food, but the third was found stuck into a side of ham. As soon as that syringe casing was found, Schneiders issued the recall.

What duty do companies owe to their consumers? At one extreme is the concept of caveat emptor (discussed at the beginning of this section), according to which the companies can claim no liability at all. At the other extreme is the belief that companies owe consumers fair compensation for any harm caused by the products or services they purchased. It is not enough to not intend any harm; if a company has reason to suspect, because of test results or complaints, that its product or service may cause some harm to consumers, and it continues to market the product or service anyway, it is behaving unethically. In developing their products or offering their services, businesses are morally and legally obligated to take reasonable care in the design and manufacturing of their products. There is a corresponding duty to warn consumers of potential dangers relating to the product’s use. This duty of care is owed to all those who could foreseeably be harmed by the defective product or the failure to warn. For example, warnings are required on the packaging of poisonous, explosive or corrosive materials.

For this reason, companies can and should be held liable not only for intentionally and recklessly causing harm, but also for the harm caused by negligence. Negligence occurs when a person or organization fails to take steps that a reasonable person would take to avoid harming others. Failure to inspect products before sending them out, conducting inadequate tests or failing to respond to safety complaints about a product are all examples of negligence. Negligence can occur without any intent to harm. When a company places a product on the market, that product is assumed to be safe under the conditions
of normal use. If it proves not to be, and customers are harmed as a result, the company can and should be held accountable.

A company which creates a product that harms consumers due to a fault in the product itself or in the reasonable use of the product can be taken to civil court by the individuals who suffered harm. This type of situation involves what is called tort law, which is used when an individual sues another individual or a company for damages suffered. An individual suing a transport company for damages suffered as a result of an accident caused by a wheel flying off one of its trucks is an example of tort law. A company can also be sued by the government for offenses against the government and the people at large. These are called regulatory offenses. A shipping company which has an oil spill in harbour can be charged with a regulatory offense. The company can be charged under either strict liability or absolute liability. Under strict liability, the crown must show that the wrongful event (in this case the discharged oil pollution) actually occurred. The crown does not have to prove any intent or negligence on the part of the company. Once the crown has proved that the act occurred, it is up to the company to show that it exercised all reasonable care and vigilance in order to avoid having an accident. Under absolute liability, on the other hand, if the crown proves that the wrongful event or damage occurred, there is no defense. The company is liable for the damage regardless of any lack of intent or diligence in trying to prevent it.

**EXERCISE 6.2**

**Case Analysis of Product Safety**

Read the *Toronto Star* article “How Companies Cope with Disaster . . .,” by Kenneth Kidd, on page 299. Do research to find a case of a Canadian product recall or ask your instructor to suggest one. Consider the following questions:

1. What caused the product recall?
2. How was the recall handled? Quickly or slowly? Voluntarily or only under duress?
3. How much did it cost the company?
4. What was the immediate effect on consumer confidence?
5. What was or is the long-term effect on consumer confidence?
6. How do you think the situation should have been handled?

Be prepared to present your findings to the class.

Health Canada develops and enforces regulations on product safety. It posts advisories, warnings and recalls on consumer products, and receives reports from consumers across Canada on product-related injuries or deaths. It is responsible for developing legislation to regulate consumer products sold in Canada.

A question that is related to issues of product quality and safety is, Are there some products that should not be produced at all? Are we encouraging violence and brutality in children by making new and better toy weapons and electronic or simulated war games? Even if the product or its use is not necessarily harmful, are we wasting valuable and limited energy and resources creating products that are not useful or particularly pleasurable? (We could
argue that works of art, for example, are not useful, but are aesthetically pleasing to us.) Is market demand for harmful or frivolous products enough justification for producing them?

This brings up the ethical implications of “externalities.” Externalities are costs that aren’t part of the buyer-seller exchange. These costs are usually borne by parties external to the exchange. While smokers may be willing to pay for their cigarettes, and the price may cover their production and sale, with profit for the tobacco farmers and producers, there are external costs which should be considered. For example, through our taxes, everyone in Canada pays the medical costs of treating smoking-related diseases in smokers and also in non-smokers who have been exposed repeatedly to second-hand smoke.

List five products which you think should not be produced, either because they have a negative effect on people or because they are not necessary or pleasurable. Briefly state some of your reasons for your choices.

1. Product: ________________________ Reasons: ________________________
   __________________________________________________________________
   __________________________________________________________________
   __________________________________________________________________

2. Product: ________________________ Reasons: ________________________
   __________________________________________________________________
   __________________________________________________________________
   __________________________________________________________________

3. Product: ________________________ Reasons: ________________________
   __________________________________________________________________
   __________________________________________________________________
   __________________________________________________________________

4. Product: ________________________ Reasons: ________________________
   __________________________________________________________________
   __________________________________________________________________
   __________________________________________________________________

5. Product: ________________________ Reasons: ________________________
   __________________________________________________________________
   __________________________________________________________________
   __________________________________________________________________

Compare your list with those of other students. Are there differences of opinion?

The following exercise will explore further the issue of whether or not products have enough value to warrant the expense, socially and environmentally, of producing them.
Corporate responsibility involves two issues: first, doing no harm and second, doing positive good in the community. Doing good means giving back to the community—by participating in community events and beautification efforts, donating money or volunteer expertise to worthy causes, or being a responsible employer. These types of activity will be discussed later in the text. The other part of corporate responsibility—the doing-no-harm component—has to do with a business’ effect on the environment. Corporate responsibility toward the environment includes all of the following: production (using renewable versus non-renewable raw materials, energy efficiency, emissions and waste products); packaging (biodegradable versus non-biodegradable materials); transportation (bringing raw materials in and sending finished products out); and end disposal (when the product has fulfilled its function are its parts reusable, recyclable or biodegradable?). The best way to examine corporate responsibility to the environment is to begin by considering the environmental issues we are facing.

By the late 1960s Lake Erie—the entire Great Lake—was dead. There was too much pollution in the water for any life to survive. Other freshwater lakes and rivers were also full of pollutants like phosphated detergents. Factory smokestacks belched lethal wastes into the air and our soil was poisoned with DDT and other chemicals. We’ve improved a lot. Lake Erie supports life again and there are laws restricting the use of the worst toxins and pesticides. We’ve learned to reduce, recycle and reuse. But is it enough? Natural disasters such as tornadoes, floods, forest fires and tsunamis are increasing. Climate change is making the depletion of the ozone layer a visible reality for even the skeptics among us. People are beginning to realize that environmental issues may be the most important problem that faces us today.
Why Protect the Environment?

Environmental ethics are complicated because of the many different perspectives involved. Sometimes it is hard to understand the arguments environmentalists make, and disagreements arise before the debate even gets started. In order to begin the discussion of environmental ethics, read the following scenario. It will take a bit of imagination to picture the situation, but it will help each of us to determine our own perspective on the environment.

One thousand students from a college (or employees from a company) are on a cruise. During this cruise, a meteor shower destroys most of the civilized world. The cruise boat is damaged and sinks, but there is an island nearby and everyone boards the lifeboats and reaches it. The island is a tropical paradise, with a complete ecosystem of plants, insects, birds, mammals and fish in the surrounding ocean as well as in a freshwater lake. There are no other humans, however, and no rescue will be coming. The ship’s captain is elected the leader. Several crew members have brought vegetable seeds and pesticides from the ship, others have brought hunting and fishing equipment. There may be no other place on Earth where the plants and animals on this island still exist, but many of them will be destroyed if all the people from the ship are to be fed and housed and allowed to reproduce. The captain must decide the ethical thing to do in this situation. He has several options.

1. Might makes right. People are at the head of the food chain, everything else is here for humans to use however we want. Too bad for the plants, insects and other animals if they don’t survive. The captain should do whatever is necessary to save all the people.
2. Morality is only about people, but the captain should be careful not to deplete the resources on the island in case people remain there for many generations. He should limit how much of the island is cultivated, restrict the use of pesticides and put a limit on births so that people don’t overpopulate the island, causing later generations to starve.
3. Everything on the island has moral value; the animals, birds, fish, insects and plants are all as important as humans. The captain should take as much care of the island and all life on it as he does of the humans. He should get rid of the pesticides (carefully) and people should live as part of the island system. If that makes their life harder and some people don’t survive, well, the same thing is happening to all the living things on the island.
4. There is no way over a thousand people can live on this island without damaging and maybe destroying its ecosystem. The island is perfect without humans, and people aren’t part of its ecosystem. Rather than ruining what might be the last living, natural habitat on Earth, the captain should divide up the food and water from the ship and make everyone get back into the life rafts and leave. When they’ve used up the last of the supplies, they’ll die, but they won’t have destroyed the island and maybe it’ll become the source of life beginning over again on Earth.

Which option should the captain choose?

