

TABLE OF CONTENTS

Volume 1

<i>List of Contributors</i>	iii
<i>Foreword</i>	xxxiii
<i>Table of Cases</i>	cv
PART I ABORIGINAL	1
Aboriginal — <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
PART II ARBITRATION	33
Arbitration — <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
PART III AVIATION	71
Aviation — <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
PART IV CLASS ACTIONS	113
Class Actions — <i>John A. Campion, Sarah J. Armstrong and</i> <i>Antonio Di Domenico</i>	115
PART I — COMMENTARY	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 LAW211

Private Litigation in Canadian: Competition Law — Mark Katz and

Chantelle Spagnola213

PART I — COMMENTARY214

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 <i>Competition Act</i> (Price-Fixing)	240
Appendix 2 — Statement of Defence in Response to a Claim under Section 36 of the <i>Competition Act</i> (Price-Fixing)	246
Appendix 3 Notice of Motion — Certification Motion for a Class Action under Section 36 of the <i>Competition Act</i> (Price-Fixing)	249
Appendix 4 Statement of Claim for a Class Action under Section 36 of the <i>Competition Act</i> (Price-Fixing)	252
Appendix 5 Statement of Defence in Response to a Class Action Claim under Section 36 of the <i>Competition Act</i> (Price-Fixing)	260
Appendix 6 Notice of Application for Leave Pursuant to Section 103.1 of the <i>Competition Act</i> (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 — <i>Duncan Glaholt</i>	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
PART II — PRECEDENTS	293
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 — <i>Mark Gannage</i>	399
Part I — COMMENTARY	402
1. Introduction	402
2. What is a Contract?	402
3. <i>Consensus Ad Idem</i>	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. <i>Statute of Frauds</i>	409
11. <i>Sale of Goods Act</i>	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
PART II — PRECEDENTS	478
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
PART II — PRECEDENTS		561
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
PART IX DEBTOR-CREDITOR		577
Debtor and Creditor — Michael Tweedie		579
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
	PART X DEFAMATION	665
	Libel and Slander — Howard Winkler	667
	PART I — COMMENTARY	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
PART II — PRECEDENTS	683
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
PART XI EMPLOYMENT AND LABOUR LAW	709
Wrongful Dismissal — Stuart Rudner and Erik Marshall	711
INTRODUCTION	713
PART I — STATEMENT OF CLAIM FOR WRONGFUL DISMISSAL	715
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
PART II — STATEMENT OF DEFENCE FOR WRONGFUL DISMISSAL	761
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
PART III — REPLY TO STATEMENT OF DEFENCE FOR WRONGFUL DISMISSAL.....		815
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 —

<i>Bonnie Roberts Jones</i>	835
-----------------------------------	-----

PART I — COMMENTARY

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

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*.....

1. Introduction.....	867
2. The Scheme of the <i>Employment Standards Act, 2000</i>	868
3. Issues relating to Civil Litigation in Enforcement of the <i>Employment Standards Act, 2000</i>	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

PART XII ENVIRONMENTAL LAW	895
Environmental Law — <i>Paula Lombardi and Kirsten Mikadze</i>	897
PART I — COMMENTARY	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
PART II — PRECEDENTS	920
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
PART XIII EQUITABLE REMEDIES	939
Equitable Remedies — <i>Mark Gannage</i>.....	941
Introduction.....	942
PART I — INJUNCTION	945
Precedent 1. Breach of Dealership Agreement (Also Declaration, Specific Performance)	948
Precedent 2. Trespass	950
Precedent 3. Preventing Lawyer From Acting.....	952
PART II — SPECIFIC PERFORMANCE.....	954
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
PART III — RECTIFICATION.....	967
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
PART IV — RESCISSION.....	978
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 <i>Family Law Act</i>	1025
(i) Relation to <i>Succession Law Reform Act</i>	1025
(b) The <i>Divorce Act</i>	1026
(c) The <i>Children's Law Reform Act</i>	1026
(i) The Best Interests of the Child Test	1027
(d) The <i>Child and Family Services Act</i>	1027
(e) The <i>Arbitration Act</i>	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
	PART XV IMMIGRATION LAW.....	1045
	Leave Applications & Judicial Reviews — Mario Bellissimo	1047

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
PART XVI INFORMATION TECHNOLOGY	1129
Information Technology Disputes — <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
PART XVII INSOLVENCY	1175
Insolvency — <i>Natasha MacParland and Natalie Renner</i>	1177
I. BANKRUPTCY	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
	BANKRUPTCY — FORMS	1188
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.	THE TRUSTEE	1207
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
PART XVIII INSURANCE COVERAGE	1699
Insurance Coverage — <i>Lawrence G. Theall and Shaun A. Hashim</i>	1701
PART I — COMMENTARY	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
PART II — PRECEDENTS	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

