

# TABLE OF CONTENTS

## Volume 1

<i>List of Contributors</i> .....	iii
<i>Foreword</i> .....	xxxiii
<i>Table of Cases</i> .....	cv
<b>PART I ABORIGINAL</b> .....	1
<b>Aboriginal</b> — <i>Jack Woodward</i> .....	3
1. Aboriginal Law Litigation.....	3
2. Basic Principles of Pleadings under Section 35 of the <i>Constitution Act, 1982</i> .....	5
3. Aboriginal Title.....	8
4. Failure to Consult Regarding Section 35 Rights: A Challenge to a Federal Order in Council [ <i>Gitxaala</i> ].....	15
5. Inadequate Consultation on a “strategic, higher level decision” [ <i>Chartrand</i> ].....	18
6. Trespass to a Reserve; Action for Ejectment.....	25
7. A Charter Challenge to the Customary Laws of a First Nation.....	29
8. Breach of Fiduciary Duty by Chief and Council; Return of Bonus Payments.....	31
<b>PART II ARBITRATION</b> .....	33
<b>Arbitration</b> — <i>Alexander Gay and Alexandre Kaufman</i> .....	35
I. INTRODUCTION.....	35
1. Arbitration Agreement Defined.....	37
2. Treaty Requirements.....	38
3. <i>Ad Hoc</i> Arbitration Versus Institutional Arbitration.....	38
4. Rules that Guide the Arbitration.....	40
5. Defining the Scope of the Dispute.....	41
6. Location of Arbitration.....	42
7. Applicable <i>Lex Arbitri</i> .....	42
8. Governing Law of the Contract.....	42
9. Naming of Arbitrators/Number of Arbitrators.....	43
10. Replacement Arbitrator.....	44
11. Language.....	44
12. Preservation Measures.....	45
13. Document Production.....	46
14. Confidentiality.....	47
15. Allocation of Costs and Fees.....	48
16. Qualifications of the Arbitrators.....	48

CANADIAN PRECEDENTS OF PLEADINGS

17. Time Limits .....	49
18. Finality of Arbitration .....	50
19. Multi-Tier Dispute Clauses.....	51
20. Multiparty Arbitration .....	52
21. Multicontract Arbitration.....	52
22. Limitation of Liability Clauses .....	53
23. Punitive Damages.....	53
24. Online Arbitrations .....	54
25. Draft of Proposed Award.....	55
II. APPENDIX “A” — SAMPLE CLAUSES.....	55
III. APPENDIX “B” — SAMPLE NOTICE OF APPLICATION TO APPEAL AWARD .....	63
IV. APPENDIX “C” — LIST OF ARBITRAL INSTITUTIONS .....	66
<b>PART III AVIATION</b> .....	71
<b>Aviation</b> — <i>Carlos P. Martins and Andrew MacDonald</i> .....	73
I. INTRODUCTION .....	74
1. Which Convention Applies? .....	75
2. “Strong” Exclusivity of the Conventions in Canada .....	76
3. Limitation/Prescription Periods .....	77
4. Punitive Damages.....	78
5. Jurisdiction .....	79
II. PERSONAL INJURY CLAIMS AGAINST AIR CARRIERS .....	79
1. Embarkation/Disembarkation .....	79
2. The Concept of “Accident” .....	80
3. What is Bodily Injury? .....	82
4. Limits of Liability for Bodily Injury .....	83
5. Contributory Negligence and Exoneration of Air Carrier .....	84
III. DELAY CLAIMS AGAINST AIR CARRIERS .....	84
1. Limits of Liability in Delay Cases .....	84
IV. BAGGAGE CLAIMS AGAINST AIR CARRIERS.....	85
1. Liability for Destruction or Loss of, or Damage to, Baggage and Defences.....	86
2. Timely Notice of Complaint.....	86
3. Limitation of Liability and Special Declaration of Interest .....	87
4. Documentary Requirements .....	88
V. CARGO CLAIMS AGAINST AIR CARRIERS.....	89
1. Liability for Destruction or Loss of, or Damage to, Cargo.....	89
2. Who May Sue the Carrier .....	90
3. Carriage Defences Available to Carrier.....	90
4. Contributory Negligence .....	91
5. Timely Notice of Complaint .....	92

## TABLE OF CONTENTS

6. Limitation of Liability and Special Declaration of Interest .....	92
7. Documentary Requirements .....	93
VI. FORMS OF CLAIMS .....	94
1. Claim Against an Air Carrier (Personal Injury Action).....	94
2. Defence of an Air Carrier (Personal Injury Action).....	99
3. Claim Against an Air Carrier (Delay/Lost Baggage).....	102
4. Defence of an Air Carrier (Delay/Lost Baggage) .....	103
5. Claim Against an Air Carrier (Lost/Damaged Cargo Action)...	107
6. Defence of an Air Carrier (Lost/Damaged Cargo Action) .....	109
<b>PART IV CLASS ACTIONS</b> .....	113
<b>Class Actions</b> — <i>John A. Campion, Sarah J. Armstrong and</i> <i>Antonio Di Domenico</i> .....	115
<b>PART I — COMMENTARY</b> .....	116
1. Introduction .....	116
2. What is a Class Proceeding? .....	116
3. History of Class Proceedings in Canada .....	117
4. Class Actions Procedure.....	117
(a) Commencing an action, pre-certification motions and certification .....	117
(i) Does the pleading disclose a cause of action? .....	121
(ii) Is there an identifiable class? .....	123
(iii) Does the claim raise common issues?.....	126
(iv) Is a class proceeding the preferable procedure?.....	129
(A) Access to justice .....	131
(B) Judicial economy.....	132
(C) Behaviour modification .....	133
(v) Will the proposed representative plaintiff adequately represent the class? .....	133
(vi) Has the representative plaintiff put forward an adequate litigation plan?.....	134
(b) Notice of class certification .....	135
(c) Appeals, defence, discovery and decertification.....	135
(d) Common issues trial(s) and adjudication or assessment of individual claims .....	137
(e) Costs.....	138
(f) Settlement .....	141
(g) National class actions and private international law .....	144
(h) Conclusion .....	147
Part II — PRECEDENTS .....	147
Precedent 1: Statement of Claim.....	147
Precedent 2: Notice of Intent to Defend .....	157

## CANADIAN PRECEDENTS OF PLEADINGS

Precedent 3: Statement of Defence.....	158
Precedent 4: Notice of Motion Seeking Certification .....	164
Precedent 5: Affidavit of Proposed Representative Plaintiff .....	168
Precedent 6: Affidavit of Lawyer In Support of Certification.....	173
Precedent 7: Plaintiff's Litigation Plan.....	179
Precedent 8: Affidavit of Corporate Officer in Opposition to Certification.....	184
Precedent 9: Notice of Motion for Leave to Appeal .....	198
Precedent 10: Issued Certification Order .....	207

### **PART V COMPETITION LAW .....**

#### **Private Litigation in Canadian: Competition Law — *Mark Katz and Chantelle Spagnola* .....**

### **PART I — COMMENTARY .....**

1. CANADIAN COMPETITION LAW .....	215
(a) Overview .....	215
(b) Criminal offences .....	216
(i) Conspiracy .....	216
(ii) Bid-rigging .....	218
(iii) Criminal misleading representations .....	218
(c) Civil reviewable practices.....	219
(i) Price maintenance .....	219
(ii) Exclusive dealing/tied selling/market restriction .....	220
(iii) Refusal to deal .....	220
2. Private Actions for Damages.....	221
(a) Overview .....	221
(b) Relation to common law causes of action.....	223
(c) Elements .....	223
(d) Limitation period .....	225
(e) Forum.....	226
(f) Equitable relief and interim/permanent injunctions .....	226
(g) Damages/costs.....	227
(h) Arbitrability of claims .....	227
(i) Sample filings.....	228
3. Class Actions .....	228
(a) Overview .....	228
(b) Certification .....	229
(c) Jurisdiction .....	232
(d) Evidence.....	232
(e) Damages .....	232
(f) Costs.....	233
(g) Sample filings.....	233

TABLE OF CONTENTS

4. Private Applications .....233

    (a) Overview .....233

    (b) Applications for leave — standard .....234

    (c) Applications for leave — process.....235

    (d) Hearings.....237

    (e) Interim injunctions .....238

    (f) Remedies.....238

    (g) Settlements .....238

    (h) Costs.....239

    (i) Appeals .....239

    (j) Sample filings.....240

**PART II — SAMPLE FILINGS .....240**

    Appendix 1 — Statement of Claim under Section 36 of the  
*Competition Act* (Price-Fixing) .....240

    Appendix 2 — Statement of Defence in Response to a Claim  
under Section 36 of the *Competition Act* (Price-Fixing) .....246

    Appendix 3 Notice of Motion — Certification Motion for a Class  
Action under Section 36 of the *Competition Act* (Price-Fixing).....249

    Appendix 4 Statement of Claim for a Class Action under Section  
36 of the *Competition Act* (Price-Fixing) .....252

    Appendix 5 Statement of Defence in Response to a Class Action  
Claim under Section 36 of the *Competition Act* (Price-Fixing) .....260

    Appendix 6 Notice of Application for Leave Pursuant to Section  
103.1 of the *Competition Act* (Refusal to Deal) .....264

    Appendix 7 Notice of Application on the Merits (Refusal to  
Deal).....269

    Appendix 8 Affidavit in Support of Application for Leave  
(Refusal to Deal).....271

    Appendix 9 Response to Application for Leave (Refusal to  
Deal).....273

    Appendix 10 Notice of Appeal to Federal Court of Appeal from  
Denial of Leave (Refusal to Deal) .....277

**PART VI CONSTRUCTION LAW .....281**

**Construction Claims — *Duncan Glaholt* .....283**

**PART I — COMMENTARY .....284**

    1. Introduction.....284

    2. Parties and Forms of Contract .....285

        (a) Parties.....285

        (b) Forms of Contract .....286

    3. Bidding and Tendering .....287

        (a) Basis of Claim.....287

CANADIAN PRECEDENTS OF PLEADINGS

(b) Remedies.....	287
4. Request for Proposals .....	288
5. Delay Claims.....	288
(a) Special Considerations.....	288
6. Extra Work, Changed Work, Defective Work .....	289
(a) Concepts .....	289
(b) Defective work .....	289
7. Payment.....	289
(a) Concepts .....	289
(b) Payment.....	289
8. Claims in Tort.....	290
(a) Concepts .....	290
9. Risk Management Cases .....	291
(a) Concepts .....	291
10. Surety Bonds.....	291
11. Insurance .....	291
12. Liens .....	292
(a) Concepts .....	292
13. Trusts.....	293
(a) Concepts .....	293
<b>PART II — PRECEDENTS .....</b>	<b>293</b>
Precedent 1: Statement of Claim — General Contractor against Owner and Architect — Breach of Contract and Tort .....	293
Precedent 2: Statement of Claim — Contractor against Owner and Architect/Engineer — Subsurface Conditions.....	298
Precedent 3: Statement of Claim — Contractor against Owner — Delay .....	304
Precedent 4: Statement of Claim — Owner against Architect/ Engineer — Breach of Contract and Negligence .....	306
Precedent 5: Statement of Claim — Owner against Contractor and Engineer — Breach of Contract and Tort.....	315
Precedent 6: Statement of Claim — Subcontractor against General Contractor — Breach of Contract (Delay) and Tort.....	323
Precedent 7: Defence and Counterclaim (Engineer Defending against Owner).....	327
Precedent 8: Construction Lien — Defence and Counterclaim of Owner.....	339
Precedent 9: Lien — Statement of Claim Subcontractor against Owner and General Contractor .....	347
Precedent 10: Lien — Statement of Claim General Contractor against Owner .....	349

TABLE OF CONTENTS

Precedent 11: Third Party Claim — Contractor against Subcontractor and Architect..... 353

Precedent 12: Construction Lien — Breach of Trust — Statement of Claim by Supplier..... 355

Precedent 13: Breach of Trust — Statement of Defence (General Contractor Defending against Subcontractor) ..... 362

Precedent 14: Third Party Claim ..... 363

Precedent 15: Reply and Defence to Counterclaim ..... 368

Precedent 16: Statement of Claim — Bid Bond ..... 370

Precedent 17: Statement of Defence — Bid Bond ..... 374

Precedent 18: Statement of Claim — Performance Bond ..... 379

Precedent 19: Statement of Defence — Performance Bond ..... 386

Precedent 20: Statement of Claim — L&M Bond ..... 392

Precedent 21: Statement of Defence — L&M Bond ..... 394

**PART VII CONTRACTS** ..... 397

**Contracts — Mark Gannage** ..... 399

Part I — COMMENTARY ..... 402

1. Introduction ..... 402

2. What is a Contract? ..... 402

3. *Consensus Ad Idem* ..... 403

4. Offer and Acceptance ..... 403

(a) Offer ..... 404

(b) Acceptance ..... 404

5. Criteria of Enforcement ..... 405

6. Consideration ..... 405

7. Reason for Invalidity of Contract ..... 407

8. Capacity to Contract ..... 407

(a) Minor ..... 407

(b) Person of unsound mind ..... 407

(c) Corporations ..... 408

(d) Unincorporated associations ..... 408

(e) The Crown ..... 408

9. Privity ..... 408

10. *Statute of Frauds* ..... 409

11. *Sale of Goods Act* ..... 409

12. Mistake ..... 410

13. Misrepresentation ..... 411

(a) Fraudulent misrepresentation ..... 411

(b) Negligent misrepresentation ..... 412

(c) Innocent misrepresentation ..... 412

(d) Non-disclosure ..... 412

CANADIAN PRECEDENTS OF PLEADINGS

14. Duress.....	413
15. Undue Influence.....	413
16. Unconscionability.....	413
17. Illegality.....	413
18. Conditions Precedent.....	414
19. Terms.....	415
(a) Definition.....	415
(b) Interpreting express terms.....	415
(c) Implied terms.....	418
(d) Variety of terms.....	419
20. Exclusion Clauses.....	419
21. Collateral Contracts.....	420
22. Performance.....	420
(a) Duty to perform.....	420
(b) Time for performance.....	421
(c) Dependency of performance.....	421
(d) Incomplete performance.....	421
(e) Modification of performance.....	421
(f) Discharge of duty to perform.....	422
23. Breach.....	423
(a) Anticipatory breach.....	424
(b) Doctrine of fundamental breach.....	425
24. Frustration.....	426
25. Assignment.....	427
26. Remedies for Breach of Contract.....	427
(a) Options.....	427
(b) Void or voidable?.....	427
(c) Range of Remedies.....	428
27. Damages.....	428
(a) Types.....	428
(i) Compensatory damages (also called “actual damages”).....	428
(ii) General damages (also called “non-pecuniary damages”).....	429
(iii) Pecuniary damages (also called “special damages”).....	429
(iv) Liquidated damages.....	429
(v) Aggravated damages (sometimes also called “mental distress damages”).....	430
(vi) Punitive damages (also called “exemplary damages”).....	430
(vii) Nominal damages.....	431
(b) Principles.....	431

## TABLE OF CONTENTS

28. Overlapping or Alternative Causes of Action.....	432
29. Sources of Contract Law.....	434
30. Supreme Court of Canada Contracts Cases 1959 to present .....	434
31. Some Leading English Contracts Cases .....	448
32. Practical Tips .....	449
33. Outline.....	452
34. Matters that Must Be Specifically Pleaded.....	453
35. Defences.....	454
36. Scope .....	457
37. Pertinent Forms .....	457
38. Small Claims Court.....	461
39. Selected Bibliography (Canadian).....	476
<b>PART II — PRECEDENTS .....</b>	<b>478</b>
Precedent 1. Oral Contract for Services — Services Not Provided — Statement of Claim .....	478
Precedent 2. Car Rental Agreement — Car Damaged — Statement of Claim .....	479
Precedent 3. Driveway Construction Contract — Deficiencies — Statement of Claim.....	480
Precedent 4. Defective Consumer Goods — Insurer’s Subrogated Claim; Negligence; Breach of Contract/Warranty; Negligent Misrepresentation — Statement of Claim .....	482
Precedent 5. Storage of Goods — Goods Destroyed — Statement of Claim .....	484
Precedent 6. Supply and Delivery of Goods — Partial Payment — Statement of Claim .....	485
Precedent 7. Unpaid Construction Services — Breach of Contract; Unjust Enrichment; Breach of Trust under the <i>Construction Lien Act</i> — Statement of Claim .....	488
Precedent 8. Franchise and Sub-lease Agreements — Default — Statement of Claim.....	490
Precedent 9. Banking — Loan Default; Non-payment by Borrower and Guarantors — Statement of Claim.....	492
Precedent 10. Consumer Contract — Breach; Unfair Practices — Statement of Claim.....	495
Precedent 11. Bulk Cable Services Agreement — Breach; Injunction; Declaration; Damages — Statement of Claim.....	499
Precedent 12. Pharmacy Licence Agreement — Breach; Interference with Obligations; Improper Solicitation — Statement of Claim.....	502
Precedent 13. Partnership Agreement — Breach; Attempted Unilateral Dissolution — Statement of Claim.....	506