Those who chose option 1 or 2 chose the anthropocentric perspective. This is the traditional, human-centred view of the environment. People who take this perspective may well believe that the environment should be cleaned up and further pollution avoided, rainforests should be preserved along with other natural habitats and endangered species protected from becoming extinct—but they believe all this should be done because it is in the best interests of human beings. Who knows what cures for diseases might be found in the rainforest in the future? Incidents of diseases like cancer and asthma
increase dramatically with constant exposure to airborne and chemical pollutants. If we don’t take care of the environment our health and perhaps our descendants’ very existence may be threatened. Natural wild areas give us aesthetic pleasure and should be preserved for our children to enjoy also. Anthropocentrism also argues that humans have a responsibility to future generations not to use up all the non-renewable resources such as fossil fuels. “We don’t own the Earth—we hold it in trust for our children,” is the kind of argument someone with this perspective would make.

Those who chose option 3 in the above scenario chose the biocentric perspective. They believe that animals and plants have rights just as much as people do, for their own sakes, not only because they are or might be useful or give us pleasure. All living things are as much a part of creation as people and we have no right to destroy them or their habitats indiscriminately. Albert Schweitzer, the famous Swiss humanitarian, proposed biocentricism this way in his book, *Out of My Life and Thought*:

> The great fault of all ethics hitherto has been that they believed themselves to have to deal only with the relations of man to man. In reality, however, the question is what is his attitude to the world and all life that comes within his reach. A man is ethical only when life, as such, is sacred to him, and when he devotes himself helpfully to all life . . .

Those who chose option 4 chose the ecocentric perspective. Ecocentrism attaches value and rights to whole ecosystems, including even the non-living elements in them, such as rivers and soil. Rainforests and wetlands and savannas and tundra all have value in their own right and should be preserved for themselves. We humans have no right to destroy or disrupt any ecosystem simply for our personal benefit or profit. Selective hunting or careful use of natural resources like selective thinning of a forest would be morally acceptable if it allowed the ecosystem to remain healthy and diverse. Aldo Leopold, a forester and writer in the early twenty-first century, called this kind of thinking a “land ethic.” He proposed this position in his book, *A Sand County Almanac*:

> All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts . . . The land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively: the land . . . A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.

Obviously people have very different perspectives on environmental ethics. However, it is possible to put aside differing opinions about what our relationship with the Earth is, and why we have obligations to it, and simply agree that certain things should be done. Whether we are acting out of self-preservation, out of a sense of responsibility to our children or their children, or to all forms of life, or to the Earth itself, we can all agree that protecting the environment is important. This position is called environmental pragmatism. Environmental pragmatism maintains that we can reach a consensus of environmental values that will determine environmental policies we can all agree upon.

**What Is Involved in Protecting the Environment?**

From this pragmatic perspective, protection of the environment includes conservation of natural resources, including fossil fuels; protection of wilderness areas and endangered species; prevention of soil contamination and erosion; prevention
or clean-up of air and water pollution; careful agricultural use of pesticides and chemical fertilizers; halting global warming and the depletion of the ozone layer; dealing with nuclear waste; and limiting human overpopulation and urban sprawl. This list sounds a bit overwhelming, but for easier discussion we can divide the issues into three main categories: pollution, use of natural resources and land health.

Pollution includes the emissions, by-products and waste from our production, energy and farming facilities. These materials are harmful to humans and other living things when they are released into the air, water and soil. In other words, it is not only the pollutants themselves that are the problem, but also the way we dispose of them. Even products that we use intentionally, such as chemical fertilizers and pesticides, can be considered pollutants if the damage they do to the environment is as great or greater than their benefits to us. Often the solution is one of striking a balance between the harms and benefits, or finding a less harmful product that can accomplish the same result. Waste is another important consideration, both for individuals and corporations. Recycling and finding new uses for the things we throw out, as individuals and in industry, is crucial to cutting down on pollution.

Ethical issues around the use of natural resources include sustainability and non-renewable resources. Sustainability means that an activity can be sustained—can continue indefinitely—without depleting the resources it utilizes. Current intensive farming methods are not sustainable because they deplete the land and erode soil faster than it can be replenished. Current energy policies and transportation methods are unsustainable because they rely largely on non-renewable resources like fossil fuels. Fossil fuels such as oil and coal are limited; once they have been used up, we will not have any more. Wind and sun and water, on the other hand, are renewable resources because they can’t be used up. One outlook on non-renewable resources is that we should not use up what future generations will need. Future generations have a right to expect us to limit our use of the Earth’s non-renewable resources so that they will benefit from them in the future. The other concern is that we should use only our fair share of resources, in terms of the world’s population. Third World countries have as much right as we do to benefit from the Earth’s resources.

The solution to this problem lies in using these resources more efficiently (an example would be more fuel-efficient cars) and developing sustainable methods of achieving our ends (an example would be solar panels to help heat our houses in winter). For businesses, this might mean smaller immediate profits due to the expense (at least initially) of implementing more environmentally friendly production methods. Sustainable farming methods, for example, means caring for the long-term productivity of the soil and practising crop rotation so that the soil continues to be fertile. Sustainable energy and transportation means developing alternatives such as solar and wind power to avoid depleting the Earth’s limited amount of fossil fuels. It also involves creating more mass transit and affordable living communities that are close to shopping, school and work to cut down on commuting. For individuals, using resources more efficiently and developing sustainable methods of achieving our ends might involve consuming less energy in our homes and using alternate methods of transportation.

Land health includes preserving wild areas and biological and ecological diversity. Parks Canada defined ecological integrity as “the condition of an ecosystem where the structure and function are unimpaired by human-caused stresses, and the biological diversity and supporting processes are likely to
This means limiting human use of the land, not only by limiting development for human habitation or agriculture, but also by forgoing the opportunity to mine or take lumber from restricted areas. The question is, What is that limit? Some environmentalists say that we have already taken up too much of the Earth for human uses. Non-environmentalists might disagree. But pragmatically, we can all agree on the need to preserve natural spaces for the following four reasons:

- Park space within urban areas provides us with areas to play and relax in, as well as space for smaller wildlife such as birds, insects and squirrels.
- Unique landscapes or wilderness park areas such as the Rocky Mountains, the badlands of Alberta or Algonquin Park enrich our lives as well as offering sanctuary to larger animals, birds and plants.
- Preserving a variety of ecosystems, large enough in size to be self-sustaining, protects endangered plants and wildlife as well as serving their natural functions (for example, large wetlands minimize the threat of floods and act to purify inland water systems).
- Biological diversity in nature creates healthier ecosystems, makes plants and animals more resistant to disease and increases the likelihood of discovering new medicines.

List five things an individual can do to live a more environmentally ethical lifestyle:

1. ______________________________
2. ______________________________
3. ______________________________
4. ______________________________
5. ______________________________

List five things a business can do to be more environmentally responsible:

1. ______________________________
2. ______________________________
3. ______________________________
4. ______________________________
5. ______________________________

What is Business’ Responsibility in Protecting the Environment?

Business owners and managers make decisions all the time. We have already discussed how these decisions affect their employees and their customers. When owners and managers make decisions that will affect the environment, these decisions affect all of us and our children, as well as future generations and the Earth itself. Whether they run a factory that produces smog or chemical wastes, a lumber industry that harvests trees, a manufacturing company that uses non-biodegradable packaging for its products or a store that wastes energy through poor insulation, they have made decisions which in some measure affect us all.

While we all hold responsibility for the effect our actions have on the environment, it is especially important for businesses to take responsibility by ensuring that environmental ethics play a part in their decisions. People in business can take one of two attitudes: either the classical position that business’ only
responsibility is to make a profit within the law, or the position that business has a responsibility to make a profit through sustainable production practices.

The argument for the classical position is that competitive markets benefit us all. They result in a variety of products for consumers to choose from, at competitive rates, and allow them the opportunity to make their own choices. These choices demonstrate what consumers are willing to pay for. If people want environmentally responsible goods, they will show this by being willing to pay for wilderness spaces to be left alone instead of building resorts on them, (for example, by buying rainforest acres) or by buying fuel-efficient cars and appliances. The problem with this position is that it is impossible to put a market value on most social goods because they are values rather than products. There is no market for ecological diversity or endangered species or wilderness spaces. They can be destroyed, but they aren’t something consumers can buy instead of something else, so they cannot be safeguarded by the market law of supply and demand alone.

Those who take the classical position also claim that there are no finite resources—human ingenuity will always come up with alternatives when one resource becomes too costly or is depleted, and that’s what will happen when non-renewable resources are used up. Even if this is true, and solves the problem of availability for future generations, it doesn’t refute the accusation that the current use of those resources is not being fairly distributed among the world’s population. Unfortunately, the only way we will learn if this is true is through a market failure, which is a condition that occurs when a market becomes unsustainable. The idea is that we learn from the failure and take corrective action. But when the goods are irreplaceable, such as wilderness areas or public health and safety or non-renewable resources or species going extinct, it is too late to take corrective action. One failure is all we get.

As citizens we can get legislators to pass laws that will regulate and restrict our choices as consumers. There is environmental legislation at both the federal and provincial levels. The Canadian Environmental Act (1999) sets federal standards to prevent pollution and protect the environment and human health. These standards include sustainable development. Each province and territory has its own legislation as well. But legislation is always a poor substitute for ethics for two reasons. First, legislation sets up only the minimum standards that must be adhered to. Minimum standards serve to limit damage rather than improve current practices with new technologies and innovative, environmentally friendly products and production methods. And second, when we count on legislation rather than high ethical standards in business people, we are overlooking business’ influence over public policy through aggressive lobbying.

