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### TECHNOLOGY CONTRACTING

**P. Bradley Limpert**  
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This publication provides comprehensive, invaluable information relating to transactions and agreements that technology-oriented companies enter into throughout their life cycle. Each chapter includes a discussion on the law that is relevant to negotiating and drafting particular types of agreements, and practical suggestions for drafting and negotiating clauses and provisions within the agreements. The publication includes key contracts and transactions that are of interest to technology-oriented companies.

This release features updates to Chapter 1. Appendix 1E Remedies Table—Misuse of Confidential Information Appendices in Chapter 12. Dispute Avoidance and Resolution including updates to Appendix 12F. Quantum Table—Trade-Mark Infringement and Passing Off—This release also features updates to the Appendices in Chapter 13. Appendix 13T. Sentencing and Resolutions Table—Offences under the Competition Act.

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## Highlights

- **Remedies Table—Misuse of Confidential Information—Damages**—Ballmer was ordered to pay \$776,000 to the Plaintiff SK. SK brought a summary motion against Ballmer to determine the quantum of damages it suffered. The expert witness testified that SK had suffered damages of \$776,000. An objection was made to the expert witness' assumption that SK would have continued to increase the price of sleeves by 5% per year, but for KM entering the market using SK's trade secrets and undercutting its prices by 40%. The expert witness assumed that Shaver-Kudell would have increased its prices at 5% per year as it did for the years 2011, 2012, and 2013. The expert calculated the damages based on SK being unable to increase prices at 5% per year and due to a loss of sales from 2014 until 2018. He calculated the damages at \$36,000 in 2014, \$138,000 in 2015, \$171,000 in 2016, \$268,000 in 2017, and \$163,000 in 2018. The damages were suffered due to the loss of sales to KM and an inability to increase its prices by 5% per year as it had in the previous three years as a result of KM using SK's trade secrets and undercutting SK's prices: *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2018 CarswellOnt 14599, 2018 ONSC 5206, 298 A.C.W.S. (3d) 155 (Ont. S.C.J.) (Liability Decision); additional reasons in *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2024 CarswellOnt 1578, 2024 ONSC 829 (Ont. S.C.J.) (summary motion against Ballmer to determine damages).
- **Quantum Table—Trademark Infringement and Passing Off—Damages under Section 7**—There was no independent or expert evidence regarding the assessment or the calculation of damages. Keezio's evidence in support of its damages claim came only from Clutek and aspects of the damages calculation were problematic. Justice Loo noted that there was no clear evidence contradicting Clute's assertions as to damages, and it was reasonable to conclude that the delisting of Keezio's product pages caused a decrease in Keezio's sales on the days on which the delisting occurred. Accordingly, Justice Loo would assess damages on that basis. In Justice Loo's view, it was appropriate to assess damages by comparing Keezio's 2018 figures to its 2019 figures, without a 30% increase in sales. The decreased sales would then be multiplied by a profit margin of \$50 USD per unit for the days during which the Keezio sales pages were delisted. Justice Loo calculated that the sales on the relevant days in 2018 totaled 1,129 units, and the sales on the relevant days in 2019 totaled 640 units. Therefore, the decrease in sales totaled 489 units. At a loss of profit of \$50 USD per unit, the damages were \$24,450 USD: *Keezio Group, LLC v. The Shrunk's Family Toy Company Inc.*, 2024 BCSC 64 (B.C.S.C.).