CANADIAN PRECEDENTS OF PLEADINGS

Precedent 14. Share Purchase Agreement — Damages; Rescission  
— Statement of Claim..... 508

Precedent 15. Post-Retirement Benefits Entitlement — Money  
Owed — Statement of Claim..... 512

Precedent 16. Condominium Construction — Deficiencies —  
Statement of Claim ..... 517

Precedent 17. Property Insurance Contract — Insurer’s and  
Agent’s Breach of Contract and Negligence — Statement of  
Claim ..... 519

Precedent 18. Change of Control Agreement — Breach; Money  
Owed — Application..... 523

Precedent 19. Agreement of Purchase and Sale of Land —  
Binding Agreement; Declaration; Specific Performance;  
Damages — Application ..... 525

Precedent 20. Sale of Goods — Non-payment Because of  
Defective Goods and Failure to Honour Warranty — Statement  
of Defence..... 528

**PART VIII CORPORATE PLEADINGS..... 531**

**Corporate Pleadings — Larry P. Lowenstein, Craig T. Lockwood and  
Robert Carson ..... 533**

**PART I — COMMENTARY ..... 534**

1. Introduction ..... 534

2. Preliminary Considerations Regarding Corporate Parties..... 535

3. Limitations Issues..... 536

4. The Oppression Remedy ..... 537

(a) The applicable statute ..... 537

(b) Standing..... 537

(c) Proper defendants and respondents ..... 540

(d) Procedural considerations..... 541

(i) The applicable court..... 541

(ii) Action or application ..... 541

(iii) Class proceedings ..... 542

(iv) Arbitration clauses ..... 542

(e) The central elements of an oppression claim..... 542

(i) Reasonable expectations..... 543

(ii) Corporate conduct ..... 543

(iii) The standard of conduct: Oppression, unfair prejudice  
and/or unfair disregard..... 544

(f) Damages ..... 544

(g) Remedies..... 544

5. The Derivative Action ..... 546

TABLE OF CONTENTS

(a)	The requirements for leave .....	546
(i)	Notice to the board of directors .....	546
(ii)	Standing.....	548
(iii)	Good faith .....	548
(iv)	Interests of the corporation .....	549
(b)	Procedural considerations.....	550
(i)	The applicable court.....	550
(ii)	Seeking leave.....	550
(iii)	Action.....	550
(iv)	Limitation period .....	551
(c)	The cause of action .....	551
(d)	Remedies.....	551
(e)	Costs in a derivative action .....	551
6.	Interplay Between the Oppression Remedy and the Derivative Action .....	552
7.	Securities Class Actions for Misrepresentation.....	554
(a)	Common law pleadings .....	554
(b)	Statutory claims for secondary market misrepresentation ..	555
(i)	The right of action .....	556
(ii)	The statutory protections for defendants .....	557
(A)	The leave requirement .....	557
(B)	Damages calculations and liability limits .....	558
(C)	Statutory defences .....	559
(c)	Statutory claims for primary market misrepresentation.....	560
<b>PART II — PRECEDENTS .....</b>		<b>561</b>
	Precedent 1: Oppression Remedy — Statement of Claim .....	561
	Precedent 2: Derivative Action — Notice of Application for Leave to Commence a Derivative Action.....	566
	Precedent 3: Derivative Action — Statement of Claim.....	569
	Precedent 4: Securities Class Actions — Notice of Motion for Leave to Commence an Action under Part XXIII.1 of the Ontario <i>Securities Act</i> .....	571
	Precedent 5: Securities Class Actions — Statement of Claim under Part XXIII.1 of the Ontario <i>Securities Act</i> .....	573
<b>PART IX DEBTOR-CREDITOR .....</b>		<b>577</b>
<b>Debtor and Creditor — Michael Tweedie .....</b>		<b>579</b>
1.	Issuance .....	581
2.	Renewal .....	582
3.	<i>Alias Writ</i> .....	583
4.	Debtor’s Estate .....	585
5.	Competing Interests .....	586

CANADIAN PRECEDENTS OF PLEADINGS

6.	Requisition.....	588
7.	Direction to Enforce Writ of Seizure and Sale.....	588
	(a) Sale of Real Property Under Execution.....	588
8.	Amending Debtor's Name.....	591
	(a) Withdrawal of an Execution.....	592
9.	Privacy Concerns.....	593
	(a) Garnishment.....	594
	(b) Procedure at the Court Counter.....	596
	(c) Termination.....	597
	(d) Garnishment Hearing.....	598
	Precedent 1 — Writ of Seizure and Sale.....	600
	Precedent 2 — Requisition.....	602
	Precedent 3 — Direction to Enforce Writ of Seizure and Sale.....	603
	Precedent 4 — Request to Renew Writ of Seizure and Sale.....	604
	Precedent 5 — Requisition for Garnishment.....	605
	Precedent 6 — Garnishment Affidavit.....	606
	Precedent 7 — Garnishee's Statement.....	608
	Precedent 8 — Garnishment Motion.....	609
	Precedent 9 — Affidavit in Support of a Garnishment Motion.....	612
10.	<i>Mareva</i> Injunctions.....	618
	(a) Introduction.....	618
	(b) Purpose.....	620
	(c) Jurisdiction.....	621
	(d) Availability.....	623
	(e) The Test.....	624
	(i) <i>Prima Facie</i> Case.....	626
	(f) Balance of Convenience/Risk of Dissipation.....	627
	(g) Balance of Convenience/Irreparable Harm.....	628
	(h) The Fraud Exception.....	630
	(i) Undertaking as to Damages.....	632
	(j) Variation.....	633
	(k) Statement of Claim.....	637
	Precedent 10 — Motion for <i>Mareva</i> Injunction.....	641
	Precedent 11 — Affidavit in Support of <i>Mareva</i> Injunction.....	646
	Precedent 12 — Motion to Vary <i>Mareva</i> Order.....	659
	<b>PART X DEFAMATION</b> .....	665
	<b>Libel and Slander</b> — <i>Howard Winkler</i> .....	667
	<b>PART I — COMMENTARY</b> .....	668
	1. Introduction.....	668
	2. Glossary.....	669
	3. Limitation Periods.....	671

TABLE OF CONTENTS

4. Notices of Libel .....	673
5. Statements of Claim .....	673
6. Jury Notices .....	675
7. Notice of Motion for Interim Injunction .....	675
8. Notice of Motion for Disclosure of True Identity of Defendant .....	675
9. Apologies and Retractions.....	676
10. Statements of Defence — General .....	677
11. Preliminary Motions by a Defendant.....	680
(a) Motions for a determination of a point of law — whether the words complained of are capable of a defamatory meaning.....	680
(b) Motions for security for costs.....	680
12. Motions for Summary Judgment .....	680
13. Replies .....	681
14. Section 137.1 — <i>Courts of Justice Act</i> — Motion.....	682
<b>PART II — PRECEDENTS .....</b>	<b>683</b>
Precedent 1: Notice of Libel — Publication .....	683
Precedent 2: Notice of Libel — Broadcasts.....	684
Precedent 3: Statement of Claim — Media Defendants.....	685
Precedent 4: Statement of Claim — Non-Media Defendant .....	689
Precedent 5: Statement of Claim — Slander .....	691
Precedent 6: Jury Notice .....	693
Precedent 7: Notice of Motion for Interim Injunction .....	694
Precedent 8: Notice of Motion for Disclosure of the Identity of Defendant.....	695
Precedent 9: Statement of Defence — Media .....	698
Precedent 10: Statement of Defence — Non-Media .....	701
Precedent 11: Reply.....	704
Precedent 12: Section 137.1 — <i>Courts of Justice Act</i> — Notice of Motion.....	705
 <b>PART XI EMPLOYMENT AND LABOUR LAW .....</b>	 <b>709</b>
<b>Wrongful Dismissal — <i>Stuart Rudner and Erik Marshall</i> .....</b>	<b>711</b>
<b>INTRODUCTION .....</b>	<b>713</b>
<b>PART I — STATEMENT OF CLAIM FOR WRONGFUL DISMISSAL .....</b>	<b>715</b>
1. Liability .....	715
(a) Where no just cause alleged — claim for notice or pay in lieu.....	715
(i) Constructive dismissal .....	725
(ii) Successor employers .....	728

CANADIAN PRECEDENTS OF PLEADINGS

(iii) Failure to provide notice in accordance with a termination agreement.....	729
(b) Where just cause alleged.....	730
(c) Where just cause alleged but facts do not preclude statutory notice and severance pay .....	734
2. Damages .....	735
(a) Notice of termination .....	735
(i) Common law notice period .....	735
(A) Inducement .....	738
(B) Period of non-competition or non-solicitation .....	739
(ii) Statutory notice period.....	740
(iii) Contractual notice period .....	741
(b) Entitlements during the notice period .....	744
(i) Salary, salary increases and overtime.....	744
(ii) Commissions .....	745
(iii) Bonuses.....	746
(iv) Vacation and vacation pay .....	747
(v) Insurance benefits — medical, dental and disability....	748
(vi) Fringe benefits .....	749
(vii) Retirement/pension benefits.....	750
(viii)Employment insurance and Canada Pension Plan contributions .....	751
(c) Mitigation expenses.....	752
(d) Moral damages — damages for bad faith in the course of dismissal — “The Damages Formerly Known As Wallace” .....	753
(e) Aggravated damages — damages for mental distress .....	755
(f) Punitive and exemplary damages.....	757
(g) Damages for breach of human rights legislation .....	759
<b>PART II — STATEMENT OF DEFENCE FOR WRONGFUL DISMISSAL .....</b>	<b>761</b>
1. Where No Just Cause Alleged .....	761
(a) Notice entitlement limited to statutory minimums .....	765
(b) Constructive dismissal .....	766
(c) Resignation/job abandonment .....	767
(d) Frustration — illness.....	769
(e) Independent contractor .....	771
(f) Fixed-term contract.....	773
(g) Successor employers .....	776
2. Where Just Cause Alleged .....	777
(a) General .....	777
(b) Poor performance — incompetence .....	780

TABLE OF CONTENTS

(c)	Absenteeism — lateness.....	782
(d)	Impairment — intoxication .....	783
(e)	Insubordination and insolence.....	785
(f)	Dishonesty .....	789
(g)	Theft.....	791
(h)	Sexual harassment.....	793
(i)	Breach of fiduciary duty.....	795
(j)	Breach of policy.....	797
(k)	Off-duty, online misconduct .....	798
3.	Damages .....	802
(a)	Notice of termination.....	802
(i)	Inducement .....	802
(ii)	Period of non-competition or non-solicitation .....	803
(b)	Entitlements during the notice period .....	804
(i)	Salary, salary increases, bonuses and overtime.....	804
(ii)	Commissions .....	805
(iii)	Vacation and vacation pay .....	806
(iv)	Insurance benefits — medical, dental and disability....	806
(v)	Fringe benefits .....	807
(vi)	Retirement/pension benefits.....	807
(vii)	Employment Insurance and Canada Pension Plan contributions .....	808
(c)	Deductions: income earned — benefits received during notice period .....	808
(d)	Failure to mitigate damages .....	810
(e)	Mitigation expenses.....	811
(f)	Moral damages — damages for bad faith in the course of dismissal — “the damages formerly known as Wallace” .....	811
(g)	Aggravated damages — damages for mental distress .....	812
(h)	Punitive and exemplary damages.....	813
(i)	Damages for breach of human rights legislation .....	814
<b>PART III — REPLY TO STATEMENT OF DEFENCE FOR WRONGFUL DISMISSAL.....</b>		<b>815</b>
1.	General — Confirmation of Dismissal and Obligation to Provide Pay in Lieu of Notice .....	815
2.	Responses to Specific Allegations in Statement of Defence .....	817
(a)	Just cause.....	817
(b)	Resignation/job abandonment .....	821
(c)	Frustration — illness.....	822
(d)	Independent contractor .....	823
(e)	Fixed-term contract.....	825

CANADIAN PRECEDENTS OF PLEADINGS

(f) Contractual notice..... 826  
APPENDIX A — STATUTORY RULES OF PLEADING ..... 829

**Injunctions in the Labour and Employment Contexts —**

*Bonnie Roberts Jones* ..... 835

**PART I — COMMENTARY** ..... 835

1. Introduction ..... 835  
2. Employment — Injunctions against Departing Employees  
— Injunctions to Prevent Loss of Confidential  
Information — Injunctions to Prevent Loss of Clients  
and Employees ..... 836  
3. Labour — Injunctions in the Strike Context..... 837

**PART II — PRECEDENTS** ..... 838

1. Introduction ..... 838  
2. Employment — Injunctions against Departing Employees ..... 838  
(a) Precedent 1: Statement of Claim..... 838  
(b) Precedent 2: Notice of Motion ..... 841  
(c) Precedent 3: Affidavit — Background ..... 844  
(d) Precedent 4: Affidavit — Technical Information..... 847  
(e) Precedent 5: Order ..... 850  
3. Labour — Injunctions in the Strike Context..... 852  
(a) Precedent 1: Statement of Claim..... 852  
(b) Precedent 2: Notice of Motion ..... 856  
(c) Precedent 3: Affidavit of Management ..... 860  
(d) Precedent 4: Affidavit of Picketing Activities ..... 862  
(e) Precedent 5: Order ..... 864

**Employment Standards Litigation — *T. Stephen Lavender***..... 867

1. Introduction ..... 867  
2. The Scheme of the *Employment Standards Act, 2000*..... 868  
3. Issues relating to Civil Litigation in Enforcement of the  
*Employment Standards Act, 2000* ..... 869  
(a) Introduction..... 869  
(b) Greater right or benefit ..... 869  
(i) Draft pleading in defence ..... 870  
(c) Notice periods at common law ..... 870  
(i) Draft pleadings ..... 877  
(d) Entitlement to termination and severance pay ..... 878  
(i) Draft pleadings ..... 879  
(e) Aggravated and Punitive Damages ..... 880  
(i) Draft pleadings ..... 882

TABLE OF CONTENTS

4.	Administrative Enforcement of the <i>Employment Standards Act, 2000</i> .....	883
	(a) Discussion with employer .....	883
	(b) Investigation by employment standards officer .....	884
	(c) Appeal to the Ontario Labour Relations Board.....	885
5.	Appendix .....	885
	(a) Sample statement of claim.....	885
	(b) Sample statement of defence.....	888
	(c) Sample reply .....	892

**Volume 2**

<b>PART XII ENVIRONMENTAL LAW</b> .....	895	
<b>Environmental Law</b> — <i>Paula Lombardi and Kirsten Mikadze</i> .....	897	
<b>PART I — COMMENTARY</b> .....	898	
1. Introduction .....	898	
2. Defending Environmental Prosecutions .....	899	
	(a) Kinds of offences .....	900
	(b) Establishing the offence.....	901
	(c) Defences.....	901
	(i) Defence of due diligence.....	901
	(ii) Officially induced error .....	902
	(iii) Mistake of fact.....	903
	(d) Penalties.....	903
	(e) Procedure.....	904
	(i) Unreasonable search and seizure: section 8 of the Charter .....	904
	(f) Laying an information .....	906
	(i) Limitations.....	906
	(ii) Crown disclosure.....	906
	(iii) The rule from <i>R. v. Kienapple</i> .....	906
	(iv) Unreasonable delay: subsection 11(b) of the Charter .....	908
3. Environmental Torts .....	908	
	(a) Introduction .....	908
	(b) Nuisance .....	909
	(i) Private nuisance .....	909
	(ii) Public nuisance .....	910
	(c) Negligence.....	911
	(d) <i>Rylands v. Fletcher</i> /Strict Liability .....	911
	(e) Trespass .....	913
	(f) Statutory claims .....	913