The other attitude that business people may take is the position that business has a responsibility to use sustainable production practices to make a profit. This means that businesses should not use energy or resources faster than they can be replaced, or use too much of the energy or resources which cannot be replaced. They also should not produce more waste than can safely be absorbed into the environment. The use of natural resources can be reduced by using these resources more efficiently. Energy-saving light bulbs, windows and insulation are examples of how energy requirements can be reduced while still meeting production targets. Waste can be reduced by finding uses for by-products and by creating longer-lasting and recyclable products. More environmentally friendly human habitats can be designed to reduce commuting by clustering housing, shopping and workplaces together, instead of the current
practice of clustering housing in distant suburbs, shopping in downtown areas and major employers in huge industrial parks.

Individuals in positions of high responsibility in business, particularly in large corporations, have a tremendous opportunity to do good in this area. And with the growing emphasis on environmentally friendly products and processes, decisions that help the environment are also good business.

EXERCISE 6.4

Report on a Company’s Environmental Practices

Working in groups of two to four students, choose a business in your area. Your task is to interview the owner or a manager concerning the business’ environmental policies and practices. First, do some preliminary research on the company, either on the internet or through the Chamber of Commerce and the Better Business Bureau. Look at the Suzuki Foundation website (www.Davidsuzuki.com) to get some ideas about what environmentally concerned businesses are doing across Canada. Find a business similar to the one you are going to interview for the purpose of comparison.

When you interview the owner or manager of the company, you might ask such things as what they do to reduce waste, how they dispose of wastes, are their products biodegradable or recyclable, whether they have considered ways to reduce energy consumption, have they considered “green” packaging, etc. Think about what you have learned through your preliminary research when forming your questions, so that they are appropriate for the company you are interviewing.

Local company:

______________________________

Contacted by telephone to arrange an interview—date _______ time _____

With (name and position in company):

______________________________

Before visiting the company, write out eight to twelve questions to take into the interview.

1. ________________________________

2. ________________________________

3. ________________________________

4. ________________________________

5. ________________________________

6. ________________________________

7. ________________________________

8. ________________________________

(Continued)
Insider trading refers to individuals—directors, managers and employees—who buy and sell stock in their own company. Often companies will give employees stock and there is nothing wrong with owning, buying or selling stock in the company a person works for. The problem arises when “inside” or privileged knowledge, which is not available to the general public, is used when buying or selling securities (stocks and bonds). When individuals learn “inside” information that will cause the firm’s stock to rise or fall before it becomes public, they can make money by buying up the stock just before it rises or selling it just before it falls in value. Any individual who works for a publicly traded company may get inside information about something that is about to happen to the stock of that company. The higher up in the organization the person is, the more likely it is that he will be in meetings where something that will affect the stock is discussed. Anyone in the higher levels of Johnson & Johnson in 1982, when cyanide was found in Tylenol capsules, knew that company stock would plummet as soon as the recall became public. A company’s stock can be affected by occurrences within a company such as product recalls; financial instability or corporate takeovers; natural disasters; regional, national or global competition; political decisions such as large-scale purchases; relocation of provincial or federal departments; contracts offered; and even municipal zoning decisions. Politicians who have inside information and use it for personal gain in buying or selling stocks or bonds are also guilty of insider trading. Even employees who don’t hear the information directly may hear rumours circulating in the office and act on them.

It is illegal to profit from insider information. It is also considered unethical. In the case of politicians, they are betraying the trust of those who elected them by using their position for personal gain. They are also putting themselves in a conflict of interest situation where they stand to gain or lose financially from their political decisions. In the case of employees of a publicly traded company, insider trading violates their ethical responsibilities to the company, to the public stockholders and to the financial marketplace.

Insider trading is a violation of company trust. The information used in insider trading belongs to the company; from this point of view, insider trading is a way of using company resources for personal gain. Furthermore, if the practice occurs and becomes public knowledge, the reputation of the entire company is damaged, sometimes irreparably.

Insider trading also violates the trust of public stockholders in two ways. First, it is unfair to public traders because they do not have access to the same information. Some people argue that the trading ground for stockholders is
not equal to begin with. Certain traders spend a lot of time and thoroughly research the stocks involved, and therefore have more information when it comes to buying and selling them. But insider information is not the result of effort, and it can’t be learned even through the most thorough research. It is information that outsiders simply do not have fair and equal access to.

Second, and even more unethical, is the fact that when insiders trade based on their privileged information, they are necessarily selling or buying from public stockholders. Whether they are buying stock which they know will rise in value or selling stock which they know will soon fall, they are causing financial harm to the outsider they are trading with. By deliberately hiding this information from public stockholders in order to get them to buy or sell to their disadvantage, and to the insiders’ advantage, they are committing fraud.

Finally, insider trading damages the financial marketplace. When managers and employees withhold information from the public and profit from that information, often at the public stockholders’ expense, then public investors lose confidence in the fairness and transparency of capital markets in general. All publicly traded companies stand to lose if public investors lose confidence in the integrity of the stock market.

EXERCISE 6.5

Insider Trading and Martha Stewart

In March 2004, Martha Stewart and her stockbroker, Peter Bacanovic, were convicted of lying to federal investigators about why Stewart sold 3,928 shares of ImClone Systems Inc. stock just before it plunged on a negative government report. They were both sentenced to five months in prison and five months of home confinement. In addition, Stewart was ordered to pay $30,400 in fines and court fees.

Partner with one other student to research this case on the internet. Try to get information from at least four different sites, and from both sides of the issue. Consider the site source when evaluating the information you find. Discuss your findings together. Did Martha Stewart behave unethically? Was the sentence just? Do you think another person in her position would have done the same as she did? Would you have acted differently in her situation? Why or why not? Write out your conclusion in one or two paragraphs.

In Canada, both federal and provincial governments have the authority to enact laws against insider trading. There is thus a fair amount of overlap involved. Companies incorporated under the federal Canada Business Corporations Act (CBCA) are subject to the provisions for insider trading within the act. The Ontario Securities Act (OSA) is an example of provincial legislation governing companies in Ontario. Bill 198 in the OSA is specifically aimed at creating tighter restrictions on publicly traded companies.

In its most basic form, marketing is the process by which a business exchange takes place between two people when one purchases a product or service from the other. In the case of a product, we have already considered business responsibilities in creating that product and ensuring its quality and safety,
although these issues are also related to marketing. In this section, we will consider only the ethical aspects of the exchange itself.

What considerations make the business exchange described above ethical or unethical? According to Kantian ethics, people should never be treated as a means to an end, but as ends in themselves. In other words, the buyer should not be considered by the seller as merely a means of increasing the seller’s finances. Respecting the buyer as a person in this case means respecting his freedom of choice. The buyer should not be coerced, deceived or manipulated into purchasing the product. It may seem like all purchases of goods or services in Canada are freely chosen by the buyer. No one forces us to purchase anything, or forces us to buy from one particular dealer over another. However, there are subtle forms of coercion and manipulation that are nevertheless unethical. Buyers can be coerced either through their own vulnerability or through high-pressure sales methods. They can be deceived or manipulated through false or misleading information or simply through not having all the information they need to understand the product or service being sold. How knowledgeable is the average consumer about the various options available in life insurance, or the workings of a DVD player? He is usually not knowledgeable enough to make an informed decision without getting more information. Consumers can also be coerced into buying on impulse through high-pressure sales techniques. In Canada, there is a mandatory ten-day “cooling off period” during which the buyer can change her mind and nullify the sales contract. This is intended to prevent consumers from becoming victims of high-pressure sales.

From a contractarian perspective, coercive or deceitful marketing practices are unethical and would not be permitted, either. From behind the veil of ignorance we would not know whether we would be the buyer or the seller, and therefore we wouldn’t agree to any practice that might be harmful to either side.

According to utilitarian ethics, for the exchange to be ethical, it has to increase the overall happiness of individuals and of society as a whole. When an exchange is mutually beneficial, the happiness of both the buyer and the seller should be increased. This happens when both the buyer and the seller consider the value of the goods to be equal to their cost. If a homeowner is forced to sell his home below its market value, perhaps because she has had to declare bankruptcy or has to move immediately, and the buyer takes advantage of this to coerce her into selling cheaply, then the seller will not consider the transaction to have been fair and ethical. If a buyer purchases something that doesn’t perform as promised, or purchases goods or a service on impulse due to high-pressure sales techniques and later regrets the purchase, then the buyer will not consider the transaction to have been fair and ethical.

Individual happiness with the sale is not the only consideration for an ethical exchange. According to utilitarianism, the happiness and well-being of society as a whole must be increased. Some transactions are illegal and unethical because they do not promote a healthy society. There may be buyers willing to purchase mind-altering drugs or counterfeit Canadian passports or child pornography, and there may be people willing to produce and sell these items, but it is not in the best interests of Canadians as a whole to allow these kinds of exchanges. They do not increase the overall happiness and well-being of our society.

