

THE RECEPTION OF EQUITY IN THE SUPREME COURT OF CANADA (1875 - 2000)

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Historically equity has brought the principles of fairness and good faith into the private law. During the first period of the Court's existence (1875-1949) it simply applied English doctrine and precedents. In the second (1949-1975) it was more focussed on the themes of equity, especially conflict of interest and duty. But in the latest period (1975-2000), though not without there being difference of opinion, it has been creative, especially with equitable remedy. It has introduced good conscience liability, and required fiduciary standards of conduct where previously contract and tort alone supplied remedy.

Historiquement, l'équité a introduit les principes d'équité et de bonne foi dans le droit privé. Durant sa première période d'existence (1875-1949), la Cour a simplement appliqué la doctrine et les précédents d'Angleterre. Durant la seconde (1949-1975), elle a davantage porté son attention sur les thèmes de l'équité, spécialement le conflit d'intérêts et le devoir. Durant la dernière période cependant (1975-2000), malgré certaines divergences d'opinion, la Cour s'est montrée créative, particulièrement dans le recours en équité. Elle a introduit la responsabilité "de bonne conscience", et elle a imposé des devoirs de conduite d'un fiduciaire là où, antérieurement, seuls les contrats et les délits accordaient un recours.

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I. *The Role of Equity in a Legal System*¹

Historically, equity in the common law world is a tale of divided jurisdictions; a physical distinction between those courts that apply the letter of the law, and those other courts which hone the often rough edges of those decisions. Such a distinction can be a phenomenon only of a system of law that is non-codified, secular, and confident in its belief of its own authority and its role in the realm. That was the case of the Court of Chancery in fourteenth century England. The law, which was the custom of the realm, was the business of the Court of Common Pleas, the Court of Exchequer, and the Court of King's Bench.

The courts which apply the letter are literal and precise, because their prime task is to ensure that their objectivity of approach, however great or low the parties before them, is fully evident to all. They are applying a body of law that stands between the ordinary person and the policy makers of the state and

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The Commonwealth texts on the subject of equity at large are: (Australia) *The Principles of Equity*, ed. P. Parkinson, (IBC Information Services, 1996, Sydney); *Equity: Doctrines and Remedies*, Meagher, R.P., Gummow, W.M.C., and Lehane, J.R.F., 3rd ed., (1992, Butterworths, Sydney). See also *Equitable Remedies*, Spry, I.C.F., 4th ed., (1990, Law Book Co. of Australia). (England and Wales) *Snell's Equity*, ed. J. McGhee, 30th ed., 2000, (Sweet & Maxwell, London). A well respected but older text is Ashburner, W., *Principles of Equity*, ed., Denis Browne, 2nd ed., (1933, Butterworths, London). See also *Modern Equity*, ed. J. Martin, 15th ed., (1997, Stevens, London), and *Equity and The Law of Trusts*, P.H. Pettit, 8th ed., (1997, Butterworths, London) (these texts are well known but principally concerned with trusts law). (Canada) There is no Canadian text on equity. But see *Injunctions and Specific Performance*, R. Sharpe, 2nd ed., (1992, Canada Law Book, Aurora, Ontario) and J. Berryman, *The Law of Equitable Remedies* (Irwin Law Inc: Toronto, 2000). (United States) The classic is Story, J., *Commentaries on Equity and Jurisprudence*, Vols. I and II, ed. W.H. Lyon, Jr., 14th ed., (1918, Little Brown, Boston). For contemporary writing, see *Cases and Materials on Equity*, Re, E.D., and Re, J.R., 4th ed., (1995, Foundation Press).

society, and when there is no code of law they are building that law day by day because their decisions, one following upon another, are implicitly putting doctrine into place. They see doctrine, whether it be in procedural form or later in substantive concepts of liability and remedy, as the embodiment of their protection of the freedom of activity of the ordinary person. The concept of 'the rule of law' in later centuries as the central rubric of democracy has its dawn in the attitude, the approach and the professional detachment of these courts.

The courts which hone edges are of another but related tradition. They are concerned that the parties before the court shall leave with their particular dispute not only adjudicated upon but also with a judgment within the range of what the ordinary person would conceive as 'just'. The judicial considerations are of a kind well-known today. If a procedural requirement is not met, should the plaintiff, whatever the merits of his case, be non-suited? If the reason for not meeting the requirement is reasonable, does that justify the court in agreeing to hear and rule upon the merits? If the law affords no remedy for a demonstrated wrongdoing, or the remedy available is not that for which the supplicant is reasonably asking, can another remedy be contrived?

It is evident that a court that is prepared to hone edges stands in a perilous position. There is an obvious potential for difficulty in that the courts that hone appear to be superior to those that apply the letter. No one need overtly say that the 'honing' courts are sitting in some kind of appellate (or reopened trial) role, but that is how it may be viewed among those, judges and pleaders, who work in the courts. This was the situation behind the scenes in the poor relationship between the Lord Chancellor, Roger Bacon, in the Court of Chancery and the Chief Justice, Edward Coke, of the Court of Common Pleas and then of King's Bench in the early seventeenth century in England. Which man (and which courts) would the King, James I, favour in this dispute? In the England of that century the courts that honed were recognized for what they were – an emanation of, and deriving their authority from, the Crown as the source of justice. The courts of law – those that applied the letter – were also emanations of the Crown in the eleventh and twelfth centuries, but by the mid-fourteenth century, when the first Equity court appeared, the independence of the 'courts of law' from the Crown was well established. In the seventeenth century that royal source of the common law courts had been forgotten, and in the minds of most people the courts of law were associated more with the then embryo Parliamentary forces, while the later Chancery court remained a Crown court. In the England of the seventeenth century, and as a result of the 1649 defeat in the civil war of the Crown's interests, it was touch and go until 1660 (and the restoration of the Crown) whether the Court of Chancery would survive.

However, a more far-reaching issue – as it can be seen in retrospect – was what was to be the nature of a court whose guiding star was 'good conscience' and whose aim was to do 'equity' as between those who came before the courts. Justice in society is an ideal that our Graeco-Roman civilization has fitfully treasured since the beginning in the fifth century B.C., but its warmest advocates tend to be those within society who feel themselves, or those with

whose condition they associate, to have been victimized by others. As a consequence 'justice' may be pejorative expression in the support of a cause, a philosophy concerned with principles of behaviour, or simply rhetoric in the mouths of those who would harness the warmth that the word communicates. The so-called 'courts of equity' were on a narrow causeway with the ocean of politics and politicization on one side and a sea of contemporary prejudice on the other. To lurch into either, while attempting to reflect cultural (and therefore acceptable) ideas of equality between persons, would have proved fatal. For a legal system to adapt itself - within, for example, a code - to the demands of each new age and so produce equity in the application of the law would be challenge enough. The English fourteenth century fashioned a court whose *raison d'être* was 'doing equity'. And somehow, despite early seventeenth century internal rancour within the court system, later seventeenth century civil war between Crown and Parliament, and the agonizing prolixities of the earlier nineteenth century when equity became procedure-dominated *par excellence* (the novelist, Charles Dickens, crucified Chancery),² courts of equity remained in being.

It was the great age of English Liberalism that, starting in 1830, brought ultimately the Judicature Act of 1873. In that decade the Court of Chancery with its nineteenth century Vice-Chancellors' courts, the Rolls Court, and the Court of Appeal in Chancery passed into history. The 1873 Act created one High Court that would exercise in each of its divisions jurisdiction in both law and equity. The only trace of five centuries of separate law and equity jurisdictions in England would be the Chancery Division of the one High Court, to which a statutory allocation was made of the branches of legal work it should handle. These included trust law, the administration of deceaseds' estates, and real estate transactions and mortgages. Equitable remedies could be granted in all High Court divisions. Ever since that time the debate has been whether law and equity are logically inseparable, one fusing with and energizing the other, or they remain different bodies of law - as they once were - that, though doctrinally separate, today fully complement each other.

The Supreme Court of Canada in 1875 came late into the story of two jurisdictions. The western provinces, including British Columbia as colonial territory prior to 1870, were formed too late to inherit the administration of law and equity in different courts, though nevertheless like all Canadian provinces they received the bifurcated case law of England. However, the maritime provinces and Ontario with their eighteenth century origins indeed inherited the separate administration of law and equity, then in full force in the 'old country'. Concurrent jurisdiction was ultimately adopted in New Brunswick in 1854, in Nova Scotia two years later, and in Prince Edward Island in 1873. Ontario had a Court of Chancery as of 1837, and only with the province's

² The opening chapter of *Bleak House*, published in 1853, draws with the consummate descriptive skills of Dickens a picture of the absurd procedural complexities and delays of the old Court of Chancery.

Judicature Act of 1881 was the administration of law and equity joined. That combined jurisdiction existed in each division of the now single High Court.

As to court organization, the report series, Grant's Chancery Cases (1849-1881), has immortalized the days during the nineteenth century in Ontario of a separate Court of Chancery, and after the demise of the distinct court in 1881 Ontario possessed a judicial Chancellor of its then Chancery Division until 1931, when divisions in that province were abolished.³ In another part of the Commonwealth, Australia, equity was administered in New South Wales in a separate judicial system until very recent times, and in the United States of America, whose early seventeenth century origins caused it to take a model of the then English system to 'the new world', separate courts of equity were known in several states, notably Delaware, equally late into the twentieth century. But two forces tended to prevent or bring to an end the bifurcation of law and equity courts. In the young colonies, aside from the cost involved, there was little or no occasion for separate jurisdictions. The volume of business was not great enough, and the sums usually involved in litigation did not justify maintaining separate courts. And in Australia, which like common law Canada followed the English law and practice for so long, only New South Wales – the oldest of the states – embarked upon the separate administration system.

For all practical purposes, therefore, the Supreme Court of Canada at its beginning would have conceived of law and equity as two bodies of doctrine rather than two separate administrations. It never developed an equity panel of judges, and there is no evidence known to the writer that, though Québec civilians would on occasion throughout the ensuing years urge the formation of a separate panel of Supreme Court civil law judges to hear appeals on the Civil Code of Québec, there was ever anything similar in the case of the law of equity. So far as equity is concerned the Supreme Court of Canada has remained a court of generalists - as have the other Commonwealth final courts of appeal - dealing from time to time with equitable principles and doctrines.

The point the writer would like to emphasize at this juncture, therefore, is that the Supreme Court in this country came into being at the close of five centuries of development, when functioning with separate administrations of law and equity had long since been a familiarity elsewhere. That left legacies of thought. Also at that close the fashioning of the doctrines of equity – perhaps necessarily achieved in a separate court system - had for the most part been accomplished. What was left was to adapt and mould those doctrines to the demands of changing future times.

³ Nova Scotia had until 1884 an Equity Division with its own Judge in Equity, and New Brunswick retained divisions of its Supreme Court until 1966. Prince Edward Island abolished divisional organization of its court work only in 1975 (Chancery Jurisdiction Transfer Act, 1974, c. 65, proclaimed July 4, 1975). Until that year there was in Prince Edward Island both a Rolls Court and a Vice-Chancellor's Court, names resonant with history.

The other challenge for the future was the integration of law and equity – regardless of continuous argument as to what the language of the Judicature Act, 1873,⁴ required – in the process of one system of courts. Here the Supreme Court of Canada was to play its role in history.

II. *Equity in 1875*

The appearance of equity to the casual observer would justifiably be that of a rag-bag of rules concerning substantive liability, remedies, and defences. Equity and equitable principles are a gloss on the common law, sometimes in pre-Judicature Act days with an exclusive jurisdiction, as with trust law and the administration of estates, sometimes concurrent, as with equitable remedies, and sometimes auxiliary with the less rigid procedures of Chancery.

Though it is an area of private law, the onlooker who comes from the broad fields of common law's voluntary obligation – contract – or involuntary obligation – tort (or delict) – might see equity as more of a patchwork quilt constituting activities in many areas of law than a consistently developing obligatory concept. And the critic who thinks in terms of what might be described as practice areas, such as corporate law, bankruptcy and insolvency, real estate law, or commercial law, would have difficulty in listing with which area(s) of law equity is concerned. Even those working in the area of the administration of deceaseds' estates, or in estate planning for the private client, each of which historically is a discrete field of equity development, might well have forgotten that fact. He or she would be puzzled with the question of where else equitable principles have influenced developments and equitable doctrines have been introduced. Yet 'Wills and Trusts', a term hallowed by time in the Canadian Bar Association, and unfortunately a misnomer since at least the mid-twentieth century as to what it suggests of the role of trust law, would be the immediate response of most people as to what equity is all about.

What then was the nature and doctrinal scope of equity when in 1875 the Supreme Court of Canada came into existence, and in the great majority of common law jurisdictions the centuries of separate law and equity courts were fast coming to a close?

Equity was and is the voice of conscience. Sir Anthony Mason, former Chief Justice of Australia and a distinguished equity lawyer, recently put it this way – "equitable principles were shaped with a view to inhibiting unconscionable conduct and providing for relief against it." Equity's rules are "flexible, discretionary, conduct oriented". They "incorporate broad standards which, in borderline cases at least, call for an exercise of value judgment".⁵

⁴ 36 & 37 Vict., c. 65. This Act was copied or adapted in almost all jurisdictions of the Commonwealth that possessed the common law system. This paper adopts the original Act in England as the model of them all.

⁵ 'Equity's Role in the Twentieth Century', (1997/98) 8 King's College L.J. 1. This was a lecture delivered in March, 1997, in the University of London, England.

The Crown through the Lord Chancellor as senior law officer entered the judicial scene in the mid-fourteenth century to rectify injustice between the parties when a common law procedure or substantive rule produced such a result. From the beginning equity therefore assumed the role of giving remedy and in a manner that was not otherwise available. The essence of its jurisdiction was *in personam*. As an eighteenth century jingle recalls, fraud, mistake and breach of confidence were the three situations that it remedied. It went further than common law fraud and deceit in granting relief, it went further than common mistake and mutual mistake at law, and it went further in the protection of those who confided with the reasonable expectation that that confidence would be honoured rather than abused for unauthorized personal gain. It also attached liability to the person in a fiduciary position who took advantage of the beneficiary of that relationship. The trust, as is well known to legal historians, itself began as a remedy. The individual who took title to another's asset with the promise to administer for the benefit of the transferor or a third party, and retaining the benefits of that title for himself breached that promise, was obligated to suffer incarceration until he performed the promise (the 'trust'). Incarceration soon changed to civil *in personam* liability, and the now civilly enforceable 'trust' evolved by the end of the fourteenth century into a *modus* of property holding and management.

Well before 1875 equity had developed a series of remedies that, unlike the common law's award of monetary damages for breach of civil obligation, were distinct in that they required action of the defendant. There was specific performance, injunction and rescission as remedies for breach of contract, injunction against continuing tortious conduct, and account to require the fiduciary to open his books and explain personal gains he had made. Erroneously written documents could be produced and corrected with the remedy of rectification, and the office of receiver protected the interests of creditors in the assets of insolvent persons.

A 'court of conscience' was also concerned with the position of the particular defendant in litigation. Defences made available by equity to parties sued in common law courts went beyond the technicalities of the common law to look at the merits of the conduct and circumstances of the particular defendant. Laches looked to delay, acquiescence - like release and waiver - to the conduct of the plaintiff, and set-off to the already existing obligations between the parties. Actions in equity were not subject to the Limitations Act, but the equity jurisdiction in order to complement the statute applied analogously the permitted limitation periods for different legal heads of action.

The existence of the concurrent and auxiliary jurisdictions of equity prior to the Judicature Act of 1873 in England need not concern us here, but in addition to the supplementary role of equity with its additional remedies and defences something more should be said of the equity jurisdiction that was exclusive. The trust is the pre-eminent example of this. Whether the trust was express or implied, or was remedial in character, as are the constructive and resulting trusts, the law and theory on this subject was developed entirely within

the pre-1873 courts of equity. The administration of deceaseds' estates, including the construction of wills, though not probate, was an area of law and practice that the equity jurisdiction acquired for itself almost from the beginning, and in 1875 it had long been inseparably associated with that jurisdiction. The equitable doctrines of conversion and reconversion, election, performance and satisfaction, though in 1875 they were seen as equity theory, unparalleled at law, were all developed with respect to the administration of deceaseds' estates and, moreover, in their operation they are essentially involved with that area of law.

Equity is often described as the principles of conscientious conduct applied across the span of private law. And it sometimes reaches into public law. The seventeenth and eighteenth centuries were fond of tags, such as 'equality is equity', 'he who comes to equity must come with clean hands', and 'equity looks on that as done which ought to be done', and in those centuries these maxims summed up in popular expression observations as to what the equity courts were doing. There could be no pretence that the maxims were binding principles, which equity courts then applied in the decisions they reached. However, sound equity doctrine was fashioned and established by Lord Nottingham L.C. in the second half of the seventeenth century. To Nottingham we owe the main body of the law of trusts as we know it today, and it was also by him that the *bona fide* purchaser for value without notice doctrine was brought into being. No wonder that he is known as 'the father of equity'. The systemization of equity was continued by Lord Hardwicke L.C. in the middle of the eighteenth century, but it was under the enduring Chancellorship of Lord Eldon between 1801 and 1827 that equity became as precedent-minded and as rule-conscious as the common law. Eldon's conception of equity would today be regarded as an abandonment of the necessary balancing of seeking a fair solution and providing certainty. However, his thinking certainly found support in a century that associated *stare decisis* with predictability, and regarded predictability as the essential quality of a legal system. Nevertheless, though immutable rules that dictate outcome have little attraction for the courts today, Eldon's work did mean that by 1875 equity's *modus* of growth was so similar to that of the common law that a continued separate administration of law and equity had increasingly less justification. The ultimate logic of the 1873 Judicature Act became more compelling as each successive decade of that century passed.

However, the first three quarters of the nineteenth century – the age of Liberalism in English economic and legal life, and the age of industrialization and the growth of the towns – was a period of inventive doctrinal thinking in both equity and law. This was the age of commerce and the mercantile class, and the century during which the economy of the traditional landed estates of the aristocracy and the gentry would begin the steady decline that reached its finality with the war of 1914-18. Equity doctrine until the nineteenth century reflected a considerable concern with land – the interests that might be had in land, the mortgaging of interests in land, and the disposition in settlements and in wills of estates in land. Land was wealth. The 'conscience' of equity also

found expression in the protection of the young gentry from would-be mortgagees and purchasers keen to exploit the naïve land inheritor, and of the elderly whose realty interests and expected demise attracted from near and far the eager landless in the 'family'. The nineteenth century in its hey-day brought *laissez faire* commercial capitalism. Contract law and equity's remedies of specific performance, injunction and rescission became the centre of doctrinal growth, and the mercantilist's trust for sale - the first investment trust - was gradually to acquire greater significance than the land settlement. Doctrinally, the call for the ability of the successful business man as settlor to dispose among family members yet to be born focused emphasis upon another equity doctrine, the power of appointment. 'Conscience' led courts of equity to conceive of proprietary and promissory estoppel, doctrines which would be developed so successfully in the following century. Reliance upon unenforceable promise seemed to common law lawyers to lead to waiver at best; to equity lawyers it was at least a defence to an assertion of rights at law. Perhaps it might also be a cause of action. The more radical reformers must have seen it as a harbinger - the enforcement of agreement on the basis of promise relied upon to detriment. They would certainly see that development within the forthcoming century.

The law of choses in action, and the assignment of legal and equitable choses, as well as of expectancies, also benefited in the nineteenth century from the new age of world-wide commerce. There was much sophistication in the law by the year, 1875, and here as elsewhere in this exciting century Parliament at Westminster was increasingly introducing new developments and reorganizing doctrine by statute.

III. *The Privy Council Years (1875 – 1949)*

When the federal Parliament, further to its right under the British North America Act, 1867,⁶ statutorily created the Court in 1875,⁷ the new court took its place between the provincial courts and the appellate jurisdiction of the Privy Council sitting in London, England. It was therefore an intermediate court of appeal, superior to all provincial courts and able to review any of their decisions, but inferior to the Privy Council. Indeed, in this same decade of court reform the Privy Council itself in England was undergoing change, and its judicial role in relation to all the overseas colonial jurisdictions, previously a practice only with its decisions sometimes lightly regarded, was in 1876 put on a statutory basis.⁸ The Lords of Appeal in Ordinary were introduced - the most senior English, Scottish and Irish appellate judges, who would be members of the House of Lords - and thereafter the legal appellate work of the House would

⁶ Renamed in 1982 by the U.K. parliament as the Constitution Act, 1867. See R.S.C. 1985, App. II, No. 5.

⁷ S.C. 1875, c. 11.

⁸ Appellate Jurisdiction Act, 39 & 40 Vict., c. 59.

be discharged by them only. The age of the lay lord with a right to intervene in legal appeals, though very seldom exercised, was gone.

The law lords, as they were known, were also Privy Councillors and they therefore became the judicial members of the Privy Council. This, it will be recalled, was an advisory body to the Sovereign that traditionally also proffered legal advice. The Judicial Committee of the Privy Council as of 1876 sat as an appellate court, albeit as 'councillors', its members being the law lords. A senior judge of an overseas colonial jurisdiction was frequently invited to sit with them.

The Supreme Court of Canada had been in office one year when these changes in London took place. Moreover, of course, the right of parties at the provincial level to appeal to the Privy Council not only remained, the parties might ignore the Supreme Court of Canada and proceed directly to London. We can see from the Reports of the Judicial Committee's decisions between 1876 and 1913 that in this environment London would be seen by wealthy litigants with substantial claims, often involving the significant legal issues of the time, as the obvious place to which to take an appeal. Large corporate appellants and government would also find it attractive to avoid the costs of intermediate appeal procedures by proceeding straight to London, a facility which was available in civil law matters until 1949.

While it has been estimated that only some 10% of Supreme Court decisions were the subject of application to the Privy Council for leave to appeal from the Court,⁹ and only 2% of appeals heard by the Privy Council resulted in a reversal of the Court's decision, the Court seems to have drawn no confidence from this. But, perhaps more to the immediate point, the Court had no control over the appeals that were brought before it. The would-be appellant made a personal decision whether to invoke the Court's jurisdiction; a nominal dollar floor in the value of remedy sought was the only qualification.¹⁰ As a consequence, as the law reports of the years would show, many matters came before the Court that essentially involved disputes over facts. The law was not in serious dispute. In equity matters, where the substance of the law was involved, the dispute seems invariably to have been how the settled law applied to the facts. It truly is a review process.

(i) *Equity in the Court*

As one might expect of a review tribunal, the Court had before it during this period issues of equity law from every part of equity jurisdiction. The maxims or principles of equity appear not to have been discussed, but equitable interests

⁹ The 1875 Act, *supra* note 7, s. 47, expressly said of further appeals that there should be none, "Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative". The Privy Council therefore heard appeals only by its leave.

¹⁰ \$2,000.00 (S.C. 1875, c. 11, s. 17). Later the sum was increased to \$10,000.00.

in real property, such as mortgage, charge and lien, issues in trust law and in the administration of estates, including the doctrine of election, and the scope and application of various equitable remedies and equitable defences, were considered. Reflecting in this way the Canadian economy during the first fifty years, concerns as to real estate transactions, particularly as to mortgage and remedies, dominate the period. The interesting cases from this time are those where what might be called the higher ground of the nature or purpose of doctrine are near the surface of judgment.

(ii) '*Conscience*'

Equity is '*conscience*' – this is its whole *raison d'être*, doctrinal in character though it be – and in *Effie Wilson v. His Majesty The King*,¹¹ an appeal from the Exchequer Court of Canada in the later part of the period, the Court was concerned with an alleged unconscionable agreement. The appellant's late husband had purchased from the Government of Canada a life annuity, and for this he had paid \$10,000, which sum constituted the major part of his then estate. At that time he was 73 years of age, in very poor health, and under the misapprehension that his wife and son were hostile to his best interests. The local postmaster, through whom the annuity was purchased from the Crown, was less than encouraging to Wilson going ahead with this purchase, because of Wilson's state of mind and poor health. The Government was not otherwise aware of these factors. After seven monthly payments, as a result of which he received \$882.49, Mr. Wilson died, and his widow as his executrix and sole beneficiary then sought by petition of right to recover the \$10,000. The Exchequer Court held that the petitioner had no such entitlement, and the appeal was taken to the Supreme Court. There the appeal was upheld.

