

ABORIGINAL TITLE: THE CHIPPEWAS OF SARNIA

James I. Reynolds*
British Columbia

The unanimous decision of a 5-person panel of the Ontario Court of Appeal in The Chippewas of Sarnia Band v. Canada rejected the claim of the Band in trespass and for declaratory relief to recognise their right to reserve land. The lands had been granted to non-Indians despite the lack of a valid surrender. In the writer's view, this case was wrongly decided as it misapplied equitable principles. It is also an example of the "fusion fallacy" that there is no longer any distinction between law and equity. This fallacy would throw the law into disarray and cannot be supported.

Selon une décision unanime de cinq juges de la Cour d'Appel de l'Ontario dans la cause Chippewas of Sarnia Band v. Canada, cette Cour a rejeté l'action de la Bande en trespass et en jugement déclaratoire pour faire reconnaître leurs droits relativement au territoire de la réserve. Ce territoire avait été accordé à des non-indiens malgré l'absence d'une cession valable. Selon l'auteur, cette cause a été jugée erronément car les principes de l'equity ont été erronément appliqués. Il s'agit aussi d'un exemple de "l'erreur de fusion" selon lequel il n'y a plus de distinction entre la common law et l'equity. Cette erreur créerait du désordre dans l'interprétation de la loi et ne peut pas être soutenue.

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*James I. Reynolds, Ratcliff & Company, North Vancouver, B.C. This case note is based on a paper which I presented at the "National Conference on Aboriginal Law and Governance 2001," Pacific Business & Law Institute, Vancouver, B.C., 19-20 April, 2001. That paper was prepared before I had the opportunity to read the facts filed by the counsel for the Chippewas of Sarnia in the Ontario Court of Appeal. It is only fair to note that they made many of the arguments set out below which makes the decision of the Court even more difficult to understand. I would also like to acknowledge the very able research conducted by Ms. Karen Leung, law student, University of Victoria.

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I. Introduction

The unanimous decision of the Ontario Court of Appeal sitting as a 5-person panel in *The Chippewas of Sarnia Band v. Canada*¹ raises, and in the writer's view, confuses some fundamental issues of the general law including the relationship between the common law and equity, the *nemo dat* principle and the doctrine of the *bona fide* purchaser of value. In the area of aboriginal law, it fails to apply relevant decisions of the Supreme Court of Canada on the requirement for a valid surrender of reserve lands before the interests of Indians in such lands may be defeated and ignores the constitutional protection for aboriginal and treaty rights. Unfortunately, by dismissing the Band's application for leave to appeal on November 8, 2001, that Court missed the opportunity to clarify these important issues.

II. Facts

The essential facts of the Sarnia case are that in 1839, a businessman, politician and land speculator named Cameron negotiated a sale of a quarter of the Chippewas reserve with three chiefs of the band. There was no surrender of the reserve by the members of the band as required by the Royal Proclamation of 1763. In the next 22 years, Cameron sold portions of the land to settlers who occupied and developed them. In 1853, letters patent were granted by the Crown to Cameron apparently in the mistaken belief that a surrender of the lands had been made. In contrast to the finding of the Motions Judge, the Court of Appeal found that the Chippewas both acknowledged and accepted the sale of the lands for 140 years after the Cameron transaction until it was discovered that there was no documentation evidencing the surrender of the lands. At the time of the hearing, the land was occupied by over 2,000 businesses, organizations and individuals who had no reason to know of the lack of a surrender.

¹ (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), application for leave to appeal dismissed without reasons, S.C.C. Bulletin, 2001 at 1998, see K.A. Waters, "A Primer on Aboriginal Title: Understanding Chippewas of Sarnia" (2001) 41 R.P.R. (3d.) 94. K. McNeil, *Extinguishment of Aboriginal Title In Canada*, October 2001. Online: Delgamuukw Gisday'wa National Process www.delgamuukw.org/research/extinguishment.pdf at 35-6, 48-82 forthcoming Ottawa L. Rev.

III. Nature of Claim

In 1995, the Chippewas commenced an action against the Governments of Canada and Ontario and, by way of defendant class action, the current commercial and residential landholders. They sought, in the words of the Court of Appeal, "in essence C declaratory relief recognizing their right to the disputed lands and damages for trespass and breach of fiduciary duty"² [emphasis added]. It is important to note that, in terms of the distinction between equitable and legal claims, they were making both types of claims. The claim for trespass is soundly based in the common law and never required the assistance of equity.³ The other claims were found by the Court to be equitable in nature and so subject to the Court's discretion to refuse a remedy.⁴ The judgment does not consider the claim in trespass at all and, after being mentioned in paragraph 3, it is ignored thereafter.

The legal rather than equitable nature of the claim for trespass is critical to this and other claims for wrongful dispossession of lands. As a common law claim, trespass is not subject to defeat by equitable principles: the doctrines of laches and acquiescence have no application⁵ and the claimant is entitled as of right to a remedy⁶ and there is no justification for the Court to refuse it on the

² *Ibid.* at para. 3. The claim in trespass was considered and rejected by the motions judge: (1999) 40 R.P.R. (3d) 49 at paras. 788-89 on the grounds that it was barred by the equitable limitations and good faith purchaser defences. It may be noted that paras. 3-5 & 7 of the Amended Fresh Statement of Claim limited the claim for damages for trespass to three corporate defendants if negotiations were successful with other non-residential or non-institutional defendants. If such negotiations were unsuccessful, damages for trespass were sought against those defendants. The Band was clearly entitled to bring an action for trespass to its reserve lands: *Custer v. Hudson's Bay Developments* (1983) 142 D.L.R. (3d) 722 (Sask. C.A.); *Fairford First Nation v. Canada* [1999] 2 C.N.L.R. 60 (Fed. T.D.).

³ Its origin can be traced back to the time of Edward I (1239-1307) and the formative years of the common law before the rise of equity. W. Holdsworth, *History of English Law*, 3d ed., vol. 2 (London: Methuen, 1923) at 364-65, 404; F.W. Maitland, "The History of the Register of Original Writs (1889-90)" 3 Harv. L. Rev. 97 & 167 at 177-79. For example, in 1293 "it was adjudged that Henry (de Guildeford) should recover his seisin and his damages against Sir John Targot, and that Sir John should go to prison for coming with force and arms." ("E pur coe fut agarde ke Henry recoverat sa seysine ver Sire Jon Tergot e ces damages, e Jon en la mercyre, e le cors a la prison pur le venyr a force e as armys.") (1293) Y.B. 21 & 22 Edw.1 274-77 at 274-75, ed. and trans. A. J. Horwood (London: Longman, 1873). According to F. Pollock & F.W. Maitland, *The History of English Law*, 2d. ed., (Cambridge: University Press, 1968 reissue) at 525 note 2, the action for trespass was "quite common" by the commencement of the reign of Edward I in 1272.

⁴ *Supra* note 1, see paras. 255-67, 278-83.

⁵ *M(K) v. M(H)*, [1992] 3 S.C.R. 6 at 77-78 per La Forest J. quoting R.P. Meagher, W.M.C. Gummow & J.R.F. Leane, 3d ed. *Equity - Doctrines and Remedies* (Sydney: Butterworths, 1992).