Thus, marketing is either ethical or unethical according to the degree that it sells socially acceptable products or services at a fair and reasonable price and promotes them in an socially acceptable honest and non-coercive manner to customers who have been given the information they need to choose freely. We will examine these issues more carefully in the next section.
Determining the price of a product begins with determining the cost of raw materials, production, packaging, advertising and transportation—and then some profit. These are reasonable and fair aspects to consider. Determining the price of a service involves similar considerations—the cost of any equipment, office expenses and support staff are all reasonable and fair considerations. Ethical issues emerge when other considerations are involved, such as who the potential buyers are and how high a price they would be willing to pay, and what the competition is charging for similar products. In other words, what is reasonable and fair is superseded by what is possible and how it will affect the competition.

There are a number of ethical issues related to pricing a product or service. Since pricing has a lot to do with competition and demand, most ethical pricing issues have to do with how pricing affects fair competition, or how it responds to consumer demand.

Patents for drugs and new inventions protect the developer or inventor and allow him to be compensated for the time and expense of developing the product. In the case of pharmaceuticals, this expense is very high because of the extensive testing that must take place before the product can be sold. When generic brands are later sold at lower prices, someone else is benefiting from the years of unpaid labour involved in developing the original product. On the other hand, patents allow companies to have a monopoly on a product or an idea and to sell it for a much higher rate than the actual costs of production. Not only do the companies benefit from having the entire market to themselves, but they can charge whatever price they wish without worrying about the competition undercutting them. When the product is a medical drug or treatment that people cannot do without and there are no alternatives on the market, consumers are not in a position of having free choice. People who are suffering from illness are considered to be a vulnerable market, and taking advantage of their need to be healed is unethical.

Price gouging occurs when sellers increase the price of a product beyond a reasonable cost and profit margin because the market cannot easily do without it and people must therefore buy it. Natural disasters like the ice storm in Montreal in 1998 can create a sudden, immediate need for certain products such as generators. Some retailers took an unethical advantage of the temporary high demand and limited supply of generators to raise the price on these products during the emergency. Immediately before Hurricane Katrina, which threatened the oil rigs in Texas and off the gulf coast in 2005, consumers rushed to buy gasoline, fearing that prices would soar. They did soar—even before the hurricane struck—as gas stations took advantage of Canadian consumers’ fears. And prices stayed high because dealers discovered that consumers would pay the higher price.

Price-fixing occurs when companies conspire together to fix their prices at a higher rate than they could charge if they were not all in agreement. The Competition Act forbids this practice, and the Competition Bureau will look into any suspected incident of price-fixing by businesses in Canada. Price-fixing takes an unethical advantage of consumers’ needs by limiting their choices. The transaction between buyer and seller has been unfairly rigged against the buyer.

Another unethical pricing practice is called predatory pricing. This occurs when one retailer sells a product below its actual cost in order to undermine the competition. Usually large national or international chains or “big box” stores like Wal-Mart are accused of doing this. Because they buy in bulk and sell a wide range of other merchandise, they can absorb the loss. Smaller, family-run
stores are often driven out of business by this practice. When the competition has gone out of business, the large store will often raise its prices again. Predatory pricing is unethical not only because it exercises an unfair advantage over smaller businesses and causes harm to their owners and managers, but also because it manipulates consumers, treating them as means to an end, not as ends in themselves. When the smaller stores have folded, consumers are worse off than they were originally; even if the larger store keeps its lower pricing, their choices of where to buy are limited by the loss of competition.

**EXERCISE 6.6**

**Doing Business the Wal-Mart Way**

Compare the two articles on Wal-Mart on pages 287 and 288 near the end of Chapter 9.

Which article do you find more convincing? Give reasons for your answer.

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Is Wal-Mart a good model for future businesses? Why or why not?

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Based on these two articles, write a short, five-paragraph essay on your opinion of Wal-Mart.

Government subsidies can also exert an unfair price advantage in the marketplace. The government subsidizes our postal system as well as our electricity and gasoline. We can appreciate this as a good thing, since both private citizens and businesses in Canada pay much less than they otherwise would for energy and transportation. In turn, we pay less for all the products we consume and the services we buy, because if energy and transportation costs were higher businesses would surely pass that increase on by adding it to the price of their products and services. It may be difficult to see the downside of this, but for one thing, it encourages us to waste electricity and fossil fuels. We are less concerned about energy-efficient appliances and production methods or about fuel-efficient automobiles or alternative means of transportation than we would be if we were paying full price for our energy and fuel. In the long
run, this harms us all. Furthermore, alternative energy products like hybrid cars cannot compete as long as the price of fuel is subsidized by the government, since fuel efficiency is their main advantage. This actually amounts to the government subsidizing SUVs and other fuel-wasting products. From this point of view, the Conservative government’s 2007 proposal to increase the tax on fuel-inefficient vehicles and bring the price of fuel and electricity closer to its full cost may be a step in the right direction.

What is the purpose of advertising?

The answer to this question could include a number of things. The purpose of advertising could be to make consumers aware of new products or services, to inform them of improvements to existing ones, to promote brand loyalty, to present a positive image of a profession or a person (such as a political candidate), to share information concerning political policies, taxes, laws or by-laws or to convince consumers to buy a product or service. These purposes are neither ethical nor unethical. The way these purposes are accomplished can be either ethical or unethical.

Marketing serves a valuable role in our society, as can be seen in the purposes listed above. However, unethical advertising is damaging to individuals, to society as a whole and to the advertisers themselves. It is damaging to individuals because it promotes or reinforces stereotypes. Even if the stereotypes are not blatantly negative or belittling (which they often are), stereotyping can limit people’s expectations for themselves—by showing a female secretary and a male boss, for example, or a female nurse and a male doctor. Unethical advertising is also harmful to society because it promotes values that are not good for it, such as irrational consumerism or status based entirely on money. And it is damaging to the advertisers themselves because eventually consumers get tired of being manipulated and become very cynical about advertising. This does not necessarily make them immune to the continuous onslaught of negative images and values propagated by unethical advertising, but it does make them likely to reject all advertising as manipulative, rather than trying to sift through to discover what is true and what is false or exaggerated. Furthermore, unethical marketing practices are unfair to competitive companies. When a company sells its products through deception or manipulation, companies that use ethical, honest marketing practices may be at an unfair disadvantage in competing with them.

There are many ways in which advertising can be unethical. Social issues in advertising include respecting the dignity of all people and promoting positive social values. Advertising which attempts to manipulate people by appealing to their fears, vanities or other irrational influences falls into this category. For example, ads for products like Viagra, Cialis and Levitra, drugs that counteract erectile dysfunction (e.d.), usually focus on sexual insecurity, embarrassment and fears of romantic rejection. They use young or middle-aged men in apparent good health as models, instead of providing information about e.d. Erectile dysfunction in healthy men is most often caused by alcoholism, depression, obesity, inactivity, smoking or certain prescriptive drugs, so an irrational,
emotional appeal on behalf of these products is harmful to individuals because it offers a quick fix for the symptom while ignoring the underlying problem.

Legal issues in marketing and advertising include honesty, disclaimers, fair comparisons, the use of celebrities and contests. Deceptive or misleading advertising is usually a legal issue, although in some cases it may not actually be against the law. For example, an ad that presents a pain medication as the brand most hospitals use or a battery as the type most frequently used in emergency rescues may be deceptive, even if the statement is accurate. The ad intends viewers to conclude that the hospitals or emergency teams are promoting that brand. However, if the pain medications or the batteries are distributed free or at a greatly reduced price to hospitals or emergency teams, and this is the true reason they use them more than other brands, the claim is misleading. Consumers who buy a particular product at a higher price than they would have paid for a similar one because of misleading statements like these are being harmed financially as well as ethically.

The social effects of unethical advertising are often far more damaging and have a wider effect than the issues covered by law. Advertisements make powerful visible and emotional statements and they are pervasive throughout our culture. Humanities and social science scholars have been criticizing advertisements for decades. Richard Pollay, in his article, “The Distorted Mirror: Reflections on the Unintended Consequences of Advertising,” summed up the criticisms as early as 1986:

“They see advertising as reinforcing materialism, cynicism, irrationality, selfishness, anxiety, social competitiveness, powerlessness and/or the loss of self-respect.”

Social issues can be grouped into two main categories: respecting the worth and dignity of all people, and promoting positive, or at least not negative, social values. Advertisements that fail to respect the dignity of people are those that stereotype people or present certain groups of people in a negative light. They reinforce stereotypes that contribute to people’s sense of powerlessness and loss of self-respect. Women in particular have been stereotyped in advertisements. They are portrayed as sex objects (they are positioned beside rather than inside expensive cars) and less powerful or successful in their careers than males (they are shown repeatedly in roles as mothers, cooks, housecleaners and secretaries). Their body image is constantly undermined by abnormally thin models promoting diet aids, hair products or teeth whiteners.

The absence of images is also a form of stereotyping. Few, if any, advertisements portray men engaged in infant or child care, and those that do almost always include a female; in other words, they are portraying a family, not a male caring for his child. The absence of minorities in advertisements conveys a hidden message about their importance as consumers, although this is rapidly changing.

Humour can be particularly damaging when combined with stereotyping. A television ad for cereal in 2007 shows a man swathed in bandages on a witness stand. The lawyer representing the insurance company pours a bowl of cereal while the supposed victim watches hungrily. Finally he rises and rushes over to eat the cereal, throwing off his bandages as he runs. This ad is unlikely to appear funny to the many injured victims of accidents who already feel helpless enough when dealing with powerful insurance companies that are treating them as frauds.

