

TABLE OF CONTENTS

Table of Contents.....	iii
Table of Cases.....	xi
INTRODUCTION	lxv
1. Overview	lxv
2. Other Comments	lxvii
PART I — THE INSURANCE CONTRACT.....	1
CHAPTER 1: THE CREATION OF AN INSURANCE CONTRACT	1
1. Overview	1
2. The Distinction Between “Contract” and “Policy”	1
3. Insurance Intermediaries: Brokers and Agents.....	2
4. Creating an Insurance Contract Through an Intermediary	4
5. Creating an Insurance Contract Through a Managing General Agent.....	5
6. Creating an Insurance Contract Directly with the Insurer	6
7. Special Issues Relating to the Creation of an Insurance Contract.....	7
(a) Binders of insurance	7
(b) Rectification	9
8. Summary	12
CHAPTER 2: THE FORM AND STRUCTURE OF AN INSURANCE	
POLICY	13
1. Overview	13
2. Declarations	13
(a) Name of the insurer and the insurer’s address.....	13
(b) Policy number.....	14
(c) Policy period	15
(d) Identity of the named insured.....	16
(e) Description of the insured’s business	16
(f) Description of the risk.....	17
(g) Policy forms, form numbers, and edition dates.....	18
(h) Premium	19
(i) Policy limits.....	19
(j) Deductibles, self-insured retentions, and co-insurance.....	20
(i) Deductibles.....	20
(ii) Self-insured retentions	21
(iii) Differences between deductibles and self-insured retentions...	21
(iv) “Per occurrence” and “per claim” provisions.....	22
(v) Co-insurance.....	23
(k) Identity of the intermediary.....	23
(l) Other information	24
3. Insuring Agreements	24
4. Exclusions	25
5. Exceptions to Exclusions	28

6. Definitions	29
(a) Definition sections in insurance policies	29
(b) “Means” and “includes”	29
(c) Absence of defined terms	31
(d) Inconsistent use of defined terms	32
7. Conditions and Warranties	33
(a) Overview	33
(b) Conditions relating to the existence and termination of coverage ..	33
(c) Conditions relating to claims	34
(d) Conditions relating to other insurance	34
(e) Miscellaneous conditions	35
(f) Effect of a breach of a condition relating to the loss	35
(g) When conditions may be disregarded	35
(i) Waiver and estoppel	35
(ii) Unjust or unreasonable conditions	36
(iii) Relief from forfeiture under insurance legislation	36
(A) Imperfect compliance and non-compliance	37
(B) “With respect to the loss”	38
(C) “Clean hands”	39
(D) Prejudice to the insurer	39
(iv) Relief under general jurisdiction	40
8. Endorsements	41
CHAPTER 3: HOW TO READ AN INSURANCE POLICY	43
1. Overview	43
2. Obtaining the Entire Policy	43
(a) Sources of the policy wording	43
(b) The schedule of policy forms and endorsements	44
3. Reading the Entire Policy	45
4. Reading the Policy in Order	46
5. Reading Techniques	47
(a) Stripping out unnecessary words	47
(b) Inserting definitions	48
6. Marking Up the Policy — Privilege and Production Issues	49
(a) The lawyer’s notes and marked-up copies of the policy	50
(b) The adjuster’s or broker’s notes and marked-up copies of the policy	53
PART II — EVIDENCE ISSUES	55
CHAPTER 4: ONUS AND STANDARD OF PROOF	55
1. Onus of Proof	55
(a) Proving the existence and terms of lost insurance policies	55
(i) Overview	55
(ii) Why old policies are litigated	55
(iii) Proving lost insurance policies	55
(iv) The business records rule	58