⁶ In the great constitutional case of *Entick v. Carrington* (1765), 2 Wils.K.B. 275, 95 E.R. 807, Lord Camden C.J. of the Court of Common Pleas said at 291, 817: "Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does so he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." Usually the measure of damages in trespass is the market rent that could have been charged by the owner of the land: *Swordheath Properties Ltd. v. Tabet* (1979) 1 All E.R. 240 (C.A.) but damages may be based on the conduct of, or the benefit received by, the trespasser: *Shewish v. MacMillan Bloedel Ltd.* (1990) 48 B.C.L.R. (2d.) 290 (C.A.), *Moses v. Trans-Canada Displays Ltd.* (2001) B.C.S.C. 1461.

basis of a discretion.⁷ It is surprising that the judgment is so confusing on this critical issue and is indicative of the Court's failure to appreciate the vital distinction between legal and equitable causes of action.⁸

IV. *Legal Analysis*

After summarizing its findings with respect to the facts, the Court proceeded to analyse the legal issues as follows:

A. *The Royal Proclamation of 1763*⁹

This Proclamation provided that, in colonies to which it applies, Indian lands could only be acquired if they were first surrendered to the Crown by the Indians at a public meeting of the nation or tribe held for that purpose. As noted by Dickson J. of the Supreme Court of Canada in *Guerin*,¹⁰ this provision is the origin of the surrender requirement in the *Indian Acts*. The motions judge in the *Sarnia* case held that the Royal Proclamation applied to the Cameron transaction in 1839, that the surrender provision was not followed and, therefore, the letters patent to Cameron were illegal and void.¹¹ The Ontario Court of Appeal disagreed with this conclusion.¹²

The Ontario Court of Appeal held in the *Bear Island* case¹³ that the surrender provision of the Royal Proclamation had been repealed in 1774 by the *Quebec Act*.¹⁴ In *Sarnia*, the Court said it was bound by this prior ruling but that, in any event, it was not necessary to its analysis to determine the precise legal status of the Royal Proclamation at the time of the *Cameron* transaction

"... we are of the view that, in this case, little turns on whether the surrender provisions of the Royal Proclamation had the force of law at the relevant time."¹⁵

⁷ R. Megarry & W. Wade, *The Law of Real Property*, 6th ed., C. Harpum, M. Grant & S. Bridge, eds., (London: Sweet & Maxwell, 2000) at para. 4-014; J. McGhee, ed., *Snell's Equity*, 30th ed. (London: Sweet & Maxwell, 2000) at 645-46.

⁸ See text accompanying notes 34-69.

⁹ Royal Proclamation, Oct. 7, 1763, printed in C.S. Brigham, ed. *British Proclamations Relating to America 1603-1783* in *Transactions and Collections of the American Antiquarian Society* (Worcester, Mass.: American Antiquarian Society, 1911), 212-18. See J. Borrows, "Constitutional Law From a First Nation Perspective: Self Government and The Royal Proclamation" (1994), 28 U.B.C.L. Rev. 1; B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (D.Phil. Thesis, Oxford University, 1979; reprint Saskatoon: University of Saskatchewan Native Law Centre 1979) at 191-361.

¹⁰ [1984] 2 S.C.R. 335 at 383 [hereinafter *Guerin*].

¹¹ *Supra* note 1, see paras. 241-343, 397-432.

¹² *Ibid.* at para. 19.

¹³ (1989), 68 O.R. (2d) 394 (Ont. C.A.); appeal dismissed [1991] 2 S.C.R. 570.

¹⁴ Reprinted in R.S.C. 1985, Appendix 2, No. 2.

¹⁵ *Supra* note 1 at para. 19, see also paras. 199, 202. For a commentary on this ruling, see B. Clark, *Native Liberty, Crown Sovereignty* (Montreal: McGill-Queen's University Press, 1990) at 85-98.

It is respectfully submitted that a great deal turned on the surrender provisions of the Royal Proclamation. This will be shown in the discussion below of the *nemo dat* principle and the *bona fide* purchaser for value without notice doctrine.

In *Bear Island*, it was argued that the Crown had not followed the surrender provisions required by the Royal Proclamation. The Court responded:

“... the relevant procedural aspects of the Proclamation were repealed by the *Quebec Act*, 1774 (U.K.), c. 83 [R.S.C. 1970, App. II, No. 2]. We think it clear . . . that the procedural requirements for purchase “at some public Meeting or Assembly . . .” was repealed. *Thus at the relevant times there was in existence no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown.*”¹⁶ [emphasis added].

It will be seen that the Court does not quote or refer to the provision in the *Quebec Act* that is said to have repealed the surrender requirements.

It is submitted that a plain reading of the Act taken as a whole and of the repeal provision does not support the Court's conclusion. The *Quebec Act* was clearly intended to restore to the French speaking population their form of government, civil laws and religion. It does not mention Indians at all. Clause IV which repeals the Royal Proclamation refers to 65,000 persons professing the religion of the Church of Rome and enjoying an established form of constitution and system of laws from the time of the establishment of the Province of Canada. It repeals the Royal Proclamation with respect to Quebec “relative to the Civil Government and Administration of Justice in the said Province.” It is far from “clear” that Clause IV was intended to go beyond the repeal of provisions in the Royal Proclamation that affected the civil government and system of justice of the French speaking population. Certainly, as found by the Court of Appeal in the *Sarnia* case, the government officials still considered the surrender provisions of the Royal Proclamation to be in force in 1839.¹⁷ Further, there is no reason to suppose that the Imperial government would have repealed such provisions in the Province of Quebec but not elsewhere in British North America.

It is also relevant to note that, in *Easterbrook v. The King*¹⁸, discussed below,¹⁹ the Supreme Court of Canada accepted that the Royal Proclamation applied to a lease of land in 1821 by a band with a reserve on Cornwall Island in the St. Lawrence River. Further, decisions of the Ontario Court of Appeal subsequent to the *Bear Island* case appear to assume that the Royal Proclamation remained in force in that Province after the *Quebec Act*: *Skerryvore Ratepayers*

¹⁶ *Supra* note 13 at 410.

¹⁷ *Supra* note 1, see paras. 58-65, 117.

¹⁸ [1931] S.C.R. 210 [hereinafter *Easterbrook*]. See also *St. Catherine Milling and Lumber Co. v. The Queen* (1887) 13 S.C.R. 577 at 629 - 635 per Strong J. (dissenting in the result) who considers the matter in detail and rejects the argument that the Quebec Act repealed the Royal Proclamation 1763 with respect to the Indian provisions, see also Taschereau J. (in the majority) at 648 and (1888) 14 A.C. 46 (P.C.) at 53-55 per Lord Watson who clearly considered that the Royal Proclamation of 1763 continued to apply in Ontario in 1873.

¹⁹ See text accompanying note 81.

*Ass. v. Shawanaga Indian Band*²⁰ and *Chippewas of Kettle and Stony Point v. Canada*.²¹

In summary, it is submitted that the surrender provisions of the Royal Proclamation applied to the Cameron transaction in 1839, to the issue of the letters patent in 1853 and to all sales of the reserve lands. As discussed further below, this is of critical importance to the application of both the *nemo dat* principle and the *bona fide* purchaser for value without notice doctrine.²²

B. Statutory Limitation Periods

The Court proceeded to review the argument of the landholders that the claim against them was barred by the provisions of no less than 18 different statutes. It agreed with the motions judge that none of these statutes applied.²³

C. Public Law Remedies

The discussion then moved on to the issues of remedies and equitable defences. The Court discussed the nature of public law remedies and especially the discretionary nature of such remedies.²⁴ It held that the exceptional circumstances of the case justified its refusal to protect or vindicate aboriginal title.²⁵ It is again very surprising that the judgment does not contain any detailed discussion of the arguments of the Band based on section 35(1) of the *Constitution Act* 1982²⁶ which recognizes and affirms existing aboriginal and

²⁰ (1993), 16 O.R. (3d) 390 (Ont. C.A.), leave to appeal ref'd (1994) 110 D.L.R. (4th) vii 16 (S.C.C.).