CANADIAN PRECEDENTS OF PLEADINGS

(g) Defences.....	914
(i) Due diligence .....	914
(ii) <i>Caveat emptor</i> .....	914
(iii) Landlord not responsible for torts of the tenant .....	915
(h) Remedies.....	915
(i) Damages .....	915
(ii) Injunctions and other orders .....	916
4. Administrative Law.....	916
(a) Administrative decision-makers in the environmental context .....	917
(b) Judicial reviews .....	918
<b>PART II — PRECEDENTS .....</b>	<b>920</b>
Precedent 1: Statement of Claim (Contaminated Land Action).....	920
Precedent 2: Statement of Defence (Contaminated Land Action).....	927
Precedent 3: Notice of Appeal (Environmental Review Tribunal) ....	931
Precedent 4: Motion for Stay (Environmental Review Tribunal).....	933
Precedent 5: Motion for Particulars (Environmental Review Tribunal).....	935
Precedent 6: Agreed Statement of Facts (Environmental Prosecution) .....	936
<b>PART XIII EQUITABLE REMEDIES .....</b>	<b>939</b>
<b>Equitable Remedies — <i>Mark Gannage</i>.....</b>	<b>941</b>
Introduction.....	942
<b>PART I — INJUNCTION .....</b>	<b>945</b>
Precedent 1. Breach of Dealership Agreement (Also Declaration, Specific Performance) .....	948
Precedent 2. Trespass .....	950
Precedent 3. Preventing Lawyer From Acting.....	952
<b>PART II — SPECIFIC PERFORMANCE.....</b>	<b>954</b>
Precedent 1. Employment Contract .....	957
Precedent 2. Agreement of Purchase and Sale (Also Declaration) ....	959
Precedent 3. License Agreement (Also Declaration, Injunction) .....	960
Precedent 4. Shareholder Agreement (Also Declaration, Constructive Trust, Account, Disgorgement) .....	964
<b>PART III — RECTIFICATION.....</b>	<b>967</b>
Precedent 1. Lease (Also Declaration, Specific Performance) .....	970
Precedent 2. Agreement of Entitlement to Pension Benefit (Mutual Mistake) (Also Declaration, Account).....	972
Precedent 3. Asset Purchase Agreement (Unilateral Mistake).....	975
<b>PART IV — RESCISSION.....</b>	<b>978</b>
Precedent 1. Contract of Sale of Goods (Mutual Mistake).....	979

TABLE OF CONTENTS

Precedent 2. Medical Software Agreement ..... 980  
 Precedent 3. Agreement of Purchase and Sale of Real Property ..... 982  
**PART V — ACCOUNT OF PROFITS** ..... 984  
 Precedent 1. Wrongful Dismissal ..... 986  
 Precedent 2. Breach of Covenant against Competition  
 (Also Injunction) ..... 988  
 Precedent 3. Lawyer’s Trust Funds (Also Declaration) ..... 990  
**PART VI — APPOINTMENT OF RECEIVER** ..... 993  
 Precedent 1. Winding up Company’s Affairs and Distributing  
 Its Property ..... 995  
 Precedent 2. Breach of Indemnity Agreement ..... 997  
 Precedent 3. Appointment of Receiver and Manager over  
 Motion Pictures ..... 999  
**PART VII — DECLARATION** ..... 1003  
 Precedent 1. No Right, Title or Interest in Real Property ..... 1004  
 Precedent 2. Unjust Enrichment from Wrongful Conduct  
 (Also Account) ..... 1007  
 Precedent 3. Account as Constructive Trustees; Contract Void  
 (Also Account, Rescission, Injunction, Appointment of  
 Receiver) ..... 1009  
**SELECTED BIBLIOGRAPHY** ..... 1014

**PART XIV FAMILY LAW** ..... 1017  
**Family Law — Harold Niman and Richard Niman** ..... 1019

1. Introduction: Family Law Pleadings in Canada ..... 1020
  - (a) Pleadings generally in family law ..... 1021
  - (b) Application, answer and reply ..... 1021
  - (c) Amendments ..... 1022
  - (d) Jurisdiction ..... 1022
  - (e) Conferences ..... 1023
  - (f) Marriage ..... 1023
    - (i) Annulment ..... 1024
    - (ii) Divorce ..... 1024
  - (g) Family dissolution: legislation ..... 1024
2. Section 1: Statute Mechanics ..... 1025
  - (a) The *Family Law Act* ..... 1025
    - (i) Relation to *Succession Law Reform Act* ..... 1025
  - (b) The *Divorce Act* ..... 1026
  - (c) The *Children’s Law Reform Act* ..... 1026
    - (i) The Best Interests of the Child Test ..... 1027
  - (d) The *Child and Family Services Act* ..... 1027
  - (e) The *Arbitration Act* ..... 1028

CANADIAN PRECEDENTS OF PLEADINGS

(f)	The <i>Family Responsibility and Support Arrears Enforcement Act</i> .....	1028
3.	Section 2: Basic Pleadings.....	1028
(a)	Part 1: The Application — Form 8 .....	1028
(i)	Background/overview .....	1030
(ii)	Custody .....	1030
(iii)	Access (parenting time) .....	1031
(iv)	Child support .....	1031
(v)	Spousal support .....	1032
(vi)	Other claims.....	1033
(vii)	The financial statement and supporting documents.....	1033
(viii)	Family property .....	1034
(A)	Equalization.....	1034
(B)	Matrimonial Home .....	1035
(C)	Net Family Property Statement — Form 13B and Comparison of Net Family Property Statement — Form 13C .....	1035
(b)	Part 2: The Answer — Form 10 .....	1035
(c)	Part 3: The Reply — Form 10A.....	1037
4.	Section 3: Conferences.....	1037
(a)	Standard conferences.....	1037
(i)	Case conference — case conference brief form 17A .....	1037
(ii)	Settlement conference — settlement conference brief form 17C .....	1038
(iii)	Trial management conference — trial management conference brief form 17E .....	1039
5.	Section 4: Motions for Temporary Orders.....	1040
(a)	Part 1: Regular Motion Mechanics.....	1040
(i)	Form 14A affidavit .....	1040
(ii)	Form 14B motion form.....	1040
(iii)	Form 14 notice of motion .....	1040
(iv)	Form 14C confirmation.....	1041
(v)	The factum.....	1041
(b)	Part 2: Urgent Motion Mechanics .....	1042
(i)	Emergency without notice — ( <i>ex parte</i> ) .....	1042
(c)	Part 3: Motion to Change .....	1042
(i)	Motion to change — form 15.....	1042
(ii)	Change information form — form 15A .....	1042
(iii)	Response to motion to change — form 15B .....	1043
	<b>PART XV IMMIGRATION LAW.....</b>	<b>1045</b>
	<b>Leave Applications &amp; Judicial Reviews — Mario Bellissimo .....</b>	<b>1047</b>

TABLE OF CONTENTS

1.	Executive Summary .....	1048
2.	Statutory Framework .....	1049
3.	Applications for Judicial Review .....	1051
	(a) Stage 1: The “leave” application.....	1051
	(i) Applicant’s affidavit .....	1053
	(ii) Memorandum of fact and law .....	1054
	(iii) Standard of review .....	1055
	A. Content of duty of fairness: <i>Baker</i> test.....	1056
	B. <i>Dunsmuir</i> .....	1058
	C. Jurisprudence since <i>Dunsmuir</i> .....	1058
	(iv) Respondent’s record & applicant’s reply.....	1061
4.	Effective Written Advocacy at the Federal Court — Leave Application .....	1062
5.	Sample Memorandum of Fact and Law .....	1068
6.	Settlement .....	1076
7.	Stage 2: Further Pleadings and Hearing .....	1080
8.	Sample Further Memorandum of Argument.....	1083
9.	Judicial Review Hearings.....	1090
10.	Oral Advocacy at the Federal Court .....	1090
	(a) Before the court .....	1090
	(b) Oral advocacy — universal considerations.....	1092
	(c) Oral advocacy — specific legal suggestions.....	1093
	(i) Opening statement/issues.....	1093
	(ii) Facts.....	1094
	(iii) Standard of review .....	1095
	(iv) Other legal arguments .....	1095
	(d) Relief requested.....	1097
	(e) Reply .....	1097
	(f) Conclusion .....	1098
11.	Certified Questions.....	1098
	(a) Appeals to the Federal Court of Appeal.....	1098
12.	Motions for a Stay of Removal.....	1099
13.	Sample Written Representations — Stay of Removal Motion.....	1102
14.	Changes in Legislation Relevant to Federal Court Proceedings.....	1110
	(a) Changes to <i>IRPA</i> — 2015 .....	1110
	(b) Changes to the <i>IRPA</i> — 2016.....	1114
	(c) Changes to the Federal Court Rules.....	1114
15.	Appendix “A” — Case Law on Stays of Removal.....	1126
	(a) Mootness .....	1127
16.	Appendix “B” — Case Law on Inadmissibility.....	1127
	(a) Human or international rights violations under section 35 of the <i>IRPA</i> .....	1127

CANADIAN PRECEDENTS OF PLEADINGS

(b)	Serious criminality under section 36 of the <i>IRPA</i> .....	1127
(c)	Organized criminality under section 37 of the <i>IRPA</i> .....	1127
(d)	Misrepresentation under section 40 of the <i>IRPA</i> .....	1127
<b>PART XVI</b>	<b>INFORMATION TECHNOLOGY</b> .....	1129
	<b>Information Technology Disputes</b> — <i>Martin P.J. Kratz, Q.C.</i> .....	1131
1.	Introduction.....	1132
2.	Terms of Use Enforcement.....	1133
(a)	Are the terms of use legally effective?.....	1133
(i)	Click to agree.....	1134
(ii)	Browse wrap agreements .....	1137
(b)	Terms of use .....	1142
(c)	Enforcement of terms of use.....	1144
(d)	Example of a terms of use complaint.....	1145
3.	Notice and Takedown .....	1146
(a)	Background.....	1146
(b)	Immunity from liability .....	1147
(c)	Requisite knowledge by the ISP .....	1148
(d)	Takedown notice.....	1150
(e)	Safeguards.....	1151
(f)	Liability for making materially false allegations of infringement.....	1153
(g)	Checklist of issues for copyright owners to consider with a takedown notice .....	1153
(h)	Counter notification .....	1155
(i)	Example DMCA takedown notice.....	1156
(j)	Example DMCA counter notice .....	1157
4.	Canada’s Notice and Notice System .....	1159
(a)	Background.....	1159
(b)	Immunity from liability .....	1160
(c)	Working the new system .....	1161
(d)	Form of the notice .....	1162
(e)	Remedies of the copyright holder .....	1164
(f)	Checklist of issues for copyright owners to consider .....	1165
(g)	Assessing the notice.....	1166
(h)	Seeking disclosure of alleged infringer identity.....	1168
(i)	Example notice letter under the Canadian system.....	1172
<b>PART XVII</b>	<b>INSOLVENCY</b> .....	1175
	<b>Insolvency</b> — <i>Natasha MacParland and Natalie Renner</i> .....	1177
I.	<b>BANKRUPTCY</b> .....	1184
1.	Commencing Bankruptcy Proceedings .....	1185

TABLE OF CONTENTS

(a)	Voluntary bankruptcy .....	1185
(b)	Involuntary bankruptcy.....	1185
(i)	Service of the bankruptcy application.....	1186
(ii)	Burden of proof .....	1186
(c)	Duties of a bankrupt.....	1187
2.	Administration of the Estate .....	1187
(a)	Notice of bankruptcy and first meeting of creditors.....	1187
	<b>BANKRUPTCY — FORMS.....</b>	<b>1188</b>
1.	Commencing Bankruptcy Proceedings .....	1188
(a)	Voluntary bankruptcy .....	1188
(i)	Form I.A.1(a) — resolution of the board of directors of the corporation authorizing bankruptcy .....	1188
(ii)	Form I.A.1(b) — assignment for the general benefit of creditors — form 19.....	1189
(b)	Involuntary bankruptcy.....	1191
(i)	Form I.A.2(a) — demand letter.....	1191
(ii)	Form I.A.2(b) — application for a bankruptcy order .....	1192
(iii)	Form I.A.2(c) — affidavit verifying application for bankruptcy order .....	1193
(iv)	Form I.A.2(d) — notice of hearing.....	1194
(v)	Form I.A.2(e) — order of substituted service of application — form 89 .....	1195
(vi)	Form I.A.2(f) — notice of substituted service of application — form 90 .....	1195
(vii)	Form I.A.2(g) — bankruptcy order — form 91 .....	1196
(c)	Duties of bankrupt.....	1197
(i)	Form I.A.3(a) — statement of affairs (business) — form 78 .....	1197
(ii)	Form I.A.3(b) — notice of examination before the official receiver (corporation) — form 24.....	1204
2.	Administration of the Bankrupt Estate.....	1205
(a)	Notice of bankruptcy and first meeting of creditors.....	1205
(i)	Form I.B.1(a) — notice to bankrupt of first meeting of creditors in local newspaper — form 73 .....	1205
(ii)	Form I.B.1(b) — proxy — form 36 .....	1206
II.	<b>THE TRUSTEE .....</b>	<b>1207</b>
1.	Report of the Trustee.....	1207
2.	Substitution of Trustee.....	1208
3.	Discharge of the Trustee and Paying Final Dividend.....	1208

CANADIAN PRECEDENTS OF PLEADINGS

(a)	Final statement of receipts and disbursements and final dividend sheet .....	1208
(b)	Approval of the final statement of receipts and disbursements and final dividend sheet .....	1209
(c)	Court approval of final dividend and taxation of accounts .....	1209
(d)	Payment of final dividend .....	1210
(e)	Discharge of trustee .....	1210
	THE TRUSTEE — FORMS .....	1211
1.	The Trustee .....	1211
(a)	Form II.A.1 — report of trustee under subsections 171(1) and (2) — form 83 .....	1211
(b)	Form II.A.2 — statement of receipts and disbursements — form 12 .....	1214
2.	Substitution of Trustee .....	1217
(a)	Form II.B.1 — application of former trustee to pass accounts — form 7 .....	1217
(b)	Form II.B.2 — affidavit verifying application to pass accounts — form 8 .....	1218
3.	Discharge of the Trustee and Payment of Final Dividend .....	1219
(a)	Form II.C.1 — notice of final dividend and application for discharge of trustee — form 11 .....	1219
(b)	Form II.C.2 — application of trustee for discharge — form 10 .....	1220
(c)	Form II.C.3 — affidavit of mailing .....	1220
(d)	Form II.C.4 — trustee’s discharge order .....	1221
III.	PROPOSALS .....	1222
1.	Commencing Proceedings .....	1222
2.	Cash-Flow Statements and Reports .....	1223
3.	Extension of Time to Make a Proposal .....	1223
4.	Approval of the Proposal .....	1224
(a)	The meeting of creditors .....	1224
(b)	Approval of the proposal by creditors .....	1224
(c)	Court approval of the proposal .....	1225
(d)	Refusal of a proposal .....	1226
5.	Default/Annulment of Proposal .....	1226
6.	Completion of Proposal .....	1227
	PROPOSALS — FORMS .....	1227
1.	Commencing Proceedings .....	1227
(a)	Form III.A.1 — resolution of the board of directors of the corporation authorizing proposal .....	1227

TABLE OF CONTENTS

(b) Form III.A.2 — notice of intention to make a proposal  
— form 33 ..... 1228

(c) Form III.A.3 — form of proposal ..... 1229

(d) Form III.A.4 — notice of proposal to creditors —  
form 92 ..... 1242

(e) Form III.A.5 — consent of trustee to act under the  
proposal ..... 1243

2. Cash-Flow Statements ..... 1243

(a) Form III.B.1 — trustee’s report on cash-flow  
statements — form 29 ..... 1243

(b) Form III.B.2 — report on cash-flow statement by the  
person making the proposal — form 30 ..... 1244

(c) Form III.B.3 — report of trustee on non-filing of  
cash-flow statement or proposal — form 34 ..... 1245

3. Extension of Time to Make a Proposal ..... 1246

(a) Form III.C.1 — notice of motion to extend time for  
making a proposal ..... 1246

(b) Form III.C.2 — affidavit in support of motion to  
extend time for making a proposal ..... 1248

(c) Form III.C.3 — order extending time for making a  
proposal ..... 1251

4. Approval of the Proposal ..... 1252

(a) Form III.D.1 — proxy — form 36 ..... 1252

(b) Form III.D.2 — voting letter — form 37 ..... 1252

(c) Form III.D.3 — report of trustee on refusal by  
creditors to approve proposal — form 38 ..... 1253