Duff C.J. was of the opinion that, if such a contract had been made between parties in the private sector, a court of equity would hold the benefiting party, such as an insurance company, chargeable on equitable principles with fraud in the sense of its taking an unconscientious advantage. Government officers would not be performing their duty to the Crown if they concluded such a contract that in the private sector would be set aside. The postmaster was an agent of the Crown, and therefore his knowledge of the circumstances was the Crown's knowledge. He should have notified his superiors of these circumstances. Restitution was due to the executrix of the \$10,000 less the sum already paid out, and with interest as of the date the petition was made. It was of no consequence that Wilson had fully received the rights for which he had bargained, or that the contract had been executed by each party. Practical justice should be done, and an effective restitution could be had in the circumstances. The Government had simply received money. And Duff C.J. applied English precedent.

¹¹ [1938] S.C.R. 317.

Davis J. agreed with this result because "I cannot bring myself to the conclusion that the Court is helpless to do the manifest justice of the case."¹² Nor was this a situation where "disturbance" of an executed contract would be "highly inconvenient or unjust"¹³ to a third party. And he cited the American text of Story, *Equity Jurisprudence*.¹⁴

Kerwin J. dissented on the grounds that no advantage was in fact taken of Wilson. No fraud was perpetrated upon him, and because the contract had been performed in part there could be no *restitutio in integrum*. Nor in Kerwin J.'s opinion did the postmaster, even if an agent of the Crown, have any authority conferred upon him that would allow any knowledge of his to be imputed to the Minister.

This is not a case where the Court chose to go deep into case authority and the literature. But it does reveal the Court meeting with 'conscience' and dealing with doctrinal issues that fifty years later would be developed into their full modern state. How does actual fraud differ from constructive fraud? In what circumstances has there been a 'change of position' and a reliance to detriment so that it would be unfair to the defendant to award restitution to the plaintiff? If mental incompetence has not been established in the trial court, so that the contract cannot be set aside on that ground, can restitution be awarded when the terms of the contract explicitly recognize the nature of the performance that the Crown had carried out? Could the Court purport to deduct the value of that performance from a putting back of the plaintiff into the position in which he was before he entered into the contract and handed over the purchase monies? Duff C.J. also reflected upon the significance for the insurance industry if the Court awarded restitution in this case. Unless mental incapacity is established in the particular case, what is it exactly that exposes the insurance company to a restitution claim other than that the annuitant died very shortly after the contractual performance commenced? What is the "mental and physical weakness" of which the insurer must know?

(iii) *Equitable proprietary interests*

As to equitable ownership of mortgage interests, and as to liens and charges, the Court met this early with an appeal on the subject of what, if any, notice to the registered party will give a person later advancing a loan priority over the already registered interest, though the later lender had taken an oral or informal conveyance of security. That was in *Rose v. Peterkin*.¹⁵ Here is the issue that

¹² *Ibid* at 333 (S.C.R.). The transfer to another of \$10,000 for monthly payments of \$129 to a man in "Wilson's physical and mental condition" was "an unconscionable thing" (*ibid.*).

¹³ *Ibid* at 334 (S.C.R.).

¹⁴ 13th ed. Vol. I, p. 242 (*ibid.* at 331).

¹⁵ (1885), 13 S.C.R. 677.

has all too often raised its head. If registration is intended to give ultimate security to the lending party, how far may 'conscience' deprive that party of the priority if he knew of the later lender's intended loan? And, if actual knowledge can bind, should what the lender reasonably could have been expected to know bind him? If *bona fides* means what it says in the context of the purchaser for value without notice, there is a nice question whether it should be different in the present context. It can be said that the later would-be lender should have inspected the register – that is what the system intends. But, if statute or regulation be silent, is that the point for a court of equity concerned with 'conscience' as between two persons, in this instance two lenders? The earlier secured lender is not asked by equity to keep himself aware of those who might do business with the borrower. He is merely expected to respond when he knows or, perhaps, ought to have known. There is a good question, too, as to whether 'knowledge' rather than 'notice' (either being actual or constructive) should be the appropriate equitable standard. After all, under the rule in *Barnes v. Addy*¹⁶ it is knowledge, not notice, that binds the third party in a breach of trust proceeding when the third party is joined. Why would we think a more subjective test is appropriate in that setting, but a purely objective test the approach to be taken in the case of priorities?

The discussion in *Rose v. Peterkin* is brief, and the issues raised here are contemporary, some of which have yet to come before the courts, but the *Rose* judgement could be said to have set the scene for the developments that were to follow.

(iv) *Assignment*

Much of the present law of equitable assignment was in place when the Supreme Court came into being. The late nineteenth century was concerned with the question of how the modern form of statutory assignment fits together with equitable assignment. Does statutory (or legal) assignment of choses in action effectively repeal equitable assignment, or, if the statutory method fails in a particular instance (e.g., one of the constituent elements is missing), is the assignment nevertheless valid as between the assignor and the assignee because the assignor *intended* to assign? Previously the writer queried the relationship of the notice doctrine with the statutory requirement that title (in that instance, land) be registered. This is another instance of the issue of how equity co-exists with the statutory provision that at first sight appears to replace the former equitable rule. The case law certainly confirms that equitable assignment does survive. In this instance the statute is taken to be facultative of assignment, and to leave the informality of equitable assignment in place. But what is the significance today of an assignment of a chose if the debtor has no notice? For practical purposes has personal property security legislation rendered it otiose?

¹⁶ (1874) 9 Ch. App. 244. See *infra* text to note 108.

But these questions were all in the future so far as the Supreme Court was concerned. Suffice it that the existing law was correctly applied.

In *Moore v. Roper*,¹⁷ *Fraser v. Imperial Bank of Canada*,¹⁸ and *Standard Bank of Canada v. Finucane*¹⁹ it was indeed the existing law as to assignment in equity that was applied. *Moore* followed House of Lords authority, *Standard Bank* decided that a would-be equitable assignment or charge created by the bank's customer was valid, and *Fraser* reiterated that an assignment of future property takes effect in equity by way of agreement, binding the conscience of the assignor. Upon the property becoming existing property, the assignor also becomes a trustee of it for the assignee. A later assignee who knew of the first assignee before advancing money to the assignor, and who encourages the first assignee to proceed with his contractual undertaking to the assignor, can have no priority.

(v) *The administration of deceaseds' estates*

The administration of deceaseds' estates has been an exclusive equity jurisdiction since the sixteenth century. Much of its doctrinal ground was developed in the eighteenth century, and by 1875 the English courts were concerned with refinements to that doctrine. The principal doctrines this area of jurisdiction has produced include satisfaction and performance which are little heard of today, but conversion, election, and ademption, the last of which appears most often in the context of satisfaction, are not infrequently applied in the context of wills, and these cases are occasionally reported. Satisfaction and performance are both 'conscience' doctrines because they are concerned with double dipping, as it were. In broad terms the issue with the satisfaction doctrine is whether the donor of property intended with his or her gift to satisfy in whole or in part an existing obligation of the donor to the donee. For instance, in his lifetime the testator purchases a house for his son, having previously made his will in which he carefully divides his residuary estate equally among his children. Did the testator intend the house to be in whole or part satisfaction of the testamentary gift? Performance is concerned with whether a later act was intended to be in whole or part performance of an existing obligation.

Equity puts a person to his or election when, customarily in a will, the maker of the instrument leaves some of his own property to one individual, and then purportedly leaves some of that individual's property to a third party. The will maker is invariably mistaken in believing the individual's property is his own. Suppose H invests in jewellery, and gives possession to W in order that she may wear the purchases. Many years later W leaves the jewellery to her daughter by a previous marriage, and also leaves a vacation property that she (W) owns to

¹⁷ (1905), 35 S.C.R. 533.

¹⁸ (1912), 47 S.C.R. 313.

¹⁹ (1921), 62 S.C.R. 110.

H. Surprisingly, this is not an infrequent occurrence, and the legal issue, H being the survivor, is whether an election situation exists. For instance, the will must clearly appear to be disposing of another's property. When properly construed, the will may have been intended to dispose solely of the testator's interest in the disputed property. This was recently demonstrated in *Granot v. Hersen*²⁰ in the Ontario Court of Appeal. There is also a presumption that the will maker did not intend to dispose of another's property. And, if no ambiguity or uncertainty exists on the face of the will, extrinsic evidence cannot be introduced to show that the will maker was mistakenly disposing of what was not his or hers. This again was recently emphasized in *Maw Estate v. Bush*²¹ in British Columbia at first instance. The difficulties to which the doctrine can give rise were discussed in *Shillabeer v. Diebel*.²²

In *Cowan v. Allen*²³ a father left a defeasible fee interest in land to his son, and provided that the son's wife, if widowed after the testator's death, should have \$50 per year out of the father's estate. In law at that time the daughter-in-law was entitled on her husband's death to dower out of his fee interests in land. She was not denied dower by the fact that the fee was defeasible. But did the gift of the \$50 per year put her to her election? The Court held not, because the law - and not the father's will - created her rights in the defeasible interest.²⁴ Indeed, a classic statement of the doctrine of election was made by Davies J. in *Rosborough v. Trustees of St. Andrew's Church*²⁵ in 1917. It is the sort of passage that finds its way into law students' materials. A testator had bequeathed \$12,000 to his mentally incapacitated son, and a mortgage to the value of \$30,000 on certain church lands to the Trustees of the Church. After making the will he gifted the mortgage to the same son. Was the committee of the son put to its election on the son's behalf? The Chief Justice thought there was no case for an election because in his view a gift of a mortgage is a legacy of the amount. The testator had not left the son's property to another. However, the majority held that a bequest of a debt secured with an interest in land is to be regarded as a mortgage in that land, and therefore the son who owned the mortgage debt was indeed through his committee put to his election.

There is nothing here that justifies saying that the Court was on the cutting edge of laying out the borders of equity's election doctrine, but the contribution was a useful one.

²⁰ April 16, 1999, CA C29379.

²¹ (1999), 26 E.T.R. (2d) 221 (B.C.).

²² (1979), 5 E.T.R. 30 (Alta).

²³ (1896), 26 S.C.R. 292.

²⁴ *Ibid* at 313.

²⁵ (1917), 55 S.C.R. 360, at 368-70.

(vi) *Trusts*

The legacy of the Court during this period to trusts law, the second discrete area of equity jurisdiction, is to most aspects of this subject that have come before courts in Canada. The distinction between trust and contract, the constituting of express trusts, including the rule in *Strong v. Bird*,²⁶ proving the trust, including secret trusts, public policy restraint in the choice of trust objects, "settlements" that are fraudulent conveyances, resulting trusts, and some constructive trust consideration; all these are represented in the reported cases of the period. Some early thinking on the conflict of interest and duty problem exists in this first period also. The requirement of certainty in the description of charitable purposes, the administration of trusts, including the rule in *Howe v. Dartmouth*,²⁷ discretionary trustee distribution in the form of powers of maintenance and advancement, trust termination and the rule in *Saunders v. Vautier*,²⁸ each of these topics are to be found canvassed in some measure in the reports of the period.

If there are cases of the years between 1875 and 1949 that can be said to be precedents cited frequently in later years, they are those that concern fraudulent conveyances and resulting trusts.

Scheuerman v. Scheuerman,²⁹ decided by the Court in 1915, concerned the issue that was to continue troubling the Court in later decades as to whether A's conveyance of property into the name of B, A's object being to avoid his creditors, should later result in B's ability to keep the property for himself because A has to plead his illegal purpose and B has merely to point to the fact that he has title. The problem occurs most often in cases of husband and wife. The presumption of a resulting trust in favour of H when W is shown to be a volunteer is rebutted by the presumption that H is making an advancement – a gift – to W. One issue that *Scheuerman* raised is whether H may recover his property from W if he can prove his lack of an intention to make a gift to her without reference to his illegal purpose. Idington J. said in the *Scheuerman* case that he can, if "the untainted part of his story [is] enough to entitle him to succeed without reliance upon that which [is] either illegal or immoral."³⁰ The more substantial question, however, is whether there is any bar to H pleading his wrongful intent if in fact no one was proved to have been defeated or defrauded. The Court divided on whether proof of his *intent* to defraud is enough in itself to defeat the plaintiff's claim. Fitzpatrick, C.J., Idington J., and Brodeur J. considered it was, Anglin J. concluded that the illegal purpose must also have been achieved, so that both elements must be proved, and Duff J. gave a

²⁶ (1874), 18 Eq. 315.

²⁷ (1802), 7 Ves. 137.

²⁸ (1841), Cr. & Ph. 240.

²⁹ (1915), 52 S.C.R. 625, 28.

³⁰ *Ibid* at 629 (S.C.R.).

judgment concurring in the result but did so because actual perpetration of fraud had not been proved. The outcome of *Scheuerman* therefore appeared to be that intent to defraud is enough. But the lack of clarity as to whether fraud had actually taken place in that case put the *ratio* of the decision into question. Possibly it had, and what the majority had said was therefore *obiter*.

Elsewhere the present writer has examined this decision and what it meant for the future. Those steps need not be retraced here.³¹ The point to be made in the present context is that the Court in *Scheuerman* canvassed issues and provoked debate. It did not solve very much, but it provided a starting point for future judicial debate. There was often dissent on the Court during these years, but on the interpretation of evidence or particular matters of that kind. The *Scheuerman* decision includes dissent on doctrinal matters. And the Court itself was to return to the matter in *Elford v. Elford*³² in 1922, when that the fraud had injured another was beyond challenge. H and W for many years benefited by transfers of H's property to W, to overcome the difficulties of which W gave a power of attorney over these properties to H. Ultimately marital problems led H to protect himself by using the power to transfer the properties back into his own name. The Court by a majority held for W when she sought to recover the properties. She had merely to plead breach by her agent. It was irrelevant whether she had joined in the fraudulent behaviour of H. The minority could not stomach this; the Court, it was thought, should have no part with either H or W.

The Court visited the issue again in *Krys v. Krys*³³ in 1929, when the Court seemed to go back on the majority opinion in *Scheuerman* and argue that both elements – intent and achieved fraud – must be proved. In *Krys*, however, the Court found no intent to defraud to have been proved, so once again *ratio* was in question.

Resulting trusts are rarely in issue today, except in first instance courts, because of the attractiveness of the contemporary remedial constructive trust. What a resulting trust is, and how it applies, for instance, in a cohabitation property dispute, are issues most courts today are happy to pass by. But prior to 1949, and indeed until the 1970s, that was certainly not the case. There were several useful decisions during these years, but perhaps the most celebrated controversy of the 1875-1949 period was whether a presumption of resulting trust comes into being when A transfers property to B, a volunteer. This is an issue that can still occur even if the presumption of advancement in favour of wives has become weakened or has even been abolished. If A sues to recover his property from a hostile B, the abolition of that presumption means that, despite the remaining presumption of resulting trust which impels B to show a gift was intended, A must adduce the evidence which shows he did not intend a gift.

³¹ *Law of Trusts in Canada*, Waters, D.W.M., 2nd ed., (Carswell: Toronto, 1984), at 319 *et seq.*

³² (1922), 64 S.C.R. 125, 69 D.L.R. 284.

³³ [1929] S.C.R. 153, [1929] 1 D.L.R. 289.

In *Niles v. Lake*³⁴ in 1947 the Court went into one of the most extended considerations of a point of law that had ever hitherto been seen from the Supreme Court in any equity matter. The textbook writers' opinions were described and discussed, and the authorities canvassed.

The immediate problem arose out of a joint bank account, which had been funded by the transfer by one party of his monies into the names of himself and another. Though this was a case involving personalty, it inevitably gave rise to a preliminary discussion about conveyancing practice. The conveyancing issue was whether a transfer by A 'unto and to the use of' B, which as an expressly created 'use' was not executed by the *Statute of Uses* and did not give rise to a resulting 'use' (in favour of A), nevertheless – on the introduction of the trust in the early seventeenth century – caused a resulting trust to come into existence. Did B hold on trust for A? If a trust did arise, the transfer would read, 'unto and to the use of B on trust for A'. It all sounds pretty esoteric today, but of course it has practical significance. If there is a trust as to realty, why not as to personalty? If it does apply to both realty and personalty, then it is always going to arise when one person transfers property belonging to that person into joint names. Joint tenancy is not only the poor man's will; it is the poor person's unadvised idea of how to avoid probate fees and death taxes. Has the transferor the onus of proof that he or she did not intend a gift, or is that onus – of proving that the transfer was intended as a gift – upon the volunteer transferee?

The Court had to choose between the opinions of the then giants of Canadian common law. In 1925 in England as a result of legislation the matter there had lost practical consequence. However, in previous centuries English judges of eminence had disagreed, and so had English academics. Maitland considered that no resulting trust arose, and that was the decision to which Kerwin and Taschereau JJ. came in *Niles v. Lake*. So far as equity is concerned, it was a unique demonstration by the Court of appellate in-depth consideration of doctrinal law. No wonder it still often appears, sometimes at length, in trust law or legal history case materials in our law schools.³⁵

(vii) Remedies

Equitable remedies (as opposed to equitable 'doctrines', as they are called, such as satisfaction and election) were always designed to supplement remedies at law. The essential remedy at law is damages by way of compensation for injury caused, whereas equity – coming as it does from the point of view of 'conscience' – is primarily interested in the liable party doing something. *Snell's Equity*,³⁶ commonly recognized as the time-honoured text authority on the subject, lists seven equitable remedies. The party subject to the remedy must

³⁴ [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

³⁵ See further Waters, *op. cit.* at 308-10.

³⁶ *Op. cit.* note 1.

carry out his contract (specific performance), stop whatever conduct it is he is perpetrating (injunction), and describe and prove how he has administered the property of another (account). He must deliver up for cancellation a documentation that is void for fraud; in that way the document is not left in the public arena for the ready defrauding of others. He must consent to documentation being corrected so that it says what the parties agreed it should say (rectification). However, contracts will be set aside which are vitiated by innocent misrepresentation or equitable (or constructive) fraud (rescission). A receiver will be appointed to secure his assets on behalf of his creditors when his insolvency occurs or looms. The Court was involved in the award and application to the facts of each of these remedies.

Nevertheless, *Snell* might forgive its readers for reflecting that 'equitable remedies' go further than this. No doubt justifiably, *Snell* takes a conservative and traditional position as to what are the remedies of equity. The present writer would have added subrogation to which *Snell* refers in connection with mortgage transactions. Perhaps it is the development of restitution as a head of liability - particularly in the last twenty years - that leads Canadians to see constructive trust, equitable lien, and subrogation as generalized remedies, quite like the seven such remedies that *Snell* isolates. Subrogation permits the court to place another in the shoes of one to whom earlier the debtor has discharged an obligation. It can be an invaluable means of giving priority to an injured party. In the present writer's opinion the operation of the generalized remedy of subrogation can clearly be seen in 1943 in *W.J. Greenbank v. The National Supply Co. Ltd.*,³⁷ and in particular in the concurring judgment of Rand J.

(viii) *Influence of Québec civil law*

Nor should one overlook the influence of the Civil Code in Québec upon the development of the common law. It can clearly be seen in the third (and present) period of the Court's history, but in 1937 in *Stanley Johnston v. Dame Vera Channell*³⁸ in the judgment of Rinfret J. the Court applied a line of reasoning that is exactly in line with today's more expansive attitude in common law Canada towards civil obligation and appropriate remedy. There is little doubt that the growth of the unjust enrichment idea (and concept) in the common law provinces and territories has been encouraged by civil law judges accustomed to Code principles. The plaintiff claimed in an action against her brokers that the stock transactions into which they had entered on her behalf ought to be annulled because she had had no consent of her husband to those transactions as required by the then Civil Code. The brokers refuted this alleged absence of the husband's "knowledge, consent and approval". Rinfret J. said simply that there

³⁷ [1944] S.C.R. 59.

³⁸ [1937] S.C.R. 275.

is a distinction between the fundamental incapacity of a party and a capacitated party whose transactions can be set aside for reasons of fraud, undue influence, mistake, and similar objections. In the latter instance the Court looks for the most equitable solution, while in the former the total protection of the law is called into play, and in that regard full restitution should accompany a declaration of nullity. The Court did not have to decide whether the doctrine of *enrichissement sans cause* was part of the (then) Civil Code, and the brokers were entitled to invoke it. Neither the principle nor the effect of public policy (*ordre publique*) could be defeated in that way.

(ix) *Equitable defences*

As to equitable defences, which include notions such as the limitation analogy and laches, the Court in this period was seemingly less active. Mainstream equity is the interest of this Court. Nevertheless, even as early as 1883 in *Smith v. Bank of Nova Scotia*³⁹ the notion of being entitled to an “equitable defence” – undefined in this litigation – is current. The defendant was allegedly liable to a call for payment on the plaintiff’s shares that he (the defendant) was said to own. The defendant had responded that he had assigned the shares to another before he was notified of the call, but that for its own reasons the corporate board had declined to permit the assignment. The plaintiff had not informed the defendant of this refusal, and only on the call being made was he aware of what had happened. The Court thought the defendant fully entitled to an “equitable defence”.

(x) *Pre-1949 in retrospect*

Looking back at the work of the Court during these first 75 years, commentators have found limited opportunity for praise for what was achieved. The judgments of the Court have been said to be by and large lacklustre. A want of aggressive intellectualism and inventiveness is the charge levelled, and the levelling has evidently been done with some sadness. It is so much a tale of lost opportunity. Suggestions have been made that federal cabinets put on the Court former political office holders and one-time leaders in public life.⁴⁰ There was never the vision to adopt a regular policy of selecting from members of the provincial judiciary the most outstanding and well regarded by Bench and Bar.⁴¹

³⁹ (1883), 8 S.C.R. 558.

⁴⁰ There are many insights provided in the Canadian Bar Review papers written by Chief Justice Laskin and others to mark the 100th anniversary of the Court’s creation. See (1975), 53 Can. Bar Rev. 459 *et seq.* See also Laskin, B., *The British Tradition in Canadian Law*, (The Hamlyn Lectures, 1969, Stevens, London). Laskin was then a member of the Ontario Court of Appeal.

⁴¹ Though the power lay in “Her Majesty” (S.C. 1875, c. 11, s. 4) to appoint either provincial court judges or barristers (or advocates) of at least ten years’ standing as Chief Justice or Puisne Judges.

It is perhaps not unfair to note that Lyman Duff, who for so long sat on the Court as justice and chief justice, is the sole judge during this period to be acclaimed by all. He has been said to have been the outstanding judicial mind of his time on the Court.⁴² Judges like Strong, Anglin, Henry, Kerwin, and Crocket are not refused recognition – their contribution to equity and trust law is to be noted – but they are not regarded as being in Duff's class.

To the writer's mind the disappointment that is felt when assessment is made of the first 75 years is largely brought about by the assumption the Court itself seems to have had as to its role. Perhaps because it was not the final appeal body for Canada, the members of the Court appear to have seen their task as solely one of review of the immediate facts and findings from the particular court decision below.⁴³ This would certainly explain why the Court often spent inordinate time (and written pages) upon an analysis of the facts of the particular case. It would also explain why they apparently felt no need for extended doctrinal treatment of the issues of law that by pleading or in fact came before them. *Niles v. Lake*⁴⁴ in 1947 – at the end of the period – stands out for this reason. Even Lyman Duff has been criticized for not giving the benefit of his considerable intellectual gifts to his judgments.⁴⁵ In cases involving equity matters it is true that he rarely writes at any length. And not infrequently, as in *Scheuerman v. Scheuerman*⁴⁶ and *Elford v. Elford*,⁴⁷ he finds something not proven on the facts, and therefore offers in one or two lines a concurrence or dissent without explanation of his conclusion. Evidently even a judge respected by all felt no need to do more. No more was asked of him.