²¹ (1996), 141 D.L.R. (4th) 1 (Ont. C.A.), aff'd [1998] 1 S.C.R. 756.

²² See text accompanying note 70 ff and note 97 ff.

²³ *Supra* note 1 at paras. 220-42.

²⁴ *Ibid.* at paras. 243-75.

²⁵ *Ibid.* at para. 275.

²⁶ *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11. The Motions Judge did apply the justification and reconciliation approach of the Supreme Court of Canada and concluded that a 60-year equitable limitation period should apply before the extinguishment of the Band's aboriginal rights: *supra* note 2 at paras. 741-769. The importance of section 35 to the protection of aboriginal and treaty rights was noted by Chief Justice Dickson in *Sparrow* [1990] 1 S.C.R. 1075 where he said at 1105: "s. 35(1) of the *Constitution Act*, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Metis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against legislative power." Unfortunately, as the result of the decision of the Ontario Court of Appeal in the *Chippewas of Sarnia* case, the "solid constitutional base" afforded by the rock of section 35 has been replaced by the shifting sands of judicial discretion.

treaty rights and on Supreme Court of Canada decisions considering the scope of section 35(1) such as the *Sparrow*,²⁷ *Van der Peet*,²⁸ *Badger*,²⁹ *Delgamuukw*,³⁰ and *Marshall*³¹ decisions. In effect, the Court defeated the constitutionally-protected right of the claimants to their land by use of the equitable defences discussed below and so achieved by the application of judge-made law what the Constitution forbids to the federal and provincial legislatures.

D. *Private Law Remedies*

1. *Court's Characterization of the Claim*

The final 40 or so paragraphs of the judgment consider the private law remedies sought by the Chippewas and the equitable defences that the Court applied to defeat those claims. Again, it must be stressed that the Court did not consider at all the claim for damages for trespass. It said the primary relief sought was for a declaratory judgment or, in the alternative, an immediate vesting order.³² These remedies were equitable in origin and discretionary in nature “[i]n our view, the Chippewas cannot escape the fact that, from a private law perspective, they are claiming remedies that are discretionary in nature: and subject to equitable defences.”³³

2. *The Fusion Fallacy*

In what is perhaps the most far-reaching statement in the judgment, the Court rejected the “traditional dichotomy between law and equity” in the following passage:

To hold that aboriginal rights are immune from the principles of equity would be inconsistent with the repudiation of the traditional dichotomy between law and equity by this Court, the Supreme Court of Canada and by the House of Lords, particularly in relation to remedial issues. As Grange J.A. stated in *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 with reference to the legislative direction that the courts “shall administer concurrently all rules of equity and the common law” (now found in the *Courts of Justice Act*, s. 96(1)), “the fusion of law and equity is now real and total”. In *Canson Enterprises Ltd. v. Boughton &*

²⁷ *Ibid.*

²⁸ [1996] 2 S.C.R. 507.

²⁹ [1996] 1 S.C.R. 771.

³⁰ [1997] 3 S.C.R. 1010.

³¹ [1999] 3 S.C.R. 456, re-hearing [1999] 3 S.C.R. 533.

³² *Supra* note 1 at para. 278.

³³ *Ibid.* at para. 283.

Co., [1991] 3 S.C.R. 534 at 582 La Forest J. adopted Lord Diplock's assertion in *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904 at 924-5 that the merger of law and equity is complete and that "the waters of the confluent streams of law and equity have surely mingled now."³⁴

This passage is clear confirmation that the Court has fallen into the trap of the fusion fallacy, i.e., the belief that, because one court can administer concurrently all rules of equity and the common law, there is no longer any distinction between the two.³⁵ This procedural change has its origin in the English

³⁴ *Ibid.* at para. 289. J.D. Davies comments on the fluvial metaphor employed by Lord Diplock which makes reference to the confluence of the Rhone and Saone rivers: "it should be better known what really does happen when the waters of the Rhone meet the waters of the Soane. The Rhone comes from the Alps and is cold, the Soane from less high parts and is warmer. The result for the inhabitants of Lyons - Equity lawyers beware also - is fog." J.D. Davies, "Equitable Compensation: Causation, Foreseeability and Remoteness" in D.W.M. Waters, *Equity, Fiduciaries and Trusts*, *infra* note 117, 297 at 323.

³⁵ Meagher, Gummow & Lehane *supra* note 5 at paras. 220-22, 254-63; See the following articles on the fusion of law and equity in commonwealth countries: P.V. Baker, (1977) "The Future of Equity" 93 L.Q. Rev. 529; K. Barker, "Equitable Title and Common Law Conversion: The Limits of Fusionist Ideal" (1998) 6 Restitution Law Review 150; F. Burns, "The 'Fusion Fallacy' Revisited" (1993) 5 Bond L.R. 152; S. Chesterman, "Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of Law'" (1997) 24 Journal of Law and Society 350; J.E. Cote, "Ex Parte Maitland" (1965) 4 Alta. L. Rev. 134; V.T.H. Delaney, "Equity and The Law Reform Committee", (1961) 24 M.L.R. 116; M. Evans, "Common Law/Equity Divide Remains" (1998) 17 International Financial Law Review 56; R. Evershad, "Reflections On The Fusion of Law and Equity After 75 Years" (1954) 70 L.Q.Rev. 326; W. M.C. Gummow, "Compensation for Breach of Fiduciary Duty" in T.G. Youdian ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 57 at 82-85, J.R.F. Lehane, "Book Review of Specific Performance by G. Jones", (1987) Camb. L.J. 163; J. M. MacIntyre, "Equity - Damages in Place of Specific Performance - More Confusion About Fusion" (1969) 47 Can. Bar Rev. 644; J. Martin, "Fusion, Fallacy And Confusion; A Comparative Study" [1994] The Conveyancer, 13; C.J. Mason, "The Place of Equity And Equitable Remedies In The Contemporary Common Law World" (1994) 110 L.Q. Rev. 238; J. Maxton, "Some Effects of the Intermingling of Common Law and Equity" (1993) 5 Canterbury L.Rev. 299; L.J. Millett, "Equity - The Road Ahead" (1995/96) The King's College Law Journal 1; N.E. Palmer, "Trusts of Historic and Valuable Chattels: Equitable Interests and Common Law Remedies" (1999) 4 Art, Antiquity and Law 69; P.M. Perell, "A Legal History of The Fusion of Law and Equity in The Supreme Court of Ontario" (1988) 9 Advocates' Q. 472; P.M. Perell, "The Aftermath of Fusion *Canson Enterprises Ltd. v. Boughton & Co.*" (1993) 14 Advocates' Q. 488; A.B.L. Phang, "Common Mistake in English Law: The Proposed Merger of Common Law and Equity" (1989) 9 Legal Studies 291; L.I. Rotman, "Deconstructing the Constructive Trust" (1998) 37 Alta. L.Rev. 133 at 159-161; Justice Tipping, "Causation At Law And In Equity: Do We Have Fusion?" (2000) 7 Canterbury L.Rev. 443; D.W.M. Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)" (2001) 80 Can. Bar Rev. 620 at 623-25, 660-61, 689-95. For a discussion of the situation in the United States of America, see D.Laycock, "The Triumph of Equity" (1993) 56 Law and Contemp. Prob. 53. Most states have merged the administration of law and equity although Delaware still has a separate court and a Chancellor. The debate over substantive fusion or "segregation/integration" seems equally intense.