(d) Form III.D.4 — report of trustee on proposal —  
form 40 ..... 1254

(e) Form III.D.5 — notice of hearing of application for  
court approval of proposal — form 40.1 ..... 1256

(f) Form III.D.6 — report of trustee on refusal by court  
to approve proposal — form 41 ..... 1256

5. Default/Annulment of Proposal ..... 1257

(a) Form III.E.1 — notice of default in the performance  
of a proposal — form 43 ..... 1257

(b) Form III.E.2 — report of trustee on annulment of  
proposal — form 43.1 ..... 1258

(c) Form III.E.3 — order annulling proposal — form 43.2... 1259

6. Performance of Proposal ..... 1260

(a) Form III.F.1 — certificate of full performance of  
Proposal — Form 46 ..... 1260

IV. RECEIVERSHIPS ..... 1261

CANADIAN PRECEDENTS OF PLEADINGS

1.	Enforcement of Security .....	1261
2.	Appointment of Interim Receiver .....	1262
3.	Appointment of National Receiver .....	1262
4.	Duties of the Receiver .....	1263
5.	Discharge of Receiver.....	1264
	RECEIVERSHIPS — FORMS.....	1265
1.	Enforcement of Security .....	1265
	(a) Form IV.A.1 — notice of intention to enforce security (Bankruptcy and Insolvency Act) — form 86 .....	1265
2.	Appointment of Interim Receiver .....	1266
	(a) Form IV.B.1 — notice of motion for appointment of interim receiver .....	1266
	(b) Form IV.B.2 — order appointing interim receiver .....	1269
3.	Appointment of National Receiver .....	1279
	(a) Form IV.C.1 — notice of motion for appointment of receiver .....	1279
	(b) Form IV.C.2 — receiver consent to act .....	1281
	(c) Form IV.C.3 — model receiver order (Ontario).....	1282
	(d) Form IV.C.4 — model receiver order (British Columbia), with explanatory notes .....	1295
	(e) Form IV.C.5 — model receiver order (Quebec) .....	1325
	(f) Form IV.C.6 — model receiver order (Alberta) .....	1333
	(g) Form IV.C.7 — model receivership order (Nova Scotia).....	1365
	(h) Form IV.C.8 — model receivership order (Saskatchewan).....	1376
4.	Duties of Receiver.....	1391
	(a) Form IV.D.1 — notice and statement of receiver — form 87 .....	1391
5.	Discharge of Receiver.....	1392
	(a) Form IV.E.1 — notice of motion for discharge of receiver .....	1392
	(b) Form IV.E.2 — receiver’s final report/form 12 — statement of receipts and disbursements .....	1395
	(c) Form IV.E.3 — model discharge order (Ontario), with explanatory notes .....	1400
	(d) Form IV.E.4 — model discharge order (British Columbia), with explanatory notes .....	1402
	(e) Form IV.E.5 — model discharge order (Alberta).....	1406
V.	COMPANIES’ CREDITORS ARRANGEMENT ACT .....	1409
	1. Commencing CCAA Proceedings .....	1409
	2. Stay Extension .....	1411

TABLE OF CONTENTS

3.	Debtor-in-Possession Financing.....	1411
4.	Creditors' Committees.....	1412
5.	Plans of Compromise or Arrangement .....	1412
	(a) Approval of the plan of compromise or arrangement .....	1413
	(b) Sanction of the plan.....	1414
COMPANIES' CREDITORS ARRANGEMENT ACT —		
	FORMS.....	1415
1.	Commencing CCAA Proceedings .....	1415
	(a) Form V.A.1 — resolution of the board of directors authorizing filing for CCAA protection.....	1415
	(b) Form V.A.2 — initial affidavit.....	1415
	(c) Form V.A.3 — model initial order (Ontario).....	1423
	(d) Form V.A.4 — model initial order (Alberta), with explanatory notes .....	1438
	(e) Form V.A.5 — model initial order (British Columbia), with explanatory notes .....	1453
	(f) Form V.A.6 — model initial order (Quebec) .....	1474
	(g) Form V.A.7 — model initial order (Nova Scotia).....	1490
	(h) Form V.A.8 — model initial order (Saskatchewan) .....	1501
	(i) Form V.A.9 — monitor consent to act.....	1521
2.	Stay Extension .....	1522
	(a) Form V.B.1 — notice of motion for extension of stay .....	1522
	(b) Form V.B.2 — order extending stay of proceedings.....	1523
3.	Debtor-in-Possession Financing.....	1524
	(a) Form V.C.1 — debtor in possession financing order .....	1524
4.	Creditors' Committees.....	1530
	(a) Form V.D.1 — creditors' committee guidelines .....	1530
	(b) Form V.D.2 — court order re formal creditors' committee .....	1534
5.	Plans of Compromise or Arrangement .....	1537
	(a) Form V.E.1 — plan of compromise or arrangement.....	1537
	(b) Form V.E.2 — plan meeting and approval order.....	1560
	(c) Form V.E.3 — plan sanction order .....	1565
VI.	FEES AND FEE APPROVAL .....	1571
1.	Bankruptcy .....	1571
2.	Proposal Proceedings.....	1572
3.	Receiverships.....	1572
	(a) Fees of the interim receiver .....	1572
	(b) Fees of a national receiver.....	1573
4.	CCAA Proceedings .....	1573
	FEES AND FEE APPROVAL — FORMS.....	1574

CANADIAN PRECEDENTS OF PLEADINGS

1.	Form VI.1 — Notice of Application for Taxation of Accounts and Discharge of Interim Receiver — Form 18.....	1574
2.	Form VI.2 — Notice of Motion re Approval of Fees.....	1574
3.	Form VI.3 — Affidavit of Restructuring Professional re Fees.....	1577
4.	Form VI.4 — Affidavit of Lawyer re Fees.....	1578
5.	Form VI.5 — Order re Fees.....	1580
VII.	CLAIMS.....	1581
1.	Claims Process.....	1581
2.	Claims.....	1582
(a)	Proof of claim — form 31.....	1582
(b)	Reclamation of property claim.....	1582
(c)	Demand for repossession of goods (30-day goods claim).....	1583
(d)	Notice by trustee requiring filing of proof of security — form 76.....	1584
(e)	Notice of disallowance of claim, right to priority or security or notice of valuation of claim — form 77.....	1584
	CLAIMS — FORMS.....	1584
1.	Claims Process.....	1584
(a)	Form VII.A.1 — claims procedure order.....	1584
(b)	Form VII.A.2 — model claims procedure order (Quebec).....	1594
2.	Claims.....	1602
(a)	Form VII.B.1 — proof of claim — form 31.....	1602
(b)	Reclamation of property claim.....	1606
(i)	Form VII.B.2 — reclamation of property proof of claim — form 74.....	1606
(c)	Form VII.B.3 — demand for repossession of goods (30-day goods claim) — form 75.....	1607
(d)	Form VII.B.4 — notice by trustee requiring filing of proof of security — form 76.....	1608
(e)	Form VII.B.5 — notice of disallowance of claim, right to priority or security or notice of valuation of claim — form 77.....	1609
(f)	Form VII.B.6 — Appeal of disallowance.....	1610
VIII.	DISCLAIMERS.....	1610
	DISCLAIMERS — FORMS.....	1612
1.	Disclaimers of Agreements.....	1612
(a)	Form VIII.A.1 — notice by debtor to disclaim or resiliate an agreement in a proposal — form 44.1.....	1612

TABLE OF CONTENTS

(b) Form VIII.A.2 — Notice to Lessor to Disclaim or Resiliate a Lease by Commercial Tenant in a Proposal — Form 45 .....	1613
IX. ASSET SALES .....	1613
1. The Sale Process .....	1613
2. Asset Sale and Approvals.....	1614
(a) Asset sale during the course of a bankruptcy proceeding.....	1614
(b) Asset sale during the course of a proposal or CCAA proceeding.....	1615
(c) Asset sale during the course of a receivership .....	1616
(d) Additional factors relevant to the approval of an asset sale .....	1616
3. Distributions .....	1617
ASSET SALES — FORMS .....	1617
1. Sale Process .....	1617
(a) Form IX.A.1 — sale process order.....	1617
2. Asset Sale and Approvals.....	1620
(a) Form IX.B.1 — model approval and vesting order (Ontario).....	1620
(b) Form IX.B.2 — model approval and vesting order (British Columbia).....	1625
(c) Form IX.B.3 — model approval and vesting order (Alberta) .....	1632
(d) Form IX.B.4 — model approval and vesting order (Quebec).....	1639
(e) Form IX.B.5 — certificate.....	1651
3. Distributions .....	1652
(a) Form IX.C.1 — Notice of Motion re Distribution.....	1652
(b) Form IX.C.2 — distribution order .....	1654
X. FOREIGN PROCEEDINGS.....	1656
1. Commencing Foreign Proceedings.....	1657
2. Foreign Plan Recognition.....	1658
FOREIGN PROCEEDINGS — FORMS.....	1659
1. Commencing Foreign Proceedings.....	1659
(a) Form X.A.1 — application for recognition order .....	1659
(b) Form X.A.2 — order recognizing foreign main proceeding (Ontario) .....	1662
(c) Form X.A.3 — order recognizing foreign main proceeding (British Columbia).....	1666
(d) Form X.A.4 — supplemental order (Ontario).....	1670
(e) Form X.A.5 — supplemental order (British Columbia) ...	1680

CANADIAN PRECEDENTS OF PLEADINGS

2.	Foreign Plan Recognition Proceedings.....	1692
(a)	Form X.B.1 — foreign plan recognition order.....	1692
XI.	PRACTICE DIRECTIONS .....	1696
1.	Practice Direction Regarding Frequently Cited Cases in Commercial Proceedings in the Superior Court of Justice in Toronto Region .....	1696
(a)	Form XI.1 — practice direction regarding frequently cited cases .....	1696
	<b>PART XVIII INSURANCE COVERAGE</b> .....	1699
	<b>Insurance Coverage</b> — <i>Lawrence G. Theall and Shaun A. Hashim</i> .....	1701
	<b>PART I — COMMENTARY</b> .....	1702
1.	Introduction .....	1702
2.	Principles of Insurance .....	1703
(a)	Fortuity .....	1703
(b)	Utmost good faith.....	1705
(c)	Indemnity.....	1708
(d)	Duty to defend.....	1708
3.	Principles of Interpretation.....	1709
(a)	Reading insurance policies.....	1710
(b)	Ambiguity .....	1710
(c)	Reasonable expectations of the parties .....	1711
(d)	Promoting realistic results .....	1712
(e)	Consistent interpretation .....	1713
(f)	<i>Contra proferentem</i> .....	1714
(g)	Factual matrix and the standard of review .....	1715
4.	Limitations.....	1718
(a)	Duty to indemnify.....	1718
(b)	Duty to defend.....	1719
5.	Relief from Forfeiture .....	1720
	<b>PART II — PRECEDENTS</b> .....	1721
1.	Property Insurance: Statement of Claim of the Insured .....	1721
2.	Property Insurance: Statement of Defence of the Insurer .....	1730
3.	Commercial General Liability Insurance: Statement of Claim of the Insured .....	1738
4.	Commercial General Liability Insurance: Statement of Defence of the Insurer .....	1747
5.	Duty to Defend: Notice of Application of the Insured.....	1753
6.	Duty to Defend: Affidavit of the Insured .....	1757
7.	Duty to Defend: Reply Affidavit of the Insurer.....	1760
8.	Claim against Broker: Statement of Claim of the Insured.....	1762
9.	Claim against Broker: Statement of Defence of the Broker.....	1768

TABLE OF CONTENTS

Volume 3

<b>PART XIX INTELLECTUAL PROPERTY</b> .....	1773
<b>Copyright</b> — <i>Sangeetha Punniyamoorthy, Ryan Evans and Thomas Kurys</i> .....	1775
<b>PART I — COMMENTARY</b> .....	1789
Copyright Litigation in Canada.....	1789
1. Statement of Claim — Copyright and Moral Right	
Infringement .....	1791
(a) Prayer for relief.....	1792
(b) Parties.....	1794
(c) Plaintiff’s copyright and standing to sue for relief.....	1795
(i) Defendant’s infringing acts.....	1796
(d) Plaintiff’s moral rights.....	1798
(i) Defendant’s infringing acts with respect to the plaintiff’s moral rights .....	1798
(e) Technological protection measures .....	1799
(f) Relief sought and <i>quantum</i> .....	1799
(g) Miscellaneous.....	1799
2. Statement of Defence — Copyright and Moral Right	
Infringement .....	1799
(a) Admissions, denials and/or assertions of no knowledge of allegations made in statement of claim .....	1800
(b) Parties.....	1800
(c) Defendant’s business and activities .....	1800
(d) Defences.....	1800
(i) Denial of subsistence/validity of copyright.....	1800
(A) Improper subject matter .....	1800
(B) Not an expression of an idea .....	1800
(C) Term of copyright has expired.....	1800
(D) Work not original .....	1801
(ii) Denial of copyright ownership.....	1801
(e) No copyright infringement .....	1801
(i) Defence of consent .....	1801
(ii) Defence of fair dealing .....	1802
(A) Research .....	1802
(B) Private study .....	1802
(C) Criticism or review .....	1802
(D) News reporting.....	1803
(E) Education, parody or satire.....	1803
(iii) Network services or information location tools .....	1803
(iv) Other defences.....	1803

CANADIAN PRECEDENTS OF PLEADINGS

(f)	Unenforceability of moral rights.....	1805
(g)	Disentitlement to relief claimed .....	1805
(h)	Limitation period .....	1805
(i)	Miscellaneous.....	1806
3.	Counterclaim.....	1806
(a)	Prayer for relief.....	1806
(b)	Parties.....	1806
(c)	Plaintiff by counterclaim’s business and activities .....	1806
(d)	Non-infringement .....	1806
(e)	Invalidity of copyright.....	1806
(f)	Miscellaneous.....	1807
4.	Reply .....	1807
(a)	Acceptance of admissions, admissions, denials and/or no knowledge of allegations made in statement of defence.....	1807
(b)	Reply and miscellaneous .....	1807
5.	Reply and Defence to Counterclaim .....	1807
(a)	Acceptance of admissions, admissions, denials and/or no knowledge of allegations made in statement of defence/counterclaim .....	1807
(b)	Reply .....	1807
(c)	Defence to counterclaim .....	1808
(d)	Miscellaneous.....	1808
6.	Reply to Defence to Counterclaim.....	1808
(a)	Admissions, denials, and/or assertions of no knowledge of allegations made in the defence to counterclaim .....	1808
(b)	Reply and miscellaneous .....	1808
7.	Application for Copyright and Moral Right Infringement or TPM Circumvention .....	1808
(a)	Notice of application.....	1808
<b>PART II — PRECEDENTS .....</b>		<b>1809</b>
1.	Copyright and Moral Right Infringement.....	1809
1.1	Statement of claim .....	1809
1.1.1	Prayer for relief.....	1809
1.1.1.1	Declaration of copyright and moral rights in work .....	1809
1.1.1.2	Declaration of copyright in other subject matter .....	1809
1.1.1.3	Declaration of infringement of copyright in work and other subject matter.....	1810
1.1.1.3.1	Registered copyright.....	1810
1.1.1.4	Declaration of infringement of moral right.....	1810

## TABLE OF CONTENTS

1.1.1.5	Declaration of TPM circumvention .....	1810
1.1.1.6	Remedies.....	1811
1.1.1.6.1	Injunction .....	1811
1.1.1.6.1.1	Copyright in work.....	1811
1.1.1.6.1.2	Copyright in performer's performance .....	1812
1.1.1.6.1.3	Copyright in sound recording.....	1812
1.1.1.6.1.4	Copyright in communication signal .....	1813
1.1.1.6.1.5	Secondary infringement .....	1813
1.1.1.6.1.6	TPM circumvention ...	1814
1.1.1.6.2	Delivery up/destruction .....	1814
1.1.1.6.3	Damages and accounting of profits ...	1814
1.1.1.6.4	Recovery of all infringing copies ...	1814
1.1.1.6.5	Punitive/exemplary .....	1815
1.1.1.6.6	Interest.....	1815
1.1.1.6.7	Costs.....	1815
1.1.1.6.8	Importation.....	1815
1.1.1.6.9	Other relief.....	1815
1.1.2	Parties.....	1816
1.1.2.1	Plaintiff.....	1816
1.1.2.2	Defendant .....	1816
1.1.2.3	Plaintiff's business .....	1816
1.1.3	Plaintiff's copyright .....	1817
1.1.3.1	Details of copyright/registration .....	1817
1.1.3.2	Authorship.....	1817
1.1.3.2.1	Presumption of author(s) as the first owner.....	1817
1.1.3.2.2	Collective work .....	1817
1.1.3.2.3	Compilation of works .....	1817
1.1.3.2.4	Collective work/compilation of works.....	1818
1.1.3.2.5	Employee(s) of the plaintiff .....	1818
1.1.3.2.6	Independent contractor(s) retained by the plaintiff .....	1818
1.1.3.3	Originality.....	1818
1.1.3.4	Citizenship and residency .....	1819
1.1.3.5	Duration of copyright .....	1819