The claims that advertisements promote negative social values usually refer to the motivations used in advertising. These include advertisements that sell
products by portraying characters who are envious of those who have the product, or that show social competition for the product, or that create fear, anxiety or insecurity around not having the product. Are we really less valuable as human beings if our teeth aren’t artificially white or we don’t wear a particular brand of clothing? Will others love us less if we don’t buy them a particular brand of greeting card? Advertisements that make people buy products for irrational reasons such as these are unethical because they are manipulative and they feed into people’s vulnerabilities.

Perhaps the most damaging overall criticism of advertisements is that they promote a lifestyle of uncontrollable consumerism. The message is subtle: if you have a problem, buy something; if you're unpopular, buy something; if you’re unhappy, buy something. In 2007, a television advertisement shows two girls visiting a friend who has just been jilted by her boyfriend. They buy her a box of cereal, which they call “comfort food.” While discussing the merits of the cereal, all three become happier. The problem with portraying consumption as an anti-depressant is that it will not solve any real problems and will only interfere with the search for a real solution. Furthermore, consumption for its own sake is not a positive social value. Messages like “I’m worth it,” promote a greedy, egocentric view of people who are concerned only with their own happiness.

In addition to promoting products for the wrong reasons by manipulating people’s emotions and insecurities, marketing can also create an artificial desire or need for products. If rather than informing consumers of how a product can satisfy their needs, advertising makes them feel a need they previously did not have, then it is manipulative. Instead of respecting consumers as persons and helping them to meet their own goals, this type of advertising treats consumers as only a means to the company’s end. The company makes money by manipulating people into buying products they do not, on their own initiative, want or need.

Consider the unnecessary or even harmful products you listed on page 178 prior to Exercise 6.3. What marketing methods or motivations have been used to create a demand for these products?

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Are these methods ethical? Why or why not?

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Instead of reinforcing negative values, advertisers could be a powerful force for improving society by reinforcing positive values. Just as selling cars because they are sporty and powerful promotes reckless driving and social competitiveness, selling the same cars because they are fuel- and cost-efficient promotes concern for the environment and respect for individuals as rational, intelligent consumers. Informing consumers of a model’s high safety rating in crash tests is not the same as playing into consumer fears, because it involves giving accurate information for consumers to make a decision.

List three ads you have seen which reinforce stereotypes of people or negative values. Briefly describe the stereotype or negative value involved.

1. ____________________________________________________________________
2. ____________________________________________________________________
3. ____________________________________________________________________

Now list three ads you have seen which reinforce the dignity and worth of people or positive social values. Briefly describe the positive image or value involved.

1. ____________________________________________________________________
2. ____________________________________________________________________
3. ____________________________________________________________________

The Consumer Packaging and Labelling Act and the Competition Act regulate marketing and advertising in Canada, along with other acts which deal with specific types of advertising. These documents deal with such things as honesty in advertising, disclaimers, fair comparisons, the use of celebrities and contests. Like any laws, they promote the minimum criteria of acceptable truth and integrity, not the highest ethical standards.

Honesty in advertising means presenting a product or service truthfully. The statements made about the product or service and the general impression given about it must be both truthful, and not omit anything important. Even though
the factual information in the ad may be true, an offence can still arise if the overall impression conveyed is misleading. For example, if a furniture store advertises brand new leather couches for $899, but the only leather couches at that price are ones that have been slightly damaged during delivery to the store, then the ad is misleading. Although the couches may still be brand new, the advertiser has led consumers to believe that top quality merchandise was being sold for $899, when in fact only damaged items are offered at that price. Misleading advertising laws deal with any type of ads, as well as statements made on product packaging and labels, inserts or oral statements made by salespersons.

Disclaimers cannot be used to protect an advertiser from a deliberate false impression created by an ad or by the packaging or label of a product. Disclaimers cannot contradict a statement made in the body of the advertisement. They can be used in advertisements only to clarify a minor ambiguity in the copy or to add some information. For example, “batteries not included” is a common disclaimer for battery-operated toys or tools. A contest advertising a free weekend in Mexico might include the disclaimer, “air flight not included.” Disclaimers must be worded clearly and precisely so as to leave no room for doubt. If they are written, they must be large enough to be read; if spoken (or taped as TV or radio voice-overs) they must be said slowly enough to be understood.

Comparison advertising rates a product or service against other similar products or services on the market. Comparison advertising is legal, but nothing said about a competitor can be false or misleading. Even if the ad doesn’t specify the competitor’s name or brand, if it is possible for a consumer to identify who the competitor is, then the same laws apply as if the competitor was named. But ethics goes beyond the law, and advertisers who undermine competitors rather than pointing out the advantages of their own products or services are largely seen in a negative light. Political campaigns that slam the other party have made consumers cynical about this tactic, to the extent that it can backfire. In the 1993 federal election, the Conservative party brought out an ad mocking Liberal leader Jean Chretien’s facial expression, which was caused by a childhood illness that left him with a hearing defect. The backlash was so negative that the Conservative party had to issue an apology, and Chretien won the election.

Celebrities are frequently used to market products and services. Celebrities have the right to control the use of their name, picture, likeness, identity, voice, traits and distinguishing habits such as a phrase or expression they have made well-known. Using any of these in conjunction with advertising a product or service without the permission of the celebrity is called misappropriation of a celebrity’s personality. The same rule applies to non-celebrities. In the case of testimonials, the Competition Act prohibits their use unless they have been approved in advance and in writing by the person who gives it.

Contests are often used as a means of promoting a product, business or service. In Canada, contests must include a skill-testing question so that the prize is not awarded by chance. This distinction may become irrelevant with the increase of legal gambling, but it is currently the law. Contests cannot require the purchase of a product, and must provide another means of entering. In order to use the name and picture of the winner in subsequent ads, the contest must make this a requirement of accepting the prize—otherwise use of the winner’s photograph without consent would constitute misappropriation of the person’s likeness or personality. All contests must be open and fair. This means the number of prizes, their approximate value, any rules about their allocations (such as two per store,
one per municipality, three per province), and any other fact that affects the chances of winning, must be disclosed. If the contest is running in Quebec, it must be registered with the Quebec Lottery Board, which charges a lottery tax.

These laws and others were created to keep marketing and advertising in Canada truthful, fair and ethical. But the question remains, Are they beneficial or detrimental to Canadians? Should there be laws governing the stereotyping and negative social values portrayed in advertisements? If so, what sort of laws? If not, why not?

In marketing, targeting refers to where and when the product will be placed in the marketplace in order to reach a specific group of consumers, and how it will be presented to them. There is nothing wrong with determining which market, or which section of the population, a product will most likely appeal to. Ethical issues in targeting arise when marketers or salespeople target consumer groups that are vulnerable for some reason. Vulnerability, in this sense, refers to any condition that makes people more susceptible to manipulation or pressure, and less able to make informed and completely voluntary choices in buying products.

Children are considered a vulnerable consumer group because they have not yet developed the reasoning powers to resist manipulation of their emotions. Although it is legal, marketing toys directly to children is often considered unethical, particularly expensive, brand-name toys, which their parents might not be able to afford. Since they are not the ones actually doing the purchasing, should we consider young children consumers at all? ________________

People with disabilities or those who are medically ill are also vulnerable, in the sense that their mental or physical condition puts them at a disadvantage in the seller/buyer exchange. For example, a person suffering from a painful illness will be more likely to grasp at any offer of relief or recovery without considering the expense or possible side effects. A consumer who is not ill or in pain might consider the same expense or side effects and find them unacceptable. People’s ability to rationally evaluate and freely choose a product is undermined by their physical or emotional state. Elderly people are another vulnerable market; they often feel helpless to protect themselves from harm. Selling insurance or safety alarm systems to this group by playing on their fears and vulnerability rather than by appealing to their reason is unethical.

Health care professionals are, more often than not, dealing with a vulnerable population. They often care for children, people with disabilities or the elderly. Even when they are dealing with competent adults, their clients are likely to be ill or injured and thus made vulnerable by the stress of pain and fear. Of course, health care professionals can also work in research, teaching or supervisory positions, but the majority deal directly with a vulnerable population. Understandably, extra care must be taken to avoid infringing upon the rights of such clients. When discussing ethical considerations about how health care
professionals should treat their clients, six principles are commonly considered. These will be discussed generally in Chapter 7, along with other ethical principles and rights, but here we will examine how they relate to the field of health care.

■ **Autonomy.** Patient autonomy refers to the patients’ right to make decisions about their own health care, within legal limits and as long as they don’t harm others. The therapeutic use of marijuana is a current issue that affects patient autonomy and is dependent upon the law. The right to choose between treatment options or to refuse treatment altogether is another example of this principle. In order to make decisions of this nature, patients must be given all the information necessary to understand their options. They must also be deemed capable and competent to evaluate the information they are given. (This will be discussed further under the section about informed consent.) Autonomy also concerns patients’ rights to control personal information about themselves, and is therefore a consideration in confidentiality. Intrinsic to patient autonomy is the expectation that health care professionals will respect the values and choices made by patients about their care, even if they are very different from their own values. Kant’s categorical imperative to respect people and treat them as ends in themselves upholds the principle of autonomy.