Judicature Act of 1873³⁶ which was followed in Canadian jurisdictions including Ontario³⁷. The intention of the legislature was clearly explained by Lord Selbourne, L.C., who said in introducing the bill:

It may be asked C though I do not think the question would be put by those who are well acquainted with the subject C why not abolish at once the distinction between law and equity: I can best answer that by asking another question C Do you want to abolish trusts? If trusts are to continue, there must be a distinction between what we call a legal and an equitable estate C The distinction, within certain limits, between law and equity, is real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded.³⁸

³⁶ *Supreme Court of Judicature Act 1873* (U.K.), 36 and 37 Vict., c 66 s 24; see Holdsworth *supra* note 3, vol. 15 at 128-138. The topic of fusion of law and equity, both substantive and administrative, has a long history. Lord Mansfield C.J. of the court of King's Bench from 1756 to 1788 advocated both substantive and administrative fusion. See, for example, his judgment in *Burgess v. Wheate* (1757-9) 1 Eden 177, 28 E.R. 652. His views found favour with Blackstone but were not accepted by the other judges. See, for example, Lord Kenyon C.J.'s judgment in *Bauerman v. Radenius* (1798) 7 T.R. 663 101 E.R. 1186 at 667, 1189 in which he urged "the propriety of keeping the jurisdictions and rules of the different courts distinct." It was Lord Chancellor Eldon who settled the matter in favour of the latter view: *Princess of Wales v. Earl of Liverpool* (1818) 1 Swan 114, 36 E.R. 320 at 123-5, 324. See generally, W. Holdsworth, *Some Makers of English Law* (Cambridge: University, 1966) at 172-75, 200-10; Holdsworth *supra* note 3 Vol. 12 at 588-90, 595-601. For a fascinating account of the relationship between equity and law during the chancellorships of Thomas Wolsey (1515-29) and Thomas More (1529-32) based on the writings of Christopher St. German recording a dialogue between "a Doctor of divinity and a Student in the laws of England" and a "Replication" from a "Sergeant at the Laws of England", see G. Behrens, "An Early Tudor Debate on the Relation between Law and Equity" (1998) 19 J. Legal Hist. 143. It is suggested at 158-9 that More favoured a form of fusion. See also T.A.O. Endicott, "The Conscience of a King: Christopher St. German and Thomas More and the Development of English Equity" (1989) 47 U. of T. Fac L. Rev. 549.

³⁷ Perell (1988) *supra* note 35 gives a detailed account of the legal history of the fusion of the administration of law and equity in Ontario. See now *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.96(1) which provides, "Courts shall administer concurrently all rules of equity and the common law." For a list of equivalent provisions in other jurisdictions, see *Canadian Encyclopedic Digest*, looseleaf ed., (Toronto: Carswell, 2001), title 55 (Ontario), title 56 (Western) at paras. 1-2.

³⁸ U.K. H.L. *Parliamentary Debates*, 3d ser., vol. 214, col. 331 at col. 339 (13 February 1873) (Lord Selbourne, L.C.). See to the same effect, the following comment of the Attorney-General, Sir John Coleridge, to the House of Commons quoted by Meagher, Gummow & Lehane, *supra* note 5 at para 205: "To talk of the fusion of Law and Equity was to talk ignorantly. Law and Equity were two things inherently distinct." As noted by McDermott, *infra* note 41 at 105, the wording of the *Act* clearly evidences "that it was intended that the rules of equity and common law would continue as separate systems" and that "it was not intended that the rules of equity should be coalesced into the rules of law."

A great weight of judicial authority³⁹ supports this distinction as does a considerable volume of academic commentary⁴⁰ the leading texts on equity and property law⁴¹ and eminent legal historians.⁴² Indeed, on a daily basis, courts continue to apply the law of trusts and equitable principles which would have

³⁹ *Salt v. Cooper* (1880), 16 Ch.D. 544, Aff'd 16 Ch.D. 556; *Britain v. Rossiter* (1879), 11 Q.B.D. 123; *Clements v. Matthews* (1883), 11 Q.B.D. 808 at 814; *Joseph v. Lyons* (1884), 15 Q.B.D. 280 (C.A.); *Riddiford v. Warren* (1901), 20 N.Z.L.R. 527 (C.A.); *Lavery v. Pursell* (1888), 39 Ch.D. 508; *Manchester Brewing Company v. Coombs*, [1901] 2 Ch. 608 at p. 617; *Stickney v. Keeble*, [1915] A.C. 386 at 417 per Lord Parker; *Bennett v. Stodgell* (1916), 36 O.L.R. 45. (C.A.); *Di Guilo v. Boland* (1958), 13 D.L.R. (2d) 510 (Ont. C.A.); *Felton v. Mulligan* (1971), 124 C.L.R. 367 at 392 per Windeyer J. (H.C. Aus.); *O'Rourke v. Hoener*, [1974] 1 N.S.W.L.R. 622 at 626; *Maguire v. Makaronis* (1997), 188 C.L.R. 449 at 489 per Kirby J. (H.C. Aust.); *Pilmer v. The Duke Group Limited (in liquidation)*, (2001) HCA 31 at para. 173 per Kirby J. where he refers to: "the repeated recognition by this Court that, in Australia, the substantive rules of equity have retained their identity as part of a separate and coherent body of principles." See also *infra* note 49.

⁴⁰ Baker; Barker; Burns; Davies; Evershad; Gummow; Lehane; Martin; Perell (1988), (1993); Rotman, Waters, *supra* notes 34 and 35.

⁴¹ D. Browne, ed., *Ashburner's Principles of Equity*, 2nd. ed. (London: Butterworths, 1933) at 18; Lord Hailsham, *Halsbury Laws of England* 4th ed. reissue, vol. 16 (London: Butterworths, 1992) at para 740; J.E. Martin, ed. *Hanbury & Martin Modern Equity* 15th ed. (London: Sweet & Maxwell, 1997) at 20-25: "They are coming closer together. But they are not yet fused."; P.M. McDermott, *Equitable Damages*, (Sydney: Butterworths, 1994) at 104-106; Megarry & Wade *supra* note 7 at 774; "Law and equity nevertheless remain distinct." Meagher, Gummow and Lehane, *supra* note 5; P. Loughlan in P. Parkinson, ed. *The Principles of Equity* (Sydney: LBC Information Services, 1996) at 21-22; A.H. Oostelhoff & W.B. Rayner, ed., *Anger and Hansberger Law of Real Property* 2d ed., vol. 1 (Aurora: Ont.: Canada Law Book, 1985) at para. 105: "the distinction between legal and equitable interests still maintains."; P.H. Pettit, *Equity and the Law of Trusts* 8th ed. (London & Butterworths, 1997) at 9-11; *Snell's Equity* *supra* note at 7 para. 1-17, I.C.F. Spry, *The Principles of Equitable Remedies* 5th. ed. (London: Sweet & Maxwell, 1997), Preface to 5th. Ed. Cf. J. Berryman, *The Law of Equitable Remedies* (Toronto: Irwin, 2000) at 5: "Canadian Courts have tended to eschew debates about the nature of fusion and have created a distinctive equity jurisdiction", see also 7, 15 and 307; M.V. Ellis, *Fiduciary Duties in Canada*, looseleaf ed. (Toronto: Carswell, 2000) at para 20-1; "[h]appily in Canada the separate disciplines of Law and Equity were joined before the turn of this century"; R.J. Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Aurora: Ont.: Canada Law Book, 2000) at para. 1.60: "Law and equity have been fused and a single court now administers both, but the imprint of history has not been erased", see also paras. 1, 100 and 10.10.