The Court at this time also clearly felt that the common law inheritance of Canada lay in the English precedents. The Canadian courts' task was to apply this law correctly. Nor, if extended explanation was of value at any juncture, did the Court's members did see it as their assignment to supply that explanation. That would be found in English judgments, which – so far as equity and trusts law are concerned – the members apparently considered to be the definitive treatment of the law being applied. It has to be said that judgments in the area of trusts are remarkably thin, and, like a butterfly in a summer meadow, the Court gives no impression of direction. There is no apparent individual viewpoint on any doctrinal matter in equity. No mention is made of U.S. precedents, and the decisions of the appellate courts of other Empire jurisdictions,

⁴² See *Duff: A Life in the Law*, Williams, D.R., (U.B.C. Press, 1984). Lyman Duff sat on the Court from 1906 to 1944. In the 'Epilogue' to this biography the author paints a vivid picture of the Court, its members, and the setting of those years.

⁴³ S. 101 of the Constitution Act; 1867, authorized the Federal Parliament "to provide for the constitution, maintenance, and organization of a general court of appeal for Canada." Under this authority the Court was established.

⁴⁴ *Supra* note 34.

⁴⁵ Williams, *supra* note 42, describes him (at 275) as "essentially a talented student and exponent of the law, not a creator of it". He was not "an original thinker".

⁴⁶ *Supra* note 29.

⁴⁷ *Supra* note 32.

such as those of Australia and New Zealand, are apparently of no interest to the Court. And, as has been said, for this Court English equity is mainstream doctrine; the adventurous that was happening in nineteenth century English courts is not picked up at all. Above all, and this is a topic of central importance, these were the years that law and equity for the first time were being applied in the same courts. What impact did this have on doctrine? Even in the conservative tradition of England this was a subject that frequently surfaced, with the judiciary as well as text writers. In the Supreme Court of Canada, there is only silence.

To the writer's mind, however, this judicial attitude, however depressing it seems now, is entirely understandable. Even though it may not have been a factor, the Court's role was limited, and, if it decided to 'go it alone' on any aspect of doctrine, it well knew that financially well-placed parties on the losing side would at once consider an appeal to London. The New Zealand Court of Appeal today, possessive of the finest legal talent as it is, itself is in that same curious position.⁴⁸ And, if the Canadian Court did make any practice of striking out doctrinally on its own, the well-advised litigant would obviously choose to bypass it and go directly to London. Moreover, so far as Chancery matters were concerned, the English in 1875 had had over five hundred years of experience in the building of doctrine. Was the Canadian Court created in 1875 to reinvent that body of case law or with an instant *panache* assume the role of further developing the English supplied equity jurisprudence? *Grant's Chancery Cases* in Ontario was a multi-volume report series testifying in 1875 to the already long-established dominance of English precedents.

In short, our values and attitudes today on the turn of the twentieth and twenty-first centuries are not those which existed in the "Old Queen's time" and before 1949, and we cannot surely judge as mediocre that which fails to meet modern minds as to what was required. Though few among the public were even aware of its existence, the Court over the Privy Council years no doubt did what was seen by informed opinion of the time as a competent job. It was to be a court for litigants from across Canada and their lawyers. And that is what it was. It is difficult to think of who else would have looked for more, and why in those years they would have done so.

Today it is the perceived mark of the most able in judicial office at that level that they can see beyond the near horizon, and write with ease and knowledge in discussing doctrine and issues in the context of the times. They will also have the talent to carry with them the populace, whose values and self-interest invariably reflect the here and now. It was not so then. Canadian society in those years, something common to the Commonwealth, looked to judges, as lawyers, to be properly restrained, technically informed, and conservative. It seems fair to suggest that that was the mould of the Supreme Court. The more pertinent question perhaps is how far that now distant world of 1949 changed when

⁴⁸ See, e.g., *Re Goldcorp Exchange*, post, note 132.

appeals from Canada to the Judicial Committee of the Privy Council - at least new would-be appeals - were no more.

IV. *The Litigants' Right of Appeal Years (1950-1975)*

The right of every litigant to appeal to the Court, provided the amount in issue was over a relatively small dollar amount in value, had existed from the beginning in 1875. And, though right of appeal to the Privy Council was abolished in 1949,⁴⁹ the right of the litigant to take an appeal to the Court continued. That facility would not be terminated until 1975. Consequently, despite its providing a second appeal hearing and its now being the final court of appeal for all Canada in all matters, the Court like a store in the high street was required as before to serve any and every customer who chose to come through its doors. It had no control over the subject-matter that came before it, nor over the volume. Its only response to subject-matter and volume could be to 'keep it moving'.

Nevertheless, things were changing, even as the period opened. Whatever was the cause, there is in 1949 a feeling of a new beginning. The reason may indeed be the Court's sense that finally, after a war that had seen Canada as a significant player on the world scene, it too was recognized. Finally it had the last word in Canada's judicial process. As we have seen,⁵⁰ already in *Niles v. Lake* in 1947 a new note was struck. The judgments in that case do not amount to much more than a rehearsal of well-established law and the commentaries of the writers, but such judgments *were* delivered. The Court's members in this case thought it their role to explain the doctrine, necessarily at length, and to put it into its immediate litigation context. Today it is a truism that the Supreme Court is concerned with setting out the principles in the area of law under review, and in giving guidance to lower courts. But in 1947 that was a conclusion that had not been reached. On the other hand at the close of this transitional period a series of cases had revealed a Court consistently developing a judgment style that gave doctrinal direction to the lower courts and the profession.

Equity came under consideration in these years in a manner that was to prove a pattern in the third and latest period. In the period after 1975, when the Court had control over the litigation it will hear and decide upon, it would be an expectation that the most controversial cases of nation-wide importance make up the docket. But already in this second, transitional period there is some lessening of the wide range of equity matters that previously had come to this second level of appeal. Is it the cost of appeals to the Court that was now the deterrent, giving attractiveness to settlements? One might speculate at length.

⁴⁹ S.C. 1949 (2nd sess.), c. 37, s. 3.

⁵⁰ *Supra*, text to note 34.

However, with that apparent lessening, and in place of the former generality, one issue seems to dominate the concern of litigants. It is not an issue in the traditional areas of wills and the administration of estates, or of the 'equitable doctrines' associated with that process of administration. Nor is it the nature of a trust (where trust is apposed to agency or third party contract), or of express trust variation or termination, which in England after 1958 was to lead to so many applications to court.

What happened in Canada after the War was the evident spread of equity principles into non-traditional areas of law.⁵¹ On no less than eight reported occasions in these twenty-five years the Court was asked to consider what 'conflict of interest and duty' means, in what circumstances a conflict of interest and duty will arise, and in what manner the prohibition against being in such a conflict applies. The question was asked once within the context of the express trust, and in the remaining seven instances with regard to other fiduciaries or employees engaged in commercial and industrial activities.

There is also an interesting development in the Court itself, to which some reference has already been made. The judgment writing of Court members in these 'conflict' cases now reflects their interest in the concerns of the litigating (and non-litigating) public at large, rather than solely the dispute of the immediate parties. Moreover, the doctrinal depth of judgments is a feature of the Supreme Court Reports that previously - in equity cases at least - was hardly ever seen. The judgments of the early years continue to be on the lean side, but the gradual change becomes very evident. Also the Court is now noticeably willing to discuss Canadian as well as English case authority, and to develop its own examination of equitable principles and doctrines. Indeed, there now occur in-depth Canadian authorities that lend themselves to discussion. The practice of referring only to English precedents, and then applying those precedents - with their distinctly English doctrinal rationalizations - to the immediate litigation facts, will only gradually fade throughout the period, but decline it does. So far as equity at large is concerned, it was the singularity of English Chancery thinking and expression, and Chancery's skills with equity learning, that held things back until the 1980s.

But, first, it is important to note that something else, closely related to doctrinal consideration, was occurring. During this period there begins the elucidation by the Court of the fundamental principles underlying common law concepts. Civilians often observe that in a non-codified jurisdiction it is the names of eminent judges, both past and present, that are discussed. Judges, European civilians note, have names. Both academics and practitioners follow this manner of discussion of the law. Civilians on the other hand think of *persons*

⁵¹ The commercial cases of the 1930s, largely concerning national corporations engaged with transportation and primary products, made no reference to equitable principles or doctrine. Commercial cases throughout the Commonwealth rarely did so until the 1970s.

in connection only with the great teachers and authorities of time. Instances are Ulpian and Sabinus of the Roman period, and Pothier, Mommsen and Girard of the eighteenth and nineteenth centuries. These were the scholars who shaped civil law doctrine in their time and inspired the later codifiers. Codification, the binding statement of the law, occurred only in recent times; the first famous codification was the French in 1804, and the second, the German, marking the then recent unification of that country, took place as late as 1901. Québec did not codify its transplanted pre-Revolution *coutume de Paris* until 1865.

In the empirical and inductive common law system, however, the courtroom provides both the resolution of disputes and the crucible in which law is fashioned. Even statute and regulation have to be judicially interpreted. In a common law setting the members of a final appeal court today have to be fully cognizant that, while resolution of dispute is necessary, doctrinal knowledge, clarity of thought, and incisiveness of expression, complementing a sense of the practical, are vital. Case law is always, but especially in an appellate court, essentially the interplay of policy and legal principles. Neither can be subordinated to the other. That is how the doctrine of the common law has grown and will continue to grow.

(i) *Unjust enrichment*

It is at this point, as it seems to the writer, that *Degleman v. Guaranty Trust Company*⁵² comes into view.

The jurist on the Court at this time who has received the greatest acclaim is Ivan Rand. He sat during the early years of this period. He was an intellectual, and he also wrote well. Rand was appointed in 1943 when Duff C.J. was in the last months of his thirty-six year tenure as a member of the Court, and consequently Rand was there during the last Privy Council years. Rand J.'s contribution - and the present writer will emphasize restitution law - was the input of a scholar, but a scholar who was in close touch with the practicalities and purpose of the judicial work of which he was a part. When he left the Court in 1959, he left behind judgments that were widely recognized as models of clear factual analysis, economically expressed description of the relevant law, and closely tied-in application of that law.

Ivan Rand post-graduated in law at Harvard, and in 1954 he was well aware of the Restatement of Contracts, published by the American Law Institute in 1932, the "monumental work"⁵³ of Professor Samuel Williston, the celebrated authority on the subject. Williston, as Rand J. pointed out, had expressly dealt with the fact situation that occurred in *Degleman*. Ivan Rand would also have been versed in the *Restatement of Restitution*, published in 1937, and authored by Professors Warren Seavey and Austin Scott. Both, like Williston, were

⁵² [1954] S.C.R. 725.

⁵³ *Ibid* at 728 (S.C.R.).

professors at Harvard and among the academic *elite* of the day. Seavey was noted for his expertise in agency and partnership law, and also tort law, and Scott in trust law and equity. Analysed by Seavey in the *Restatement of Restitution* were the circumstances at law and in equity that led to a quasi-contractual or an equitable obligation to restore money, chattels or land to another, and the nature of that liability. The equitable proprietary remedies – as the *Restatement* presented them – of constructive trust, equitable lien, and subrogation were rationalized by Scott. The rubric of ‘restitution’, and the organizing principle now given to it, namely, the prevention of ‘unjust enrichment’, broke new ground, and were way ahead of any judicial development of the common law in jurisdictions beyond the United States of America.

In England, to which Canadian courts of the 1950s continued to look, there was no movement beyond ‘quasi-contract’ as the basis of recovery. And no scholar, let alone the courts, would have conceived of the three equitable concepts of trust, lien, and subrogation as Scott had done. Lord Wright in the House of Lords in the 1943 spoke enthusiastically of ‘restitution’ and ‘unjust enrichment’. That was in the celebrated *Fibrosa* case.⁵⁴ But he was alone. None followed him.

Of course, with hindsight of subsequent events in all common law courts it is not difficult to be dismissive of the opponents of the new thinking of those days. One has to remember, however, that at that time there seemed to English and Dominion courts no obvious merit in adopting broad principle as the theme of quasi-contract or of constructive trust. There is resistance even today from those who would prefer an enumeration of ‘restitution’ obligation situations, built up by the courts from ground level, rather than the ‘vagueness’ of ‘unjust enrichment’ beaming down from on high.⁵⁵ Indeed, in the 1950s Québec civil law also was having problems with the principle of unjust enrichment. It was questionable whether any such principle existed in the Civil Code of the province and, even if it did, there was debate as to the meaning of ‘unjust enrichment’. There is an inevitable gap between the statement of a general abstract principle and its use to solve a particular and very practical dispute before the court. And, for the purposes of an inductive jurisprudence, principle that is too far ahead of the case decisions is simply philosophic. Once a principle of ‘unjust enrichment’ is accepted, therefore, the crucial element is the quality of the link that the court provides. To state the principle and then find as a fact that it is met in the circumstances in dispute – achieves nothing for subsequent courts. And especially is this important in the inductive environment of the common law. Lord Wright’s colleagues in the Lords were very well aware of this.

⁵⁴ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32.

⁵⁵ Common law lawyers instinctively feel that broad abstractions serve to summarize the achievements of the past; they provide no sure footing for those progressing into new terrain in the future.

The *Degleman* case marks the first time in the area of quasi-contract law – and possibly also of equity and trusts law – that the Court adopted reasons for its decision that an English court would not have reached.

It arose out of the simplest fact pattern. An aunt promised her nephew that, if he provided various household and car driving services for her, she would leave him in her will a freehold house that she owned. The services were rendered, but the aunt died intestate. The nephew sought the house on the basis of part performance, and in the alternative *quantum meruit*. Both the lower courts held that the services were not unequivocally referable to a contract concerning the transfer of the real estate but that, since there was evidence enough of a contract, that evidence took the case out of the *Statute of Frauds*. The defendant, who was the unsuccessful appellant below, representing the next of kin, appealed to the Court. Rand J. for three members of the Court, and Cartwright J. for four, agreed that no implied contract for payment for services could be spelled out of facts constituting an unenforceable express contract (there was no unequivocal reference to the contract concerning realty). The courts below were therefore wrong in their reasons for finding for the nephew. However, Rand J. and Cartwright J. agreed that *quantum meruit* fell within “the principles” of the *Restatement of the Law of Contracts*⁵⁶ as an instance where “the principle of restitution” is invoked “against what would otherwise be an unjust enrichment of the defendant [estate] at the expense of the plaintiff.”⁵⁷ These were the words of Rand J. Both he and Cartwright J. explicitly adopted the *Restatement*, though Cartwright J. also cited at length Lord Wright’s words in *Fibrosa*, themselves pretty clearly inspired by the *Restatement*. There is a comment by Rand J. that any other result would be “inequitable”, but there is otherwise no reference to law or equity, or to obligation and remedy.⁵⁸ The principle of restitution, says Rand J., is untouched by the Statute; it is a right, says Cartwright J., “based, not on the contract, but on an obligation imposed by law.”⁵⁹ And that is it.

It is evident that Rand J., giving the first judgment, took the lead in introducing American scholarship, and the judgment is both comprehensive and succinct. The essentials are there. If others want to know more, they can consult the American Law Institute’s work. This was very much the Ivan Rand style.

⁵⁶ The American Law Institute, 1932. In 1937 the *Restatement of Restitution* was released by the Institute. See, *post*, text to note 104.

⁵⁷ *Supra* note 52 at 728.

⁵⁸ This is interesting. A later generation in the Court was to describe ‘unjust enrichment’ as an equitable principle, which in fact doctrinally it is not. This is an instance where equity is used in the loose sense of fairness.

⁵⁹ *Supra* note 52 at 734.

(ii) *Conflict of interest and duty*

The eight cases on conflict of interest and duty that were brought before the Court during the years 1949 to 1975 were concerned with personal gain made by insiders of one kind or another.⁶⁰ The plaintiff or plaintiffs in each instance sought recovery of that gain. They wanted it for their own benefit or in a combined activity for the benefit of themselves and the others in the particular group. The case made was in equity. It was said the profit maker was a fiduciary, and that acting within the scope of his particular fiduciary task he had abused his fiduciary duty of loyalty by acquiring an asset for himself. The eighth case was also concerned with obtaining remedy for alleged improper gain, but action was brought at law on a contract of employment. An employer sought to acquire title to property that the employee had been asked to investigate and had ended up taking for himself from the third party.

There are two things about seven of the conflict cases that deserve notice in the context of this paper. The first is that, while whether the defendant is a fiduciary at all is an issue in two of the cases – that is, *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd.*⁶¹ in 1958, and *Canadian Aero Service Ltd. v. O'Malley*⁶² in 1973 – this group of cases is essentially about what conflict of interest and duty means and at what point it cannot be said that the gain made was associated with the fiduciary role the defendant had. By the time *Hawrelak v. City of Edmonton*⁶³ had been decided in March, 1975, it was pretty clear what questions the Court would be asking of the parties and the general approach it would take on these issues. During the third (and present) period of the Court's work these issues would not arise again. There are disputes over matters of law concerning every aspect of equity's concept of the fiduciary relationship, but the issues discussed here do not essentially occur again. The Court had done its job.

The second thing to notice is the manner in which judgments change during this second group of years, from *Zwicker v. Stanbury*⁶⁴ in 1953 to the *Hawrelak* decision. The leading judgments or the judgment of the Court are now tending to develop a uniform style. First the facts as found and held to be pertinent are set out, then the case law on the subject is brought into perspective (and argued, when necessary), and finally that law is applied to the facts for the purpose of

⁶⁰ *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257; *Crocker v. Tornroos*, [1957] S.C.R.; *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd.*, [1958] S.C.R. 3145; *Crighton v. Roman*, [1960] S.C.R. 858; *Peso Silver Mines Ltd. v. Cropper*, [1966] S.C.R. 673; *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592; *Hawrelak v. City of Edmonton*, [1976] S.C.R. 587. See also *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, concerning the terms of an employment contract.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

a concluding decision and court order. Judgments are frequently long and the law itself is considered and discussed in increasing depth. As noted previously, precedent that is Canadian is now under discussion. The *tour de force* is Laskin C.J.'s judgment for the Court in the *Canadian Aero Service* case in 1973, which has been hailed as a definitive exposition on the subject of the conflict of interest and duty rule.

(iii) *The applicability of fiduciary obligation*

Was the defendant a fiduciary vis-à-vis the plaintiff ? This is not so much an issue in these cases because except in two instances, the *Midcon Oil* dispute and *Canadian Aero*, case law had established that the particular defendants *were* fiduciaries. These cases concerned express trustees, company directors, and elected city officers. However, the defendants also included what we would describe today as joint venturers, as well as the situation of the employee.

The *Midcon Oil* case in 1958, historically the second in the sequence of seven, saw the Court divide 3:2 on whether one of two corporate co-venturers might go it alone during the subsistence of their relationship, and situate itself to receive (and obtain) a considerable personal profit. Midcon Oil Ltd. signed an agreement with New British Dominion Oil Ltd. that together at a described location they would test drill in search of mineral wealth and, if successful, join in the development and production. Mineral rights at the site had been granted by the Alberta provincial authorities to a company that held in trust for New British, and the parties to the agreement agreed that they would share the drilling costs. Midcon would carry out the drilling, and New British agreed to act as the "operating party." Minerals discovered and produced, like the mineral leases themselves, would be owned equally by the parties in undivided shares. Considerable natural gas was discovered, so that the next question was how best to market it. The agreement said nothing about the costs of the sale of product, and did not ascribe duties to "the operator" as to marketing and sale. New British went ahead, formed with others a chemical fertilizer company that would be a substantial consumer of the gas, and assisted in the financing of this form of product sale. It also purchased a significant shareholding in the new company. Midcon, which on request of New British had formally agreed to each of these moves under the terms of the agreement with New British, now sought - at the price paid - half of the shares purchased by New British. The latter refused, saying marketing and sale was not an element in the agreement, and that it had been seeking simply to exploit its one-half interest.

Were the parties in a fiduciary relationship ? That was the first question. The trial judge had said no, but the provincial appeal court by a majority had said yes.

Locke J. for the majority in the Court considered they were not. They were admittedly tenants in common as to the mineral leases and the product, and the House of Lords had held that tenants in common are not fiduciaries. "If, therefore, a fiduciary relationship existed between these parties, it resulted either from the terms of the agreement, or from what was done pursuant to those

terms.”⁶⁵ He then turned to the agreement, analysed it clause by clause, and found that it was specific as to the duties New British assumed. It specified also that no partnership or agency was intended. All that New British had done was exploit its own one-half ownership interest in the gas field,⁶⁶ and it was entitled in law and equity to do that. At this point Locke J. made reference to *Regal (Hastings) Ltd. v. Gulliver*⁶⁷ in the House of Lords, and Lord Russell’s words that the gain must have been obtained “by reason and only by reason” of the fiduciary position. Locke J. noted that the authorities concerning the required conduct of those in “fiduciary capacities” had been “examined at length”⁶⁸ in that case, and concluded with that observation.

Rand J., for himself and Cartwright J. as the minority, stood back from the agreement, and looked at the ‘joint venture’⁶⁹ as a whole. He saw risk assumed in three activities, namely, test drilling, finding any or (if any) commercial quantities of minerals, and locating a market for the product. New British was the “operator” by its choice and, as figures of intended gas supply to the chemical fertilizer company showed, was binding Midcon’s interest in the gas produced as well as its own. Marketing and sale was an integral part with drilling and production, and the agreement had to be read in this light.

It is interesting that Locke J. reasons from the bottom up, as it were. It is with *Kennedy v. De Trafford*⁷⁰ in the Lords holding that tenants in common are not fiduciaries and the agreement terms then before him, that he attains his conclusion.⁷¹ Rand J. makes a top down assessment. The agreement fits into a fiduciary whole. He does not define ‘fiduciary’; that is not a feature of case law before the late 1970s: But he illustrates from the case authorities in what circumstances the relationship arises and the results it has. But between the bottom up and the top down, the question is who is right, and which judgment better meets equity’s requirement that parties act in ‘good conscience’ towards each other? Probably today Rand J.’s approach better commends itself. We see the moral imperatives of equitable principles more starkly today than most people did in the 1950s.

By the time *Canadian Aero Service*⁷² came before the Court in 1973 – that being the penultimate of the seven conflict cases – the moral imperatives were already observable in Canadian jurisprudence. The case concerned two employees. While working for the employer on a certain project they acquired considerable knowledge of a foreign terrain, and how a business opportunity

⁶⁵ *Supra* note 60 at 323 (S.C.R.).

⁶⁶ *Ibid* at 327 (S.C.R.).

⁶⁷ [1942] 1 All E.R. 378.

⁶⁸ *Supra* note 60 at 327.

⁶⁹ *Ibid* at 339 (S.C.R.).

⁷⁰ [1897] A.C. 180.

⁷¹ *Supra* note 60 at 323.

⁷² *Ibid*.

might be pursued there. However, believing – as it was alleged – that the Canadian government would not accept the employer's bid for the opportunity, they resigned, and forming their own company made a bid of their own. They were successful. Thereupon the employer claimed that this was an unlawful gain that they must surrender. The trial judge concluded that they were fiduciaries because, though under a contract of employment, they were managing personnel. However, he held that they had not conspired against the employer, and that on resigning their employment they took no confidential information of the employer with them, or did they use any such information for themselves. The Ontario Court of Appeal, on the other hand, was of the opinion that the two employees were not fiduciaries. It upheld the lower court because neither defendant's contract of employment barred him from being in post-employment competition with the employer. They had taken no information that was the property of the plaintiff, and they had enticed no customer of the employer away from the employer.

Laskin C.J. for the Supreme Court adopted an English corporate law text⁷³ to the effect that senior corporate personnel, like directors, *are* subject to fiduciary duties. The defendants were 'top management'. This matter was not to be decided on the basis of their contracts of employment; although subject to supervision they were "charged ... with initiatives and with responsibilities far removed from the obedient role of servants."⁷⁴ From these seven decisions, and in particular *Canadian Aero Service*, emerges the essential duty of a fiduciary as being loyalty, which means the avoidance of conflict of interest and duty and an accounting (or surrender of the unjust enrichment) if gain is acquired in breach of that loyalty obligation. The avoidance of conflict and the obligation to surrender gain is described in the context of corporate directors and senior management as "the pervasiveness of a strict ethic".⁷⁵ There is also reference to good faith as being a fiduciary duty,⁷⁶ but today we would probably say that good faith, like the duty to be prudent, is an obligation of the fiduciary, though not peculiar to that status.