CANADIAN PRECEDENTS OF PLEADINGS

1.1.3.6	Assignment/license of rights from individual(s)/employee(s)/independent contractor(s) to the plaintiff .....	1819
1.1.3.6.1	Ownership of copyright by virtue of assignment/license .....	1819
1.1.3.7	Partial assignment/license of rights from the plaintiff to defendant .....	1820
1.1.3.7.1	Type of assignment/grant .....	1820
1.1.3.8	No waiver of moral rights .....	1820
1.1.3.9	Persons entitled to commence copyright proceedings .....	1821
1.1.3.9.1	Assignee is entitled to commence copyright proceedings.....	1821
1.1.3.9.2	Exclusive licensee is entitled to commence copyright proceedings...	1821
1.1.3.10	Defendant's infringing acts — primary infringement.....	1821
1.1.3.10.1	Defendant's infringing acts with respect to the plaintiff's copyrighted work and other subject matter .....	1822
1.1.3.10.2	Defendant's infringing acts with respect to the plaintiff's performance .....	1822
1.1.3.10.3	Defendant's infringing acts with respect to the plaintiff's sound recording.....	1822
1.1.3.10.4	Defendant's infringing acts with respect to the plaintiff's communication signal.....	1822
1.1.3.11	Defendant's infringing acts — secondary infringement .....	1823
1.1.4	Plaintiff's moral rights.....	1824
1.1.4.1	Authorship.....	1824
1.1.4.2	Citizenship and residency of author.....	1824
1.1.4.3	Duration of moral rights .....	1824
1.1.4.4	Ownership of moral rights.....	1824
1.1.4.4.1	Sale of work from the plaintiff to the defendant .....	1824
1.1.4.5	Defendant's infringing acts with respect to the plaintiff's moral rights .....	1824
1.1.4.5.1	Right of integrity of the work .....	1824

TABLE OF CONTENTS

1.1.4.5.2	Right to be identified with the work .....	1825
1.1.4.6	Infringement of moral rights .....	1825
1.1.4.7	Extent unknown.....	1825
1.1.5	Technological protection measures (“TPMs”).....	1825
1.1.5.1	TPM 1,2 TPM 2, TPM 3. . . ..	1825
1.1.6	Remedies.....	1826
1.1.6.1	Registered copyright.....	1826
1.1.6.2	Injunction .....	1826
1.1.6.2.1	Defendant was aware of the plaintiff’s copyright .....	1826
1.1.6.2.1.1	Plaintiff used universal copyright convention symbol as a general reminder of copyright .....	1826
1.1.6.2.1.2	Cease and desist letter was sent .....	1827
1.1.6.2.2	Defendant was aware of the plaintiff’s TPM.....	1827
1.1.6.2.3	Wide injunction.....	1827
1.1.6.3	Damages and accounting of profits .....	1828
1.1.6.4	Statutory damages.....	1828
1.1.6.4.1	Conduct of the parties before and during the proceedings .....	1828
1.1.6.4.1.1	Defendant was aware of the plaintiff’s copyright.....	1828
1.1.6.4.1.2	Plaintiff used universal copyright convention symbol as a general reminder of copyright .....	1828
1.1.6.4.1.3	Cease and desist letter was sent .....	1829
1.1.6.4.1.4	Defendant was aware of its infringement of copyright.....	1829
1.1.6.4.2	Bad faith of the defendant.....	1829
1.1.6.4.3	Need to deter other infringements of the copyright in question.....	1829
1.1.6.4.4	Copyright.....	1830

## CANADIAN PRECEDENTS OF PLEADINGS

1.1.6.4.5	Moral rights.....	1830
1.1.6.4.6	TPM circumvention .....	1830
1.1.6.5	Delivery up/destruction .....	1830
1.1.6.6	Recovery of all infringing copies .....	1830
1.1.6.7	Punitive/exemplary .....	1830
1.1.6.8	Punitive/exemplary available even if plaintiff elects statutory damages .....	1830
1.1.7	Miscellaneous.....	1831
1.2	Statement of defence .....	1831
1.2.1	Admissions, denials and/or no knowledge of allegations made in statement of claim .....	1831
1.2.1.1	Admissions of certain allegations from the statement of claim.....	1831
1.2.1.2	Denials of certain allegations from the statement of claim.....	1831
1.2.1.3	No knowledge of certain allegations from the statement of claim.....	1832
1.2.2	Parties.....	1832
1.2.3	Defences.....	1832
1.2.3.1	Denial of subsistence of copyright .....	1832
1.2.3.1.1	So-called work and other subject matter is not proper subject matter for copyright law.....	1832
1.2.3.1.2	So-called work and other subject matter is an idea and not an expression of that idea .....	1833
1.2.3.1.3	Subject-matter of the so-called work and other subject matter is in the public domain.....	1833
1.2.3.1.4	So-called work and other subject matter is not “original” .....	1833
1.2.3.2	Denial of copyright ownership.....	1833
1.2.3.2.1	So-called work and other subject matter was copied .....	1833
1.2.3.2.2	Author(s) was not an employee(s)/ independent contractor(s) of the plaintiff.....	1834
1.2.3.2.3	Defendant was not aware of copyright.....	1834
1.2.3.2.4	Defendant was not aware of TPM ...	1834
1.2.3.3	Denial of ownership of copyright .....	1834

TABLE OF CONTENTS

1.2.3.3.1	Denial of citizenship and residency of author in treaty country .....	1834
1.2.3.3.2	Expiration of copyright .....	1835
1.2.3.3.3	Plaintiff's copyright registration(s) are invalid .....	1835
1.2.3.3.4	So-called work and other subject matter was copied from works authored by others .....	1835
1.2.3.3.5	Plaintiff failed to obtain a valid assignment / license in the so-called work and other subject matter.....	1836
1.2.3.3.5.1	No assignment/ license .....	1836
1.2.3.3.5.2	No written assignment/ license. No signature by assignor and licensor .....	1836
1.2.3.3.5.3	Plaintiff has a partial assignment/license in the so-called work and other subject matter .....	1836
1.2.3.3.6	Defendant has rights pursuant to section 13(3) as the employer of the plaintiff .....	1837
1.2.3.4	Plaintiff not entitled to commence copyright proceedings .....	1837
1.2.3.5	Plaintiff is not the exclusive licensee .....	1837
1.2.3.6	Plaintiff is not the assignee .....	1837
1.2.4	No copyright infringement .....	1837
1.2.4.1	Defendant is owner of copyright in collective work / compilation of works .....	1838
1.2.4.1.1	Collective work .....	1838
1.2.4.1.2	Compilation of works .....	1838
1.2.4.1.3	Collective work/compilation of works .....	1838
1.2.4.2	Defence of assignment/license generally .....	1838
1.2.4.2.1	Defence of full assignment/license.....	1838
1.2.4.3	Defence of consent .....	1839
1.2.4.4	No cease and desist letter was sent .....	1839
1.2.5	The defendant was not aware that its activities were an infringement of the plaintiff's rights.....	1839

## CANADIAN PRECEDENTS OF PLEADINGS

1.2.5.1	Defence of fair dealing .....	1839
1.2.5.1.1	Research/private study/satire/ parody/education .....	1840
1.2.5.1.2	Criticism .....	1841
1.2.5.1.3	Review .....	1841
1.2.6	No moral right infringement .....	1841
1.2.6.1	No moral rights exist .....	1841
1.2.6.2	Plaintiff does not have moral rights.....	1841
1.2.6.2.1	Plaintiff is not author of the work...	1841
1.2.6.2.2	Sale of work from the author to the plaintiff .....	1841
1.2.6.2.3	Plaintiff does not have moral rights in work via its employees/ independent contractors .....	1842
1.2.6.2.4	Moral rights cannot be waived by assignment of copyright.....	1842
1.2.6.3	Plaintiff waived his/her moral rights .....	1842
1.2.7	Defendant did not infringe plaintiff's moral rights.....	1842
1.2.7.1	Right of integrity of the work .....	1842
1.2.7.2	Acts or omissions contrary to moral rights were consented to by the plaintiff.....	1842
1.2.8	Denial of circumvention of a TPM.....	1843
1.2.9	Denial of infringement conclusion .....	1843
1.2.10	Plaintiff is not entitled to any remedies.....	1843
1.2.10.1	Claims are time barred .....	1843
1.2.10.2	Claims barred by the doctrines of estoppels, waiver, acquiescence and laches.....	1843
1.2.10.3	Plaintiff is not entitled to an injunction .....	1844
1.2.10.4	Plaintiff is only entitled to an injunction because the defendant was not aware of copyright.....	1844
1.2.10.4.1	Defendant was not aware of the plaintiff's copyright .....	1844
1.2.10.4.1.1	Plaintiff did not use the universal copyright convention symbol as a general reminder of copyright.....	1844
1.2.10.4.1.2	A cease and desist letter was not sent .....	1844
1.2.10.5	Copyright was not registered at the material time.....	1844

## TABLE OF CONTENTS

1.2.10.5.1	Presumptions and evidentiary rules governing registered copyright shall not apply .....	1845
1.2.10.5.2	Plaintiff acted in bad faith in filing copyright registration .....	1845
1.2.10.6	Plaintiff is not entitled to damages and accounting of profits .....	1845
1.2.10.6.1	Plaintiff is not entitled to damages ...	1845
1.2.10.6.1.1	Defendant was not unjustly enriched .....	1845
1.2.10.6.1.2	Failure to mitigate.....	1845
1.2.10.6.1.3	Plaintiff is only entitled to an injunction.....	1845
1.2.10.6.2	Plaintiff is not entitled to accounting of profits .....	1846
1.2.10.7	Plaintiff is not entitled to statutory damages....	1846
1.2.10.8	Plaintiff is only entitled to nominal statutory damages .....	1846
1.2.10.8.1	Conduct of the parties before and during the proceedings .....	1846
1.2.10.8.1.1	Defendant was not aware of the plaintiff's copyright.....	1846
1.2.10.8.1.2	A cease and desist letter was not sent .....	1846
1.2.10.8.1.3	Defendant was not aware of its infringement of copyright.....	1846
1.2.10.8.1.3.1	No notice of copyright.....	1847
1.2.10.8.1.3.2	Defence of fair dealing .....	1847
1.2.10.8.1.3.3	Defence of license/assignment/consent/authority .....	1847
1.2.10.8.1.4	No need to deter other infringements of the copyright in question .....	1847
1.2.10.9	Punitive / exemplary.....	1847

CANADIAN PRECEDENTS OF PLEADINGS

1.2.10.9.1	Particulars of conduct deserving of punitive/exemplary damages.....	1847
1.2.10	Miscellaneous.....	1848
1.3	Counterclaim.....	1848
1.3.1	Declaration of invalidity of copyright registration .....	1848
1.3.1.1	Remedies.....	1848
1.3.1.1.1	Costs.....	1848
1.3.1.1.2	Other relief.....	1848
1.3.1.1.3	Plaintiff's copyright registration(s) are invalid .....	1848
1.3.2	Miscellaneous.....	1849
1.4	Reply.....	1849
1.4.1	Acceptance of admissions, denials and/or no knowledge of.....	1849
1.4.1.1	Acceptance of admissions from the statement of defence.....	1849
1.4.1.2	Admissions of certain allegations from the statement of defence.....	1849
1.4.1.3	Denials of certain allegations from the statement of defence.....	1850
1.4.1.4	No knowledge of certain allegations from the statement of defence .....	1850
1.4.2	Copyright.....	1850
1.4.2.1	Authors of the work and other subject matter were those who contributed skill and judgment in the authorship of said work and other subject matter.....	1850
1.4.2.2	Plaintiff obtained a valid assignment/license.....	1850
1.4.2.3	Fair dealing does not apply .....	1850
1.4.2.4	No assignment/license/consent/authorization given to the defendant.....	1850
1.4.2.5	Defendant did not obtain copyright clearances.....	1851
1.4.3	Moral rights .....	1851
1.4.3.1	Defendant knowingly infringed moral rights...	1851
1.4.4	Plaintiff is entitled to equitable remedies .....	1851
1.4.4.1	Clean hands .....	1851
1.4.4.2	Defendant was aware of the plaintiff's copyright.....	1851
1.4.4.3	Continuing infringement requires restraint by the court .....	1852
1.4.4.4	Limitation period has not expired .....	1852

## TABLE OF CONTENTS

1.5	Defence to counterclaim .....	1852
1.5.1	Acceptance of admissions, denials and/or no knowledge of.....	1852
1.5.1.1	Acceptance of admissions from the counterclaim.....	1852
1.5.1.2	Admissions of certain allegations from the counterclaim.....	1852
1.5.1.3	Denials of certain allegations from the counterclaim.....	1852
1.5.1.4	No knowledge of certain allegations from the counterclaim.....	1852
1.5.2	Miscellaneous.....	1852
1.6	Reply to defence to counterclaim .....	1853
1.6.1	Acceptance of admissions, denials and/or no knowledge of.....	1853
1.6.2	Reply and miscellaneous .....	1853
2.	Application for Copyright and Moral Right Infringement .....	1853
2.1	Notice of application.....	1853
2.1.1	Prayer for relief.....	1853
2.1.1.1	Declaration of copyright in other subject matter .....	1854
2.1.1.2	Declaration of infringement of copyright in work and other subject matter.....	1854
2.1.1.2.1	Registered copyright.....	1854
2.1.1.3	Declaration of infringement of moral right.....	1854
2.1.1.4	Declaration of TPM circumvention .....	1855
2.1.1.5	Remedies.....	1855
2.1.1.5.1	Injunction .....	1855
2.1.1.5.1.1	Copyright in work.....	1855
2.1.1.5.1.2	Copyright in performer's performance .....	1856
2.1.1.5.1.3	Copyright in sound recording.....	1857
2.1.1.5.1.4	Copyright in communication signal (section 21 of the <i>Copyright Act</i> ).....	1857
2.1.1.5.1.5	Secondary infringement.....	1857
2.1.1.5.1.6	TPM circumvention ..	1858
2.1.1.5.2	Delivery up/destruction .....	1858

CANADIAN PRECEDENTS OF PLEADINGS

2.1.1.5.3	Damages and accounting of profits .....	1858
2.1.1.5.4	Recovery of all infringing copies ...	1859
2.1.1.5.5	Punitive/exemplary .....	1859
2.1.1.5.6	Interest.....	1859
2.1.1.5.7	Costs.....	1859
2.1.1.5.8	Importation.....	1859
2.1.1.5.9	Other relief.....	1860
2.1.2	Parties.....	1860
2.1.2.1	Applicant .....	1860
2.1.2.2	Respondent .....	1860
2.1.2.3	Applicant's business .....	1861
2.1.3	Applicant's copyright .....	1861
2.1.3.1	Details of appropriate subject-matter for copyright/registration .....	1861
2.1.3.2	Authorship.....	1861
2.1.3.2.1	Presumption of author(s) as the first owner.....	1861
2.1.3.2.2	Collective work .....	1861
2.1.3.2.3	Compilation of works .....	1862
2.1.3.2.4	Collective work/compilation of works .....	1862
2.1.3.2.5	Employee(s) of the applicant .....	1862
2.1.3.2.6	Independent contractor(s) retained by the applicant .....	1862
2.1.3.2.6.1	Contract for service...	1862
2.1.3.3	Originality.....	1863
2.1.3.4	Citizenship and residency .....	1863
2.1.3.5	Duration of copyright .....	1863
2.1.3.6	Assignment/license of rights from individual(s)/employee(s)/independent contractor(s) to the applicant .....	1864
2.1.3.6.1	Ownership of copyright by virtue of assignment/license .....	1864
2.1.3.6.1.1	Terms of assignment/license .....	1864
2.1.3.6.1.2	Type of copyright assigned/licensed to applicant .....	1864
2.1.3.6.1.3	Copyright retained by individual(s)/employee(s)/	