⁴² Holdsworth *supra* note 3. vol 15 at 134-38: "In the sphere of substantive law. — the legislation did little or nothing to promote fusion," F. W. Maitland, *Equity* (Cambridge University Press, 1913) at 151: "For the Judicature Act did not alter the substantive law — It only made a thorough change in procedure."; See also Earl of Halsbury, *The Laws of England* vol 13 (London: Butterworths 1910) at para 74. For the view that law and equity were part of one substantive body of law even prior to 1873, see S.W. De Vine, "The Concept of Epieikeia in the Chancellor of England's Enforcement of Feoffment to Uses Before 1535", (1987) 21 UBC L. Rev. 323 at 323-4: "Accordingly, to the extent that they made equity a part of the procedural armoury of the common law courts, the nineteenth century reforms stripped from the Chancery three centuries of dilatory and costly procedural accretions, exposing and perpetuating an ecclesiastically tinted Aristotelian corrective within the common law."

little meaning if there were no distinction between law and equity. Further, it makes no more sense to say that, because one court applies both law and equity, there has been a fusion or merger of the substantive law than to say that, because the Supreme Court of Canada applies both the common law of the English-speaking provinces and the civil law of Quebec, there has been a fusion of the common law and the civil law.

It is submitted that the following comment by Meagher J.A. of the New South Wales Court of Appeal in *G.R. Mailman & Associates Pty. Ltd. v. Wormald (Aust) Pty. Ltd.*⁴³ is as applicable to the *Sarnia* decision as to the *United Scientific Holdings* case:

Lord Diplock (in the *United Scientific Holdings* case) expressed the remarkable view that the (*Judicature Act* 1873) effected a "fusion" of law and equity so that equity as a distinct jurisprudence disappeared from English law. That view is so obviously erroneous as to be risible. . . The fallacy of Lord Diplock's views may be appreciated by asking two unanswerable questions: one, what does it mean to say that a substantive '>fusion' has occurred?; and two, if such a '>fusion' has been effected by the 1873 Act, what sections of that Act had that result?⁴⁴

The two questions posed by Meagher J.A. and that of Lord Selbourne⁴⁵ are a sufficient reply to the Ontario Court of Appeal and other courts promoting the fusion fallacy.⁴⁶ None of these courts give any convincing explanation of the basis for their assertions of a substantive fusion nor any consideration of its practical consequences which must include the abolition of trusts and doctrines which depend upon a distinction between law and equity such as that of the *bona fide* purchaser for value.

The Chief Justice of Australia, Mason C.J., has described Lord Diplock's comment as "extreme" and not supportable if it means, for example, that relief by way of damages is available in every case that there is a breach of a purely

⁴³ (1991), 24 N.S.W.L.R. 80 (C.A.).

⁴⁴ *Ibid.* at 99.

⁴⁵ *Supra* note 38.

⁴⁶ *Walsh v. Lonsdale* (1882), 21 Ch.D. 9 at 14 per Jessel M.R.: "There are not two estates as there were formerly, one estate at common law . . . and an estate in equity" (C.A.); *Errington v. Errington* [1952] 1 ALL E.R. 149 at 155 per Denning L.J.: "Law and equity have been fused for nearly eighty years" (C.A.); *United Scientific Holdings v. Burnley Borough Council*, [1978] A.C. 904; *Federal Commerce Ltd. v. Molena Alpha Inc.*, [1978] Q.B. 927 at 974 per Denning M.R.: "the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other" (C.A.); *Habib Bank Ltd. v. Habib Bank AG Zurich*, [1981] 1 W.L.R. 1265 at 1284-285 per Oliver L.J. (C.A.); *Amherst v. James Walker*, [1983] Ch. 305 at 319 per Lawton L.J. (C.A.); *Chief Constable of Kent v. V.*, [1983] Q.B. 34 at 42 per Denning M.R.; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), leave to appeal ref'd: [1986]; *Day v. Mead* [1987] 2 N.Z.L.R. 443 (C.A.); *Aquaculture Corp. v. N.Z. Green Mussel Co.*, [1990] 3 N.Z.L.R. 299 at 301 per Cooke P.: "For all purposes now material, equity and common law are mingled or merged."

equitable duty.⁴⁷ With some exceptions,⁴⁸ English cases after the *United Scientific Holdings* case, including subsequent decisions of the House of Lords, have ignored Lord Diplock's statement and continued to analyse legal issues in terms of both the common law and equity.⁴⁹ Lord Browne-Wilkinson of the House of Lords pointed out in *Tinsley v. Milligan*: "[m]ore than 100 years has elapsed since the administration of law and equity became fused. The reality of the matter is that, in 1993, English law has one single law of property made up of legal and equitable interests. Although for historical reasons legal estates and equitable estates have differing incidents, the person owning either type of estate has a right in rem not merely a right in personam"⁵⁰ Millet L.J. of the English Court of Appeal has written "[the] opinion that the Judicature Acts had the effect of fusing law and equity to the extent that they have become a single body of law rather than two separate systems of law administered together is, I believe, now widely discredited both in England and Australia."⁵¹ After a detailed review of Commonwealth authorities, one commentator concluded that "we are at an intermediate stage of development where substantive fusion is still limited and prospective."⁵²

⁴⁷ Mason CJ *supra* note 35 at 240. See also A. Mason, "The Place of Equity and Equitable Decisions in the Contemporary Common Law World: An Australian Perspective" in D.W.M. Waters ed "Equity, Fiduciaries and Trusts", *infra* note 117, 3 at 5-8. Canada's current Chief Justice, Beverley McLachlin, has written extra-judicially: "It is my own belief that equity is most usefully viewed as doctrinally distinct from the law" in "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective", *ibid* at 40.

⁴⁸ See note 46.