(iv) *Determining the parameters of the relationship*

The scope of fiduciary relationship is a more difficult notion to explain. No less than four of the seven cases in this second period turned on this issue, and in reading the sequence of these cases one has the distinct impression that the Court has broadened its thinking about scope as it has reached the conclusion that this is an "ethic" the application of which to the instant facts should be "strict".

⁷³ Gower, L.C.B., *Principles of Modern Company Law*, 3rd ed., (Sweet & Maxwell; London, 1969) at 518.

⁷⁴ *Supra* note 60 at 606.

⁷⁵ *Ibid.* at 607.

⁷⁶ *Ibid.* at 610.

In *Crocker v. Tornroos*⁷⁷ in 1957 the question concerned to what extent, if at all, the settlor of a testamentary trust had foregone the protection of the conflict rule. There are two aspects to the issue of the scope of the fiduciary relationship. One concerns the extent or scope of the conflict situation giving rise to the equitable duty to surrender gain, and the other how far (if at all) the creator of the fiduciary relationship, e.g., a settlor or testator, has permitted conflict - and consequent gain - to occur. Crocker involved the second of those two aspects.

As with all fiduciary duties, such as acting impartially as between beneficiaries and not delegating one's duties, the creator of a fiduciary relationship can always provide that the relationship shall not apply or apply only to a limited degree. Crocker was one of three associates in an operating company. Each of the three associates held an equal number of issued shares in the company, and under the articles of the company each had a first option to purchase shares offered for sale. Tornroos, an associate, died and appointed his colleague, Crocker, as a testamentary co-trustee of the deceased's shares in the company. On the death of the third associate the shares of that associate were put up for sale. Crocker exercised his power in the articles to purchase those shares for himself. Subsequently his co-trustee, the widow, challenged this sale, arguing that, though a trustee of the deceased's shares and a fiduciary towards the trust beneficiaries, he had "failed to exercise the [estate's] right of pre-emption".⁷⁸ No fraud was alleged, but it was argued that by his conduct he had put the estate shares into a minority position, with himself as the majority shareholder. The appeal court below reversed the trial court and held for the estate.

The Court unanimously reversed the appeal court. The estate had no power to purchase the shares for itself, and - as the law then stood - it was of the opinion that the court would have had no jurisdiction to confer that power upon the trustees. Moreover, knowing of the articles, the testator was clearly content that his estate should be a minority shareholder. Nor could Crocker as trustee sell to himself any purchase rights the estate had. In fact the articles gave him a pre-emptive right, and the estate having no power to buy was not in a competitive position.

But had he no obligation as trustee, one asks, to seek the advice and direction of the court? Could he as trustee *assume* that the then inherent power of the court to vary trust terms would not be exercised in the circumstances in favour of the trust being empowered to buy? Was it even relevant to the issue of his own purchase that without court assistance the trust could not buy? Was the testator's intention in appointing Crocker trustee to be construed as intending also to submit the trust to a possible minority position and to its fate at Crocker's majority shareholding call? Was his right of first option something that Crocker

⁷⁷ *Supra* note 60.

⁷⁸ *Ibid.* at 153.

should have considered before accepting the trusteeship? None of these questions was put in Kellock C.J.'s judgment for the Court.

In *Peso Silver Mines v. Cropper*⁷⁹ in 1966 an offer of a mineral claim was made to several persons and entities. The latter included a mining company, and the claim was physically adjacent to the company's existing holdings. The company's geologist advised the person who owned the claim to offer it to the company, and this was done. However, the board decided that, given its existing commitments, it had not the means to take advantage of the offer. Cropper attended the board meeting as a director, and took part in the board discussion and decision. Later he was approached by the same consulting geologist to become an associate with others in a joint venture to acquire and develop the claim. He did so, and gained significantly. The appeal court below dismissed the claim of *Peso Silver* to have an accounting of this gain, and the Court itself dismissed the further appeal. The reason was simple. The director as a participant in the board consideration of the offer had taken part in that discussion and decision with good faith, i.e., integrity, and thereafter his agreement with others acting entirely independently was outside the fiduciary relationship. Cropper's gain, as Cartwright J. said for the Court,⁸⁰ quoting from *Regal (Hastings)*, was not "by reason of and in the course of his execution of" his directorship.

It is very doubtful that this would have been the decision of the *Canadian Aero* Court. The directorship remained in being. One is reminded of Lord Eldon's comment on the strictness of the conflict rule that prevents a fiduciary from even being in a conflict situation, regardless of whether he gains thereby. Who, said Eldon, can know the true mind of a person in such a position? A fiduciary who knows that he *can* later pursue his own advantage in this way may make his own silent decisions as to how he will 'play his hand' at a board meeting.

In the *Hawrelak* case the Court, as in *Midcon Oil*, again divided 3:2. *Hawrelak* became a city mayor in October, 1963, and in March, 1964, the company of which *Hawrelak* was a forty per cent shareholder contracted with the city to sell certain lands to the city. Later for development purposes the city formally replotted land in the area, including the land by then acquired from the company. *Hawrelak* was relieved of his office because of this sale, and the city then sought to recover the gain he had made on selling his shareholding in the company. Both lower courts held that he was in breach in selling to the city while mayor.

That decision was now reversed by the Court.⁸¹ This company may have formally contracted during the mayoralty, but it was before *Hawrelak* was elected mayor that the city's decision to purchase the company's land had been made, and the price it would pay per acre had been agreed with the company at that time. There may have been debate in council during the mayoralty period concerning the manner in which the adjacent lands intended for replotting and

⁷⁹ *Supra* note 60.

⁸⁰ *Ibid* at 8.

⁸¹ *Supra* note 60.

development might be acquired by the city, but again the intention to acquire and to replot had been taken before October, 1963. And Hawrelak had not voted when a formal motion to replot was taken in 1964; no one alleged he had attempted to influence the vote. Applying *Regal (Hastings)* and the test whether gain had been made "by reason and only by reason of" the holding of a fiduciary office, Spence J. for the majority emphasized that Hawrelak had made no profit as a consequence of anything done or omitted by him while holding office. Indeed, the company sold to the city at a price well below market; Hawrelak made no profit anyway. Here is another insight into the scope of fiduciary relationship. The acts and omissions impugned must have occurred during the period of the relationship; prior acts and omissions (when they are legitimate) that independently produce results during a later relationship are irrelevant.

When the close of the 1949 - 1975 period came, it was evident loyalty was strictly required of the fiduciary. That meant, it was confirmed, surrendering to the beneficiary of the relationship personal gain that was not pre-approved by the beneficiary, and the gain had to have been made by the fiduciary while engaged in a role or task intended to benefit solely the beneficiary. As to the scope of the fiduciary relationship, that issue is mostly a question of fact, but conduct that is proper when it occurred does not require the surrender of later and consequential gain simply because the gain was received when the recipient had later become a fiduciary. It is the conduct with which equity is concerned, not the time of receipt. In the language of unjust enrichment it is the conduct that creates the injustice. It is similar as to conduct that occurs while the fiduciary relationship is in being, but the conduct takes place in circumstances that are beyond the reach of that relationship. For instance, the fiduciary is an investment agent handling the beneficiary's stock portfolio, and he purchases the beneficiary's used car for a price that the beneficiary later regrets. On the other hand the fiduciary relationship may endure beyond the termination date of the agency or office-holding that gave rise to that relationship. Even if it does not so continue, conduct during the time of the agency or office-holding that was the cause of the gain that came to the agent or officer, though only after that position had ended, remains indefinitely the conduct of a fiduciary. The obligation to surrender the gain continues as a result.

The strictness of the conflict rule is reflected in the fact that a well-meaning fiduciary dealing with the beneficiary's property for the beneficiary's benefit, but making an unauthorized gain for himself, such as an undisclosed commission, commits breach.⁸² And full disclosure is vital if a fiduciary dealing with the fiduciary property seeks to rely even upon a formal deed of release that was given by the beneficiary.⁸³

⁸² *Zwicker v. Stanbury*, *supra* note 60. 'Profiting' does not mean only the margin of gain following a well-intentioned acquisition for value of the beneficiary's capital. It means surrendering to the beneficiary the capital also.

⁸³ *Crighton v. Roman*, *supra* note 60.

(v) *Conflict and the employee*

Nevertheless, though there were judgments from Rand, Cartwright and Spence JJ. in this group of seven decisions, it is Laskin C.J. in *Canadian Aero Service*⁸⁴ who gives doctrinal depth, sweep and topicality to the principles governing conflict of interest and duty. The terseness of Rand J. and the blend of learning and clear decision-making that is Cartwright J., give way to the comprehensiveness and scholarship, yet the directness, of Laskin J. It was not always so with Laskin; there are judgments in the writer's opinion that are so dense that the expression of thought tends towards the convoluted and the abstruse. Sentence structure is sometimes over complex; the number of subordinate clauses and an apparent lack of ease in tying them all together have a tendency almost to overwhelm the reader. Academic law authorship is not perhaps the ideal earlier experience for a future judgment writer in an appellate court. But at his best, as in the writer's view he was in *Canadian Aero Service*, Bora Laskin was unsurpassed.

Laskin J., as he then was, took the conflict of interest and duty rule and put it into a perspective, not only of Canadian, but of Commonwealth and U.S. case law. As well he gave the equitable principles a timelessness by stressing that they have to be understood and also applied against the background of contemporary policy, values and practices. He develops the 'top down' approach that Rand J. had used in his *Midcon Oil* dissent in 1958. Like Rand J., but in greater detail, he demonstrates how a 'top down' application of equitable principles does not result in all conduct being seen as a facet of conflict. What is required is a careful assessment of the factual scope of the particular fiduciary obligation.

The circumstances of *Canadian Aero Service* encouraged an examination of how the 'top down' application works. It was argued for the two management personnel that fiduciary rules should not be applied to employees (this argument had succeeded in the appeal court below) and, if those rules could be invoked, that they did not apply to fiduciaries who took from their employ nothing that was the employer's and simply brought their personal skills to bear on information that was available to any member of the public who went in search of it. Even though the costs of securing the particular information had been borne by the employer, the employees had not benefited by reason of and while acting in their employment. They benefited only later and because of their own acumen. Laskin J. countered with three observations. (1) What had been acquired was a maturing business opportunity; (2) the source of this opportunity lay, not in the defendants' own initiative, but in their employment; and (3) resignation from the employment facilitated the personal acquisition of the opportunity. The description of property, not in the traditional manner but in the contemporary mould as 'corporate opportunity', is a crucial element in Laskin J.'s broadening of the description of the rule.

⁸⁴ *Supra* note 60.

Then he widens out with the 'top down' theme of the inclusion of an equitable principle concerned from age to age with 'conscience'. *Regal (Hastings)* and the law, 'by reason and only by reason,' are presented against a different backdrop. "In this, as in other branches of the law," he says, "new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting."⁸⁵ He points to recent decisions that "indicate ... an updating of the equitable principle whose roots lie in the general standards ... loyalty, good faith and avoidance of a conflict of interest and duty."⁸⁶ And as to the defendants' argument restricting the scope of the fiduciary relationship, he has this to say, summing up the new panorama, "... in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits".⁸⁷ Facts, shape, no fixed limits - the conception of equity is almost Hardwicke, before the capable pedestrianism of Eldon took hold in the early 1800s.⁸⁸

The natural question at this point is what is the link between axiom and judicial application? How are the courts to move from statement of principle to particular circumstances and the application of the principle? That is one of the most troubling problems, because without a well-charted link the court is really exposed to the perils of subjective values and preconceptions. And one peril is unpredictability of outcome. It is possible that such values and preconceptions not only determine the principle's application, but lead at the opening of the judgment to a formulation of principle that is weighted towards how it is then to be applied. This is the 'bottom up' process again. Speaking of directors and senior management, Laskin C.J. said in response to the concern about unpredictability that the conduct of such persons "must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively."⁸⁹

The factors he selected were (1) the nature of the office held, (2) the nature of the corporate opportunity, its ripeness, how specific it is, and the defendant's relation to it, (3) the amount of knowledge possessed by the defendant, (4) the circumstances in which the knowledge was obtained, and whether the knowledge was special or even private, (5) the time between termination of the office and the alleged breach of the fiduciary obligation, if the claimed breach occurred later, and (6) the circumstances and manner in which that termination took place.

⁸⁵ *Ibid* at 609.

⁸⁶ *Ibid* at 610.

⁸⁷ *Ibid.* at 619.

⁸⁸ Of Lord Hardwicke (Lord Chancellor, 1737-1757) it has been said - *Fourteen English Judges*, F.E. Smith, First Earl of Birkenhead, (Cassell, London, 1926), at 158 - that "his restatement of the basic principles of equity harmoniz[ed] the precedents with the philosophic notions of his age".

⁸⁹ *Supra* note 60 at 620.

This must be the right approach to linking principle and application. With regard to alleged conflict of interest and duty, each set of circumstances calls for its own pre-determined set of questions. Only when at trial level the questions are formulated in this way, can the court turn to the evidence with any sense thereafter that its thinking and decision are capable of being assessed on any appeal as being objective in character.

Canadian Aero Service was an appropriate precursor of the third and final stage of the Court's development. It tackled the equity issues doctrinally and with an originality of thought and presentation. The character of the judgment of the Court on this occasion was to prove the harbinger of things to come. This style of judgment, as it seems to the writer, would become very much the pattern of an age where the Court rules on disputes whose issues are of national importance. In these circumstances the Court must respond to the gravity that its own determination has attached to the matter under appeal. This – the style of *Canadian Aero* – is the style for an age that decides what it will hear and what it will not.

V. *The Modern Era - Control of the Docket (1975 - the present)*⁹⁰

Bora Laskin, the former well-known University of Toronto law professor, and Pierre Elliot Trudeau were the makers of the modern Court. When in 1970 the federal government under Prime Minister Trudeau invited Laskin from the Ontario Court of Appeal to a seat on the Supreme Court, the Cabinet must already have been aware that Laskin shared Trudeau's view of the role the Supreme Court of Canada should play in Canada. Trudeau – ever anxious to fit Québec and the English speaking provinces into an accepted, workable whole – was of course drawn very much to the key constitutional position of the United States Supreme Court. When in 1973 on the retirement of Fauteux C.J. Mr. Justice Laskin as the most junior judge on the Court was invited to become Chief Justice of Canada, there could be no doubt. Two years later things began to move. Laskin secured for his Court the hallmark of a final appellate court. It now had control over the cases it would hear.⁹¹ At that moment the Court came of age,

⁹⁰ Where the *Charter of Rights and Freedoms* applies, namely, regulating the relations between government and private persons, the period from 1982 – the year of its adoption – to the present is unquestionably a fourth epoch. But the *Charter* has no application to relations between private persons and therefore no application to such persons' obligatory, remedial, and proprietary rights or duties. Consequently it has had no apparent impact upon the law of equity, including trust law. What the *Charter* may well have done, however, is to make the Court, fresh from *Charter* litigation and interpretation, much more at ease with the formulation or adoption of general or abstract principle and also with the phenomenon of policy, when considering private law, including equity, issues.

⁹¹ S.C. 1974-75-76, c. 18, proclaimed in force January 27, 1975. It is the Court that gives leave to appeal civil cases, but there is power also in the provincial courts of appeal and in the Federal Court of Appeal to do so, though these courts rarely grant such leave. See Hogg, *Constitutional Law of Canada*, (Carswell: Toronto, loose-leaf edition), ch. 8.5(b).

as it were, and in 1982, with Trudeau's repatriation of the Constitution and the adoption of the Charter of Rights and Freedoms that his government introduced and saw through to constitutional enactment, the Court entered into the inheritance of status and position that it has today. It is now a court indisputably at the very centre of Canadian political, social, economic and legal life. And unlike the U.S. Supreme Court it is the final appellate court for provincial (or state) law as well as federal law. Its members are known, and so far as their position allows they regularly speak across the country. The Court's decisions on so many issues are now front page and television news from St. John's to Victoria.

What effect has this profound change meant for equity in the Court? With the Court able to determine what matters it would hear, and constitutional matters pressing, one might have been forgiven in 1975 for supposing that private law, and especially equity, would now rarely reach this elevated level. Even before 1982, however, it was evident that this more pessimistic assessment was not going to materialize. Private law quickly proved to have national issues of its own.

Equity too was front page news. More than one of its doctrines proved as early as 1973 to be at the centre of a societal flashpoint. In *Murdoch v. Murdoch*⁹² the majority members were of the opinion that the rights of the spouse who contributed financially to the purchase of property whose title was taken in the name of the other was a matter not of contract but of trust law. The question was a property issue, and whether or not - and if so in what circumstances - a resulting trust arose in favour of the non-titled spouse. It was a matter of acquiring a property interest and, as the law stood, that was a matter of intention, said the majority. This was clear, the majority members said, from *Pettitt v. Pettitt*⁹³ and *Gissing v. Gissing*⁹⁴ in 1970 in the House of Lords. The spouse with title could be said to hold on a resulting trust for the other if prior to obtaining title it had been their intention that the spouse with legal title should hold subject to a beneficial interest in each of them or as agreed between them. If there was no evidence of such agreement - of such intention - then the beneficial interest vested solely in the spouse who took title. In the case before the Court, concluded the majority, there was no evidence of agreement (of intention).

Observing how close but how far away was the possibility of achieving "equitable sharing"⁹⁵ by means of a resulting trust, and what might well be achieved with unjust enrichment liability along the lines of the *Degleman* case, Laskin J. dissented. He did not dispute that trust law could be applied. However, he concluded that it "is unnecessary to bend or adapt [the nature of the non-titled spouse's contribution] to the desired end [of a resulting trust] because the

⁹² [1975] 1 S.C.R. 423.

⁹³ [1975] A.C. 777.

⁹⁴ [1971] A.C. 886.

⁹⁵ *Supra* note 60 at 451.

constructive trust more easily serves the purpose.”⁹⁶ In just two pages of judgment on the subject of a constructive trust that would bring relief - about which the majority had said nothing - he thereby contributed to an impassioned public reaction.

The Court’s decision met hostility among women from coast to coast. There was a storm of protest. For over ten years the tension over this matter of property division on marriage breakdown had been building, but apparently torn between opposing factions the legislatures across the country had done nothing. And now the Court had simply noted the trial judge’s finding that “what the appellant had done, while living with the respondent, was the work done by any ranch wife.”⁹⁷ Like married women throughout common law Canada in the throes of divorce, Ginger Murdoch therefore got nothing of the farm lands and the improvements. It was to her as if the *Married Women’s Property Acts*, the acme of reform, had been passed yesterday.⁹⁸

Looking back from today’s vantage point at the achievement within six years of this decision of the changes for which women then contended, changes that occurred in the legislatures *and* the Court, one can appreciate that a solution through traditional trust law was not as easy a proposition as was popularly thought in 1973. The resulting trust is not a vehicle for equitable distribution. Apart from those resulting trusts that arise ‘automatically’ on the failure of an express trust either to take effect or to expend upon its objects all the trust property, the resulting trust *is* a creature of intention.⁹⁹ Was it intended when title was taken in the name of A that B should have an equitable proprietary interest in the property? So far as the constructive trust is concerned, all Commonwealth opinion adhered to the view that trust obligation is imposed, i.e., regardless of intent, only in a few, long recognized specific situations of fraud. *That* was the constructive trust. It was not for the courts on their say-so to take from a person the property rights vested in that person.

Of course, if that was the accepted Commonwealth - and Canadian - position, there was another side to this matter. There was a variety of associated remedy issues in 1973 that called for answers. Where does the line lie between implying an intent, as the court can do, that the non-titled spouse should have a beneficial interest, and imposing the obligation upon the title holder to suffer such an interest in the non-titled spouse? Was there indeed any reason why the Court should not adopt the ‘remedial’ constructive trust if the courts in the United States had already done so? Has equity never intervened to take beneficial title - property enjoyment - from one and put it in another? Scholars will say that equity has done that down the centuries. Was that not the way in

⁹⁶ *Ibid.* at 455.

⁹⁷ *Ibid.* at 436.

⁹⁸ These Acts, first enacted in the Commonwealth in England in 1870 and 1882, gave married women the legal authority to own property in their own right. Formerly a husband held title to, and managed, his wife’s property during the subsistence of the marriage.

⁹⁹ See Waters, *op. cit.* ch. 10.

which the earliest form of the trust itself came into being? And did the *Degleman* concept of unjust enrichment have any application here, or was that liability only existent in cases of fraud, mistake, breach of contract, and cases where property right was otherwise in, or as a result of transaction should have come to, the plaintiff? Was 'unjust enrichment' only *in personam* liability, the form it took in *Degleman*? Was it 'unconscionable' conduct for a titled spouse to deny to the other on a termination of their marriage any recognition of *post-marriage* and pre-breakdown contribution, whether by way of material resources or of services? Is proprietary estoppel an available remedy in these circumstances? Or is the 'unconscionability' doctrine only concerned with a single transaction which was unconscionably procured by one at the expense of the other? If it is, need it be limited in this way?

However, at the end of the day, after all these questions are posed, says the 1973 traditionalist, the issue is equitable division between the owner and another of property owned by one, who may be - and usually is - without fraud or fault. To accept intervening services after acquisition of title raises an issue of *quantum meruit*, not proprietary interest. Indeed, *Degleman* might reasonably be understood as underlining this.

The legal scene for equity and trust lawyers in the 1970s after *Murdoch* could not have been more active. Then there was *Rathwell v. Rathwell*¹⁰⁰ in 1978, when the dissent of one became the dissent of three. Spence J. appeared to have changed his mind from the *Murdoch* decision. And finally came *Pettkus v. Becker*¹⁰¹ in 1980, two years after the provinces in 1977 and 1978 finally moved to make the discretionary equitable division of property statutory.

So in commencing his comments on the third stage of the Court's life, the present writer is forcibly reminded of the words of Lord Millett, a distinguished Chancery lawyer and member of the House of Lords, to whom equity scholarship owes much. Writing in October, 1999, a foreword to the thirtieth edition of *Snell's Equity*, he said:

"...equity is on the march again. After long years of slumber during the post-war period, fitfully broken by Lord Denning and the interest which he revived in promissory and proprietary estoppel, it is now fully awake. Indeed it is rampant. It has broken through the traditional barriers which would confine its operations to the home and family and entered the business world. It brings with it obligations of loyalty, confidence and good faith, obligations higher than those imposed by the common law, which is satisfied with honesty, careful conduct and keeping one's promises. The exposure of the commercial world to equitable concepts is bringing a host of problems with which we are only now beginning to grapple.

Courts in Canada, Australia and New Zealand have been busy developing general principles of unconscionability and unjust enrichment to the point where they may come to replace older doctrines such as detrimental reliance or undue influence. New uses have been found for the constructive trust, sometimes as a pseudonym for

¹⁰⁰ [1978] 2 S.C.R. 436.

¹⁰¹ [1980] 2 S.C.R. 834.

proprietary relief, sometimes as an institution in its own right, sometimes merely to justify the granting of a personal remedy. There is new interest in equitable compensation. ... There is constant pressure to adapt equitable principles to a changing world.”¹⁰²

Some sign of what was coming in Canada was observable between 1949 and 1975 when the series of appellants came to the Court seeking remedy for breach of the fiduciary obligation of loyalty. Prior to *Canadian Aero Service*, and indeed after it with the *Hawrelak* case, there really was not too much dispute about the existence of that obligation. The 1942 decision of the House of Lords in *Regal (Hastings)* was cited and quoted from by every plaintiff in those years, and thereafter the contention was made that the fiduciary's gain occurred “by reason and only by reason” of the opportunity offered by the fiduciary role. Equity in other words was essentially of interest as the provider of a more rewarding remedy. Remedy was the attraction, as Lord Millett has observed of the litigation scene since that time. Proprietary relief was available in equity, and the burden of proof was upon the defendant fiduciary. Moreover, the defendant had to show that he had not breached a yet higher standard of behaviour than law requires.