(b) Onus of proving claim is covered	60
(c) Order of presentation at trial.....	62
2. Standard of Proof.....	63
CHAPTER 5: ADMISSIBILITY OF EVIDENCE.....	65
1. Admissibility of the Contract	65
2. Inadmissibility of Parol Evidence	65
3. Evidence of the Parties' Subjective Intent	66
(a) Inadmissibility of insurer's subjective intent	67
(b) Inadmissibility of insured's subjective intent	67
(c) Inadmissibility of subjective intent in dispute between two insurers	69
4. Exceptions to the Inadmissibility of Parol Evidence	69
(a) Ambiguity	69
(i) General.....	69
(ii) Patent and latent ambiguity	70
(iii) Extrinsic evidence to establish ambiguity.....	72
(iv) Extrinsic evidence to resolve ambiguity	74
(b) Evidence of the factual matrix (surrounding circumstances)	75
(c) Evidence of drafting history and other policies.....	79
(i) Overview	79
(ii) Negotiations and draft versions of the policy	80
(iii) Prior policies	83
(iv) Subsequent policies	84
(v) Availability of other coverages.....	86
(vi) Historical evolution of standard policy wordings	88
(vii) Insurer's marketing material.....	90
5. Evidence of Subsequent Conduct	91
6. Evidence of the Meaning of Technical Words or Trade Usage.....	93
7. Evidence of Premium	95
(a) Evidence of low premium as indication of narrow coverage	95
(b) Evidence of premium payment as indication that coverage was purchased.....	97
PART III - INTERPRETATION OF THE POLICY	99
CHAPTER 6: THE COURT'S ROLE.....	99
1. Giving Effect to the Objective Intent of the Parties and Not Re-Writing the Agreement	99
2. Using Interpretive Tools to Analyze Coverage	101
3. Making a Decision	102
CHAPTER 7: THE PARTIES' INTENT	105
1. Giving Effect to the Parties' Intent.....	105
(a) Intent at the time the contract was formed	105
(b) Objective intent versus subjective intent	106
(c) Intent of both parties	108

(d) Sources of evidence of intent	108
2. The Average Person Standard	109
3. Effect of the Insured Not Reading the Policy.....	110
4. Ordinary Meaning of the Words.....	114
5. Context of the Words.....	116
(a) Context of the words within the policy	116
(b) Context of the words within the surrounding circumstances	120
6. Dictionary Definitions.....	120
7. Consideration of “General Principles”	123
CHAPTER 8: IMBALANCE OF NEGOTIATING POWER	127
1. Contract of Adhesion.....	127
(a) Rationale and development of the adhesionary rules.....	127
(b) Manuscript policies/sophisticated policyholders	130
(c) Application of the adhesionary rules to manuscript policies	132
(d) Application of the adhesionary rules to policy terms mandated by legislation	137
(e) Application of the adhesionary rules to third party beneficiaries (unnamed and additional insureds)	140
(f) Contractual modification of the adhesionary rules.....	141
2. Contra Proferentem	143
(a) Ambiguities construed against the drafter versus against the insurer	143
(b) When the rule applies.....	145
(i) Definition of ambiguity	145
(ii) The multiple meanings must be reasonable	147
(iii) Insured’s inability to understand policy.....	149
(iv) Mere difficulty in construction.....	149
(v) Disagreement between the parties as to meaning	150
(c) Differing judicial decisions as evidence of ambiguity	150
(d) Application of the rule to various documents.....	154
3. Broad Interpretation of Clauses Granting Coverage and Narrow Interpretation of Clauses Removing Coverage.....	155
(a) Sources of the principle	156
(b) Application of the principle to contracts negotiated by sophisticated policyholders.....	157
(c) Narrow construction of exclusions	157
4. Construction Most Favourable to the Insured.....	159
CHAPTER 9: CIRCUMVENTION OF POLICY LANGUAGE.....	163
1. Overview.....	163
2. Literal Meaning and Commercially Sensible Result.....	163
3. Absurdity	167
4. Nullification of Coverage.....	169
(a) Development of the principle.....	170
(b) Application of the principle in the absence of ambiguity.....	173
(c) Evidence of nullification	175