⁴⁹ *Leigh & Silavan Ltd. v. Aliakmon Shipping Co.*, [1986] A.C. 785 at 812-13 per Lord Brandon (H.L.); *Bank of Boston Connecticut v. European Grain and Shipping Ltd.*, [1989] 1 All E.R. 545 (H.L.) at 557 per Lord Brandon: "the Judicature Acts, while making important changes in procedure did not alter and were not intended to alter the rights of the parties." *Napier and Ertick (Lord) v. Hunter*, [1993] A.C. 713 (H.L.); *Tinsley v. Milligan*, [1994] 1 AC 340 (H.L.); *MCC Proceeds Inc. v. Lehman Bros. International (Europe)*, [1998] 4 All E.R. 673 (C.A.) at 691 per Mummery L.J.: "the Supreme Court of Judicature Acts — were intended to achieve procedural improvements in the administration of law and equity in all courts, not to transform equitable interests into legal titles or to sweep away altogether the rules of the common law"; *Cossett (Construction) Limited* [1998] Ch. 495 (C.A.); *Banque Financiere de la Cite v. Parc (Battersea) Limited*, (1999) 1 A.C. 221 (H.L.); *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.); *Smith (Administrator of Coslett (Contractors) Limited v. Bridgend County Borough Council*, [2001] UKHL 58; *Royal Bank of Scotland v. Etridge*, (2001) UKHL 44; but see *Bank of Credit and Commerce International S.A. v. Munawar Ali*, (2001) 1 All E.R. 961 (H.L.) at para 17 per Lord Bingham; Spry, *supra* note 41, comments in the Preface to the 5th edition of his book, "It is — a matter of satisfaction that those observations (of Lord Diplock) have been criticised and do not appear in practice to have had significant consequences. Equitable doctrines have continued to be applied in the same way and to provide a just basis for the resolution of difficulties." The New Zealand Court of Appeal has also, in practice, ignored its earlier decisions to the effect that there has been a total merger of law and equity (see *supra* note 46) and continued the dual analysis: eg. *Fortex Group Limited v. Trustees, Executors and Agency Company of New Zealand Limited*, [1998] 3 N.Z.L.R. 171, *Attorney-General v. Equiticorp Industries Group Limited*, [1996] 1 N.Z.L.R. 528.

⁵⁰ *Supra* note 49 at 371 [emphasis added].

⁵¹ *Supra* note 35 at 6. Lord Millet is now a member of the House of Lords and has been described by Prof. Waters as "a distinguished Chancery lawyer—to whom equity scholarship owes much", *supra* note 35 at 659.

⁵² Burns, *supra* note 35 at 178.

The most comprehensive analysis of the supposed fusion of law and equity has been made by a Canadian author, Paul Perell, who wrote a thesis for his Master of Law degree at Osgoode Hall Law School on the topic, which has since been published.⁵³ The inspiration for his research was the comment of Mr. Justice Grange in *LeMesurier v. Andrus*⁵⁴ relied upon in the *Sarnia* case that "the fusion of law and equity is now real and total."⁵⁵ He tested this comment by a detailed examination of nine different topics such as tracing, set-off, contractual mistake and damages. His investigation led him to the following conclusion "it is not correct to say, as was said in *LeMesurier v. Andrus*, following *United Scientific Holdings Ltd. v. Burnley Council*, that the fusion of law and equity is now real and total. Indeed, with the exception of negligent misrepresentation, all of the areas studied show strong evidence of the dual approach."⁵⁶ In a case comment on the *Canson*⁵⁷ case, he states:

... the old Judicature Acts did not, have not, and will not totally fuse equity and common law. There are large portions of the substantive law that are structured on the conceptual framework of the continuing existence of both the common law and equity. Real property law and the law of trusts with their various legal and equitable property interests are examples. There are large portions of the substantive law that continue to be regarded as the exclusive domain of the common law or equity respectively. Damages awards remain a common law remedy for breach of contract; specific performance remains an equitable remedy for breach of contract. There are also large portions of the substantive law that continue to recognize both common law and equitable treatments. Set-off and contractual mistake are examples. Total fusion has not occurred.⁵⁸

In the *Canson* case, three of the other judges agreed with the decision of La Forest J. on the application of legal as well as equitable principles to compensation for breach of fiduciary duty (an equitable claim) but the other four judges disagreed. Therefore, it cannot be said that the judgment of La Forest J. speaks for the Supreme Court of Canada.⁵⁹ In his judgment, Stevenson J. said with great insight: "I greatly fear that talk of fusing law and equity only results in confusing and confounding the law."⁶⁰ Of equal importance is that, in his judgment La Forest J. expressly rejected indiscriminate attempts at melding the whole of the two systems as advocated by the Ontario Court of Appeal in the *Sarnia* case: "[t]here might be room for concern if one were indiscriminately

⁵³ P.M. Perell, *The Fusion of Law and Equity* (Toronto: Butterworths, 1990).

⁵⁴ (1986), 54 O.R. (2d) 1 (C.A.).

⁵⁵ *Ibid.* at 9.

⁵⁶ Perell, *supra* note 53 at 129 [footnotes omitted]. It is puzzling in the extreme that Sharpe J.A. (who was part of the Court that decided the *Sarnia* case) should cite Perell's book in apparent support of his statement that "Law and equity have been fused": *supra* note 41 at para 1.60 footnote 6.

⁵⁷ [1991] 3 S.C.R. 534.

⁵⁸ Perell (1993), *supra* note 35 at 491 [footnotes omitted].

⁵⁹ Waters *supra* note 35 at 690: "Canson Enterprises effectively says nothing on the subject (of fusion) that binds the future in any way."

⁶⁰ *Supra* note 57 at 590.

attempting to meld the whole of the two systems. Equitable concepts like trusts, equitable estates and consequent equitable remedies must continue to exist apart, if not in isolation, from common law rules.”⁶¹ In short, the *Canson* case far from repudiating the dichotomy between law and equity expressly supports it so far as equitable concepts are concerned.

In my respectful submission, the above demonstrates that the Ontario Court of Appeal made a fundamental error in the *Sarnia* case in concluding that “the traditional dichotomy between law and equity” had been rejected by earlier cases. This error led it to make the further fundamental error contained in the following statement: “[r]ights of equitable origin are every bit as legally enforceable as rights of a common law origin.”⁶² This is simply not correct. Equitable interests remain vulnerable to defeat by subsequent legal interests.⁶³ The “vital difference between legal and equitable interests”⁶⁴ remains part of Anglo-Canadian jurisprudence.

Having rejected the dichotomy between law and equity, the Court said it did not accept the submission that a claim to aboriginal title is strictly legal in nature and immune from the overriding principles of equity.⁶⁵ In its view, the decisions of the Supreme Court of Canada on aboriginal title such as *Guerin*⁶⁶

⁶¹ *Supra* note 1 at 587. La Forest J. has written extra-judicially, “I should note that Canson did not advocate the complete abandonment of the distinction between law and equity. The whole doctrine of trust is predicated on the distinction between law and equity”: G. La Forest, “Overview of Fiduciary Duties” in A. MacInnes and B.M. Hamilton, ed. *Fiduciary Duties/Conflicts of Law*, 1993 Isaac Pitblado Lectures, Law Society of Manitoba, 1 at 19.

⁶² *Ibid.* at para. 285.

⁶³ See *infra* note 97 and text following.

⁶⁴ Megarry & Wade, *supra* note 7 at 774. See also Snell’s Equity, *supra* note 7 at para 4-08 which refers to “a fundamental distinction between legal estates and equitable interests.

⁶⁵ *Supra* at para. 284, 290-91. The Court referred to Dickson J.’s judgment in *Guerin*, *supra* note 10, for its view that aboriginal title draws “heavily upon the principles of equity for its shape and definition”: at paras 287-88. With respect, this view is based on a misunderstanding of the statement of Dickson J. that “(t)he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title”, at 376. It will be seen that, in Dickson J.’s opinion, it is the nature of aboriginal title that gives rise to the Crown’s equitable obligations and not vice versa as suggested by the Ontario Court of Appeal.