Since 1975 and the controlled docket two issues, each arising out of plaintiffs' search for better remedy, have consumed much of the Court's time and energies. The third is a byproduct of these two. The first, to which Lord Millett refers, is the constructive trust. This notion has been taken in Canada from a humble origin of relatively little significance to first rank prominence as a proprietary remedy available today provided only an open ended ‘good conscience’ liability is established. The second is the fiduciary relationship. This too is a centuries old idea, but obligation arising out of ‘trust and confidence’ has had considerable attraction as a generator of more powerful remedy. Again as Lord Millett observes, “loyalty, confidence and good faith” have had greater appeal as the required standards of conduct. The common law's satisfaction with honesty, being careful, and keeping one's bargain is not enough. During the last thirty years fiduciary obligation has transformed the character of private law litigation.

The third issue has arisen largely as a consequence of the previous two issues. In more recent years the Court has considered the relationship between law and equity. This topic is an old argument that came out of the amalgamation of courts of law and equity in the last quarter of the nineteenth century. Was this a doctrinal ‘fusion’, or do the liabilities and remedies of equity continue to make up a body of law, albeit largely dispersed throughout the doctrines of private law, that is distinct from the liabilities and remedies of the common law? So far as tort and equity are concerned, there was opinion in the Court in 1991 that it is now one body of law, and should be rationalized as such. The law of involuntary obligation within private law would be one cloth.

¹⁰² Lord Millett, then a judge of the Court of Appeal, had developed his own views in a lecture given in the University of London, England, in 1995. See ‘Equity - the Road Ahead’, (1995/6) 6 King's College L.J. 1.

Much has been written on each of these issues, and it is not the present purpose to retrace the descriptive and analytical steps that that writing has taken. On this occasion the opportunity arises to obtain a perspective through a comparative Commonwealth and American study as to the doctrines created, to assess where we are now, and to suggest where the future of equity principles may lead.

(1) *The constructive trust*

In his foreword¹⁰³ Lord Millett refers to today's "new uses" for the constructive trust. "Sometimes" it is "a pseudonym for proprietary relief, sometimes ... an institution in its own right", and sometimes it merely "justifies the granting of a personal remedy". This neatly sums up the situation.

In Canada the term, constructive trust, is used contemporaneously in the first sense and the last sense, and Canadian case law also makes use of the categories of the institutional sense. Perhaps the Court has not spelt this out as clearly as it might, but it is important to realise that much of the confusion in this area - especially between institution (or substance) and remedy - arises from the use of the term in different senses. Lord Millett brings this out. We have constantly fallen back on the term to explain different legal phenomena.

Let us reverse things, and look first at the types of relief that are available if liability is proven. Then we will turn to liability, i.e., to obligation, whose breach gives rise to relief.

(i) *Mode of making good - property restitution or compensating restoration*

Proprietary relief means that when liability has been established remedy takes the form of giving the injured party specific property. This process may restore to the injured party property that once was his, that ought to have been his, or to which in the circumstances he has a better claim than the injuring party. A woman may be claiming the return of property which, in breach of a power of attorney she granted, her husband had transferred into his own name. That is specific property that once was hers. Secondly, a company's agent - instructed to buy certain goods for the principal - purchases in his own name, and undertakes to surrender title when some grievance that he has against the principal is settled. That is specific property that ought to be the company's property. Thirdly, a joint venturer accepts a bribe from a third party supplier for ordering that supplier's materials. These materials are to be employed in the joint venture project. The bribe is property to which his co-venturers have a better claim than he does.

¹⁰³ *Supra* text to note 102.

Proprietary relief may be the choice of the injured party. The party has this choice when the legal system, e.g., English law, requires the wrongdoer to account. Like any other trust beneficiary, the injured party may take either compensation or the specific trust property (or its traceable form). On the other hand the legal system, e.g. common law Canada, may leave the choice of remedy to the court.

Personal remedy is compensatory. Its disadvantage lies in the insolvency or bankruptcy of the wrongdoer. The claimant ranks with the unsecured creditors, whereas with a proprietary remedy the claimant has priority over all the creditors with regard to the asset claimed. The claimant has this priority because by definition the property in question is not part of the debtor's assets.

(ii) *Liability (or obligation) to make good*

The traditional approach is that liability giving rise to proprietary or personal relief for the injured party is fraud, which in equity means an intention to deprive another of the property entitlement of that other. Over the centuries what seems effectively to have become a closed list of situations has been and still is recognized as giving rise to this liability. Presumably the usual common law process of extension by analogy can take place, but it appears that that would very rarely be possible. These situations comprise the circumstances of taking advantage of statutory provisions or of abusing a concept such as joint tenancy affecting property ownership, or breach of fiduciary obligation. The description has been extended to holding title as vendor between contract and closing, and holding the balance of proceeds as a paid-up mortgagee following foreclosure and sale. The joint tenant who murders his co-tenant must submit to an imposed severance of the tenancy. English law now adds another. Denial by one party of the share of another, following the formation of an express or implied common intention to acquire an asset in the name of the one for the benefit, as agreed, of each.

However, liability in some common law jurisdictions has been held to be capable of being subsumed under one general or umbrella principle. The U.S. *Restatement of Restitution* in 1937¹⁰⁴ adopted 'unjust enrichment', thus paving the way for courts in all U.S. jurisdictions. And the Supreme Court of Canada adopted this same umbrella principle in 1980. In 1985 the Australian High Court¹⁰⁵ concluded that the principle was 'unconscionability', a conclusion which reflected the decision that the umbrella must be broader than 'unjust enrichment'. A fiduciary who, while engaged in his fiduciary task, accepts a bribe or other property inducement from a third party is an example of this

¹⁰⁴ *Supra* note 56.

¹⁰⁵ *Muschinski v. Dodds*, (1985), 160 C.L.R. 583, applied in *Baumgartner v. Baumgartner*, (1987), 164 C.L.R. 137. Both these cases involved property issues on cohabitation or marriage breakdown.

broader reach. The beneficiary has suffered no deprivation, but is entitled to seek relief for the breach. The Supreme Court of Canada revisited this issue in 1997 when the majority concluded for the Court that, though 'unjust enrichment' - an enrichment, a corresponding deprivation, and a lack of legal justification for the enrichment - covers most forms of wrongdoing giving rise to this liability, it does not cover all forms. The Court adopted a new umbrella principle, namely, 'good conscience', and applied that principle to the facts before the Court.¹⁰⁶ In Canada we have thus far apparently accepted the 'justice and good conscience' principle that Lord Denning originally put forward in England in *Hussey v. Palmer* in 1972.¹⁰⁷

The three meanings of 'constructive trust'

The first meaning of the term connotes a personal (as opposed to a proprietary) liability. Traditional constructive trust thinking sees the constructive trustee, like any trustee, as subject to the personal action to account. As a fiduciary the constructive trustee must also surrender specific property he is withholding from the beneficiary, or improper gain that remains in his name. The rule in the English case of *Barnes v. Addy*,¹⁰⁸ which is received in the case law of each common law Canadian jurisdiction,¹⁰⁹ applies not only to third party interference with express trusts, but with any fiduciary relationship. The rule defines the liability of the third party who 'knowingly receives' trust or fiduciary property made available to him as a result of a breach of trust by the trustee or fiduciary, or who 'knowingly assists' in a breach of trust by the appointed trustee or fiduciary. 'Knowing receipt' by the third party is categorized in Canada as unjust enrichment and a proprietary remedy may be given against this third party.¹¹⁰ However, if the third party has received no property, but has assisted only, he is still personally liable with the trustee or other fiduciary for the breach. Though the remedy against him is *in personam* (he has no fiduciary property with which to account), nevertheless because of his co-liability he is described as a constructive trustee. Lord Millett sees this usage of the term as "merely to justify the granting of a personal remedy."

Those common law jurisdictions that see the constructive trust as another type of trust which being imposed gives rise to such trustee duties as the imposition requires, describe this trust as substantive, i.e., like any other form of trust. It is on a par with the express or implied trust, and the resulting trust. It is its existence that causes there to be a requirement of accounting, and that

¹⁰⁶ *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

¹⁰⁷ [1972] 1 W.L.R. 1286, at 1289-90.

¹⁰⁸ *Supra* note 16.

¹⁰⁹ Cited by Dickson J. in *Rathwell v. Rathwell*, *supra* note 98 at 453-54, followed by the Court in *Air Canada v. M & L Travel Ltd.* [1993] 3 S.C.R. 787, and considered in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 152 D.L.R. (4th) 385 and *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805.

¹¹⁰ *Citadel General Assurance Co. v. Lloyds Bank Canada*, *ibid.*

creates the opportunity for the injured beneficiary to seek the usual relief for breach. This constructive trust is "an institution in its own right", to follow Lord Millett's language. This is what is meant by the institutional or substantive constructive trust. England, and those offshore jurisdictions that are or were recently associated with ultimate governance from London, are the jurisdictions following this interpretation of the constructive trust.¹¹¹ New Zealand today appears to hover between the institutional and remedial trust theories, still following the former but attracted in some degree towards the latter.¹¹²

Those jurisdictions - being the states of the United States, the states of Australia, and the common law provinces and territories of Canada - that have moved to the adoption of an umbrella principle of liability are given to seeing the constructive trust as *remedy* for breach of that principle. Any of these jurisdictions could therefore regard itself as espousing a conception of the constructive trust that is entirely 'remedial'. Hence we have the 'remedial constructive trust', or the constructive trust, in Lord Millett's words, as a pseudonym for proprietary relief. However, in Australia and the United States the choice as between proprietary and personal relief remains with the injured party. That is the conclusion the Restatement appears to present; the victim of unjust enrichment has proprietary relief available to him. The Australian court that finds 'unconscionable' conduct will determine what remedy, personal or proprietary, is appropriate. It will also determine as of what time the constructive trust shall have effect, that is, prior to, at the moment of, or later than the court order. In Canada, also, whether the injured party obtains proprietary or personal relief is a matter for the court. If proprietary relief is granted, the court is said in this country to award relief in the form of "a remedial constructive trust". The court may reach the conclusion in particular circumstances, however, that though the injured party seeks proprietary relief a personal remedy - usually damages - is adequate.¹¹³

The differing consequences of these two approaches - the institutional and the remedial - can be seen in their several conclusions as to when a constructive trust arises. If the constructive trust is seen as a trust like any other (save that it

¹¹¹ The Isle of Man may have moved to the remedial construction trust position (see text). *Cusack & Colter v. Scroop Ltd.* (1997/98), 1 O.F.L.R. 36 (now International Trust and Estate Law Reports), warmly endorsed the concept.

¹¹² *Fortex Group Ltd. (In Receivership and Liquidation) v. Macintosh*, [1998] 3 N.Z.L.R. 171 (C.A.), when the court found no 'unconscionable' circumstances that would permit remedial constructive trust claimants to go ahead of secured creditors, ie. debenture holders. See Tipping J. at 175-77. Also Blanchard J. at 182, leaving the place of this trust in New Zealand law to another day, and meanwhile cautioning against disturbing "the settled pattern of distribution in an insolvency".

¹¹³ See further Friedman, P.D., and Newman, C., 'Remedial Constructive Trusts. Where to Next?', 2000, 6 *Trusts & Trustees*, Pt. 7; pp. 20-25 and Pt. 8, pp. 6-10. This is a succinct and useful comparative assessment. The present writer has examined the Canadian position in *The Frontiers of Liability*, ed., P. Birks, (1994, O.U.P., Vol 2), pp. 165-85, 'The Remedial Constructive Trust'. Accompanying papers evaluating this remedy are written by S. Gardner, J. Eekelaar, P. Birks, & J.D. Davies, all of the University of Oxford.

is imposed by law rather than created by intention of a party), and is therefore viewed as liability, which involves accounting and therefore relief for breach, the trust will be interpreted as arising upon the wrongdoing taking place that brings the trust into being. This is the traditional approach that continues to be taken in England. Somewhat surprisingly, it was also taken by the majority of the Court in *Rawluk v. Rawluk*.¹¹⁴

The surprise is explained by the fact that at the time of *Rawluk* it was the common understanding that the Court had adopted the 'remedial constructive trust' approach. If the court grants proprietary relief, the so-called constructive trust *as a remedy* can only come into existence when the court so orders. It cannot possibly arise as a right when the wrongdoing occurs. What then is the explanation of *Rawluk*? It seems possible that on the Court at that time there were two understandings of the constructive trust. The majority view was that it refers to *liability*, which involves the remedy of proprietary relief, while the minority conceived of it solely as court awarded *remedy*.

Terminology apart, what are the real differences?

Essentially, as the Australian High Court has said, even the institutional constructive trust remedies fraud or unconscionable conduct. What then are the significant differences between the jurisdictions?

Initially we must distinguish between liability (or obligation), and remedy when the obligation is breached. Common law Canada provides that liability arises when the obligation to act 'in good conscience' is breached. That obligation includes the law of unjust enrichment and the other nominate circumstances in which English law affords a trust remedy of specific property restitution or compensation. Australia describes liability as arising when the conduct of a party is 'unconscionable'. Effectively, though whether it is so remains to be established, 'good conscience' and 'the conscionable' appear to be expressions of the same principle. The states of the U.S.A. - insofar as one can generalize - retain the former Canadian position, namely, that liability is 'restitutionary' and arises in circumstances of 'unjust enrichment'.¹¹⁵

English courts continue to reject the conclusion that one principle - good conscience, unconscionable conduct, or unjust enrichment - covers all liability circumstances.¹¹⁶ In particular English writers appear to be of the view that, if there is to be any extension beyond the circumstances in which English law at present countenances liability existing, it has to come by analogy with the present nominate circumstances, not from any broad principle.

¹¹⁴ [1990] 1 S.C.R. 70.

¹¹⁵ Scott on Trusts, 4th, Vol. V (para. 462).

¹¹⁶ Lord Browne-Wilkinson, until his retirement earlier this year the senior Chancery judge in the House of Lords, did suggest in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] A.C. 669, at 716, that the remedial constructive trust might ultimately be accepted in England and Wales, but subsequent judicial opinion seems to dissociate itself from that position.

Remedy for breach of the liability (or obligation) may in all jurisdictions be proprietary or compensatory. The term, 'remedial constructive trust', refers to the injured party having proprietary relief; the court grants remedy in that form. An Australian court will withhold such remedy where the equity of the circumstances is satisfied by a compensatory award, or indeed an estoppel or other remedy that operates between the litigating parties only. The right to have specific property taken from the wrongdoer, and transferred to the injured party, is seen as the extreme remedy in all jurisdictions, not least because of the effect such an enforced right can have on uninvolved third parties. Only particular circumstances can justify a proprietary remedy, and that is why so much importance attaches, not only to determining what conduct is unconscionable or against good conscience, but in isolating the particular circumstances that warrant proprietary relief. And such relief includes the right to trace. The Canadian approach is similar; the award of a constructive trust means proprietary relief. As Lord Millett says, the term in this context is a pseudonym for proprietary relief.

The only difference therefore of any substance between the Commonwealth and U.S. jurisdictions is whether proprietary relief should be available (i) in the nominate circumstances only that since the nineteenth century the case law has recognized, or (ii) whenever a general principle of liability is breached and in the view of the court the particular circumstances call for such relief. The English opposition to the U.S. and Canadian approach is based on the argument that there is no general principle that suggests itself, that general principles like Lord Denning's 'justice and good conscience' lead to subjective judicial notions of what conduct satisfies such a criterion, and that if the law is to take property from A and award it to B that is not for the courts, but for the legislature to decide. The English courts have also expressly rejected the remedial constructive trust as being inappropriate in circumstances of bankruptcy. If the order of priority among claimants is to be varied, that is a matter for the bankruptcy legislation which already puts in place an order of entitlement among creditors.¹¹⁷

In Australia it has been stated on several occasions that the constructive trust and proprietary relief constitute a remedy as extreme as the obligations that are fiduciary. The courts do not and will not impose such remedy or such obligations unless all other remedies or obligations are inadequate in meeting the circumstances. And the High Court means what it says. An instance of how determined is the High Court to adhere to this policy occurred in the famous case of *Hospital Products Ltd. v. U.S. Surgical Corporation*.¹¹⁸ This remains the

¹¹⁷ *Re Polly Peck International plc* (No. 2), [1998] 3 All E.R. 812 (C.A.), at 826 (Mummery L.J.) and at 829-30 (Nourse L.J.). Similar hostility to the remedial constructive trust was expressed in *Satnam Investments v. Dunlop Heywood*, [1999] 1 B.C.L.C. 385 (C.A.).

¹¹⁸ (1984), 156 C.L.R. 41.

leading authority in Australia, and its analysis is applauded by Australian commentators.

The facts were essentially simple. An Australian distributor for an American company copied its principal's goods, and sold the goods so produced to the U.S. company's customers throughout Australia. The High Court decided the case in contract; fiduciary relationship and proprietary relief were rejected as unnecessary and inappropriate.

*Soulos v. Korkontzilas*¹¹⁹ - 'good conscience' in Canada

The lineage of 'good conscience' as the umbrella principle for the liability (or obligation) is a distinguished one: Chief Justice Cardozo in *Beatty v. Guggenheim Exploration Co.*,¹²⁰ one of the early milestone cases, had this to say:

"When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

Adoption by the courts of such vague language as "good conscience" drew rebuke in 1985 from Deane J. in *Muschinski v. Dodds*¹²¹ in the Australian High Court. He considered that 'justice and good conscience' in "some mix of judicial discretion ..., [and] subjective views about which party 'ought to win' " are no substitute for principles of law.¹²² Such principles alone, he said, should govern proprietary rights. The 'new model constructive trust' of Lord Denning drew no plaudits from this court.

In "unconscionable conduct", however, Justice Deane *did* find such a principle. This is a "traditional equitable notion", he said, "which persists as an operative component of some fundamental rules or principles of equity".¹²³ And he cited by way of example in support of this characterization of 'unconscionable conduct' the Australian High Court authority of *Legione v. Hateley*.¹²⁴ He then applied the component of 'unconscionability' to the facts in hand.

His Honour considered "the content of the principle [that unconscionable conduct will be prevented] is that, in such a case, equity will not permit [a] party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do The circumstances of the present case",

¹¹⁹ *Supra* note 106.

¹²⁰ 225 N.Y. 380, at 386.

¹²¹ *Supra* note 105.

¹²² *Ibid.* at 615-16.

¹²³ *Ibid.* at 616.

¹²⁴ *Ibid.* (1983), 152 C.L.R. 406.

he said, "provide the necessary context for the operation of that general principle of the law of equity."¹²⁵ While he thought that 'unjust enrichment' might eventually become a general principle - "a basis of decision as distinct from an informative generic label for purposes of classification"¹²⁶ - that time in Australia had not come.

Twelve years later in *Soulos v. Korkontzilas*, decided by the Court in 1997, 'good conscience' became the "basis of decision" in Canadian courts. The constructive trust would be available for (i) "wrongful acquisition of property", such as fraud and breach of fiduciary obligation when there has been no deprivation of the plaintiff, and (ii) for unjust enrichment, as established in *Pettus v. Becker*. 'Good conscience', said McLachlin J. for the majority, may have the disadvantage of being very general. "But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general."¹²⁷

Though 'good conscience' reads like an informative generic label for purposes of classification, to adopt Deane J.'s words, it seems that Deane J. and the Supreme Court of Canada ultimately agree on how the law of constructive trust circumstances is to be built up. Deane J. speaks of "the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of [established equitable principles]". He adopts 'unconscionable conduct' as the relevant equitable principle. Having adopted 'good conscience', McLachlin J. says, "Particularity is found in the situations in which judges in the past have found constructive trusts. ... The goal is but a reasoned, incremental development of the law on a case-by-case basis."¹²⁸

It may be that 'unconscionable conduct' is a term that has been employed by past judgments in Australia (and to some extent in England, though the English courts have practically ignored it as a principle), and that in Commonwealth case law 'good conscience' has not the same lineage but, if analogy is the technique to be adopted, it is puzzling as to why Justice Deane would take such an adamant position with regard to 'good conscience'. At this stage in the long history of equity and the familiarity of all common law jurisdictions for centuries with equity's mode of thought and the manner in which its principles are applied to the facts in hand, it is difficult to understand why no more than a note of caution is required. However, in the fifteen years since *Muschinski v. Dodds* much has changed in this rapidly moving area of the law, and perhaps *Soulos* reflects that change. For the writer's part he notes, as did McLachlin J., in detail, that Canadian equity scholars have uniformly supported as an umbrella principle the adoption of 'good conscience', and the adoption also of constructive trust availability that *includes* unjust enrichment

¹²⁵ *Supra* note 105 at 620.

¹²⁶ *Ibid.* at 617.

¹²⁷ *Supra* note 106 at 236-37.

¹²⁸ *Supra* note 105 at 615.

situations. Canadians have always warmed to the late Lord Denning's reforming ideas, it is true, however much his views after his retirement from the Bench have been consistently criticized elsewhere. But this constructive trust is more subtle than Denning's shortly descriptive *bon mots* made of it; the carefully worded and crafted judgment of the *Soulos* majority need refer only in passing to Lord Denning's support.

How has 'good conscience' fared in the lower Canadian courts since its adoption by the Court in May, 1997? It is a mere matter of some three years since that judgment was handed down, and it is perhaps a little early to say whether the lower courts will have "regard [only] to that which might seem 'fair' in a general sense."¹²⁹ There are thirty-one reported and known unreported cases in the lower appeal and first instance courts that cite *Soulos*. Of these only two first instance courts were content to refer merely to the 'justice' of the case and the need to protect the integrity of institutions in making wrongdoers constructive trustees. However, the circumstances in neither of these two cases are out of line with precedent that awards proprietary relief in similar situations. The sizeable majority of these thirty-one cases in fact declined to grant proprietary relief, and the reasons given are based on the four criteria that the Supreme Court itself required be considered.

The Court enumerated the need to find (1) an equitable obligation, enforced by courts of equity, (2) conduct in breach of that obligation, (3) the need for a proprietary remedy - the nature of the conduct itself or the maintenance of societal standards in the adherence to the equitable obligation, and (4) the absence of interests in the wrongdoer or third parties, e.g. intervening creditors, that in the circumstances would make a constructive trust order unjust. In the thirty-one cases under review those criteria are consistently spelt out, as they are then considered with regard to the particular facts. Some cases are concerned with unjust enrichment; other with breach of fiduciary obligation, or fraud. The cases also span the usual width of areas of law in which proprietary relief or damages are sought. In some instances will administration and trusts for family members are the issue; the remainder concern commercial situations - directors in conflict situations, joint ventures, claims to insurance proceeds, nature of receipt of assets by one in which another claims an interest, and priority assertions over property subject to charges.

In one instance¹³⁰ in order to meet the fourth criterion of not being unfair to the wrongdoer in the remedy imposed, the court imposed a "time limited constructive trust" upon a director in breach of her fiduciary obligation to the company. The director and another company associated with the wrongdoing were required in the circumstances to account for profits acquired over a two year period, rather than over the entire period during which advantage had been

¹²⁹ *Supra* note 106 at 236.

¹³⁰ *Medhurst Hogg Sobotka Leong & Associates v. Mutual Gain Inc.*, September 20, 1999 ([1999] O.J. No. 3409), at para. 65.

taken. In another case¹³¹ the court denied the proprietary remedy that would order a bankrupt investment corporation to restore from its other assets the size of its improperly expended investors' guarantee fund. The denial was on the grounds that the general creditors of the company would suffer injustice. The creditors were entitled to put their claims fully before the court prior to any constructive trust order that might be made.

This case law suggests that *Soulos* has not only usefully expanded the circumstances in which proprietary relief may be imposed, but it has provided the kind of guidance to the lower courts that, if there were any such tendency, will prevent subjective moral judgment from determining court decisions. It is not likely, if these cases are a pointer to the future, that wrongdoers, so found, will have to bear the costs of appeal and then leave applications to appeal further in order to obtain an objective and balanced judicial assessment of their positions.