TABLE OF CONTENTS

	independent contractor(s).....	1864
2.1.3.6.1.4	Registration of assignment/license .....	1864
2.1.3.7	Partial assignment/license of rights from the applicant to respondent .....	1864
2.1.3.7.1	Type of assignment/grant .....	1865
2.1.3.8	No waiver of moral rights .....	1865
2.1.3.9	Persons entitled to commence copyright proceedings .....	1865
2.1.3.9.1	Assignee is entitled to commence copyright proceedings.....	1865
2.1.3.9.2	Exclusive licensee is entitled to commence copyright proceedings...	1865
2.1.3.10	Respondent's infringing acts — primary infringement.....	1865
2.1.3.10.1	Respondent's infringing acts with respect to the applicant's copyrighted work and other subject matter .....	1866
2.1.3.10.2	Respondent's infringing acts with respect to the applicant's performance .....	1866
2.1.3.10.3	Respondent's infringing acts with respect to the applicant's sound recording.....	1867
2.1.3.10.4	Respondent's infringing acts with respect to the applicant's communication signal.....	1867
2.1.3.11	Respondent's infringing acts — secondary infringement .....	1867
2.1.4	Applicant's moral rights .....	1868
2.1.4.1	Authorship.....	1868
2.1.4.2	Citizenship and residency of author.....	1868
2.1.4.3	Duration of copyright .....	1868
2.1.4.4	Ownership of moral rights.....	1868
2.1.4.4.1	Sale of work from the applicant to the respondent .....	1868
2.1.4.5	Respondent's infringing acts with respect to the applicant's moral rights .....	1869
2.1.4.5.1	Right of integrity of the work .....	1869

CANADIAN PRECEDENTS OF PLEADINGS

2.1.4.5.1.1	Painting, sculpture or engraving .....	1869
2.1.4.5.2	Right to be identified with the work .....	1869
2.1.4.6	Infringement of moral rights .....	1869
2.1.4.7	Extent unknown.....	1870
2.1.5	Technological protection measures (“TPMs”).....	1870
2.1.5.1	TPM 1 .....	1870
2.1.6	Remedies.....	1870
2.1.6.1	Registered copyright.....	1870
2.1.6.2	Injunction .....	1871
2.1.6.2.1	Respondent was aware of the applicant’s copyright .....	1871
2.1.6.2.1.1	Applicant used universal copyright convention symbol as a general reminder of copyright .....	1871
2.1.6.2.1.2	Cease and desist letter was sent .....	1871
2.1.6.2.2	Respondent was aware of the plaintiff’s TPM.....	1872
2.1.6.2.3	Wide injunction.....	1872
2.1.6.3	Damages and accounting of profits .....	1872
2.1.6.4	Damages .....	1873
2.1.6.4.1	Statutory damages.....	1873
2.1.6.4.1.1	Conduct of the parties before and during the proceedings .....	1873
2.1.6.4.1.1.1	Respondent was aware of the applicant’s copyright.....	1873
2.1.6.4.1.1.2	Applicant used universal copyright convention symbol as a general reminder of copyright.....	1873
2.1.6.4.1.1.3	Cease and desist letter was sent ....	1873

TABLE OF CONTENTS

2.1.6.4.1.1.4 Respondent was aware of its infringement of copyright..... 1874

2.1.6.4.1.2 Bad faith of the respondent ..... 1874

2.1.6.4.1.3 Need to deter other infringements of the copyright in question... 1874

2.1.6.4.2 Copyright..... 1874

2.1.6.4.3 Moral rights..... 1875

2.1.6.4.4 TPM circumvention ..... 1875

2.1.6.5 Delivery up/destruction ..... 1875

2.1.6.6 Recovery of all infringing copies ..... 1875

2.1.6.7 Punitive/exemplary ..... 1875

2.1.6.8 Punitive/exemplary available even if applicant elects statutory damages..... 1875

2.1.6.8.1 Particulars of conduct deserving of punitive/exemplary damages..... 1875

2.1.7 Miscellaneous..... 1876

2.1.8 Proceedings by way of application..... 1876

2.1.9 The applicant will rely on..... 1876

2.1.9.1 Place of trial ..... 1876

2.1.10 Application will be supported by the following material..... 1876

**Domain Name Dispute Resolution Policy — Antonio Turco and Sheldon Burshtein** ..... 1879

1. Introduction..... 1880

2. Eligible Complainant..... 1881

(a) Canadian presence requirements..... 1882

3. Respondent ..... 1884

4. Basis for Complaint ..... 1885

(a) Confusing similarity with mark of complainant ..... 1885

5. Mark: Overview ..... 1886

(a) Mark: exclusions ..... 1887

(b) Names of individuals..... 1888

(c) Statutory protected marks..... 1888

6. Confusing Similarity..... 1889

(a) Resemblance as test..... 1889

7. Bad Faith..... 1889

(a) Establishing bad faith..... 1889

CANADIAN PRECEDENTS OF PLEADINGS

(i)	Registration .....	1891
(ii)	Whose bad faith.....	1891
(iii)	Burden of proof .....	1891
(iv)	Intention .....	1892
(b)	Enumerated bad faith factors .....	1893
(i)	Bad faith: purpose of transfer.....	1893
(A)	Purpose.....	1893
(B)	Offer of transfer .....	1894
(C)	Competitor.....	1894
(D)	Excess costs.....	1894
(ii)	Bad faith: blocking complainant.....	1895
(A)	Purpose.....	1895
(B)	Pattern .....	1896
(iii)	Bad faith: disrupting business of complainant.....	1896
(A)	Purpose.....	1897
(B)	Competitor.....	1897
(C)	Parking .....	1898
(iv)	Bad faith: attracting internet users.....	1899
(A)	Intention .....	1899
(B)	Attempt to attract users .....	1899
(C)	Commercial gain .....	1899
(D)	Confusion .....	1900
8.	Legitimate Interest: Overview .....	1900
(a)	Burden of proof .....	1902
(b)	Absence of legitimate interest .....	1902
(c)	Good faith .....	1903
(d)	The listed legitimate interest factors.....	1903
(i)	Legitimate interest: use as mark .....	1903
(ii)	Legitimate interest: descriptive name .....	1903
(iii)	Legitimate interest: generic name.....	1904
(iv)	Legitimate interest: non-commercial activity .....	1904
(v)	Legitimate interest: name .....	1905
(vi)	Legitimate interest: geographical location .....	1906
<b>Patents</b> — <i>Sangeetha Punniyamoorthy, Ryan Evans and</i>		
	<i>Thomas Kurys</i> .....	1923
<b>PART I — COMMENTARY</b> .....		
<b>Patent Litigation in Canada</b> .....		
1.	Patent Infringement — Statement of Claim .....	1931
(a)	Prayer for relief.....	1932
(b)	Parties.....	1933
(c)	Plaintiff’s patent rights and standing to sue for relief.....	1934

## TABLE OF CONTENTS

(d) Defendant’s infringing acts .....	1935
(e) Relief sought and <i>quantum</i> .....	1937
(f) Miscellaneous.....	1939
2. Patent Infringement — Statement of Defence .....	1939
(a) Admissions, denials, and/or assertions of no knowledge of allegations made in statement of claim .....	1939
(b) Parties.....	1940
(c) Defendant’s business and technology .....	1940
(d) Plaintiff’s lack of rights and/or standing.....	1940
(e) Non-infringement .....	1940
(f) Invalidity of patent.....	1941
(i) Anticipation and obviousness .....	1942
(ii) Non-statutory subject matter.....	1945
(iii) Utility .....	1946
(iv) Lack of sound prediction .....	1946
(v) Insufficiency of disclosure.....	1947
(vi) Claims broader than invention made or disclosed.....	1947
(vii) Ambiguity and indefiniteness.....	1948
(viii) Double patenting .....	1948
(ix) Improperly added subject matter .....	1949
(x) Material misrepresentation and wilful omission and addition .....	1949
(xi) Irrevocable abandonment .....	1949
(xii) Failure to fulfill duty of candour.....	1950
(g) Unenforceability of patent.....	1950
(h) Disentitlement to relief claimed .....	1950
(i) Limitation periods.....	1951
(j) Miscellaneous.....	1951
3. Patent Infringement — Counterclaim (Declaration of Non-Infringement and/or Impeachment) .....	1951
(a) Prayer for relief.....	1952
(b) Parties.....	1952
(c) Plaintiff by counterclaim’s business and technology .....	1952
(d) Defendant by counterclaim’s false and misleading statements .....	1952
(e) Non-infringement .....	1952
(f) Invalidity of patent.....	1952
(g) Miscellaneous.....	1952
4. Patent Infringement — Reply.....	1953
(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence .....	1953
(b) Reply and miscellaneous .....	1953

CANADIAN PRECEDENTS OF PLEADINGS

5.	Patent Infringement — Reply and Defence to Counterclaim...	1953
	(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence and counterclaim.....	1953
	(b) Reply .....	1953
	(c) Defence to counterclaim .....	1954
	(d) Miscellaneous.....	1954
6.	Patent Infringement — Reply to Defence to Counterclaim .....	1954
	(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the defence to counterclaim .....	1954
	(b) Reply and miscellaneous .....	1954
7.	Patent Declaration of Non-Infringement and/or Impeachment — Statement of Claim .....	1954
	(a) Prayer for relief.....	1955
	(b) Parties.....	1955
	(c) The defendant's patent .....	1955
	(d) Plaintiff's business and technology and standing.....	1955
	(e) Non-infringement .....	1955
	(f) Invalidity of patent.....	1956
	(g) Miscellaneous.....	1956
8.	Patent Declaration of Non-Infringement and/or Impeachment — Statement of Defence .....	1956
	(a) Admissions, denials, and/or assertions of no knowledge of allegations made in statement of claim .....	1956
	(b) Parties.....	1956
	(c) Defendant's patent rights .....	1956
	(d) Plaintiff's lack of standing.....	1957
	(e) Plaintiff's infringement of the patent .....	1957
	(f) Enforceability of the patent .....	1957
	(g) Validity of the patent .....	1957
	(h) Miscellaneous.....	1957
9.	Patent Declaration of Non-Infringement and/or Impeachment — Counterclaim (Infringement) .....	1957
	(a) Prayer for relief.....	1957
	(b) Parties.....	1958
	(c) Plaintiff by counterclaim's patent rights and standing to sue for relief.....	1958
	(d) Defendant by counterclaim's infringement of the patent.....	1958
	(e) Relief sought and <i>quantum</i> .....	1958
	(f) Miscellaneous.....	1958

TABLE OF CONTENTS

10. Patent Declaration of Non-Infringement and/or Impeachment — Reply.....	1958
(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence .....	1958
(b) Reply and miscellaneous .....	1958
11. Patent Declaration of Non-Infringement and/or Impeachment — Reply and Defence to Counterclaim.....	1959
(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence and counterclaim.....	1959
(b) Reply .....	1959
(c) Defence to counterclaim .....	1959
(d) Miscellaneous.....	1959
12. Patent Declaration of Non-Infringement and/or Impeachment — Reply to Defence to Counterclaim .....	1959
(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the defence to counterclaim .....	1959
(b) Reply and miscellaneous .....	1959
PART II — PRECEDENTS .....	1960
1. Patent Infringement — Statement of Claim .....	1960
(a) Prayer for relief.....	1960
(b) Parties.....	1961
(c) Plaintiff’s patent rights and standing to sue for relief.....	1961
(d) Defendant’s Infringing Acts.....	1962
(e) Relief sought and <i>quantum</i> .....	1964
(f) Miscellaneous.....	1964
2. Patent Infringement — Statement of Defence.....	1964
(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of claim .....	1964
(b) Parties.....	1965
(c) Defendant’s business and technology.....	1965
(d) Plaintiff’s lack of rights and/or standing.....	1965
(e) Non-Infringement.....	1966
(f) Invalidity of Patent .....	1967
(g) Unenforceability of patent.....	1973
(h) Disentitlement to Relief Claimed .....	1973
(i) Limitation periods and delay.....	1975
(j) Miscellaneous.....	1975
3. Patent Infringement — Counterclaim (Declaration of Non-Infringement and/or Impeachment) .....	1976
(a) Prayer for relief.....	1976
(b) Parties.....	1977

CANADIAN PRECEDENTS OF PLEADINGS

(c)	Plaintiff by counterclaim's business and technology .....	1977
(d)	Defendant by counterclaim's false and misleading statements .....	1977
(e)	Non-infringement .....	1979
(f)	Invalidity of patent.....	1979
(g)	Miscellaneous.....	1979
4.	Patent Infringement — Reply.....	1979
(a)	Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence .....	1979
(b)	Reply and miscellaneous .....	1980
5.	Patent Infringement — Reply and Defence to Counterclaim...	1980
(a)	Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence and counterclaim.....	1980
(b)	Reply .....	1980
(c)	Defence to counterclaim .....	1980
(d)	Miscellaneous.....	1980
6.	Patent Infringement — Reply to Defence to Counterclaim .....	1981
(a)	Admissions, denials, and/or assertions of no knowledge of allegations made in the defence to counterclaim .....	1981
(b)	Reply and miscellaneous .....	1981
7.	Patent Declaration of Non-Infringement and/or Impeachment — Statement of Claim .....	1981
(a)	Prayer for Relief .....	1981
(b)	Parties.....	1982
(c)	The defendant's patent .....	1982
(d)	Plaintiff's business and technology and standing.....	1982
(e)	Non-infringement .....	1983
(f)	Invalidity of patent.....	1983
(g)	Miscellaneous.....	1983
8.	Patent Declaration of Non-Infringement and/or Impeachment — Statement of Defence .....	1983
(a)	Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of claim .....	1983
(b)	Parties.....	1983
(c)	Defendant's patent rights .....	1984
(d)	Plaintiff's lack of standing .....	1984
(e)	Plaintiff's infringement of the patent .....	1984
(f)	Enforceability of the patent .....	1984
(g)	Validity of the patent .....	1985
(h)	Miscellaneous.....	1985

## TABLE OF CONTENTS

9.	Patent Declaration of Non-Infringement and/or Impeachment — Counterclaim .....	1985
	(a) Prayer for relief.....	1985
	(b) Parties.....	1985
	(c) Plaintiff by counterclaim’s patent rights and standing to sue for relief.....	1985
	(d) Defendant by counterclaim’s infringement of the patent.....	1985
	(e) Relief sought and <i>quantum</i> .....	1985
	(f) Miscellaneous.....	1985
10.	Patent Declaration of Non-Infringement and/or Impeachment — Reply.....	1986
	(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence .....	1986
	(b) Reply and miscellaneous .....	1986
11.	Patent Declaration of Non-Infringement and/or Impeachment — Reply and Defence to Counterclaim.....	1986
	(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the statement of defence and counterclaim.....	1986
	(b) Reply .....	1986
	(c) Defence to counterclaim .....	1986
	(d) Miscellaneous.....	1986
12.	Patent Declaration of Non-Infringement and/or Impeachment — Reply to Defence to Counterclaim .....	1986
	(a) Admissions, denials, and/or assertions of no knowledge of allegations made in the defence to counterclaim .....	1986
	(b) Reply and miscellaneous .....	1987
<b>Registered Trade-marks — Sangeetha Punniyamoorthy, Ryan Evans and Thomas Kurys .....</b>		
		1989
<b>PART I — COMMENTARY .....</b>		1990
<b>Trade-mark Litigation in Canada .....</b>		1990
1.	Trade-mark Infringement and Passing Off — Statement of Claim .....	1993
	(a) Prayer for relief.....	1993
	(b) Parties.....	1996
	(c) Plaintiff’s rights and standing to sue for relief .....	1998
	(d) Defendant’s infringing acts .....	1998
	(e) Miscellaneous.....	1999
2.	Trade-mark Infringement And Passing Off — Statement of Defence .....	1999