⁶⁶ *Supra* note 10.

and *Delgamuukw*⁶⁷ did not support this submission.⁶⁸ The Court concluded that aboriginal title should be seen as neither legal nor equitable in nature.⁶⁹

The importance of the Court's adoption of the fusion fallacy should not be overlooked. The Court is effectively rejecting the whole basis of 600 years of legal development which led to the law of equity and equitable principles. One would have thought this rejection included the application of equitable principles such as that of the *bona fide* purchaser for value without notice which is based on the distinction between legal and equitable interests in land. However, the Court then went on to apply that doctrine to defeat the claims being made by the Chippewas.

3. *The Nemo Dat Doctrine*

Before applying equitable principles to the case before it, the Court made brief reference to the *nemo dat* principle⁷⁰ and the submission of the Chippewas that, as there was no surrender of aboriginal title to the Crown, the Crown had nothing to grant to Cameron by way of patent.⁷¹ Therefore, the Cameron patent was void and nothing was conveyed to him or those claiming under him. The motion judge had, indeed, found the patent to be void.⁷² The Court of Appeal first referred back to its prior conclusion that established legal principles required the Court to take into account the interests of innocent third parties before declaring a patent "void."⁷³

The Court then referred to two old cases on patents which it thought were consistent with this view: *Malloch v. The Principal Officers of Her Majesty's Ordinance*⁷⁴ and *Alcock v. Cooke*⁷⁵. The *Malloch* case noted that the law was

⁶⁷ *Supra* note 30. With respect, this conclusion would appear to be incorrect for the following reasons: (a) in *Delgamuukw*, Lamer C.J.C. refers to "common law aboriginal title", *supra* note 30 at para 136, (b) nowhere in *Delgamuukw* are there grounds to say that the Court's recognition of aboriginal title was based on principles of equity. Lamer C.J.C. explains the source of aboriginal title as, in part, pre-existing systems of aboriginal law and "the common law principle that occupation is proof of possession in law", *supra* note 30 at para 114, (c) in *Delgamuukw*, Lamer C.J.C. held that "aboriginal title at common law is protected in its full form by s.35(1)", *supra* note 30 at para 133. It is inconceivable that the Court could have intended that this constitutional protection could co-exist with the application to aboriginal title of the doctrine of the *bona fide* purchaser for value: see *infra* text accompanying note 97 ff.

⁶⁸ *Supra* note 1 at para. 285.

⁶⁹ *Ibid.* at para. 290.

⁷⁰ E.L.G. Tyler & N.E. Palmer, ed., *Crossley Vaines' Personal Property*, 5th ed. (London: Butterworths, 1973) at 159.

⁷¹ *Supra* note 1 at paras. 292-95.

⁷² See *ibid.*, paras. 10-11.

⁷³ *Ibid.* at para. 275.

⁷⁴ (1847), 3 U.C.Q.B. 387.

⁷⁵ (1829), 5 Bing 340, 130 E.R. 1092 (Ct. of Common Pleas).

unsettled on whether a patent of land already set aside for another purpose was void or voidable although the judge inclined to the latter view. The *Alcock* case is equally unclear. According to the report, it was a case of “trover for a bowsprit” and related to a claim to take a wreck. The validity of this claim depended in part on whether a grant of a royal deed by King Charles I was void or not. The Court held that it was void because of a prior grant by King James I and the subsequent grantee must be taken to have deceived King Charles I by not telling him of its existence. It is very difficult to see how the somewhat specious reasoning in this case apparently involving the pointy end of a boat (the “bowsprit”) could be applied to defeat aboriginal title in Canada nearly two centuries later. Further, it is difficult to see why the Ontario Court of Appeal reached the following conclusion on the strength of these two cases: “[t]hese authorities show that competing claims between subjects were reconciled according to concepts akin to modern registry systems and equitable doctrines of constructive notice. The *nemo dat* principle did not automatically invalidate Crown patents.”⁷⁶

What is perhaps more relevant than the Court’s reliance on these two questionable authorities to reject the application of the *nemo dat* principle is that it overlooked other cases that were clearly more relevant.⁷⁷ One such case was discussed by the Court in another context. This was the decision of the Privy Council in *The Queen v. Hughes*⁷⁸. As noted by the Court, much of that case had to do with the technical requirements for a writ of *scire facias* to challenge the validity of a crown grant. However, the following comment by Lord Chelmsford shows that failure to follow the requirements of a statute will void a crown grant:

In the present case a statutory power is given to the Governor to be exercised over the Crown lands. This power must be strictly construed. The leases which he is authorized to make are limited to the extent of eight acres. This quantity is said to be exceeded in the leases in question; if so, they are altogether void, and the lessees are intruders upon the lands.⁷⁹

Another relevant Privy Council decision was *Reg v. Clarke*⁸⁰ in which the Court said that, since the grant was contrary to the terms of an Ordinance, “the grant must fall”.

What is truly surprising is the failure of the Court of Appeal to consider Supreme Court of Canada cases dealing with surrenders of reserve land. In

⁷⁶ *Supra* note 1 at 295.

⁷⁷ See M.D. Walters, “The Sanctity of Patents: Some Thoughts On The Validity of Crown Patents for Un-Surrendered Aboriginal Lands”, prepared for National Conference on Aboriginal Law and Governance 2001, J. I. Reynolds (chair), Pacific Business & Law Institute, Vancouver, B.C., April 19-20, 2001 [unpublished]. See also McNeil, *supra* note 1 at 42-44.

⁷⁸ (1866), L.R. 1 P.C. 81.

⁷⁹ *Supra* note 1 at 92.

⁸⁰ (1851), 7 Moo. 77, 13 E.R. 808 (P.C.).

Easterbrook,⁸¹ the Supreme Court of Canada held that a 99-year lease of reserve lands granted by a band without a surrender meeting in breach of the *Royal Proclamation of 1763* was void and the lessees could not assert rights under it. This decision is similar in many ways to the *Sarnia* case including the failure to comply with the surrender provisions of the Royal Proclamation, the approval of the disposition of reserve lands by the chiefs alone and the receipt of the proceeds of disposition by the band. As a decision of the Supreme Court of Canada clearly on point, it was binding on the Ontario Court of Appeal yet the Court did not even mention it despite the references made to it in the *facta* filed on behalf of the Band and the decision of the motions judge.⁸²

In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*,⁸³ the Supreme Court of Canada held that a failure to comply with the requirements of the Indian Act with respect to the granting of a lease meant that the lease was void. This decision was followed by the Exchequer Court of Canada in *The King v. Cowichan Agricultural Society*⁸⁴ and by the Federal Court in *Lower Kootenay Band v. Canada*.⁸⁵ Another relevant decision of the Supreme Court of Canada was *Tonks v. Reid*⁸⁶ in which the Court held that a sale by a municipality in breach of statute was void.

It is submitted that these cases support the argument of the Chippewas that the failure to comply with the surrender provisions of the *Royal Proclamation 1763* rendered invalid any transfer of the land and thereby invoked the application of the *nemo dat* principle and excluded the application of the *bona fide* purchaser for value without notice doctrine.⁸⁷

4. Discretionary Nature of Equitable Remedies

Having satisfied itself that the *nemo dat* principle did not invalidate the Crown patents, the Court again referred to the discretionary nature of equitable remedies.⁸⁸ There is no question that this is correct.⁸⁹ However, legal remedies are available as of right and a court has no discretion to deny them however

⁸¹ *Supra* note 18. Giving the judgment of the Court, Newcombe J. said at 217-8, "(t)he lease was ineffective and void at law, by reason of the absence of any authority on the part of the grantors to make it, and for non-compliance with the preemptory requirements of the proclamation, which have the force of statute —."