(iii) *The future and the Court*

In Canada, however, the true test of the remedial constructive trust has yet to come. Three players are needed. One person who is insolvent or bankrupt, another who is a secured or unsecured creditor of the insolvent or bankrupt, and a third who was injured by the proven fraud, unconscionable conduct or unjust enrichment of the insolvent or bankrupt. It is likely that, if themselves liable for the wrongdoing, the directors of the insolvent or bankrupt corporation are unable to meet personally the claims of the injured party, so that the assets of the insolvent or bankrupt are the sole source for payment both of the creditor and of the injured party.

What guidance does the existing case law provide to a Canadian trial court faced with these facts?

Circumstances of this kind confronted the New Zealand courts in *Re Goldcorp Exchange Ltd.*¹³² The creditor in this case was secured over the whole of the insolvent corporation's assets. The New Zealand Court of Appeal held by a majority¹³³ that there was a fiduciary relationship between the injured parties and the insolvent Goldcorp, and that tracing into the corporate bank accounts was possible. In the same court Gault J. said he would have been prepared to find a remedial constructive trust appropriate, had it been necessary to do so. On further appeal the Judicial Committee of the Privy Council held that there was no fiduciary relationship, and that a remedial constructive trust could not be granted.

¹³¹ *Canada Deposit Insurance Corp. v. Principal Savings and Trust Co.* (1998), 224 A.R. 331 (paras. 50-51).

¹³² [1995] 1 A.C. 74, (P.C.).

¹³³ [1993] 1 N.Z.L.R. 257, *sub nom*, *Liggett v. Kensington*.

The Committee ruled out of hand the proposition that just any property of the insolvent could be made the subject of a remedial restitutionary right superior to the secured party's interest. And the Committee could not 'deem' any part of the insolvent's property to have been from the beginning property in which the injured parties had a retained equitable interest, i.e., property in which the secured party had never had an interest. This was because the Committee considered there to be an insufficient link between the injured parties' contractual right and the insolvent's assets. Each injured person had paid money for gold bullion, but contrary to that person's expectations no bullion out of the insolvent's fluctuating stock of bullion had been allocated to the purchaser and thereafter held as the purchaser's gold.

Consequently, the injured parties' remedy was solely in contract. They were unsecured creditors and the secured creditor's claim was itself only partly met by the remaining corporate assets.

A Canadian court with these facts before it would turn to the *Soulos* decision. There the court would find the four tests. Assuming that the insolvent's assets can be said "to have resulted"¹³⁴ from the insolvent's wrongdoing (and that in the circumstances is a leap), and that there is no fiduciary relationship (there was unconscionable conduct, but possibly no more 'trust and confidence' than would be found in any contract), the court would move to the third and fourth tests. The third requires "a legitimate reason for seeking a proprietary remedy",¹³⁵ and describes that reason as based on the particular conduct of the defendant or upon the need to ensure "faithful" adherence to the performance of duties. The fourth bars such remedy if there is any factor that would make proprietary relief "unjust". An example is given - "the interests of intervening creditors must be protected."¹³⁶

A 'legitimate reason' might be that "private citizens", as the Privy Council described the contract purchasers,¹³⁷ ought to receive recovery before creditors. But, as others have well said, this is the obligation that has to be established. To state it is not to establish the obligation. Then it might also be said that creditors take a risk; those injured by fraud or unconscionable conduct do not. Again, as has been remarked, this is only true, if at all, of unsecured creditors. Surely secured creditors have not taken a risk, except as to the decline in value of the security. Would that possible decline be enough to bring secured and unsecured creditors into the same bracket? Then something might depend on the nature of the creditor. The secured creditor may be a bank. But then investors in bank stock are often themselves less skilled investing "private citizens" who are looking for the acknowledged safety of blue chip investments. Should their position be jeopardized because a bank is interposed between them and the

¹³⁴ *Supra* note 106 at 241 (S.C.R.).

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Supra* note 132 at 104.

wrongdoer, while the injured parties had the fraud or unconscionability of the wrongdoer directly practised upon them? Of course, the secured creditor may be a "private citizen". He may have sold a house held as an investment and taken a mortgage back.

Among unsecured creditors are other tort judgment creditors and often employees of the wrongdoer, as well as the corner grocer and the house decorator with a half ton truck. These are people who are in no position to require 'up front' security for payment. They could be said to be entitled to the same consideration as the victim of fraud or unconscionable conduct.¹³⁸

It has been pointed out that, if proprietary relief is discretionary, then the conduct of the injured party – the claimant – becomes relevant. The equitable defences may be pleaded by the wrongdoer. Does the enormity of the wrongdoing justify the court in overlooking, for instance, that the injured party declined to take professional advice in an effort to keep down his investment costs, or that she held off bringing action (perhaps in the hope of forcing a settlement) to the point that insolvency had overtaken the wrongdoer when action finally was brought? There are various suggestions in *Re Goldcorp Exchange* in the lower courts that the secured creditor knew or could reasonably have known that Goldcorp was unlawfully handling its gold bullion. This, it was suggested, could have been another reason for setting the secured creditor behind the injured parties. But would it cut the other way? Suppose the injured party, being attracted by the promised exceptional return on the gold investment, took a risk with a corporation that that party knew or could reasonably have known did not enjoy a sound reputation. Should it be relevant that the injured party, knowing himself to be unskilled, exposed himself to risk in search of a higher return and now seeks to take priority over a secured creditor who registered his security but thereby would and could learn nothing of the earlier unconscionable conduct of the debtor vis-à-vis the injured party? There would appear to be some inevitable point at which the courts must respect a security registration system, land registry entries, or any similar creditor protection set up further to statute.^{138a}

¹³⁸ In *Stanton v. Reliable Printing Ltd.* (1994), 25 C.B.R. (3d) 48 (Alta), the only instance known to the writer where the facts were those under discussion, the court discovered in provincial legislation implied support for a "special relationship" between the employer (now insolvent) and its employees. The employees therefore took the available assets ahead of the trade creditors – whoever they were; the report is silent – who got nothing. The Court of Appeal reversed this decision ((1996), 181 A.R. 263) because on the facts it found no fiduciary relationship between this employer and these employees. The court emphasized (para. 21) that it was saying nothing as to other fact situations concerning employer and employee. Leave to appeal to the S.C.C. was later refused.

^{138a} If there is a PPSA registration issue, it has been suggested that a balance is struck when proprietary relief is made available in those circumstances only where (1) a secured creditor knew of the debtor's fraud, or (2) an involuntary creditor's loss is consequent upon debtor theft or fraud: J.J. Chapman, 'Mistake, Sharp Practice, Equity and the PPSA', (1999) 78 Can. Bar Rev. 71, esp. at pp. 86-101. But does this deny a persuasive *raison d'être* to such relief?

In this scene of discretion amongst competing values it is not easy to fashion objective factors that might be considered by the trial court. But it is not impossible. The above discussion suggests that as a commencement a distinction be made between (a) secured and unsecured creditors, (b) unsecured creditors who choose to take risk, and those who have no actual or practical alternative, (c) victims who involuntarily were exposed to the wrongful conduct of another, and those who voluntarily entered into some kind of legal relationship with that other, (d) injured parties who understood risk or were aware of the practice of taking professional advice, and those whose lack of sophistication genuinely deprived them of either, and (e) injured parties who were otherwise exposed through their conduct to the equitable defences, and those who were not.

The difficulty is that, beyond some point in particularizing factors or 'conditions' that should be considered, the so-called factors or 'conditions' are increasingly responses to some particular fact situation (even situations) in the author's mind. In other words, in the nature of things a test, factor or 'condition' must remain in the world of generality and abstraction. Indeed, it is possibly for this reason among others that English courts remain firmly committed to the notion that, if judgment as between persons on the basis of morality, or social or economic principles, is to be made that task is for Parliament, not the courts. The Court of Appeal in England found it inconceivable that the court should effectively change the order of priority among creditors by entertaining a remedial constructive trust. Such a trust would put the beneficiary ahead of the statutory order.¹³⁹

It seems to the present writer that a jurisdiction which launches itself into discretionary proprietary relief has to accept that the trial court will inevitably be left to weigh the merits of persons in different situations and on the basis of moral principles. In the writer's view this does not call for justification. It involves a conception of the judicial role that has changed considerably in the last twenty-five years. It is an aspect of justice being done, and beside the United States it is an approach that is adopted in Australia and New Zealand as well as in common law Canada. In the 1996 Blackburn Lecture at the Australian National University,¹⁴⁰ Justice Paul Finn - a former distinguished equity academic and writer, now a judge of the Federal Court of Australia - had this to say on the subject of 'The Courts and The Vulnerable', "while the law and morality are not synonymous, the law nonetheless can evidence strong moral purposes. And so it should. Its subject is human relations and social organisation."

The speaker went on to isolate the reduction of inequality, and the instilling of regard for the rights and interests of the weaker party where inequality cannot appropriately be reduced. He was of the view that to produce one or other of those objects legal doctrine is being deployed. The overall aim, he thought, is to recognize vulnerability and to protect the vulnerable.

¹³⁹ *Supra* note 117.

¹⁴⁰ Law and Policy Papers, Paper No. 5, at 13; Centre for International and Public Policy, Faculty of Law, A.N.U.

Of course, equity has been concerned with vulnerability since its beginning, and it is expressed in the enforcement of the mediaeval *use*, the Elizabethan concern with fraud on creditors, the seventeenth century doctrine of protecting naïve heirs of landed estates against exploiting contracts, the eighteenth century notion of even hand in trust and estate administration, and the nineteenth century emphasis upon the concept of undue influence. Indeed, 'equity doth delight in equality', as the maxim has it. There is nothing new in Justice Finn's discernment of the reach for equality and the protection of the vulnerable. It is only that, after a mid-twentieth century unconcern, the last quarter of that century saw a notable revival of interest in equity's concern for what is fair, and this was observable among courts of almost all jurisdictions. Lord Millett spoke to this in his foreword to *Snell's Equity*, as we have seen.¹⁴¹

The task for the courts with the remedial constructive trust, it seems to the writer, is to *describe* factors and considerations rather than simply to adopt catechismal generalities. In 1980 the answer seemed to be to devise formulae. *Pettkus v. Becker* led to the three-part formula for determining whether unjust enrichment has occurred, and the trial courts have often applied it since as if it were some kind of checklist. But of course, apart from recognizing matrimonial and cohabitation breakdown and the equitable division of property as a basis for proprietary relief, this line of constructive trust cases¹⁴² could achieve little else that would assist in other than cohabitation breakdown litigation. The issue there was simply as to the division between the parties of assets owned by one or other of them. The property in question - or the 'equity' in that property - was easily ascertainable, though one or both contestants may be in possession, and the remedy invariably operated only between those two. Then in the later 1980s relief was extended to commercial cases, where the applicability of the proprietary remedy is often not so simple to decide. And finally we come to the insolvency or bankruptcy situations where the weighing of merits among persons, both before the court and not so, is at the heart of things.

If unpredictability of outcome, appeal, cross-appeal and consequent costs are not to become a reproof to the system, with the race (i.e., favourable settlement terms) going to the party with the greater ability to carry on the litigation, the *description* of the objective factors or considerations must seek to probe ever deeper into the generality of possible fact situations. It can be done and with Justice Finn the present writer with respect would agree that it is worth doing.

¹⁴¹ *Supra* at note 1.

¹⁴² I.e., *Murdoch v. Murdoch*, *supra* note 91; *Rathwell v. Rathwell*, *supra* note 99; *Pettkus v. Becker*, *supra* note 100; *Palachik v. Kiss*, [1983] 1 S.C.R. 623; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38.

(2) *Fiduciary Relationship*

Lower courts, especially in Ontario and British Columbia, were active in the 1970s with an argument then being increasingly presented to the court. The plaintiff in claiming relief sought to establish that the defendant was a fiduciary vis-à-vis the plaintiff, and therefore owed the plaintiff, not merely honesty and care, but a total absence of self-interest while carrying out the fiduciary task. The trustee must also act with prudence, impartiality, good faith, and make at least the crucial decisions personally. But the attraction to plaintiffs was the equitable obligation that the defendant avoid all self-interest because that means the fiduciary may make no unauthorized personal gain while acting as the fiduciary. It is not a matter of whether the terms of the contract are silent as to the nature of the gain one of the parties has made; the fiduciary is required to surrender personal gain unless the contract positively authorizes such retention. The onus of proof is on the fiduciary; a contract that is silent as to the matter of the gain works against the fiduciary.

Aside from recovering the defendant's personal gain, plaintiffs were also attracted by the access to information from 'the other side' that the concept gave them and the remedy available - production of the information - when there is non-disclosure.

A fiduciary must have the consent of the beneficiary even to be in a situation where the fiduciary's personal interest *may* conflict with the duty he owes to the beneficiary. The 'no gain' rule is but an offshoot of the 'no conflict' rule. A fiduciary acts selflessly unless - and then only to the extent that - valid permission is given to him to pursue in any manner his own interest. There cannot be consent unless there is disclosure. Nor may a fiduciary withhold information he has and which it would benefit the beneficiary of the relationship to have also. Any such withholding is incompatible with the selflessness that fiduciary law requires. Many cases of the 1970s were concerned to establish a fiduciary relationship found in the particular circumstances before the court, because it involved the duty to disclose. It was an attractive argument for the plaintiff engaged in a dispute between transacting parties because, if the court holds that disclosure was necessary, the fiduciary has the burden of showing that a full and complete disclosure had been made.

The traditional fiduciaries are trustees, executors and administrators, partners, company directors (vis-à-vis the corporation, but not the shareholders), lawyers, accountants, agents in general, and priests. The principle that extended to each of these persons was that a fiduciary is one in whom trust and confidence is placed by another in the performance by the fiduciary of the duties of his office or the task that he has undertaken (or is required) to carry out. The office can be discharged or the task carried out only by acts or omissions that benefit solely the beneficiary of the fiduciary relationship.

The nineteenth century and the first sixty years of the twentieth century were concerned almost exclusively with these traditional fiduciaries. It is the role or status of the defendant rather than his or her immediate conduct that

determines whether he or she is a fiduciary vis-à-vis another. The quintessential fiduciary is the trustee, one who holds or holds title and administers property for the exclusive benefit of the trust beneficiary. Fiduciary obligation was applied in those years to other persons whose office or task involved another placing trust and confidence in the office holder or task performer, whether or not the holding of property title was an element. The position of the person trusted allowed him or her the opportunity either to discharge faithfully the office or task, or to abuse the situation for his or her own benefit. The beneficiary would not know or probably appreciate at once what was happening. In the nineteenth century actions were brought in the equity jurisdiction in order to obtain the advantage of equitable remedy if fiduciary status and breach of the same could be established. A close parallel with the trust reposed in a 'trustee' was the maintained link with other 'trust and confidence' capacities. Courts of equity were sparing in holding that particular circumstances did involve fiduciary status, and throughout the Commonwealth, stemming from the English courts, the combined courts of law and equity after the Judicature Acts pursued very much the same policy or interpretation of equity doctrine.

Contractual obligations did not readily attract the fiduciary classification. The *status* of the potential fiduciary would be determined by observing whether there was power and influence in one person to affect another's legal position, and the success of the argument that a fiduciary status existed would depend upon whether the contract did bar all self-interest to the one with power or influence. Since contract is essentially the achievement of mutual self-interest through bargain and agreement, fiduciary relationship would not readily be invoked.

In the years since the 1970s Canada has developed the usage of the fiduciary concept to a degree that is unparalleled in any other Commonwealth jurisdiction. England has effectively remained with the 'traditional' fiduciary relationships, and Australia appears to regard the fiduciary relationship that is based on a characterization of the duties imposed upon or voluntarily assumed by the parties as being an interference with contractual autonomy that should rarely be invoked. New Zealand similarly seems to be taking a more conservative stance.¹⁴³ So this puts Canada with its so-called 'fact based' thinking very much, and solely, in line with the United States jurisdictions. Whether in Canada the concept of the fiduciary relationship has been trivialized and on occasion almost caricatured in order to permit the plaintiff to take advantage of fiduciary obligation and the remedies for breach, or the courts have explored through the 'fact based' relationships more inherent potential applications of the concept than any other Commonwealth jurisdiction has done, is a matter of viewpoint and persuasion.

¹⁴³ The most recent authority is *MacLean v. Arklow Investments Ltd.*, [1998] 3 N.Z.L.R. 680 (C.A.), where the majority found the project financing institution to owe a duty of confidence to the would-be developer (and borrower), but not a duty of loyalty (*per* Gault J., pp. 688-93). Thomas J. (pp. 722-25) strongly dissented concerning fiduciary relationship. Cf. *Lac Minerals Ltd. v. International Corona, post*, note 145.

Certainly fiduciary obligation has replaced for common law Canada much of the significance of undue influence¹⁴⁴ and substantive estoppel (reliance to detriment), neither of which has been explored in this country. Such replacement is something that Lord Millett in his foreword appears to have had in mind. And when 'fact based' fiduciary relationship is discovered in commercial contracts and understandings, the significance in such cases of liability and remedy under contract and tort law is proportionately reduced.

Awareness by the Canadian legal profession at large of this previously rather reclusive equity concept was stimulated in the 1970s by the new found attractiveness of equitable remedies. The standards of conduct expected of the fiduciary were so much higher than those that were enough at law. It was soon to become familiar practice to argue 'fiduciary law' before arguing the application to the facts of the common law doctrines of contract and tort. The particular reason for this enthusiasm, of course, was that the courts were increasingly prepared to entertain the issue of whether fiduciary obligation existed 'on the facts'. Hence the character of the so-called 'fact based' relationships. The question was whether in the particular circumstances – traditional fiduciaries aside – the defendant had been the repository of 'trust and 'confidence' and the plaintiff was at a disadvantage in, typically, not possessing equal bargaining power or relevant knowledge kept by the defendant to himself. The defendant may have used for personal advantage information that was allegedly confidential. Each litigant in bringing his case therefore sought to establish that the other's contractual obligations made that other a fiduciary vis-à-vis the plaintiff in the carrying out of the contract. Today, over twenty-five years after that manner of pleading cases began, the invocation of fiduciary relationship is less frequent. Provincial appeal courts in particular, following the lead of the majority judgment in *Lac Minerals Ltd. v. International Corona Resources Ltd.*¹⁴⁵ and more recently the judgment in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*,¹⁴⁶ followed very recently by the Ontario Court of Appeal at length in *Visagie v. TVX Gold Inc.*,¹⁴⁷ are now less inclined to find the elements of fiduciary liability established. However, it is now well established that as to fiduciary relationships there are the so-called 'traditional' relationships and those that are 'fact based'. The 'fact based', as we have seen, are the relationships discovered in the particular circumstances. And it is there that the difficulty lies. What exactly *is* the court looking for, even when it is armed with Wilson J.'s much cited three-part test in *Frame v. Smith*?¹⁴⁸

¹⁴⁴ Other than in a testamentary connotation.

¹⁴⁵ [1989] 2 S.C.R. 574.

¹⁴⁶ [1999] 1 S.C.R. 142.

¹⁴⁷ June 1, 2000 ([2000] O.J. No. 1992), Ont. C.A.

¹⁴⁸ [1987] 2 S.C.R. 99, at 136. The most recent consideration of 'fact based' relationships occurred in *Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.*, February 25, 1999 ([1999] A.J. No. 221), Alta C.A., paras. 26-35.

The Court was first involved with who is a fiduciary in the quite distinct – indeed, unique – context of the nature of the First Nations’ relationship with the Crown. That was in 1984 in *Guerin v. The Queen*.¹⁴⁹ The Court’s involvement with what came to be called in Canada, ‘fiduciary law’, such was the industry of the lower courts in finding new fiduciary relationships, continued through a series of cases involving both private and commercial transactions and relationships, culminating to date in *Hodgkinson v. Simms*¹⁵⁰ and the *Cadbury Schweppes Inc.* case.

In September, 1998, the writer had reason to present a paper on the extensive contribution of the Court in this succession of judgments to the law of fiduciaries, fiduciary obligations and fiduciary relationships.¹⁵¹ On that occasion the writer saw four issues as having dominated the attention of the Court between 1984 and 1998. The first is the debate in the Court over who is a fiduciary, the difference of opinion over the meaning of ‘vulnerability’ summing up much of that debate. The second is what the writer discerns as “the development within fiduciary law of an imposed quasi-trust relationship” that carries with it “a consequent range of imposed positive obligations”. The third is the use of fiduciary obligation to protect the person (as opposed to the property) of persons who are vulnerable to the harmful self-gratifying acts of others. It was the tide of public disgust with the sexual exploitation of those in society who have little means wherewith to defend themselves that appears to have spurred the Court’s interest in emphasizing the gravity of the wrong. The interest took the form of invoking the vulnerability concept that is intrinsic in fiduciary relationship. The fourth is the merger of tort obligation and fiduciary obligation and the remedies available for breach of the merged obligation. The September paper discussed at length those four issues.

The writer’s concern was that the imposed quasi-trust relationship, flowing from *McInerney v. MacDonald*,¹⁵² where the fiduciary has an obligation ‘to act in good faith in the best interests’ of the beneficiary, may encourage Canadian courts to impose ‘good conscience’ constructive trusts of perhaps an unintended character. For the purpose of advancing ‘the best interests’ of the beneficiary of the relationship, such a fiduciary would be required to carry out a varying number and variety of specific duties that are positive in nature.

The two apparent schools of thought on the Court about the meaning of ‘vulnerability’ – does it mean *situation* vulnerability or *personal* vulnerability? – seemed to the writer to suggest different perceptions of the role of fiduciary law. And in the writer’s view it is open to further consideration whether there

¹⁴⁹ [1984] 2 S.C.R. 335. See *Terra Energy Ltd.*, *ibid.* at para. 39, for this same interpretation.

¹⁵⁰ [1994] 3 S.C.R. 377.

¹⁵¹ *Gérard V. La Forest at The Supreme Court of Canada, 1985-1997*, eds., Johnson, R. and McEvoy, J.P., (2000, University of Manitoba, Canadian Legal History Project), ‘The Development of Fiduciary Obligations’, pp. 81-138.

¹⁵² [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415.

is a lack in the tort of trespass to person or the remedies available for that tort, so that there is a need for supplementation with fiduciary relationship and its remedies. When the reach of each remedy is or can be seen as the same, it has been questioned elsewhere in the Commonwealth whether it is desirable to create remedial overlap for the one civil law¹⁵³ offence.

The existence of that paper makes it possible on the present occasion for the writer to stand yet further back and to consider the policy questions that the future regarding fiduciary relationships may pose for the Court.

The vulnerability debate suggests one of those issues. Is the fiduciary relationship essentially concerned with compelling those who have made an unauthorized personal gain to surrender it, or with policing conduct, particularly in business or commercial transactions? The first deters the pursuit of self-interest by effecting surrender; the second avowedly deters by preventing the opportunity for the making of personal gain from arising. The first therefore awaits the occurrence of violation; the second aims to eliminate the conflict situation and the consequent violation that is possible. The irony of the second is that, while the prohibition has been construed as strict and unbending, and sometimes a court may feel it appropriate to thunder a little, our society is riddled with actual conflict and potential abuse situations. We learn to live with this as an inevitable characteristic of a democratic society whose economic order is built primarily on the initiative of the individual and the regulated pursuit of self-interest. We value integrity and good faith as the elements that in the individual are the ultimate guarantee of the stability of our personal, commercial and public structures. We would have these qualities of integrity and reliability as commonplace attributes of the individual.

Is policing therefore a more appropriate role for the legislature? The legislative assembly can be precise in the conflict situations it wishes to prevent occurring, and in how that prevention can best be achieved. The courts by contrast have only the principles of 'no conflict' and 'no gain' as their instruments; these are the blunt tools of equity, as Sopinka J. once described them.¹⁵⁴ It is not difficult to recognize the value of a little thunder from the court in its requiring the restitution of unauthorized self-profiting. It is more difficult to appreciate the court's reproof for the fiduciary caught in a conflict situation when, for instance, nothing prevents a testatrix from leaving a life estate to her husband, the capital to her children by a former marriage, a power of capital encroachment in the trustees in favour of the life tenant, with her husband, if the survivor, as one of two trustees. If the husband may wear the two hats of trustee and beneficiary, the latter as the discretionary recipient of further benefit, why may not other fiduciaries?