PART XIX INTELLECTUAL PROPERTY	1773
Copyright — Sangeetha Punniyamoorthy, Ryan Evans and	
Thomas Kurys	1775
PART I — COMMENTARY	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
PART II — PRECEDENTS		1809
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

<i>Sheldon Burshtein</i>	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

Patents — *Sangeetha Punniyamoorthy, Ryan Evans and*

<i>Thomas Kuryls</i>	1923
PART I — COMMENTARY	1928
Patent Litigation in Canada	1928
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
Registered Trade-marks — Sangeetha Punniyamoorthy, Ryan Evans and Thomas Kurys	1989
PART I — COMMENTARY	1990
Trade-mark Litigation in Canada	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
	Trade Secrets — Donald M. Cameron and Kevin Shipley	2045
	PART I — COMMENTARY	2046
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
PART II — PRECEDENTS	2079
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
PART XX JUDICIAL REVIEW	2107
Judicial Review — <i>David Phillip Jones, Q.C., Anne de Villars, Q.C.</i> <i>and Dawn Knowles</i>	2109
PART I — COMMENTARY	2109
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
PART II — PRECEDENTS	2122
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 <i>Habeas Corpus</i>	2126
Form 7: Sample Order for <i>Habeas Corpus</i>	2128
Recent Developments in Judicial Review — <i>Raj Anand</i>	2129
PART I — COMMENTARY	2129
1. The Effect of <i>Dunsmuir</i> on the Standard of Review	2130
(a) Two standards of review	2130
(b) <i>Dunsmuir</i> '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 — <i>Christine J. Pratt, Lindsey Miller, Randal S.</i> <i>Carlson and Peter Gibson</i>	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
PART XXII PLAIN LANGUAGE	2247
A Context for Plain Language Legal Pleadings — <i>Christine Mowat</i>	
and <i>David Lloyd</i>	2249
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 (www.plainlanguage.gov)	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. <i>Before</i> and <i>After</i> Examples from a May 2, 2016 Factum Filed in the Alberta Court of Appeal	2302
6. <i>Before</i> and <i>After</i> Versions of a Notice Published in a Newspaper by a Justice Department.....	2309
7. <i>Before</i> and <i>After</i> examples from Precedents	2313
8. A Model Example of a Law Firm’s Chart Describing How a Case Goes Through Court	2315
9. <i>Before</i> and <i>After</i> 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 <i>Charter of Rights and Freedoms</i>	2330
(a) Background.....	2330
2. Public Sector Legislation	2337
(a) Federal <i>Privacy Act</i>	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
PART II — COMMONLY USED PRECEDENTS.....	2356
1. Common Law Tort of Invasion of Privacy	2357
2. Application Under the <i>Privacy Act</i>	2361
3. PIPEDA Application.....	2368
 PART XXIV PROFESSIONAL NEGLIGENCE	2373
Professional Negligence Claims — <i>Christine J. Pratt, Peter D. Gibson,</i> <i>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
PART XXV RESTITUTION	2435
Restitution — Mark Gannage	2437
PART I — COMMENTARY	2441
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
PART II — PRECEDENTS.....	2519
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; <i>Quantum meruit</i> ; Unjust enrichment	2524
Precedent 5. Unpaid legal services; Breach of retainer agreement; <i>Quantum meruit</i> ; 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; <i>Quantum meruit</i> ; Unjust enrichment	2552
Precedent 17. Breach of contract; Fundamental breach of contract; <i>Sale of Goods Act</i> ; Misrepresentation; Conspiracy; Unjust enrichment; Punitive damages	2556
Precedent 18. Lien under <i>Construction Lien Act</i> ; Breach of contract; Unjust enrichment	2560
Precedent 19. Constructive trustees; Breach of trust: Breach of fiduciary duty; Misappropriation of funds; <i>Construction Lien Act</i> ; 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; <i>Sale of Goods Act; Consumer Protection Act, 2002</i>	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
PART XXVII SUPREME COURT OF CANADA.....	2627
Supreme Court of Canada — Eugene Meehan, Q.C., Marie-France Major, Thomas Slade and Cory Giordano	2629
PART I — COMMENTARY	2629
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
PART XXVIII WILLS AND ESTATES	2639
Wills and Estates — Archie Rabinowitz, David M. Lobl and Brian Cohen	2641
PART I — COMMENTARY	2642
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
PART II — PRECEDENTS	2656
I. Challenging the Validity of Wills.....	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
II. Orders for Assistance	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
III. Dependant Support Claims	2668
10. Notice of Application.....	2668
11. Affidavit: Spouse as Claimant	2672
IV. Passing of Accounts and Executors' Fees	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
V. Statement of Accounts	2685
18. Contents of an Estate Accounting	2685
VI. Court-Appointed Guardians for Property and of the Person	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
<i>Index</i>	2735