■ **Paternalism.** When health care professionals act in a paternalistic manner toward patients, they are making choices that they believe will benefit the patients, or protect them from the harmful consequences of their own choices. This attitude is less common now than it used to be. Examples of paternalism include giving treatments or prescribing medications without obtaining consent, or failing to inform patients of possible side effects of a treatment in order to get their consent for it. Although paternalism implies the desire to do what is best for patients, it undermines their freedom and control over their own treatment. Patients who feel manipulated or coerced by their caregivers may lose trust in them and be reluctant to seek their help. The greatest long-term good for the greatest number of people is therefore achieved when patients make their own choices, even if some of those choices are not what the health care worker thinks are the best.

■ **Non-maleficence.** This principle at its most basic means avoiding injuring or harming others. In a health care setting, it means offering treatment or giving care to clients in a way that does not do more harm than good. Non-maleficence takes into account the fact that many treatments, though beneficial, are painful or unpleasant. Even simple, non-invasive procedures such as massaging or rotating an injured muscle or Asking a patient to roll onto a hard X-ray table can be painful. If the patient’s autonomy is respected and the end result is beneficial, the treatment is considered to be doing good to the patient rather than harm.

■ **Beneficence.** There are four levels of behaviour leading from non-maleficence to beneficence. The first level is not doing harm (this may mean not performing a treatment for which a professional has not been adequately trained or which, under the circumstances, is likely to do more harm than good to the patient). The second is acting to prevent harm (this may include advocating for a patient, restraining a patient who is dangerous to himself or to others or reporting on a colleague who is harming or likely to harm patients). The third level is acting to remove a harm that has been done (this may include treating an injured patient or advising patients on how to seek reparation if they are the victims of abuse or malpractice by
another health care professional). The final level is beneficence. To act
with beneficence is to actively do good to another person. In general we
are not required to seek opportunities to do good to others, although in
Quebec a person who fails to assist someone in an emergency can be sued
by the injured party. Health care workers, however, by virtue of their
profession, are expected to benefit those they care for. Failure to do so
could be a violation of professional duty or competency.

Distributive justice. The different types of justice will be discussed in Chapter 7.
However, as it relates to health care, the concept of distributive justice has
to do with the fair distribution of health care resources across society.
Diagnostic equipment, labs and the time of professionals are all too often
unequal to the needs of patients, and some criteria must be used to deter-
mine how they will be distributed. Should some patients get priority? On
what grounds? Should some patients be denied the use of limited resources?
Again, on what grounds? Should professionals spend more time with
patients, but see fewer of them, or vice versa? The utilitarian might ask,
What grounds of distribution will bring about the greatest happiness for the
most people? The contractarian would ask, What criteria would we agree to
from behind the veil of ignorance?

Compensatory justice. As its name implies, compensatory justice involves
determining if, when and how much compensation is due to someone who
has suffered harm or injury from another person. In the field of health
care, this generally takes the form of a client being awarded a financial
payment because she has suffered due to negligence or malpractice.

All of the general workplace concerns and customer relations issues about
courtesy and respect covered in Chapter 3 apply to health care professionals.
Health care practitioners who are running their own businesses will also need to
consider many of the ethical issues covered in the business and marketing
sections of this chapter, in particular the issues of competition and advertising.
In addition, there are a number of ethical concerns that apply specifically to
health care. Significant issues anyone in the field of health care must be aware of
include maintaining competency, keeping accurate records, protecting clients’
confidentiality, respecting patient autonomy and obtaining informed consent.

We expect professionals to be responsible for the quality of the service they
provide. Not only must they successfully complete the training and practical
experience, or internship, required to practise on their own, but they must main-
tain their competency. All health practitioners are understood to owe a duty of
care to their clients or patients. This duty of care implies and includes practising
their profession to a reasonable standard of competence and maintaining their
expertise through continuing education to make sure they are practising to
current standards. Competency is usually measured by meeting the standards of
practice of a profession, which are laid out by the provincial regulatory body in
the case of a regulated profession. In the case of a non-regulated profession, the
standard of care is that which a normal, competent caregiver would reasonably
be expected to meet. If the caretaker is working in a hospital, health facility or
care facility, that facility will have written policies and procedures for competent
practice, and these would be the acceptable standards of care. Failure to meet
professional standards of care can result in a charge of professional negligence,
malpractice or misconduct.
Negligence occurs when someone who owes a duty of care to another person fails in that duty due to carelessness to the extent that the other person suffers harm or injury to person or property. In order to receive legal compensation for negligence in a civil (tort) case, an individual must prove that the other person owed him a duty of care (such as a health practitioner owes to her patients); that the practitioner failed in that duty of care by behaving in a way that did not meet a reasonable standard for the profession; that harm or damages actually occurred; and that the harm is the direct result of the actions of the person who had the duty of care. Negligence is a non-intentional act, so it is not necessary to prove malicious intent, but a lack of intent to harm cannot be used as a defence.

Malpractice occurs when a health professional fails to adhere to the appropriate standards of care for a given act or procedure. The procedure is usually one that requires a high level of skill. Malpractice can result if the practitioner is not competent in that skill but performs the procedure anyway (incompetence) or if he is careless in performing the procedure (negligent). In both instances, the practitioner's performance of the act or procedure does not meet the accepted standard of the profession. The same conditions—that a duty of care was owed, that harm was done, and that the harm was caused by the actions of the person who owed the duty of care to the person who was harmed—must be proved in a case of malpractice as in a case of negligence.

Professional misconduct occurs when a licensed or certified health practitioner behaves in a way that directly contravenes the ethical and professional rules of conduct or code of ethics set out by the provincial regulatory body for its members.

A charge of negligence, misconduct or malpractice may go to civil court in a lawsuit, or to criminal court if the result is death or serious bodily harm and if the behaviour is a substantial departure of conduct from what would be reasonably expected of a health practitioner in that field. The Criminal Code states:

- **Section 216.** “Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.”
- **Section 217.** “Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.”
- **Section 219(1).** “Every one is criminally negligent who (a) in doing anything or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.”

If the harm or the conduct is less serious, it may go to the regulatory body responsible for that profession. The regulatory body will investigate the case and then direct it either to the complaints committee or the discipline committee. These procedures will be discussed in the section that follows.

Most health professions in Canada (and several other professions such as law and engineering) are self-governed through provincial regulatory bodies. Regulatory bodies are run by a board or council, two-thirds of which are members of the profession, elected by their peers, and one-third of which are public members appointed by the provincial or territorial government. A professional regulatory body governs its professional members through a number of committees made up of the elected and appointed council members. These committees and their various objectives are as follows:
The registration committee registers new members. Its task is to ensure that members have the required education and practical experience (internship) required to practise the profession. The committee may administer a qualifying entrance exam for applicants who have successfully completed their education and practicum. It is illegal for a health care professional to practise without being registered by the regulatory body. This committee ensures that the minimum standards for entry into the profession have been met before a professional can enter practice.

The quality assurance committee’s main task is to ensure that registered members of the profession maintain a high level of competency. This committee prepares written standards of practice for various procedures and documents such as the code of ethics to guide professional conduct. It determines the criteria for continuing education and ensures that members of the profession are meeting these criteria through random investigations. When requested to do so by the executive committee or the complaints committee, the quality assurance committee investigates the practices of individual members to identify incompetency, incapacity, professional misconduct and/or any inadequacies in the member’s overall practice. The committee may appoint an assessor to examine the professional’s premises and records, talk with patients and determine whether the person in question is meeting the standards of the profession. Health professionals are required to report to the regulatory body any incidents of professional misconduct, incompetence or incapacity, or failure to practise according to the standards of the profession that they observe in other professional members.

The patient relations committee deals with any incidents of sexual abuse of patients by professionals. It prepares educational material for patients and guidelines for professional members on this issue. It must also set up a fund for therapy and counselling for patients who have been sexually abused by members of the profession.

The fitness to practise committee deals with questions concerning individual members’ fitness or capacity to practise. This may involve physical or mental issues, including substance abuse, that make the professional unable to perform his responsibilities up to the standards of the profession. If the Registrar (the CEO of the regulatory body) has reason to doubt a member’s fitness to practise, the Registrar will do an initial investigation and report any findings to the executive committee. If the executive committee decides that further action is necessary, it may require the professional in question to undergo physical or psychological examinations. If there is still a concern of incapacity, the matter will be turned over to the fitness to practise committee. A panel of at least three of the committee’s members, including at least one public member, will conduct a hearing into the matter. The professional is entitled to legal counsel at this hearing.