It may well be valuable if the Court finds the opportunity to say more of the primary rule that the fiduciary shall not consciously place himself or be in a

¹⁵³ As opposed to criminal law.

¹⁵⁴ *Supra* note 145 at 595 (S.C.R.).

conflict of interest and duty situation. This today can only be a deterrent rule; there is no restitution to be made. How serious about it are we as a society? If we intend to deter self-interest, how far is the conflict rule a realistic measure to achieve that end?

Cadbury Schweppes suggests that the Court is now more attracted to defining 'vulnerability' as personal vulnerability—the existence of a disadvantage compelling the individual who possesses it to deal with the world on less than equal terms - and this seems to have been the interpretation that the Ontario Court of Appeal put upon it in *Visagie v. TVX Gold Inc.*¹⁵⁵ "There is no suggestion", said the Court of Appeal, "that [the respondents were] not in an equal bargaining position vis-à-vis" the appellant.¹⁵⁶ And it is evident that there remains a continuing reluctance by the Supreme Court to see a 'fact based' fiduciary relationship in the dealings of commercial parties at arm's length. In *Visagie* the Ontario Court of Appeal commented on the expectation that negotiating parties themselves will have thought this matter through. They will surely introduce terms into their contracts that provide the protection from each other that they wish to have.

It would be unfortunate if, with a desire to lend greater certainty to when fiduciary obligations exist, the courts were to categorize those commercial and other situations that attract fiduciary obligations, and those that do not. It must surely be right that any circumstance, commercial or otherwise, is potentially capable of giving rise to such obligations. There are other ways in which a clearer focus as to the applicability of fiduciary principles can be had. As Professor Finn (as he then was) pointed out twelve years ago,¹⁵⁷ the requirement that the parties to a commercial contract act in good faith towards each other deals with many of the problems that have led the courts to finding fiduciary relationships. We might even further note that through the criterion alone of 'good faith' the introduction of equitable standards allows the courts nevertheless to maintain the approach to commercial transactions that was taken in *Cadbury Schweppes*. In other words, we can move to three levels of equity intervention. The floor is unconscionable conduct (e.g., taking advantage in a deliberately exploitative or totally indifferent manner of a party with personal difficulties). The next level up is good faith (e.g., recognizing and respecting the expectations that the other party reasonably had as to the operation of a contract for the parties' mutual benefit). The top level is fiduciary relationship (e.g., acting in all respects within the relationship in a totally selfless manner).

Instead Canadian case law today often describes the conduct expected of the fiduciary as including 'good faith' as well as 'loyalty'. A fiduciary must of

¹⁵⁵ *Supra* note 147 at paras. 25 and 29.

¹⁵⁶ Equality of bargaining position has been rejected elsewhere in the Commonwealth as an insufficient criterion. There must be a recognizably marked position of weakness in the party claiming to have been exploited.

¹⁵⁷ *Equity, Fiduciaries and Trusts*, ed., T.G. Youdan, (Carswell: Toronto, 1989), 'The Fiduciary Principle' (pp. 6-26).

course act 'in good faith', but the disadvantage of using that term in connection with the fiduciary is that it confuses the obligations of those engaged in selfless service (the fiduciary) with the obligations of those of whom only fair dealing or equitable treatment is expected. 'Good faith' refers to frank, fair and reasonable conduct, whether for instance as a trustee exercising a discretion, or a business person upon entering into and then carrying out an agreement.

Another reason for the utmost clarity is that in certain circumstances all three levels of conduct may be expected of the same person. A trustee, for instance, is a fiduciary vis-à-vis the beneficiary for the purpose of discharging the trustee duties. The same trustee must show third parties with whom he contracts as trustee good faith in the exercise of the trustee powers and discretions, and he must not act unconscionably vis-à-vis those third parties.

There are in fact four issues that have to be considered whenever breach of fiduciary duty is alleged. The first is whether the facts give rise to fiduciary obligations. That is, is the defendant a fiduciary? The second – which has just been discussed in connection with 'good faith' – is what *are* the fiduciary obligations? This is purely a question of law. The third is the area of activity, among all the fiduciary's activities as an individual, within which he must adhere to the fiduciary obligations. That is, when is he outside that area and able to pursue his own interests as he chooses. The fourth is how the obligations apply to the kind of fiduciary who is under consideration. That is, do the obligations demand the same standard of behaviour as between, for e, the trustee of a testamentary trust, the corporate chief executive officer, and the letter delivery courier on a bicycle? The second of those issues is, as observed above, entirely a question of law. The other three cannot be handled without considering both law and fact. In this paper, looking ahead to the fiduciary law questions that may confront the Court in the future, there is one that in the writer's opinion is becoming uppermost, as in his September, 1998, paper he attempted to suggest might be the case. It is another, but related, aspect of the second issue that was discussed above. What *are* the fiduciary obligations? In November, 1998, the British Columbia Court of Appeal handed down judgment in *A.(C) v. Critchley*.¹⁵⁸ Four men sued the provincial Crown for breach of fiduciary duty, negligence, and vicarious liability. As youths they had been in the care of the provincial Crown, and had been placed in the ranch home of Critchley. The Crown in the circumstances was the legal guardian, and Critchley was an independent contractor vis-à-vis the Crown. Prior to this action it had been proven that the plaintiffs had been sexually and physically abused by Critchley over a period of time, and their position on this occasion was that the Ministry officials failed to respond adequately to complaints made by them, to investigate the matter properly, and to see that timely rehabilitative treatment took place. The Crown conceded that it was in a fiduciary relationship with the youths. But had there been a breach of fiduciary duty? Accepting the plaintiffs' argument,

¹⁵⁸ (1998), 166 D.L.R. (4th) 475. The Court of Appeal held for the respondents on the basis of the vicarious liability of the Crown.

the trial judge said yes. The Court of Appeal said no. The reason for saying no was that, though the Crown was a fiduciary, the officials at worst had been negligent. Negligence is not a fiduciary obligation.

So the Crown as fiduciary might be negligent, and if so would have to pay damages for that negligence, said the Appeal Court, but it was not because it was a fiduciary that it would be a tortfeasor. It was in tort, not in equity, that the appropriate action lay. It should be noticed that in so deciding the Court of Appeal was in no way on a course of its own. There is both Canadian and English authority to the effect that the duty of care is of common law origin, not from equity. The equitable duty to be prudent mirrors the law.

What then are the fiduciary obligations? With regard to an express or implied trustee, and so far as the trust instrument does not provide to the contrary, they are to avoid conflict and surrender unauthorized personal gain, to act impartially between beneficiaries, and not to delegate unless that is usual business practice. Such a trustee must also, of course, act honestly and with care, as the common law requires of those who act for others. The fiduciary who is not a trustee must also act with that same honesty and care, but the fiduciary obligations that apply to his position are less likely to include impartiality and no-delegation. Those obligations tend to be peculiar to the fiduciary who for another holds title to and is administering property. The single obligation that applies to all non-trustee fiduciaries is the negative duty, as it were, that the fiduciary *not* let himself be in a conflict of interest and duty situation, and if he *does* make unauthorized personal gain while in that position surrender it. A non-trustee fiduciary in Canada, however, has been said by the Court, as the writer's previous paper explained, to have the fiduciary obligation to act 'in the best interests of' the beneficiary of the relationship. This meant in *McInerney v. MacDonald* that, though there was no possible question that Mrs. MacDonald's physician, Dr. McInerney, was in a conflict situation with her patient or had improperly acquired personal gain, she had to release the medical notes of herself and other doctors to her patient. Previously in *Guerin v. The Queen* it was also the position that no one had accused the Crown of conflict or of making improper gain for itself. In each case, however, the defendant was held to be in breach of fiduciary duty, the one in declining to hand over the notes of other physicians, and the other for not obtaining consent from the Band for changed leasing conditions concerning reserve land before implementing the statutory surrender. This development was fully considered in the September paper - it is the second of the topics the writer then addressed¹⁵⁹ - and on this occasion it suffices to say that once this positive duty is imputed to the fiduciary, namely, to advance the best interests of another, all sorts of specific tasks can be said to be the obligation of the fiduciary. As we have seen, in *McInerney* it was to hand over doctors' notes; in *Guerin* it was to obtain Band consent to the new terms.

¹⁵⁹ *Supra* note 151.

This positive fiduciary obligation seems to have been part of the problem in the *Critchley* case. If the provincial Crown had the obligation to act 'in the best interests of' the youths in its care, how were the officials discharging that fiduciary duty if they did not properly follow up complaints of abuse and, when they did move, put no rehabilitation in place for the plaintiffs at once?¹⁶⁰ Admittedly the charge against the Ministry is still neglect, but if the charge was true it is hard to say that the Crown was discharging its duty of acting 'in the best interests of' the youths. In other words, it is arguable that to require 'best interests' activity is to *include* neglect in the fiduciary obligation. Neglect as an independent liability at law is only compatible with the negative fiduciary obligation of 'thou shalt not'.

Another confusing element that is noticeable in this case is the terminology that is used to describe the duty not to be in conflict situations and to surrender unauthorized personal gain. Again this follows familiar practice in Canada. Those two rules are described by one member of the Court of Appeal¹⁶¹ as the duty "to act honestly and loyally", and by another as the duty of "loyalty or fidelity".¹⁶² But surely the duty can only be concerned with 'honesty' if it solely concerns intentional unauthorized self-profiting and intentional placing of one's self in a conflict situation. Yet the duty is wider than this. As a deterrent rule it is strict. In the classic House of Lords case of *Boardman v. Phipps*¹⁶³ the Phipps family solicitor, Mr. Boardman, could only obtain the true value for the Phipps shareholding if he acquired the remaining shares for himself so that he had control of the company. He very significantly increased the value of the Phipps shares. But the no-profiting rule caught him. Though he had the approval of the one independent *and key* trustee to his acting to acquire corporate control, he had not got the approval of one of the two family trustees. Despite being without a suggestion of dishonesty he was nevertheless required to surrender his personal gain to the family. The corporate directors in *Regal (Hastings) Ltd. v. Gulliver*¹⁶⁴ were similarly required to surrender; their honesty was not in question.¹⁶⁵

So far as 'loyalty' is concerned, this is a catchword from the United States used to make quick reference to the 'no conflict' rule and its derivative the 'no profiting' rule. It is not an exact description of either rule. In fact it is misleading. Mr. Boardman was far from disloyal or unfaithful (the House of Lords ordered that he be made a generous allowance for his successful efforts on behalf of the Phipps family). And the directors of *Regal (Hastings) Ltd.* were pursued for

¹⁶⁰ See Ryan J.A., *supra* note 158 at 513 (para. 153).

¹⁶¹ *Ibid.* at 496 para. 74.

¹⁶² *Ibid.* at 511 para. 148.

¹⁶³ [1967] A.C. 46.

¹⁶⁴ *Supra* note 67.

¹⁶⁵ *Regal (Hastings)* was consistently applied by the Court in the conflict cases between 1954 and 1973, and *Boardman v. Phipps*, *supra* note 164, has been cited with approval by the Court on several occasions.

their 'gain' by a subsequent take-over company that may have seen a way in which to reduce its costs of acquisition. No one charged the directors with disloyalty or infidelity. In the *Critchley* case negligence would have made the Crown liable to the plaintiffs whether the 'no conflict' and 'no profiting' rules constitute a negative or a positive obligation. It therefore did not really matter if it is in fact a matter of choice for the court how it describes the two rules.¹⁶⁶ Nevertheless the matter was raised by Chief Justice McEachern who hoped it might be considered by the Supreme Court of Canada on some suitable future occasion.

With the preface that it is not always easy to determine "whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern",¹⁶⁷ the Chief Justice suggested that fiduciary duties should be confined to the defendant who personally takes advantage and does so for his or her own direct or indirect personal benefit. "This excludes from the reach of fiduciary duties", he continued, "many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty."¹⁶⁸

It may be that the Chief Justice intended to say only that the provincial Crown had not acted for its own profit and was not therefore in breach of any fiduciary duty, and that the common law could deal with any breach of negligence or other wrong. If that was not meant, this must be a suggestion that the Court abandon the conclusion that fiduciary duty is concerned with advancing 'the best interests' of the beneficiary of the relationship. If the law were to take that path, presumably the *Guerin* case would be classified as unique – as it has been – and *McInerney v. MacDonald*¹⁶⁹ would be explained as concerned with the right of the individual to information concerning her own person. Canada would then return to the position taken elsewhere in the Commonwealth. The fiduciary obligation would be that the fiduciary shall neither consciously allow himself to be in a position where his interest conflicts with his duty, nor should he make unauthorized gain for himself while acting within the parameters of his fiduciary task.

Speaking for himself, the writer would not necessarily see the abandonment of a 'best interests' (or positive) fiduciary obligation as necessary. 'Best interests' is something that has rarely been carried through by the Court to its logical end, as in *Guerin* and *McInerney*, and the writer is therefore inclined to think its abandonment would have relatively little impact. What is much more

¹⁶⁶ Ryan J.A. appears to adopt this view, *supra* note 158 at 513-14, para. 153. The Crown might have been independently liable in negligence.

¹⁶⁷ *Ibid.* at 496, para. 74.

¹⁶⁸ *Ibid.* at 500, para. 85.

¹⁶⁹ *Supra* note 152.

of a concern, as it seems to the writer, is that the Court clearly spell out the difference between the negative fiduciary obligation – thou shalt not – and the positive obligation – thou shalt. One has the fear at the moment that Canadian courts have drifted into this ‘best interests’ formulation of fiduciary obligation without realising quite what they are saying. ‘Best interests’ does inevitably mean, as the writer has suggested, that any number or diversity of specific positive duties could be imposed upon the person who is found to be a fiduciary.

And when one has in mind the degree of ease the courts have to create ‘fact based’ fiduciary relationships, the possible consequences are considerable. ‘Best interests’ needs to be differentiated from the traditional no conflict/no profiting fiduciary obligation. The constant widespread use of ‘best interests’ in the lower courts, as if it were merely an alternative to speaking in terms of avoiding the pursuit of self-interest, could then be arrested.¹⁷⁰ It then might be explained when the invocation of ‘best interests’ is appropriate and when it is not. If the imposition of positive duties upon the fiduciary is able to achieve results otherwise desirable but not at present doctrinally obtainable, and the Court can demonstrate when that analysis would be appropriate, then all is well. What is surely undesirable is a drift towards the positive duty that we may not intend.

The writer is less sanguine than Chief Justice McEachern that, with the abandonment of the ‘best interests’ fiduciary obligation, many more cases would be dealt with in contract and tort. From the litigator’s point of view the attraction of the traditional no conflicts/no profiting rules is just too considerable. In the absence of a clause in the contract negating the intention that the contractual terms are for the exclusive benefit of the plaintiff, the fiduciary relationship imports such an obligation, and this will compel disclosure from the defendant. Tort introduces a fault liability; the fiduciary obligation a strict liability. The remedies for breach of fiduciary obligation require the defendant to put the plaintiff into the same position as he had before the breach, or surrender the gain including any profits he has made with the gain. *Cadbury Schweppes*¹⁷¹ describes the situation as reinstatement for “the lost opportunity”. Instead of that reinstatement, a tort judgment offers the plaintiff damages and compensation for proven harm done. The fiduciary relationship being established shifts the burden of proof to the defendant, requiring him to prove a negative. An action in contract requires that the plaintiff prove the existence of an implied term to the effect that he exclusively should have any benefit arising from the contract. The fiduciary relationship obviates that necessity, and from the litigant’s point of view, if that relationship can be established as between the plaintiff and the defendant, the plaintiff’s position is eminently stronger. Admittedly ‘fact based’ fiduciary relationships, though not status (or traditional) relationships, do present the continuing problem of discerning where is the

¹⁷⁰ See, e.g., *supra* note 166 at para. 153.

¹⁷¹ *Supra* note 146 at 181, quoting McLachlin J. (as she then was) in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at 556.

crossover from the contractual relationship to the fiduciary relationship, and from tort liability to fiduciary liability. As Chief Justice McEachern says, the parameters of fiduciary obligation in most fact patterns are elusive. However, those indefinite borders are inherent in the fiduciary concept; so much turns on the particular facts. What the courts can do is to spell out the *structure* of the fiduciary relationship and fiduciary obligation, and to *describe* the manner in which the principles of equity should be applied. This seems to be the route to reducing for the would-be litigant the constant problem of unpredictability. The Court has come a long way in probing the policy and doctrinal limits of the fiduciary relationship, of obligation, and of remedies. And the Court has had little assistance from elsewhere in the Commonwealth.

(3) *The Future of Equity in Canada*

The word, equity, is employed in two ways in common law Canada. Indeed, as *Snell* records,¹⁷² there have always been two usages. It may simply mean fairness, the court being fair and equitable as between the parties. This usage is not doctrinal so much as a shorthand for saying that the reasonable and average person in contemporary Canadian society would regard such and such an outcome of litigation as appropriate. The maxims or principles of equity may from time to time be quoted by such a user as a support for this appropriateness, the appropriateness itself being found in the court's judgment on the facts or the exercise of the court's discretion. The other usage is doctrinal, and that has been the subject-matter of this paper.

(i) *Set-off and estoppel*

The Australian courts have developed considerably the defence of set-off in equity and within very recent years the High Court has considered the doctrine of estoppel¹⁷³ on no less than four occasions.¹⁷⁴ Australia seems to be working towards a unified concept of evidentiary and substantive estoppel, and one attraction of this method of handling reliance to detriment, namely, with promissory and proprietary estoppel rather than with fiduciary obligation and constructive trust, is that it operates solely as between the parties. The apprehension that innocent third parties will be hurt by proprietary remedy is a constant concern, and estoppel means there is no question of affecting the interests of third parties save those who step into the shoes of an owner as, for instance, by way of succession. As we have seen, the Supreme Court to the present has said of the constructive trust proprietary remedy only that the impact upon third parties is an element the court must take into account before awarding

¹⁷² *Supra* note 1 at 1-6.

¹⁷³ See *Equity: Doctrines and Remedies*, *supra* note 1, ch. 17 'Estoppel in Equity'.

¹⁷⁴ These are discussed in detail in *The Principles of Equity*, *supra* note 1, ch. 7 'Estoppel' (P. Parkinson).

such relief to any party. Other Commonwealth courts appear to see the long-standing defence of *bona fide* purchaser for value without notice as the third party's guarantee of protection, and in circumstances other than *bona fide* purchase they entertain the opinion that the fate of third parties should not be left to the discretion of a court. The breathtaking decision in *Stanton v. Reliable Printing Inc.* may lend some force to the view that there is here ground for concern.¹⁷⁵ Indeed, such a fate for the third party may take place in a hearing in which that party may even be unrepresented.

It has previously been noted that the Supreme Court has not had an opportunity of giving judgment on the concept of the 'unconscionable transaction'. In British Columbia about two decades ago in both first instance and appeal courts a number of cases were decided under this head,¹⁷⁶ and they were cases where, as in *Commercial Bank of Australia Ltd. v. Amadio*,¹⁷⁷ a decision of the High Court of Australia, advantage had been taken by one party of another who lacked equality of bargaining power. There was no true consent by the disadvantaged party and therefore the contract was set aside. In the *Amadio* decision the High Court drew a distinction between undue influence, where intention is absent because the weaker party is pressured into 'agreeing', and the unconscionable where there is apparent consent but the weaker did not have the means to overcome his disadvantaged position. The unconscionability doctrine also acts only between the parties. If, for example, the weaker party sells for a grossly low price and before rescission has occurred the purchaser resells for realistic value to an innocent third party, the reselling purchaser being insolvent or bankrupt when action is brought for unconscionability, that is an end of the matter. Unless he is able to trace the proceeds of the original purchaser's subsequent sale, the weaker party can only be protected to the point where the original purchaser resells to an innocent buyer. Thereafter reasonable commercial expectations would be jeopardized.

Is this the law in Canada also, or would the Court say that, as with the remedial constructive trust, it is within the particular court's discretion on the facts to determine whether that innocent buyer or the disadvantaged party (or his creditor) shall prevail?

(ii) *Equitable compensation*

An apparent impatience with the niceties of doctrine sometimes leads the courts to approach common law damages as if that concept were monolithic. But of course there are differences as between contract and tort in the assessment of the appropriate compensatory award, and differences of damages assessment as

¹⁷⁵ *Supra* note 138.

¹⁷⁶ The classic case is *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.). See also *Buchanan v. C.I.B.C.* (1980), 23 B.C.L.R. 305 (C.A.), and *Konefal v. C.I.B.C.* (1985), 62 B.C.L.R. 305 (C.A.).

¹⁷⁷ (1983), 151 C.L.R. 447, 46 A.L.R. 402.

between different torts. The rarely invoked remedy of equitable compensation was under consideration by the Court in *Canson Enterprises Ltd. v. Boughton & Co.*,¹⁷⁸ and the issue was discussed as to whether the assessment of common law compensation ("damages") and equitable compensation should now be regarded as the same. The decision of the Court was that it is unfair to require a fiduciary who is in breach to compensate for subsequent injury to the beneficiary that was "unrelated to and independent of" the breach.¹⁷⁹

That 'but for the breach the occasion for the later injury would not have arisen' was not a restitutionary doctrine the Court was prepared to accept. While damages at law compensate for harm or loss foreseeably flowing from the tortious act or contemplated as flowing from the breach of contract, and equitable compensation seeks to restore or make whole the injured party (the victim, e.g., of breach of fiduciary obligation) as of the date of trial, equity - the Court concluded - should not be interpreted as being blind to elementary injustice. The solicitor acting for both vendor and purchaser should have informed the purchaser that a middleman (the real vendor) was in fact 'flipping' the property for a higher price than that obtained by the original vendor who was purportedly selling to the plaintiff purchaser. But title to the property having been obtained by the plaintiff purchaser, any later dealings by that purchaser as owner with parties who negligently performed contractual duties owed to the purchaser with regard to the property was nothing to do with the solicitor.

However, there was no agreement on the Court as to the nature of the equitable compensation remedy. Four members of the Court went further than saying the observable cause of the loss, of which complaint is made, must be linked to the breach of the equitable obligation. They considered that compensation at common law and compensation for loss in equity should now be regarded as the same remedy. This meant that the common law doctrines of causation and foreseeability would also govern equitable determination as to which injuries can be laid at the defendant's door, and the plaintiff also would be expected to do what he or she could to mitigate loss, as does the common law. In order to look at the situation from both sides any contributory negligence of the plaintiff would also be an element the court would consider.

Three members of the Court considered that compensatory damages and equitable compensation are distinct remedies. Though equity assumes there has been no breach at all and 'restores' on that basis, a simple non-doctrinal sense of fairness and reality should make the court examine both the manner in which injury occurred and any subsequent conduct of the complainant that obviously worsened the loss. One did not need to import wholesale from law the doctrines of causation, foreseeability, and the duty of mitigation. An eighth member of the Court appeared to agree on this point with the three, and also considered the

¹⁷⁸ *Supra* note 171.

¹⁷⁹ *Ibid.* at 590, from the judgment of Stevenson J. In *Target Holdings Ltd. v. Redfems*, [1996] A.C. 421, at 439, (H.L.), Lord Browne-Wilkinson spoke of that "which, using hindsight and common sense, can be seen to have been caused by the breach".

doctrine of contributory negligence to be irrelevant. On the other hand, when the equitable obligation does not concern property held for another (and this case did not), he was more persuaded than the three that equitable compensation has a closer association with damages for tort than they would accept. There will be protagonists for the judgment of the four,¹⁸⁰ and those who favour the judgment of the three,¹⁸¹ but the decision in *Canson Enterprises* seems to have settled nothing except that there must always be a link between the person who breaches the equitable obligation and the items of loss for which equitable compensation is claimed. Link appears to mean a readily perceivable cause and effect, but without the technicalities of common law causation and remoteness. Whether the distinction between compensation at law and in equity can usefully continue to be made remains for the future.¹⁸² The inevitable problem will arise as to what *facts* constitute a break in the cause and effect or the *novus actus*, as it were. Once 'but for' is rejected, one can understand in *Canson Enterprises* that later contracts freely entered into by the beneficiary of the fiduciary relationship were a new element, but it is still puzzling for many observers that *Hodgkinson v. Simms*¹⁸³ was decided as it was.