5. Reasonable Expectations	176
(a) Overview	176
(b) Reasonable expectations in the United States.....	177
(c) Reasonable expectations in Canada.....	178
(i) Objective expectations	178
(ii) Evidence of expectations.....	179
(iii) Expectations of both parties.....	180
(iv) Expectations of third parties	181
(v) Reasonable expectations as an adjunct to resolving ambiguity	181
(vi) Application of the doctrine in the absence of ambiguity	185
(vii) Reasonable expectations as an adjunct to nullification of coverage.....	190
(viii) Reasonable expectations as an adjunct to commercially sensible interpretation	190
(ix) Reasonable expectations applied in favour of insurer	192
CHAPTER 10: PRESUMPTIONS OF DRAFTING.....	195
1. Overview	195
2. Presumption of Consistent Expression	195
(a) Same words, same meaning.....	196
(b) Different words, different meaning.....	201
3. Presumptions against Tautology, Redundancy, and Superfluity	204
(a) Overview	204
(b) Presumption against tautology.....	204
(c) Presumption against redundancy.....	206
(d) Presumption against superfluous or meaningless language.....	208
(e) Rebutting the presumptions — “belt and suspenders” drafting.....	209
(f) Where possible, contract to be interpreted as effectual (<i>ut res magis valeat quam pereat</i>)	210
(g) Summary	212
4. The Limited Class Rule (<i>eiusdem generis</i>)	212
(a) Overview	212
(b) Specific words with common characteristics.....	213
(c) Less than two specific words	214
(d) General word unrelated to specific words.....	215
(e) General word preceding specific words	215
(f) Context may negate the rule.....	217
(g) Application restricted to ambiguous wording.....	218
5. Associated Words Rule (<i>noscitur a sociis</i>).....	219
6. Implied Exclusion (<i>expressio unius est exclusio alterius</i>)	221
CHAPTER 11: IMPLIED TERMS.....	227
1. Overview	227
2. Statutory Limitations on Implied Terms	228
3. Common Features of Implied Terms	229
4. Types of Implied Terms.....	230

(a) Business custom doctrine	230
(b) Business efficacy and “officious bystander” doctrine	231
(c) Implied terms as legal incidents of particular classes of contracts	232
CHAPTER 12: CONFLICTING TERMS	235
1. Overview	235
2. Interpretation to Avoid Conflicting Terms	235
(a) Overview	235
(b) Paramount clauses	236
(c) Manuscript wording versus boilerplate wording	237
(d) Specific clauses versus general clauses	239
(e) Endorsements versus main policy	240
(f) Agreement to cover specific loss versus general exclusion	241
3. Repugnancy	243
(a) Overview	243
(b) Repugnancy resolved in favour of the insured	243
(c) Severance of a contractual term	244
(d) A later clause destroying an obligation will be rejected as repugnant to an earlier clause creating the obligation	245
CHAPTER 13: ERRORS IN THE POLICY AND MISSING WORDS	249
1. Overview	249
2. Rectification	249
3. Applicability of Cases on Errors in Legislation	250
4. Errors That Do Not Change the Meaning or Result in Ambiguity	250
(a) Wording errors that do not alter the meaning	250
(b) Formatting errors that do not alter the meaning	253
(c) Punctuation errors that do not alter the meaning	255
(d) Comment on errors in exclusions	256
5. Errors That Change the Meaning or Result in Ambiguity	257
(a) Wording errors that change the meaning or result in ambiguity	257
(b) Formatting errors that change the meaning or result in ambiguity	258
(c) Punctuation errors that change the meaning or result in ambiguity	260
6. Missing Endorsements or Policy Forms	263
7. Reading in Missing Words	264
(a) Overview	264
(b) Application of the principle	264
8. Elliptical Construction (deliberate omission of words to avoid repetition)	266
CHAPTER 14: GRAMMAR AND USAGE RULES	269
1. Overview	269
2. Adjective Preceding a Series of Nouns	269
3. Comma Separating Two Adjectives That Precede a Noun	270

TABLE OF CONTENTS

ix

4. Last Antecedent Rule.....	270
5. Meaning of “and”	274
6. Meaning of “or”	275
7. Meaning of “and/or”	276
CHAPTER 15: CONSISTENCY OF INTERPRETATION	281
1. Maintaining Consistency of Judicial Interpretation	281
2. Precedential Value of American Cases in Canada	282
Index	285