The complaints committee deals with complaints about professional members’ practice or conduct. These complaints may be submitted, in writing or by an oral recording, by patients, members of the public or by other members of the profession. The committee reviews the complaints. Unsubstantiated or frivolous complaints are processed with no further action, although the professional member may receive a caution if warranted. Substantive complaints are referred to the appropriate committee (executive, fitness to practise, quality assurance or discipline, depending upon the nature of the complaint). The committee must send a written notice of its decision to the member and the complainant within 120 days of receiving the complaint.
The discipline committee investigates and hears complaints involving incompetence and unethical or unprofessional conduct, including sexual misconduct, of registered members of the profession. The member’s licence may be suspended or restrictions placed upon it until the hearing is concluded. A panel of three to five members of the committee, including at least one public member, will adjudicate at the hearing. The professional has the right to legal counsel in his or her defence. Discipline hearings are normally open to the public. If a member is found guilty of misconduct, the committee has the power to discipline the member in an appropriate manner. This may include anything from a verbal and written caution; a requisition for the member to take a course (such as an ethics course or professional upgrading); the imposition of terms, conditions and limitations on her practice; fines, including reimbursing the regulatory body’s legal fees; up to suspension or revocation of the member’s license to practise.

The executive committee exercises the full powers of the council between monthly council meetings. Like all of the other committees, it reports to the council.

The council is made up of the elected professional members and publicly appointed members. They are ultimately responsible for governing the profession, and the work of the committees must always be reported to the council for approval. The council meets monthly and is open to the public, except for certain issues that are legally required to be discussed in camera (in private).

**EXERCISE 6.7**

**Reviewing Disciplinary Findings**

Regulatory bodies publish the results of discipline hearings when the professional member has been found guilty of misconduct, incompetence or failing to meet the standards of the profession. As a class, contact the provincial or territorial regulatory body of your current or future profession and request copies of these publications. Examine the findings to answer the following questions:

1. List five to seven examples of professional misconduct that members have been found guilty of.

(Continued)
In small groups, choose one of these cases to consider in detail (each group should choose a different one). Each group should answer the following questions about their case.

2. What was the professional member found guilty of?

3. Why do you think the member might have done this?

4. What disciplinary action was taken?

5. Do you think the disciplinary action was appropriate for the misconduct? Why or why not?

Maintaining accurate, current and thorough patient records is very important in the health professions in order to provide optimum health care. Why do you think good records benefit both health professionals and their clients?
Your response might have included the need to keep track of patient progress, what treatments have been done or need to be done, and patient preferences and possible reactions. You might have said that good documentation protects the practitioner by recording consent to treatment and showing that competent, accepted measures have been taken to treat the problem. You might also have said that good records protect the patient from such things as over-treatment or possible allergic reactions by recording a patient’s background history and tracking her symptoms and responses to treatment. Good documentation is also necessary to aid communication between several health practitioners involved in caring for the same patient, or when a substitute caretaker fills in during holidays, etc.

Health practitioners who do not keep adequate records can be charged with professional misconduct or failing to meet the standards of the profession. Most regulatory bodies have written standards for documentation and patient records, and most health care institutions also have documentation guidelines. It is important to review these standards and adhere to them, even when a practitioner’s time is limited. The main principles to keep in mind are accuracy (list times, dates, specific treatment or medication and avoid vague terms), thoroughness (it may also be important to include decisions not to treat or not to use specific methods and why), clarity (write clear, concise and legible notes in case other practitioners need to read your records, and clearly note any changes or corrections) and timeliness (keep records up-to-date).

Patient records are confidential. They may be shared only with the consent of the patient and only with other practitioners who need to know information on a patient. Furthermore, only necessary information may be shared with other practitioners. The improper disclosure of patient records is professional misconduct. The section on confidentiality in Chapter 3 is particularly significant when dealing with patient health records.

Touch is our most intimate contact with other human beings. Because it is the most sensitive of our physical senses, touching another person crosses a number of social boundaries. It requires close proximity; in order to touch us, others must invade our personal space. They must also invade our emotional space, because touch is often a way of expressing emotion, and being touched often releases strong emotions. Touch also crosses a sexual boundary, because we express our sexuality through touch. Therefore, touching invades our physical, emotional and sexual privacy.

Our responses to being touched are formed by our upbringing, our culture and our past experiences. People raised in a family and a culture where touching and kissing are an accepted norm respond very differently to touch than people raised in a family or a culture where touching one another in public is not accepted. Victims of physical or sexual abuse may find it very difficult to allow others to touch them. Because touching involves social taboos and intense, often unconscious, responses, it can be easily misinterpreted. For all of these reasons, professionals must be especially careful to maintain the highest ethical standards when touching clients or patients is part of their professional responsibilities.

Understandably, we want to maintain control over who touches us and how we are touched. Children, the elderly, and anyone who is ill or injured lose a measure of this control. Restraining implies an even further loss of
control. Touching or restraining patients without their express agreement is unethical as well as illegal.

According to Kant, people must be treated as ends in themselves, not as means to an end. Therefore, touching or restraining a client or a patient must not be done only as a means to achieving the professional's goal, but in order to achieve a client's goal as well. For example, although it may be quicker for an X-ray technician to help a patient move into the correct position, some patients may prefer to move on their own, either because moving is painful or because they prefer not to be touched. The professional's goal may be to complete patient X-rays as quickly and efficiently as possible, but the patient's goal may be to remain as independent as possible while getting the X-rays or to minimize pain while getting them. Other patients may appreciate physical assistance in moving or positioning themselves. Treating patients as means in themselves would require helping them to meet their goals in as timely a manner as possible, rather than treating them as a few more bodies in a line-up for X-rays.

According to utilitarianism, the greatest happiness must be achieved for the greatest number of people. Therefore, touching or restraining a client or a patient must be done only when—and only in a way—that benefits and increases the happiness of the patient as well as the health care worker. A caregiver in a nursing home may find that raising the bars at the sides of the beds is the easiest way to ensure that patients do not fall out of bed at night, but mobile residents may find that this impedes their ability to get out of bed on their own. Their unhappiness at being confined in this way must be taken into account. According to contractarianism, we would agree only to those things that would benefit us as patients, since the patient is the more vulnerable one in the relationship and we would not know whether we would turn out to be the patient or the professional.

Consider your present or future profession in the health care field. Under what conditions might you touch a patient in your professional role?

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If you are training to be an X-ray technician, you might have listed lifting patients onto or off the X-ray table, helping them to turn over and adjusting their position before taking the X-ray. If you are training as a physiotherapist, you might have mentioned touching patients in order to apply pressure to or stretch certain muscles, doing joint rotations, applying mechanical muscle stimulants and helping them perform exercises. As a student of dental hygiene, you might have included teeth cleaning, flossing and oral examinations. If you are studying to be a nurse's aid, a home care worker or a caretaker in a home for mentally challenged or elderly residents, you might have listed taking temperatures and blood pressure readings, helping patients into and out of bed, giving them baths and feeding them. If you are a massage therapist or a chiropractor your job consists almost entirely of touching your patients. On
the other hand, if you are a receptionist in a health care setting, there may be very few times when you have physical contact with a patient.

Regardless of how often your work involves touching patients, it is always important to introduce yourself and explain what you are about to do and, if necessary, why. Even when you are just offering simple assistance, it is important to prepare patients before touching them and give them the opportunity to refuse. A simple, “Hello, Mr. Brown. My name is Taryn. I’m here to help you with your dinner,” or “May I help you down the hall, Mrs. Smith?” are courteous ways to inform patients that you are about to touch them, and give them the opportunity to say, “No, thank you.” We will discuss informed consent in the next section.

Touch affects everyone, especially those who are sight or hearing impaired. There are special issues involved in touching these patients. They may not see or hear a health care worker approaching and may be startled, even frightened, by sudden contact. Therefore, even more care must be taken to ensure that they know they are about to be touched and that they consent to it.

Restraining a person infringes even further upon their right to autonomy. Patients cannot legally be kept in hospitals or any care-giving institution against their will, even if it is in their own best interest, unless they are deemed incapable of making decisions and an alternate decision-maker has been appointed. Raising the rails on a hospital bed without the patient’s consent can be considered a restraint. However, health care providers may restrain or confine patients when it is necessary to prevent serious bodily harm either to themselves or to others (Section 7, Ontario Health Care Consent Act, 1996).

Under English common law, which is practised in all the provinces and territories except Quebec, where French civil law is practised, touching or restraining a patient without his or her consent comes under tort law. A tort is any wrong committed by one person against another that may cause some damage, either to person or property. Under tort law, touching or restraining another person is considered battery. Battery is defined as intentionally bringing about non-consensual contact with another person that is harmful or offensive to that person (Linden, p. 40). Harmful or offensive behaviour may be direct, such as pushing a patient forward or backward, or indirect, such as pushing a patient’s walker aside, causing the patient to fall. While the act must be intentional (unintentionally brushing against a patient in a crowded waiting room is not battery) the harm or offense need not be intentional (kissing or hugging a patient without his or her consent is battery). The aim of tort law is to curb violence by making perpetrators responsible to their victims for damages. Acts that are harmful or offensive are viewed as potentially leading to violence because they may cause the victim to retaliate (Linden, pp. 40-41).

Assault is the “intentional creation of the apprehension of imminent harmful or offensive contact” (Linden, p. 42). For example, if a nurse’s aid raises her hand in a threatening manner but does not actually strike a patient, the aide is liable to damages for assault. The situation must be such that it would be reasonable for the victim to assume from the behaviour of the perpetrator that harm was imminent. Therefore, a threat to strike or restrain a patient could be considered assault.