CANADIAN PRECEDENTS OF PLEADINGS

(a)	Admission, denials and/or assertions of no knowledge of allegations made in the statement of claim .....	2000
(b)	Disentitlement to relief claimed .....	2000
(c)	Limitation periods and delay .....	2001
(d)	Defence of non-infringement .....	2001
(i)	Defence of trade-mark invalidity .....	2001
(ii)	Prohibited mark .....	2002
(iii)	Unregistrable mark .....	2002
(e)	Plaintiff not entitled to remedies.....	2002
(f)	Miscellaneous.....	2002
3.	Trade-mark Expungement .....	2002
4.	Application for Trade-mark Infringement.....	2003
PART II — PRECEDENTS .....		2004
1.	Trade-mark Infringement and Passing Off — Statement of Claim .....	2004
(a)	Prayer for relief.....	2004
(b)	Parties.....	2008
(c)	Plaintiff's rights and standing to sue for relief .....	2012
(d)	Defendant's infringing acts .....	2013
(e)	Relief sought and <i>quantum</i> .....	2015
(f)	Miscellaneous.....	2017
2.	Trade-mark Infringement and Passing Off — Statement of Defence .....	2017
(a)	Admission, denials and/or assertions of no knowledge of allegations made in the statement of claim .....	2017
(b)	Disentitlement to relief claimed .....	2021
(c)	Limitation periods and delay .....	2022
(d)	Defence of non-infringement .....	2024
(i)	Defence of trade-mark invalidity .....	2025
(ii)	Prohibited mark .....	2025
(iii)	Unregistrable mark .....	2027
(e)	Plaintiff not entitled to remedies.....	2028
(f)	Miscellaneous.....	2029
3.	Trade-mark Infringement — Counterclaim .....	2029
4.	Trade-mark Infringement — Reply .....	2030
(a)	Response.....	2030
5.	Trade-mark Infringement — Reply & Defence to Counterclaim.....	2031
(a)	Response.....	2031
(b)	Defence to Counterclaim .....	2031
(c)	Miscellaneous.....	2031
6.	Trade-mark Expungement .....	2031

TABLE OF CONTENTS

(a)	Prayer for relief.....	2031
(b)	Parties.....	2032
(c)	Declaration of invalidity trade-mark registration .....	2032
(d)	Plaintiff's trade-mark and the plaintiff's activities .....	2033
(e)	Invalid trade-mark registration.....	2034
(f)	Expunging trade-mark entries on the register .....	2037
(g)	Amending trade-mark entries on the register .....	2037
(h)	Expunging distinguishing guise registrations .....	2038
(i)	Miscellaneous.....	2038
7.	Application for Trade-mark Infringement and Passing Off.....	2038
(a)	Prayer for relief.....	2038
(b)	Ground for Application .....	2040
(c)	Documentary Evidence.....	2043
	<b>Trade Secrets — Donald M. Cameron and Kevin Shipley .....</b>	<b>2045</b>
	<b>PART I — COMMENTARY .....</b>	<b>2046</b>
1.	What is a Trade Secret?.....	2046
2.	The Three Prerequisites for Protection of Confidential Information or Trade Secrets .....	2049
(a)	Information conveyed was confidential — there must be a trade secret.....	2049
(i)	Ownership/creation .....	2050
(ii)	Collections of public information .....	2052
(iii)	Reverse engineering.....	2053
(b)	Communication under circumstances of confidence .....	2054
(i)	Circumstances or a relationship of confidence .....	2055
(ii)	Written contract.....	2055
(iii)	Implied contract.....	2056
(iv)	Employee's implied obligation .....	2057
(v)	Fiduciary duty.....	2058
(vi)	Where confidentiality is understood from the circumstances .....	2061
(vii)	No protection where there is no communication in confidence .....	2062
(c)	Misuse of the confidential information .....	2062
(i)	Onus .....	2063
(ii)	Liability of Claimants .....	2064
3.	Third Parties Who Receive Trade Secrets .....	2064
4.	Remedies for Misuse of a Trade Secret/Confidential Information.....	2065
(a)	Injunctive relief .....	2066
(i)	Interlocutory injunction.....	2067

CANADIAN PRECEDENTS OF PLEADINGS

(ii) Permanent injunction .....	2068
(iii) Last until the secret expires .....	2068
(iv) Last beyond the life of the secret — the springboard doctrine.....	2069
(v) Order not to compete.....	2070
(vi) Delay .....	2070
(b) <i>Anton Piller</i> order .....	2071
(c) Delivery-up .....	2072
(d) Damages .....	2072
(e) Accounting of profits .....	2073
(f) Constructive trust.....	2073
5. Limitations, Delay & Laches .....	2076
(a) Statute of Limitations .....	2076
6. Protective Orders in Court Proceedings .....	2076
<b>PART II — PRECEDENTS .....</b>	<b>2079</b>
Appendix A — Confidentiality or Non-Disclosure Agreement .....	2079
Appendix B — Sample Clauses for Employment Agreements .....	2082
Appendix C — Protective and Confidentiality Order.....	2083
Appendix D — Confidentiality Order.....	2092
Appendix E — <i>Anton Piller</i> Order .....	2095
 <b>PART XX JUDICIAL REVIEW .....</b>	 <b>2107</b>
<b>Judicial Review</b> — <i>David Phillip Jones, Q.C., Anne de Villars, Q.C.</i> <i>and Dawn Knowles.....</i>	2109
<b>PART I — COMMENTARY .....</b>	<b>2109</b>
1. What is Judicial Review?.....	2109
2. Grounds for Judicial Review .....	2110
3. Remedies.....	2112
(a) The prerogative remedies.....	2113
(b) Declarations.....	2114
(c) Injunctions .....	2114
4. Applications for Judicial Review .....	2115
5. Procedural Considerations.....	2116
(a) Forums .....	2117
(b) Time limits.....	2117
(c) Originating documents .....	2119
(d) Interim orders .....	2120
(e) Returns or records .....	2121
6. Sample Forms.....	2121
<b>PART II — PRECEDENTS .....</b>	<b>2122</b>
Form 1: Originating Application for Judicial Review.....	2122
Form 2: Notice to Obtain Record of Proceedings.....	2124

TABLE OF CONTENTS

Form 3: Certified Record of Proceedings..... 2124  
 Form 4: Sample Return..... 2125  
 Form 5: Sample Order for Miscellaneous Remedies..... 2125  
 Form 6: Application for *Habeas Corpus*..... 2126  
 Form 7: Sample Order for *Habeas Corpus* ..... 2128

**Recent Developments in Judicial Review — *Raj Anand***..... 2129

**PART I — COMMENTARY** ..... 2129

1. The Effect of *Dunsmuir* on the Standard of Review ..... 2130

    (a) Two standards of review ..... 2130

    (b) *Dunsmuir*'s practical effect on determining the standard  
         of review ..... 2131

2. Reasons: Rise and Fall, and Rise Again?..... 2134

**PART II — PRECEDENTS** ..... 2139

Precedent 1: Factum of the Respondent [name of appellate  
 court] ..... 2139

Precedent 2: Factum of the Applicant ..... 2146

**PART XXI PERSONAL INJURY** ..... 2153

**Personal Injury — *Christine J. Pratt, Lindsey Miller, Randal S.  
 Carlson and Peter Gibson***..... 2155

1. Introduction..... 2156

    (a) Types of damages..... 2159

        (i) Non-pecuniary damages ..... 2159

        (ii) Pecuniary damages ..... 2161

        (iii) Punitive damages ..... 2161

2. Motor Vehicle Claims ..... 2162

    (a) The style of cause or style of proceeding ..... 2163

        (i) Motor vehicle action brought by a minor ..... 2164

        (ii) Motor vehicle action brought by person of unsound  
         mind ..... 2167

        (iii) Motor vehicle action against an unidentified owner or  
         driver ..... 2167

    (b) MVA claims — by mechanism of accident ..... 2169

        (i) Rear end collisions ..... 2169

        (ii) Left turn ..... 2172

        (iii) Head on collision ..... 2173

        (iv) Improper passing ..... 2175

    (c) Fatal accidents ..... 2176

    (d) Animals on the road ..... 2183

    (e) Defences..... 2184

        (i) Limitation defence and lack of proper service..... 2184

CANADIAN PRECEDENTS OF PLEADINGS

(ii) Contributory negligence .....	2184
(iii) Inevitable accident.....	2185
(iv) Statutory defences .....	2186
(v) <i>Ex turpi causa</i> .....	2187
(f) Other pleadings .....	2187
(i) Counterclaim.....	2187
(ii) Third party notice .....	2188
(iii) Defence to third party notice.....	2190
3. Products Liability.....	2192
(a) Claims.....	2192
(b) Defences.....	2199
(i) Defence of retailer and manufacturer .....	2200
(ii) Defence of retailer .....	2203
4. Occupiers' Liability .....	2206
(a) General claim at common law — occupiers' liability .....	2206
(b) Claim pursuant to statute — occupiers' liability .....	2209
(c) Claim to include independent contractor hired by occupier ....	2211
(d) Occupiers' liability defences .....	2214
(i) General .....	2214
(ii) Independent contractor .....	2215
(A) Filed by the occupier .....	2216
(B) Filed by an independent contractor .....	2217
(iii) Recreational property.....	2219
(iv) Trespassers.....	2221
(v) Acceptance of risk.....	2223
5. Other Claims.....	2225
(a) Harassment in the workplace causing psychological injury .....	2225
(i) Defences.....	2228
(b) Nuisance .....	2229
(i) Claims in nuisance .....	2229
(ii) Defences to nuisance claims .....	2232
(c) Animal bites.....	2234
(i) Claims.....	2234
(ii) Defences.....	2238
6. Class Actions .....	2241
(a) Sample statement of claim.....	2241
(b) Sample statement of defence.....	2244
<b>PART XXII PLAIN LANGUAGE .....</b>	<b>2247</b>
<b>A Context for Plain Language Legal Pleadings — <i>Christine Mowat</i></b> <b>and <i>David Lloyd</i> .....</b>	<b>2249</b>
1. What is Plain Language? .....	2251

TABLE OF CONTENTS

2.	Why Plain Language for Legal Writing?.....	2255
	(a) What does a complete plain language rewrite look like? .....	2256
3.	A Complete Precedent Example — A Recognizance .....	2258
4.	Rebuttals to Arguments against Plain Language.....	2271
5.	Examples of Significant International Plain Language Initiatives, Organizations, and Texts.....	2275
	(a) Canada .....	2275
	(i) The Public Works and Government Services plain language writing guide entitled <i>The Canadian Style</i> .....	2275
	(ii) The <i>Employment Insurance Act</i> — Research on plain language for legislation.....	2276
	(iii) <i>Canadian Cost of Borrowing (Banks) Regulations</i> .....	2277
	(iv) Simon Fraser University’s Plain Language Certificate course (British Columbia).....	2278
	(v) Canadian Labelling Regulations .....	2278
	(b) United Kingdom .....	2279
	(i) U.K.’s Tax Law Rewrite Project .....	2279
	(ii) U.K.’s Good Law Initiative, 2013 .....	2279
	(iii) Office of the Scottish Parliamentary Counsel booklet, Plain Language in Legislation (2006).....	2280
	(c) Australia .....	2280
	(i) Plain language drafting.....	2280
	(ii) Australia’s Victoria Law Foundation.....	2280
	(iii) Plain-Language Legal Requirements.....	2281
	(d) South Africa .....	2281
	(i) Post-Apartheid Constitution (1997) .....	2281
	(e) Hong Kong.....	2281
	(i) Drafting Legislation in Hong Kong: A Guide to Styles and Practices (2012) .....	2281
	(f) USA.....	2282
	(i) Federal Rules of Court Rewritten in Plain Language .....	2282
	(ii) The <i>Plain Writing Act</i> .....	2282
	(iii) Improving Communication from the Government to the Public ( <a href="http://www.plainlanguage.gov">www.plainlanguage.gov</a> ) .....	2282
	(iv) Joseph Kimble, Instructor of Legal Writing and Drafting for over 30 years .....	2282
	(g) Sweden.....	2283
	(i) 30 Years of Plain Language .....	2283
	(h) International Organizations and Texts.....	2283
	(i) Plain Language Association InterNational, (PLAIN).....	2283
	(ii) Clarity, an international association promoting plain legal language.....	2284

CANADIAN PRECEDENTS OF PLEADINGS

(iii) Latest editions of key plain language texts..... 2284

6. Looking to the Future..... 2285

Appendix ..... 2286

1. The Communication Triad: Audience → Purpose → Message ..... 2287

2. CLARITY Guidelines for Plain-Language Drafting ..... 2293

3. Oft-used Terms Not to Use and Plain-Language Substitutes..... 2296

4. Segments from a Unique Canadian Plain-Language Court  
Decision Written to the Accused in a Case With an Indian  
Residential Schools Context ..... 2300

5. *Before* and *After* Examples from a May 2, 2016 Factum Filed in  
the Alberta Court of Appeal ..... 2302

6. *Before* and *After* Versions of a Notice Published in a Newspaper  
by a Justice Department ..... 2309

7. *Before* and *After* examples from Precedents ..... 2313

8. A Model Example of a Law Firm’s Chart Describing How a  
Case Goes Through Court ..... 2315

9. *Before* and *After* Example from a Contract’s Indemnity Clause ..... 2316

10. CLARITY Test for our Chapter Readers..... 2317

**PART XXIII PRIVACY** ..... 2327

**Privacy — Kris Klein**..... 2329

Introduction..... 2330

**PART I — COMMENTARY — PRIVACY LAW IN CANADA** ..... 2330

1. The *Charter of Rights and Freedoms* ..... 2330

(a) Background..... 2330

2. Public Sector Legislation ..... 2337

(a) Federal *Privacy Act*..... 2337

(i) Application ..... 2338

(ii) Protection of personal information ..... 2338

(A) Collection..... 2338

(B) Use ..... 2339

(C) Disclosure ..... 2339

(D) Retention and record keeping..... 2339

(iii) Access to personal information..... 2340

(A) Rights of access..... 2340

(B) Exemptions to the right of access ..... 2341

(C) Corrections to personal information ..... 2343

(iv) Oversight..... 2343

(A) The privacy commissioner ..... 2343

(B) The Federal Court..... 2344

(b) Provincial legislation ..... 2345

3. Private Sector Legislation ..... 2345

TABLE OF CONTENTS

(a) Federal <i>Personal Information Protection and Electronic Documents Act</i> .....	2345
(i) Application .....	2346
(A) Section 4 .....	2346
(B) Commercial activity .....	2347
(C) Personal information .....	2347
(ii) Main obligations .....	2348
(A) Privacy principles .....	2348
(B) The reasonable person standard .....	2349
(C) Data breach notification.....	2350
(iii) Oversight.....	2350
(A) Privacy commissioner .....	2350
(B) Federal Court.....	2350
(iv) Provincial legislation .....	2350
4. Tort of Invasion of Privacy .....	2351
(a) Does it exist?.....	2351
(b) Why is it important? .....	2356
<b>PART II — COMMONLY USED PRECEDENTS</b> .....	2356
1. Common Law Tort of Invasion of Privacy .....	2357
2. Application Under the <i>Privacy Act</i> .....	2361
3. PIPEDA Application.....	2368
<b>PART XXIV PROFESSIONAL NEGLIGENCE</b> .....	2373
<b>Professional Negligence Claims</b> — <i>Christine J. Pratt, Peter D. Gibson, J. Mark Raven-Jackson, Jennifer H. Janz and Daniel P. Carroll</i> .....	2375
I. INTRODUCTION .....	2377
1. Breach of Contract.....	2379
2. Negligence.....	2380
3. Negligent Misstatement .....	2381
4. Breach of Fiduciary Duty.....	2382
II. FORMS OF CLAIMS .....	2382
1. Claim against an Accountant .....	2382
2. Claim against Auditors.....	2386
(a) Negligence in relation to outside share purchaser .....	2386
(b) Negligence in relation to client .....	2390
3. Claim against an Insurance Broker.....	2393
(a) Breach of Contract.....	2394
(b) Negligence.....	2395
(c) Negligent misrepresentation.....	2396
(d) Fiduciary obligation .....	2397
(e) Damages .....	2397
4. Claim against a Financial Advisor.....	2397