Why the majority judgment in that case concluded, despite the rationalization given, that market losses caused by a sudden downturn in the property market having nothing whatsoever to do with the fiduciary should nevertheless be his responsibility is elusive. The appellant in *Canson Enterprises* initiated the contracts whose performance was negligently discharged, while the appellant in *Hodgkinson v. Simms* did nothing to initiate the market decline. But initiation or non-initiation by the complainant of a subsequent occurrence is not an aspect of cause and effect. Was a deterrent approach taken to the non-disclosure in *Hodgkinson* that was not taken with the traditional fiduciary relationship in *Canson Enterprises*?

(iii) *The integration of law and equity*

The *Canson Enterprises* four also gave their support to the viewpoint that law and equity are now fused. They presented it as an alternative to the 'simple fairness' adoption of some meaningful connection between the injury and the breach. The three clearly found no reason to discuss that subject, and the eighth member of the Court considered it irrelevant to the case. Indeed, said the eighth,

¹⁸⁰ E.g., Rickett, C. and Gardner, T., 'Compensating for loss in equity: The evolution of a remedy', (1994) 24 Victoria University of Wellington L.R. 19. These New Zealand authors commend the views of Cooke P. in *Day v. Mead*, [1987] 2 N.Z.L.R. 443 (C.A.), which were adopted by the *Canson* four.

¹⁸¹ *Target Holdings Ltd. v. Redferns*, *supra* note 179 at 438-39 (A.C.), per Lord Browne-Wilkinson. His Lordship did say that, given the case in hand, the House was not required to choose between the two *Canson* views.

¹⁸² "Link" demonstrating "causal connection" was also used in *Pettikus v. Becker*, *supra* note 101 at 852 per Dickson J.

¹⁸³ *Supra* note 150.

if there was a clash between law and equity, equity prevails – as the Judicature Acts provide. So, though the four gave ‘fusion’ its day in the Court, *Canson Enterprises* effectively says nothing on the subject that binds the future in any way. Nevertheless, has the time come when equity should be regarded as substantively part of one body of case law? Texts on equity law would then disappear. This is a subject about which there will probably never be agreement.¹⁸⁴ Many Canadian courts and practitioners, like succeeding generations of law students, admired the crusading and innovative application of equity doctrine that marked Lord Denning’s approach in the English Court of Appeal, and he thought the time for total merger had come. On the other hand those with a specialist equity background were inclined to see that invocation of equity doctrine as more cavalier than enlightening. As the manner of an equity revival after the doldrums of the 1940s and 50s they would have hoped for more doctrinal depth and analysis. In this country the supporters of Denning’s approach have always outnumbered the critics, and even today long after his decisions have become a matter of history this enthusiasm in Canada, unlike evaluations elsewhere in the Commonwealth, has not faded. In adopting as the basis of all constructive trust applications what was in fact the Denning rationale of “good conscience”, the majority judgment in *Soulos v. Korkontzalis* but followed this trend. Indeed, a member of the Court had previously cited with approval Lord Denning’s analysis of the “good conscience” trust.¹⁸⁵

However, the lasting assessment of whether equity will – indeed, should – survive as a separate doctrinal system no doubt has to come from those who have spent their lives in the study or practice of equity, and are steeped in its doctrines and thinking. Their opinion seems to be that doctrine (precedent) based on principles of a general moral nature has a source, perhaps an inspiration, that is a constantly renewing energy. In the last quarter century the Supreme Court of Canada has developed considerably the doctrines of tort law, and policy decisions have driven much of this, but this is not the only way in which development can take place in a purely inductive system. Equity is somewhat of a deductive science. It is interesting to note how often Québec civilians on the Court support judgment positions that are expressly applying one general equitable principle or another. Principle of this kind is the means by which, not only equitable obligation and remedy are expressed and developed, but tort, contract, and restitution also may be tempered and redirected. Every legal system has to have a means by which it can renew itself; it must respond to the changing social, cultural, and economic climate, or the system atrophies and is no longer capable of providing ‘the rule of law’. If equity, being principle and

¹⁸⁴ Among recent writers Burns, F., ‘The “Fusion Fallacy” Revisited’, (1993) 5 Bond L.R. 152, considers how the approach of the Canson four might be brought about. Martin J., ‘Fusion, Fallacy and Confusion: A Comparative Study’, [1994] Conv. & Pty. Law (N.S.) 110, does not support the four’s argument and in fact assumes a very similar position to that taken by the *Canson* three.

¹⁸⁵ See *Rathwell v. Rathwell*, *supra* note 100 at 455 *per* Dickson J., dissenting. But cf. *Pettkus v. Becker*, *supra* note 101 at 858-59 *per* Martland J., dissenting.

doctrine, in some manner disappears, there is no middle legal space between much legal precedent on the one hand and policy on the other. Equity supplies moral principle, and also doctrine in the form of precedent. Lord Denning used both in the revival of promissory estoppel. Without equity Parliament and the provincial legislatures would have to legislate more often and comprehensively in the private law area, and possibly law reform bodies would be invited to take the place that the courts would no longer have the means of filling. In a country with a civil law inheritance in the form of Québec's private law, it is difficult to see common law Canada moving to eliminate the independent energy that equity principle and doctrine provide. Just what would be the gain? It seems nevertheless that there are areas where the bringing together of law and equity doctrine would produce greater clarity and a readier vehicle for later policy decisions. This is the direction in which rationalization could most usefully move. Sometimes the doctrines at law and in equity are sufficiently close that perpetuation of the distinction is confusing and counter-productive.¹⁸⁶ Set-off and probably tracing are two such areas.

Canson Enterprises found the Court evenly divided as to whether the causation, foreseeability, mitigation, and contributory negligence doctrines of common law should now be built into the equitable compensation remedy. If that were to happen, as the four members thought it should, the compensation remedies for harm done and restitutionary compensation would each operate in determining extent of monetary liability with the same common law doctrinal elements. It also seems likely that harm compensation liability would be determined as at the date of the wrong (or breach) or at the date of trial, as the court sees appropriate in the particular circumstances. The court already has the opportunity in the case of actual fraud to determine the quantum of harm from the trial date. The merger of the compensatory remedies of law and equity would generalize this opportunity. The logical ultimate outcome of the views of the *Canson* four is that the courts would be concerned with two non-doctrinal issues. The first would be a decision as to the gravity to society or commerce of the particular conduct perpetrated, and the second whether in the circumstances it is more appropriate to compensate on the basis of harm caused or to order restoration. The first involves social and economic policy judgments, and the second locating the particular facts on the scale between harm done at perpetration date and restitution at trial date.

If on the other hand, as the *Canson* three and the eighth member would have it, that building in of the common law elements is not to occur, and equitable compensation alone is to be restitutionary, loss being determined at the time of trial, some attention has to be given as to whether *particular types of wrongdoing* constitute harm or the basis for restitution. The degrees of gravity of injurious

¹⁸⁶ The Canadian writer, P.M. Perell, takes this position in *The Fusion of Law and Equity*, (Butterworths: London, 1990), and it seems to be the most widely held view. The criterion for merger would be the similarity or otherwise of policies being pursued, and the practical advantage to be derived from combining the respective doctrines of each.

conduct, and the remedy that on the scale of degree would in each case be appropriate, would be reflected in the different actions (or claims) that may be brought and the remedies that are available for each. In other words, *doctrine* must provide the gradations of claim, and the extent of remedy. The present writer finds himself returning to a floor of unconscionability, then a level of good faith to protect mutual expectations, and ultimately fiduciary obligation in the presence of expected total selflessness. Rescission or injunction with the possible addition of damages would be expected as the remedial response for the first two situations,¹⁸⁷ and restitutionary compensation (or the enforced surrender of gain, if any) for the third and final situation. This would recognize that not all equitable obligations give rise to the same remedial response of restitution.

Clarification of the set-off doctrines is likely to come from Australia.¹⁸⁸ Canadian law will probably handle these issues differently within the application of other remedies. The unification of 'following' at law and 'tracing' at equity seems likely to emerge, with the drive of law reform recommendations behind it, from England and Wales. It is still too early to say what will ultimately be done with the remedy of equitable compensation, but one suspects that merger of the common law and equitable compensation doctrines will be seen throughout the Commonwealth as depriving the case law of its existing flexibility, and for no readily apparent gain. Judgments in the House of Lords suggest a greater interest in access to the equitable remedy being loosely linked to the wrongdoer's conduct, and a taking into account of the plaintiff's own conduct through an approach similar to the equitable defences.¹⁸⁹ Estoppel is the one fascinating response to unacceptable conduct that Canadian courts at large, and the Supreme Court in particular, have yet to consider. This is the whole area of reliance to detriment that Canada has hitherto seen more in the context of the fiduciary relationship and the constructive trust. Some find the legacy of the four quite recent Australian High Court cases on estoppel to have confused the existing law in that country, but in the main it looks as if the courts there have a considerable lead in successfully rationalizing common law estoppel and equitable estoppel.¹⁹⁰

¹⁸⁷ There are of course different opinions elsewhere in the Commonwealth concerning the existing law as to when and what damages can be ordered *in lieu* of equitable discretionary remedies. *E.g.*, see Ingman, T., 'Damages in Equity - A Step in the Wrong Direction?', [1994] Conv. & Pty. Law (N.S.) 110.

¹⁸⁸ See, *e.g.*, van der Welt, M.P., 'The clarification of equitable set-off', (1998) 72 A.L.J. 516.

¹⁸⁹ *Target Holdings Ltd. v. Redferns*, *supra* note 179.

¹⁹⁰ In *Zelmer v. Victor Projects Ltd.* (1997), 147 D.L.R. (4th) 216, the B.C.C.A. followed Lord Denning's judgment in *Crabb v. Arun District Council*, [1976] 1 Ch. 179 (C.A.), and Hinds J.A. discussed at length how a proprietary estoppel arises and its effect. The B.C.C.A. accepted the long-established position elsewhere that this type of estoppel creates a cause of action, and applied this estoppel to the facts in hand. See further *Lax Kw'laams Band v. Hudson's Bay Co.* (1998), 159 D.L.R. (4th) 526, at pp. 540-41 paras. 47-52. The respective roles played by estoppel, equitable lien or charge, and constructive trust are well brought out in the Australian High Court decision, *Giumelli v. Giumelli* (1999), 1 I.T.E.L.R. 603.

There are other areas, such as mistake in contract in common law and at equity, where rationalization would now be advantageous, but here what appears to the writer to be of primary interest is not types of mistake, but whether operative mistake should render a contract void or voidable. The nineteenth century was doctrinally justified in seeing mistake as going to the question of whether there is a contract. There can be no agreement if there is a shared fundamental mistake or both parties are mistaken as to other's understanding of what is being agreed. Today we are more concerned with the *impact* of mistake upon the parties and in particular third parties. Voidability is obviously a means whereby the court may look at all the particular circumstances and then decide upon the appropriate judicial response.¹⁹¹ The question from this point of view is whether there can be merger but on *equity's* terms.

Is it useful to press for merger or rationalization beyond this point? In *Canson Enterprises* even those who would merge compensation remedies when dealing with non-trust fiduciary relationships drew back so far as express and implied trusts are concerned. It was recognized that equitable proprietary interests had to be excepted from the doctrinal merger that was advocated. The difficulty with this concession is that it treats trust law as a discrete area having no overlap with the common law - which is so - but takes no account of the presence of similar equitable thinking throughout the law of equity. Drawing a subject-matter boundary around any area of law or equity is not easy, or particularly attractive or logical. It may accommodate law practice divisions, but surely that is all. The law of fiduciary relationships, to take an example, is an application outside trust law of a principle that is fundamental within the trust concept. The existing question for any advising lawyer is how far, if at all, the nature and application of fiduciary obligation differ when the issue before the court does not concern an express or implied trust. For instance, in *Felker v. Cunningham and Electro Source Inc.*¹⁹² the Ontario Court of Appeal held, reversing the trial court, and following *Canadian Aero*, that a key employee might be dismissed for not revealing to his corporate employer that he was seeking to obtain a particular client for his own fledgling company. Both the client and the fledgling were in competition with the employer. In the law of employment the significance of this precedent is considerable. It is no wonder it reached the front page of the *Toronto Globe and Mail*.¹⁹³ It is an issue of importance in an age of part-time employment and the employee having his or her own small company engaged in similar work, such as house decorating or tax accounting.

If on the other hand one is going to retain existing legal and equitable doctrine, especially if there is to be no ascending scale of gravity of different forms of wrongful conduct, it is impossible to hive off trusts from other forms of fiduciary relationships. The three in *Canson Enterprises* expressly recognized

¹⁹¹ I.e., the terms of any order setting aside the contract.

¹⁹² August 29, 2000.

¹⁹³ August 30, 2000.

this. They were not prepared to adopt such a cleavage between fiduciary relationships. The answer to the question of whether further merger would be worth pursuing is therefore in the writer's opinion, no. It is very much a matter of opinion, of course, and there is plenty of opinion in favour of merger and against it, but to reorder the structure of the case law if the ultimate gain is hard to define, is surely not something to be commended. The process would cause too much upheaval in the jurisprudence, too much consequent uncertainty, and an unpredictability that cannot seriously be justified. It does seem that equity is the spur to new thought and further remedy, and that it provides a means of introducing new policies. The writer would be content with that. In the very early 1950s a new area of equity's potential influence that at the time was an occasion for much law student excitement was just becoming apparent. Licences over land conveniently avoided much, if not all, of the English land registration requirements, and they were three in number – licences coupled with an interest in land, contractual licences, and gratuitous licences.¹⁹⁴ The latter two were popular for informal family arrangements, and as a right of exclusive occupation that need not be registered the contractual licence soon became familiar in commercial dealings. Because of the interest in land the first licence was indisputably irrevocable. But then, as the cases on theatre concession rights showed, there had to be an interest in land recognized in the jurisprudence if the courts were to declare an irrevocability. And of course the gratuitous licence was revocable on reasonable notice. Moreover, a contractual licensor might revoke in breach of the contract, and pay damages. Higher licence fees obtainable from another often proved a powerful incentive for such breach.

But was the licence conferred by contract made irrevocable if the licensor were subjected to an injunction? If an injunction was obtainable, had equity made of the licence a near-property interest as against the licensor and, more to the point, an actual property interest as against the licensor's successor in title? In England that was an issue for some twenty years after 1952¹⁹⁵ until Lord Denning in the 1970s turned to the "good conscience" constructive trust as a buttress for his new equity. Though the licensee's position vis-à-vis the licensor was thereby on a case by case basis strengthened, the position of the licensee as against the third party assignee of the licensor remained undecided. Subsequently in England the "good conscience" constructive trust was so criticized by the higher courts that it ultimately disappeared from pleadings and textbooks.

The story of the contractual licence is typical of the Denning ingenuity in reaching with equity's discretionary remedies what he considered fair results. But did it, as Lord Denning had originally hoped, bring about a merger of law and equity? It cannot be said that it did. From the licensee's perspective it revealed a weakness in the law, and it led to ultimate statutory reform in the case of the deserted wife left in the matrimonial home, the title to which was in her

¹⁹⁴ The subject is covered from an Australian perspective in *Equity: Doctrines and Remedies*, *supra* note 1 at 576-82 (paras. 2147-2155).

¹⁹⁵ *Errington v. Errington*, [1952] 1 K.B. 290, (C.A.).

husband's name. She obtained a registered interest in the home, and thereby deemed notice of the wife's interest was given to the husband's assignees and to his future creditors who were offered the home as security. The role equity ultimately played here was to bring the public's attention to a social issue that needed legislative reform. *Freeborn v. Goodman*¹⁹⁶ was the sole occasion when the Supreme Court was asked about these licence cases. The issue was whether unit holders in a condominium, whose entitlement was an exclusive right to occupation of their units and to hold shares in the corporation which owned the building, were entitled to possession of their units as against the assignee of the mortgage of the building. The corporation had taken over the mortgage from the developer as mortgagor. The mortgage was in default, and the assignee sued for possession. Reversing the Ontario Court of Appeal, the majority in the Court held that each unit holder had an equitable interest in his or her unit, and that the mortgage assignee had notice of the unit holders when taking the assignment of the mortgage. The licensees of the corporation therefore prevailed on the usual priority basis over the subsequent party taking an interest in the property. *Errington v. Errington* was applied, almost in passing, and carried to the ultimate, namely, priority over the third party. Given the significance of this outcome, it is unfortunate that the English jurisprudence on contractual licenses, and the critical comment of the courts there on *Errington v. Errington* in particular, were not discussed.

Thereafter during the post-1975 period of the Court the contractual licence was heard of no more. Nevertheless, the licence cases could have started a run of case decisions that, like the constructive trust and the fiduciary relationship in Canada, transforms the scene. And one has to wonder what Canadian litigators can make of the 'good conscience' constructive trust in reviving enthusiasm for contractual licence irrevocability. It also seemed in the 1980s that, though the subject appears not to have reached the Court, 'unconscionable transactions' might be another area in which in Canada a transformed scene was about to emerge. However, as Lord Millett said in the foreword, there is constant pressure to adapt equitable principles to a changing world. 'Good conscience' thinking, as in the *Soulos* case, is obviously open and fertile country for litigators.¹⁹⁷

¹⁹⁶ [1969] S.C.R. 923.

¹⁹⁷ A glance at the contents of *The Principles of Equity*, *supra*, note 1, shows how active is equity doctrine in areas in which we have yet to hear from the Court. One of the most active areas is the law of injunctions. The Mareva injunction, another Denning innovation, has become key, especially throughout the offshore common law Commonwealth jurisdictions. It is also doctrinally controversial: see *Meespierson (Bahamas) Ltd. v. Grupo Torras S.A.* (1999), 2 I.T.E.L.R. 29 (Bahamas Court of Appeal) and *Qatar v. Sheikh Khalifa*, *ibid.* at 143 (Jersey, Channel Islands). The Mareva injunction is important as an instrument in arresting the international movement and illicit investment of the proceeds of criminal activities, such as drug trafficking and large-scale theft from corporations and governments.

VI. Conclusion

The Court in the last twenty-five years has struck out with a style and a content very much of its own. It has not been shy in equity matters of formulating new ideas and fashioning new applications of doctrine. The style and approach of the House of Lords and the Privy Council in London, the High Court of Australia in Canberra, and the New Zealand Court of Appeal in Wellington, are each different, and each differs from that of the Supreme Court of Canada. But in Canada in particular the move to unjust enrichment and 'fact-based' fiduciary relationships, to the 'remedial' constructive trust and to equitable compensation where availability of remedy is 'linked' to cause, has brought with it a willingness of the Court to adopt broad abstract principle as the basis of obligation and of remedy. It is on that jurisprudential basis that lower courts are to proceed. The primary task of the coming years, so far as equity is concerned, may well be that the Court now have in mind the needs of the lower courts and of the practitioner to know how to apply these principles to particular fact situations. The balancing of stability and doctrinal re-expression is an ever-present concern for courts of appeal. But periodically such balancing acquires an added importance. This may be one of those times. The trial judge is faced in every borderline case with a mass of facts, and pleadings that itemize every head of obligation and seek in the alternative every remedy that might be found relevant. Factums often cite for the court every precedent, reported and unreported, that has any legal relevance or factual similarity to the perceived circumstances in hand. In other words, the entire initial presentation is likely to lack focus as to either fact or law. The trial judge must attempt to come to a decision that is within the range of determination which is likely to be upheld in a higher court. How can the Court help the trial court, and so arrest the often existing temptation to the losing party in effect to 'have another go' at the first appeal level?

In this paper the writer has suggested that the Court *describe* the processes of thought that should be followed in relating broad principle to the profusion of facts, pleadings and cited case law that the trial court faces. Broadly stated criteria, such as those to be found in Dickson J.'s judgment in *Pettkus v. Becker* and Wilson J.'s judgment in *Frame v. Smith*, create the same need. In *Lac Minerals Ltd. v. International Corona*, where the Court divided on whether the particular relationship was fiduciary, judgments supporting each position cited Wilson J.'s three criteria. Perhaps the nature of the need can best be demonstrated by an analogy. There is a gap between theological dogma and the circumstances of the particular individual in the pew. The minister has to relate the two. Ultimately the skilled minister will approach the penitent with a mixture of reasonableness and common sense, based on an appreciation of the realities of the penitent's circumstances. The connection with dogma will be made in a manner that accommodates the outcome of that approach, and in isolation the connection may often appear to the outsider to be tortuous. A court in an inductive legal system has to do more than 'connect' in this manner. Its decision, on application of the law, must be within the range of 'reasonable solutions' at

which objective contemporary judgment would arrive. The Court's description of the process of thought that it would follow if it were in the trial judge's position would give considerable guidance to future lower courts seeking to come within that range.

As to liability and remedy, the immediate need in the writer's opinion is for in-depth consideration of the degrees of equitable liability, and of the range of personal and proprietary remedies, that are available. One can but hope that future pleadings will reflect this. Canadian equity jurisprudence has something about it of constantly driving in top gear. The litigant's absorption with one particular degree of liability, or one particular remedy, contributes little to the richness of equity jurisprudence that is available. First it was fiduciary relationship reflecting the desire of plaintiffs to extract gain from the particular defendant, and then it was constructive trust with plaintiffs seeking the imposed property surrender remedy. However, these respectively are the extreme of liability and the extreme of remedy.

So far as liability is concerned, a step down from fiduciary obligation is good faith where, in the absence of utter selflessness being required of either party, the question is whether in the formation of agreements such conduct as disclosure was central if mutual and reasonable expectations were to be met. In the performance of agreements the concern is that each party end the day with his or her reasonable expectations realized. Unconscionability, the basement level, is the liability of those who in any transactional setting blatantly exploit the dependency or helplessness of the other or another.

We could now also be classifying remedies according to the outcome each produces. There are those that award compensation in the sense of damages for wrong done or loss caused, and those that grant restitution either *in specie* or monetarily. Personal remedies and proprietary remedies have to be distinguished. Awards of damages create judgment *creditors*, and the equitable remedies of specific performance and injunction also operate *in personam*. Estoppel is often a sufficient judicial response to wrongdoing, as English and Australian case decisions demonstrate. It operates *in personam*. So far as the extreme remedy is concerned, an equitable lien (or charge) is proprietary insofar as the plaintiff's award must be met out of the charged property, but title remains with the defendant. Circumstances may force the defendant to sell, but in principle, whatever the circumstances, the decision is the title holder's. That may be an appropriate response in many cases. It was certainly an alternative response in *Lac Minerals*. A consideration of alternatives leaves the enforced proprietary surrender remedy - the remedial constructive trust - as a deliberate judicial choice for the worst sets of fact. Do we need a jurisprudential philosophy - not another formula - as to how third parties are to be treated when proprietary remedies are sought? Many think we do. Nevertheless, this conclusion speaks to the future which will unravel as it may. Today we attempt to catch a perspective of the past, of one hundred and twenty-five years.

It is fascinating to consider how much has changed in Canadian thinking as to the role of the Court since the first five-judge court was formed, no doubt with

the humble object of harmonizing, so far as its appeal review could, the application of the common law and of equity across the provinces and territories that then made up the Canadian federation. The approach to equity in Canada has changed also. Once a relative backwater of rules originated elsewhere, it is now deliberately used as an instrument to turn the flank or fill the silences of accepted common law doctrine and to produce contemporary assessments of obligation breach and appropriate response. The intriguing anomaly that will no doubt remain into the years ahead, however, is that, while the intellectual discipline, the form of expression and the lengthy judgment that weighs argument are of the Commonwealth tradition, the doctrinal fascination - the new ideas - will increasingly come from south of the border where, beyond trusts and probate practice, equity is more another and often technical component in an integrated body of case law, where niceties of law and equity are no more. So there is no restriction on any doctrinal experimentation. American doctrine encouraged the constructive trust development, and American scholarship was the first to explore the applicability of fiduciary obligation way beyond the 'traditional' situations. But then that paradox of Commonwealth tradition and U.S. influence has always been the Canadian inheritance. The signs are that it can only increase in intensity.