Under French civil law, specific provisions in the Civil Code define the conditions under which a person is liable to another for damages. Anyone
under a duty of care not to cause harm is at fault if he or she fails in that duty or does not behave in accordance with the expected standard of care. Article 3 of the Civil Code states that every person possesses “personality rights,” which include the right to life, personal integrity and inviolability, and respect of name, violation and privacy. The right to privacy implies that individuals have the right to make decisions about their lives free from the interference of others, within the law.

Confidentiality and informed consent are two of the most important issues in the field of health care. At one time, professional paternalism was accepted in caring for patients. Paternalism occurs when a professional makes a decision for another person. Although such a decision would presumably be made in the patient’s best interests because of the professional’s expertise and superior knowledge, paternalism nevertheless deprives a patient of autonomy. Health care professionals are expected to use their greater knowledge to make a diagnosis and determine what treatment plans will help their clients, and then to explain the different options so that clients can make the decision for themselves. While patients often ask for a health care practitioner’s advice on which treatment they should choose or whether or not to proceed with a treatment plan, it is still important to give them the information to decide for themselves and to make sure that they do not feel any pressure to accept the recommended plan.

The individual’s right to autonomy is the basis of consent to treatment legislation. Patient autonomy is recognized in both common law and civil law throughout Canada. In the context of health care, the administration of any medical test, treatment or procedure, or any other intervention, including touch or restraint, is forbidden unless the health professional has first obtained the patient’s consent. The only exception is if the patient is deemed incompetent and an alternative decision-maker gives consent, or if the patient has been injured to the extent that he or she is unable to give consent and those injuries make immediate medical intervention necessary in order to prevent serious bodily harm or death.

Consent may be given verbally or in writing (this is called explicit or expressed consent) or may be implied by the circumstances and the client’s behaviour or expression (this is called implied consent). Examples of implied consent include a patient extending her arm to have her blood drawn for testing, or voluntarily climbing onto an X-ray or massage table. A patient who cannot talk or write can give consent by nodding or refuse consent by frowning, drawing back or shaking his head. Section 11 of the Ontario Health Care Consent Act, 1996, states the elements of informed consent. In Ontario and in most provinces and territories, the following conditions must be met for informed consent to be considered valid:

- The consent must be voluntary. It must have been given without the influence of any emotional pressure or coercion from another person. If possible, a patient should be given sufficient time to reflect on her options and the possible consequences of her decision and not be rushed into deciding quickly. Caregivers should be alert to non-verbal indications of reluctance or of a desire to discontinue the treatment after it has begun. A patient may withdraw consent at any point during her treatment. If she does, her earlier consent is no longer valid.
The consent must be informed. The patient must be given all the information necessary to make his decision. This includes his medical condition and test results, the risks the condition poses, the alternatives open to him for treating the condition and the potential benefits and material risks associated with the proposed treatment, including the consequences of non-treatment. A material risk is one that a reasonable person would want to know about before deciding to undergo a particular treatment or before deciding not to accept treatment. If the patient isn’t fully informed or is misled by being given incomplete information, the consent is invalid.

The information must be understood. It is the responsibility of the health practitioner to make sure of this. There are many reasons why even competent patients may not understand the information they have been given. An agitated state of mind (caused by fear or pain) might make it difficult to take in information. Language issues might pose a barrier, either because a patient doesn’t speak English or has a limited knowledge of the language, or because she isn’t familiar with the medical terms used by the health practitioner. Literacy may be an issue if the patient has been given brochures or written material explaining the procedure. There may be a need for further communication if the patient is not able to take in all of the information at once, or if she thinks of additional questions later.

The consent must be specific to the proposed treatment or procedure. Consent cannot be generalized. For example, if a patient consents to blood tests, it does not mean that he has consented to X-rays which he has not been consulted about. However, a health practitioner may assume that consent to a treatment includes consent to minor adjustments in the treatment or to continuation of the treatment in a different location provided the benefits, significant risks and possible side effects are similar to the original treatment.

The consent may be specific to a certain practitioner. Patients who have consented to treatment by their regular health practitioner cannot be assumed to have automatically consented to the same treatment by a substitute caregiver, particularly if the substitute is less qualified or is a different type of health practitioner.

The patient must be legally capable. Depending on the province, a minor under a certain age may not be legally qualified to consent. Patients who are mentally incompetent are also legally incapable of consenting. If a patient is deemed not competent, an alternative or substitute decision-maker will be appointed.

Any health care practitioner who does not ensure that full, voluntary, informed consent has been given—either explicitly in words or writing, or implicitly by behaviour or gestures—risks being found liable at least for negligence. In the case of a complete failure to obtain consent (other than in life-threatening emergencies) or of obtaining consent by fraud, the practitioner may be found guilty of battery. In some provinces, written consent must always be obtained. If verbal or implicit consent is obtained, the health practitioner should document the information that was explained, how the consent was given and, if deemed necessary, the steps taken to ensure that the information was understood. Notes to this effect should be signed and dated by the health care worker and included in a patient’s record.
In the case of an incompetent or temporarily incapacitated patient, a substitute decision-maker will be chosen. In most cases a physician must determine that the patient is incompetent or incapacitated. While there are no clear rules about making this decision, the following questions will likely be considered:

- Is the patient able to communicate choices consistently over a period of time?
- Is the patient able to understand the information needed to make the choice?
- Is the patient able to evaluate his condition and the alternatives?
- Is the patient able to weigh the options and arrive at a decision?

A person is always presumed to be competent unless a health care practitioner has grounds to believe otherwise, such as a lack of rational responses, erratic behaviour or obvious, ongoing confusion (Section 4, Health Care Consent Act, 1996). A patient may appeal a finding of incompetence by a health care practitioner. In Ontario, such an appeal would be heard by the Consent and Capacity Board.

The substitute decision-maker is chosen by the best interests standard—that is, someone who speaks for the best interests of the patient. This person should make decisions based on what the patient would likely have chosen if she were able to decide for herself. In order to do this, the substitute decision-maker should consider whether the proposed treatment is likely to improve the patient’s condition, prevent the condition from deteriorating or reduce the extent of any deterioration, and whether the benefits of the treatment outweigh its risks. The decision-maker should also consider whether a less intrusive treatment would be equally beneficial to the patient and what the effects of non-treatment would be (Section 21, Health Care Consent Act, 1996). Section 20 of the Health Care Consent Act, 1996, establishes the following hierarchy of substitute decision-makers:

- a guardian appointed by the court
- an attorney for personal care acting under a power of attorney
- the incapable person’s representative appointed by the board
- the patient’s spouse or partner
- the patient’s parent or child
- a person in lawful custody of the patient (such as a representative of the Children’s Aid Society)
- the patient’s brother or sister
- any other relative of the patient

The following legislation regulates the conditions and procedures for informed consent, competency and substitute decision-makers:

- In Ontario, the Health Care Consent Act, 1996 and the Substitute Decisions Act, 1992
- In Manitoba, the Health Care Directives Act, 1993
- In Prince Edward Island, the Consent to Treatment and Health Care Directives Act, 1996, along with the Adult Protection Act, the Mental Health Act, the Public Health Act and the Public Trustee Act
- In Newfoundland, the Advanced Care Directives and Substitute Health Care Decision Makers Act, 1995
EXERCISE 6.8

Obtaining Informed Consent

In small groups, review the legislation for your province or territory that relate to informed consent, competency and substitute decision-makers. Create a set of steps that you would follow in your health care practice to obtain consent from your patients. Consider the following questions:

1. When would implied consent be acceptable? How would you know consent was implied?

2. When would you need consent from a substitute decision-maker?

3. Under what conditions would you want written consent?

4. What steps would you follow to obtain written informed consent?
Advance Directives

Advance directives, also known as living wills, are written instructions indicating what health care measures an individual would choose if he or she became unable to make those decisions. In the event of a serious injury (such as coma) or mental incapacity, where lifesaving or life-prolonging measures are needed, if no known wishes have been previously recorded by the patient, a substitute decision-maker will make the decisions.

Advance directives are not legally recognized in every province, but they are legally binding in the following provinces through the named legislation:

- In Ontario, the Substitute Decisions Act, 1992
- In Manitoba, the Health Care Directives Act
- In Nova Scotia, the Medical Consent Act
- In Alberta, the Personal Directives Act
- In British Columbia, the Representation Agreements Act has been proposed but not yet passed.

An advance directive must include instructions specifying which life-sustaining measures should or should not be undertaken in specific situations as well as a signed proxy identifying a substitute decision-maker in the event one is needed.

EXERCISE 6.9

Writing an Advance Directive (Living Will)

The University of Toronto Joint Centre for Bioethics has published a comprehensive living will. It is available through the University of Toronto website. Consider how you would feel if you became incapacitated, and use this form to write your own advance directive. After you have written it, be sure to discuss it with your partner or family.

"We deliberate not about ends, but about the means to attain ends: no physician deliberates whether he should cure, no orator whether he should be convincing, no statesman whether he should establish law and order, nor does any expert deliberate about the end of his profession. We take the end for granted, and then consider in what manner and by what means it can be realized."

—ARISTOTLE (384–322 BC)