CANADIAN PRECEDENTS OF PLEADINGS

5.	Claim against a Solicitor .....	2402
	(a) Missed limitation.....	2402
	(b) Loss of mortgage priority .....	2405
	(c) Negligent drafting of will .....	2408
6.	Claim Against an Engineer.....	2410
	(a) Breach of contract.....	2411
	(b) Negligence.....	2411
	(c) Damages .....	2412
III.	DEFENCE OF PROFESSIONAL NEGLIGENCE CLAIMS .....	2412
	1. The General Denial.....	2412
	2. Admit Facts, Deny Conclusions .....	2412
	3. Positive Defences.....	2413
	(a) Limitation defence.....	2413
	(b) Contract unenforceable, release, performance, etc.....	2413
	(c) Contributory negligence .....	2413
	(d) Contractual defences .....	2413
	4. Sample Statement of Defence .....	2414
IV.	REPLY AND JOINDER OF ISSUE.....	2416
	1. Promissory Estoppel.....	2417
	2. Limitations Period (Minor) .....	2417
	3. Limitations Period (Person Under Disability) .....	2417
	4. Limitations Period (Fraudulent Concealment) .....	2417
	5. Fundamental Breach of Contract .....	2417
	6. Joinder of Issue.....	2418
V.	HEALTH CARE PRACTITIONERS.....	2418
	1. Introduction .....	2418
	(a) Tort of negligence .....	2418
	(i) The legal burden .....	2418
	(ii) Duty of care principles .....	2419
	(iii) Standard of care principles .....	2419
	(A) Healthcare providers .....	2419
	(B) Hospitals.....	2420
	(iv) Causation principles .....	2421
	(v) Delay in diagnosis.....	2422
	(vi) Informed consent — the duty of disclosure .....	2422
	(b) Tort of battery .....	2424
	(c) Breach of contract.....	2425
	(d) Subrogated claims .....	2425
	(e) Limitation periods.....	2425
	2. Claim against Physician and Hospital.....	2425
	(a) Clinical negligence.....	2426
	(i) Healthcare providers .....	2426

TABLE OF CONTENTS

(ii) Hospitals.....	2427
(b) Informed consent .....	2428
(c) Breach of contract.....	2428
(d) Battery .....	2429
(e) Subrogated claim .....	2429
(f) Vicarious liability .....	2430
(g) Causation.....	2430
3. Defences Available in Professional Health Liability Claims ....	2430
(a) Clinical negligence.....	2431
(i) Physician.....	2431
(ii) Hospital .....	2431
(b) Informed consent .....	2431
(c) Breach of contract.....	2431
(d) Battery .....	2432
(e) Vicarious liability of hospital.....	2432
(f) Causation.....	2432
<b>PART XXV RESTITUTION .....</b>	<b>2435</b>
<b>Restitution — Mark Gannage .....</b>	<b>2437</b>
<b>PART I — COMMENTARY .....</b>	<b>2441</b>
1. Introduction .....	2441
2. Overview .....	2441
(a) What is a restitutionary claim? .....	2441
(b) Claim in restitution for unjust enrichment .....	2442
(c) Claim for restitution for wrongs .....	2442
(d) Nature of remedies in restitution .....	2442
(e) Defences.....	2443
3. Unjust Enrichment .....	2443
(a) Rationale and definition.....	2443
(b) Cause of action .....	2444
4. Elements of an Unjust Enrichment Claim.....	2445
(a) Defendant’s enrichment.....	2445
(i) Types of enrichments or benefits .....	2446
(b) Plaintiff’s corresponding deprivation .....	2447
(i) Plaintiff causing her own deprivation .....	2447
(c) Absence of juristic reason.....	2447
(i) Step 1.....	2448
(ii) Step 2.....	2448
5. Grounds for Relief .....	2449
6. Traditional Quasi-Contract .....	2449
7. <i>Quantum Meruit</i> .....	2449
8. <i>Quantum Valebat</i> .....	2451

CANADIAN PRECEDENTS OF PLEADINGS

9.	Money Had and Received .....	2451
10.	Benefits Conferred under Mistake .....	2452
	(a) Money paid under mistake of fact .....	2452
	(b) Money paid under mistake of law .....	2453
	(c) Other benefits conferred under mistake .....	2454
11.	Benefits Conferred under Coercion .....	2454
	(a) General .....	2454
	(b) Duress .....	2455
	(c) Undue influence .....	2456
	(d) Unconscionability .....	2458
12.	Claims against or by the Government .....	2459
13.	Money Paid under Compulsion of Law .....	2460
14.	Compulsory Discharge of Another's Liability .....	2461
15.	Benefits Conferred Without Request in an Emergency .....	2462
16.	Benefits Conferred under Ineffective Transactions .....	2463
17.	Benefits Acquired through Wrongful Acts .....	2465
	(a) Waiver of tort .....	2465
	(b) Breach of confidence and breach of fiduciary duty generally .....	2466
	(i) Breach of confidence .....	2466
	(ii) Breach of fiduciary duty .....	2468
	(c) Criminal acts .....	2469
18.	Remedies .....	2469
	(a) Monetary award .....	2470
	(b) Proprietary award .....	2470
19.	Common Monetary Remedies .....	2471
	(a) Equitable damages .....	2471
	(b) Account of profits .....	2472
	(c) Disgorgement .....	2473
	(d) Equitable compensation .....	2474
20.	Quantifying a Monetary Remedy .....	2474
	(a) Conferral of mutual benefits .....	2475
	(b) Parties' reasonable or legitimate expectations .....	2476
21.	Some Examples Where Restitutionary Remedies Have Been Granted .....	2476
22.	Other Restitutionary Remedies .....	2477
23.	Defences .....	2478
	(a) Juristic reason .....	2478
	(b) Plaintiff is a mere volunteer or is officious .....	2478
	(c) Change of position .....	2479
	(d) Estoppel .....	2481
	(e) <i>Laches</i> and acquiescence .....	2482

## TABLE OF CONTENTS

(f) <i>Bona fide</i> purchase.....	2482
(g) Set-off.....	2483
(h) Assumption of risk.....	2483
(i) Impossibility of returning the parties to their original positions.....	2484
(j) Statutory defences.....	2484
(k) Lack of clean hands.....	2484
24. Maxims of Equity.....	2485
25. Practical Tips.....	2485
26. Concurrent or Alternative Causes of Action and Remedies ....	2489
(a) Contract.....	2489
(b) Tort.....	2490
(c) Property.....	2490
27. Matters that Must Be Specifically Pleaded.....	2490
28. Pleading Defences.....	2491
29. Considerations for Defence Counsel.....	2492
30. Supreme Court of Canada Restitution Cases.....	2493
(a) Co-habitants' property [family and family-like] cases.....	2493
(b) Commercial cases.....	2494
(c) Inter-governmental claims.....	2494
(d) Recovery of unlawful taxes.....	2494
(e) Claims against government.....	2495
(f) Benefits acquired through wrongful acts.....	2495
(g) Specific remedies.....	2495
(h) Defences.....	2496
31. Landmark U.K. Restitution Cases.....	2496
32. Scope.....	2497
33. Pertinent Forms.....	2498
34. Small Claims Court.....	2502
35. Selected Bibliography.....	2518
(a) Canada.....	2518
(b) U.K.....	2518
(c) U.S.A.....	2519
(d) Australia.....	2519
(e) New Zealand.....	2519
(f) International Website.....	2519
<b>PART II — PRECEDENTS.....</b>	<b>2519</b>
Precedent 1. Unpaid invoices for building materials; Unjust enrichment.....	2519
Precedent 2. Unpaid invoices; Unjust enrichment; Breach of trust; Guarantee.....	2521

CANADIAN PRECEDENTS OF PLEADINGS

Precedent 3. Unpaid invoices; Breach of contract; Unjust enrichment; Guarantee ..... 2523

Precedent 4. Supply of materials and services; Breach of contract; *Quantum meruit*; Unjust enrichment ..... 2524

Precedent 5. Unpaid legal services; Breach of retainer agreement; *Quantum meruit*; Unjust enrichment ..... 2526

Precedent 6. Money owing under line of credit; Breach of contract; Unjust enrichment ..... 2528

Precedent 7. Landlord’s failure to reimburse tenant for taxes and utilities costs owing; Unjust enrichment; Liquidated damages ..... 2530

Precedent 8. Assignment of lease; Royalty payments; Mistake of fact; Mistake of law; Constructive trust; Unjust enrichment; Set-off ..... 2533

Precedent 9. Late payment penalties; Illegality; Unjust enrichment; Injunction ..... 2535

Precedent 10. Employment; Constructive dismissal; Unjust enrichment ..... 2537

Precedent 11. Government suing insurer; Statutory accident benefits; Unjust enrichment ..... 2540

Precedent 12. Misappropriation of investment property; Refusal to repay loan; Unjust enrichment ..... 2542

Precedent 13. Breach of contract; Failure to repay advances received against success fee; Unjust enrichment ..... 2544

Precedent 14. Promissory note; Negligence; Fraud; Breach of fiduciary duty; Punitive damages; Unjust enrichment ..... 2547

Precedent 15. Division of family (husband and wife) property after divorce; Constructive trust; Unjust enrichment; Value survived method of calculation ..... 2551

Precedent 16. Oral contract; Familial relationship; Constructive trust; *Quantum meruit*; Unjust enrichment ..... 2552

Precedent 17. Breach of contract; Fundamental breach of contract; *Sale of Goods Act*; Misrepresentation; Conspiracy; Unjust enrichment; Punitive damages ..... 2556

Precedent 18. Lien under *Construction Lien Act*; Breach of contract; Unjust enrichment ..... 2560

Precedent 19. Constructive trustees; Breach of trust: Breach of fiduciary duty; Misappropriation of funds; *Construction Lien Act*; Unjust enrichment; Accounting ..... 2563

Precedent 20. Termination of agency agreement; License agreements; Breach of contract; Unjust enrichment; Declaration; Accounting ..... 2565

TABLE OF CONTENTS

Precedent 21. Defective consumer goods, Negligence; Breach of contract; Unjust enrichment; *Sale of Goods Act*; *Consumer Protection Act, 2002* ..... 2568

Precedent 22. Breach of contract; Breach of trust; Breach of fiduciary duty; Constructive trust; Wrongful retention of the refund belonging to plaintiff; Unjust enrichment ..... 2571

Precedent 23. Breach of contract; Inducing breach of contract; Breach of confidence; Breach of fiduciary duty; Knowing assistance and knowing receipt; Unjust enrichment; Unlawful interference with economic relations; Conspiracy; Punitive damages; Accounting, Disgorgement ..... 2575

Precedent 24. Notice of application - Breach of contract; Differential value agreement; Unpaid management fees; Breach of trust; Breach of fiduciary duty; Unjust enrichment; Undue influence; Equitable lien ..... 2583

**PART XXVI SECURITIES** ..... 2587

**Securities Litigation** — *Joel Wiesenfeld*..... 2589

I. INTRODUCTION ..... 2590

    1. Is There a Loss? ..... 2590

    2. What Caused the Loss? ..... 2591

    3. Alternative Legal Proceedings ..... 2591

    4. The Role of a Fact Expert ..... 2592

II. THE PARTIES..... 2592

    1. The Investor Client: Investor Profile..... 2592

    2. The Dealer/Financial Advisor ..... 2593

    3. Other ..... 2594

III. The Factual Construction of the Claim/Defence ..... 2596

    1. The Initiation of the Relationship ..... 2596

    2. The Conduct of the Account ..... 2597

    3. Documents Evidencing the Conduct of the Account ..... 2598

IV. DUTIES/CAUSES OF ACTION/PLEADING A CLAIM..... 2603

    1. Principal and Agent ..... 2603

    2. Contractual Obligations ..... 2604

    3. Fiduciary..... 2605

    4. Regulatory Requirements, Industry Practices and Internal Dealer Policies ..... 2606

    5. Pleading Regulatory Enforcement Proceedings, Settlements and Findings ..... 2607

    6. Vicarious Liability..... 2609

    7. Negligence and Negligent Misrepresentation..... 2611

    8. Failure to Supervise ..... 2612

CANADIAN PRECEDENTS OF PLEADINGS

9. Similar Fact Evidence.....	2613
10. Fraud/Fraudulent Misrepresentation .....	2614
V. COMPLETING THE INVESTOR LOSS CLAIM.....	2617
1. Causation.....	2617
2. Damages .....	2618
VI. DEFENCES TO A CLAIM/INVESTOR CLIENT DUTIES AND CONDUCT.....	2620
1. Dealer/Financial Advisor Defences to Investor Loss Claims ...	2620
2. Investor Client Duties and Conduct .....	2621
3. Duty to Mitigate .....	2623
4. Contributory Negligence .....	2623
5. Ratification, Estoppel, Waiver, <i>Laches</i> and Acquiescence.....	2624
6. Limitation Period: Statutory Bar to Asserting Claim .....	2624
<b>PART XXVII SUPREME COURT OF CANADA.....</b>	<b>2627</b>
<b>Supreme Court of Canada — <i>Eugene Meehan, Q.C., Marie-France Major, Thomas Slade and Cory Giordano</i> .....</b>	<b>2629</b>
<b>PART I — COMMENTARY .....</b>	<b>2629</b>
1. Brief Overview of Process.....	2629
(a) Deciding whether to appeal .....	2629
(b) Steps to an appeal.....	2630
(c) Importance of appeal materials .....	2632
2. Overview of Key Documents.....	2633
(a) Application for leave to appeal.....	2633
(b) Response.....	2634
(c) Reply .....	2635
(d) Factum of the appellant and respondent .....	2635
(e) Factum of the intervener .....	2636
<b>PART XXVIII WILLS AND ESTATES .....</b>	<b>2639</b>
<b>Wills and Estates — <i>Archie Rabinowitz, David M. Lobl and Brian Cohen</i> .....</b>	<b>2641</b>
<b>PART I — COMMENTARY .....</b>	<b>2642</b>
1. Challenging the Validity of Wills.....	2642
2. Orders for Assistance .....	2644
3. Dependant Support Claims .....	2646
4. Passing of Accounts and Executors’ Fees .....	2647
5. Statement of Accounts .....	2651
6. Court-Appointed Guardians for Property and of the Person .....	2651
7. Applications for the Opinion, Advice and Direction of the Court .....	2654

TABLE OF CONTENTS

8. Retirement and Removal of Trustees.....	2655
<b>PART II — PRECEDENTS</b> .....	2656
<b>I. Challenging the Validity of Wills</b> .....	2656
1. Notice of Objection — Standard Form .....	2656
2. Notice of Motion for Directions — Standard Form .....	2657
3. Affidavit in Support of a Motion for Directions.....	2658
4. Notice of Motion for Return of Certificate of Appointment .....	2661
5. Affidavit in Support of an Application for an Order for Return of Certificate of Appointment of Estate Trustee.....	2663
<b>II. Orders for Assistance</b> .....	2665
6. Order to Accept or Refuse Appointment as Estate Trustee with a Will — Standard Form .....	2665
7. Affidavit in Support of a Motion for Order to Accept or Refuse Appointment as Estate Trustee with a Will.....	2666
8. Affidavit in Support of a Motion for Order to Accept or Refuse Appointment as Estate Trustee Without a Will.....	2667
9. An Affidavit in Support of a Motion for an Order to Bring in a Testamentary Document.....	2668
<b>III. Dependant Support Claims</b> .....	2668
10. Notice of Application.....	2668
11. Affidavit: Spouse as Claimant .....	2672
<b>IV. Passing of Accounts and Executors’ Fees</b> .....	2673
12. Notice of Motion for Order to Pass Accounts .....	2673
13. Affidavit in Support of Motion for Order to Pass Accounts.....	2674
14. Notice of Application to Pass Accounts .....	2676
15. Notice of Objection to Accounts .....	2679
16. Request for Further Notice .....	2681
17. Reply to Notice of Objection to Accounts.....	2682
<b>V. Statement of Accounts</b> .....	2685
18. Contents of an Estate Accounting .....	2685
<b>VI. Court-Appointed Guardians for Property and of the        Person</b> .....	2688
19. Notice of Application.....	2688
20. Affidavit of Applicant .....	2691
21. Consent of Applicant .....	2695
22. Management Plan — Guardian of Property .....	2695
23. Guardianship Plan — Guardian of the Person .....	2705
24. Physician’s Affidavit for Guardian of Property.....	2714

CANADIAN PRECEDENTS OF PLEADINGS

VII. Applications for the Opinion, Advice and Direction of the Court ..... 2717

25. Notice of Application — Rule 14.05(3) ..... 2717

26. Affidavit in Support of Application..... 2719

27. Factum of the Applicant ..... 2722

VIII. Retirement and Removal of Trustees..... 2728

28. Notice of Application — Trustee Consenting to Removal..... 2728

29. Affidavit — Trustee Consenting to Removal ..... 2729

30. Notice of Application — Removal of Estate Trustee ..... 2731

31. Affidavit in Support of Removal of Estate Trustee..... 2731

*Index* ..... 2735