⁸² Chippewas Appellant's Factum, para. 72(c); Chippewas Respondent's Factum, paras. 123, 233-234, 255; See discussion of *Easterbrook* by motions judge, *supra* note 2 at paras. 722-29.

⁸³ [1950] S.C.R. 211 [hereinafter *St. Ann's Island*].

⁸⁴ [1951] 1 D.L.R. 96 (Ex. Ct.).

⁸⁵ [1992] 2 C.N.L.R. 54 (F.C.T.D.).

⁸⁶ [1967] S.C.R. 81; see also *Re Director of Soldier Settlements of Canada* (1971), 18 D.L.R. (3d) 94 at 96-7 (Sask Q.B.).

⁸⁷ See text accompanying notes 97-110.

⁸⁸ *Supra* note 1 at para. 296.

⁸⁹ Megarry & Wade, *supra* note 7 at para. 4-014.

much it may wish to do so.⁹⁰ In particular, as noted by *Megarry & Wade*, “if A trespassed on X’s land X had a legal right to sue him for damages and, on proving his case, he was entitled to damages as of right.”⁹¹ Therefore, to the extent that the Chippewas were suing the present landholders in trespass, and could show that the landholders claimed under an invalid grant, the Court had no discretion to deny the claim.

5. *Defences of Laches and Acquiescence*

The Court then discussed the doctrines of laches and acquiescence⁹² and applied them to deny the claims of the Chippewas.⁹³ The motions judge had

⁹⁰ See *supra* notes 6-7; *MCC Proceeds v. Lehman Bros.*, *supra* note 49 at 701 per Hobhouse L.J.: “It is of the character of legal remedies that they derive from legal rights. This is one reason why they are not discretionary.” The common law approach was set out by Holt C.J. in *Ashby v. White*, (1704) 2 Ld. Raym. 938, 92 E.R. 126 (Ct of Common Pleas) at 953, 136: “If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.” See also, *Constantine v. Imperial Hotel*, (1944) 1 K.B. 693 (Eng. K.B.). The Court’s refusal to give a remedy for the infringement of the aboriginal and treaty right of the Chippewas in their land raises jurisprudential as well as constitutional concerns (*supra* note 26). The Court found that there had been no surrender of their title to the land and that “aboriginal title can be lost only by surrender to the Crown.” (para. 219) Yet it denied any remedy to prevent loss of the rights relating to that aboriginal title. As the jurist, John Austin, pointed out in 1832, “it may be said of rights conferred by positive law that they are sanctioned or protected *legally*.” The Province of Jurisprudence Determined (London: Weiderfeld and Nicholsen, 1955 reissue) at 159, see also H.L.A. Hart, “Definition and Theory in Jurisprudence” (1954) 70 LQR 37 esp. at 49; W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press 1923) at 50-64; A. Ross, *On Law and Justice* (London: Stevens & Sons, 1958) at 172-174. If the Court exercises a supposed discretion to “withhold a remedy to protect or vindicate aboriginal title” (para. 275), it is withholding the protection of the legal system to the rights associated with that title and thereby denying them the status of legal rights. “Rights” without a legal remedy are not worthy of being called legal rights whatever else they may be called. The situation is not unlike that after the Federal Court of Appeal held in *Guerin* that the Government could not be held legally accountable to the Musqueam Band but was only under a “governmental obligation” or “political trust”: (1983) 143 D.L.R. (3d) 416. That decision was reversed by the Supreme Court of Canada, *supra* note 10. “The motions judge recognized the true relationship between rights and remedies: “(a) boriginal title cannot exist as a right in the air without a remedy for its vindication on the ground”, *supra* note 2 at para 462. The Court of Appeal, however, seems to think that you can have a right without a remedy. Its view seems to be summed up in the following comment at para 253; “(t) here is a distinction between the right of every person to have his or her claim considered by the court and the discretion of the court to grant or withhold relief upon full consideration of the case.” See on the dangers of such “discretionary remedialism”, P. Birks, “Rights, Wrongs and Remedies” (2000) 20 Oxford J. Of Legal Studies 1 at 22-24 which he describes as “a nightmare trying to be a noble dream”. He comments that “the rightlessness implicit in discretionary remedialism would deprive citizens of their dignity, bringing them as child-like supplicants – before a court which had grown too big for its boots.”

⁹¹ *Supra* note 7 at para. 4 — 014. See also *Ashburner*, *supra* note 41 at 18.

⁹² *Snell’s Equity*, *supra* note 7 at para 3-19.

⁹³ *Supra* note 1 at paras. 297 to 302.

refused to apply these equitable defences on the ground that there was no evidence that the Chippewas had knowledge of the actual terms of the Cameron transaction. The Court of Appeal said this was not correct. The Chippewas knew of the lack of a surrender and this meant that they had sufficient knowledge of the facts necessary to assert a claim. Indeed, they had actively acquiesced in the transfer by seeking and receiving payment of the sale proceeds. The Court concluded, "on these facts, we can see no reason why the equitable defences of laches and acquiescence should not apply."⁹⁴ Again, it should be stressed that laches and acquiescence only apply to claims being brought for equitable remedies. They do not apply to claims being brought for common law remedies such as damages for trespass.⁹⁵ As noted in *Snell's Equity*, such a claimant was entitled to his remedy "however dilatory he had been."⁹⁶

6. Doctrine of Good Faith Purchaser For Value

Finally, the Court of Appeal applied the doctrine of good faith purchaser for value⁹⁷ to defeat the claims of the Chippewas.⁹⁸ It quoted the motions judge who, in turn, had quoted from the decision of the English Court of Appeal in Chancery in *Pilcher v. Rawlins*.⁹⁹ He had held that there was no evidence that any owner subsequent to Cameron had any knowledge or reason to know that the lands were unsurrendered Indian lands. The Court referred to and rejected the position of the Chippewas as follows:

The good faith purchaser defence is an equitable doctrine and the Chippewas assert that their interest in the lands is a purely legal one not caught by purely equitable defences. For reasons already given, we do not accept this argument. To the extent that the Chippewas assert a claim for the return of the lands, they assert a claim to an equitable remedy that is subject to equitable defences.¹⁰⁰

It then reversed the finding of the motions judge that a 60-year equitable limitation period ought to apply.¹⁰¹

⁹⁴ *Ibid.* at para. 302.

⁹⁵ *M(K) v. M(H)*, *supra* note 5.

⁹⁶ *Supra* note 7 at 645-46.

⁹⁷ *Hanbury & Martin Modern Equity*, *supra* note 41 at 32 ff. Megarry & Wade, *supra* note 7 at 138-50; *Snell's Equity*, *supra* note 7 at 48-61; Ziff, *Principles of Property Law*, 2nd ed (Toronto: Carswell, 1996) at 402-6; see *Durrani v. Augier* (2000), 50 O.R. (3d) 353.

⁹⁸ *Supra* note 1 at paras. 303-309. See comments by McNeil, *supra* note at 38-39, 47.

⁹⁹ (1872), L.R. 7 Ch. App. 259. In that case, the English Court of Appeal in Chancery made it clear that the doctrine was based on the legal title of the purchaser and the equitable interest of the other claimant, see Sir G. Mellish L.J. at 274: "I am clearly of opinion — that where a trustee in breach of trust conveys away a legal estate which he possesses and that legal estate comes into the possession of a purchaser for valuable consideration without notice, that purchaser can hold the property against the cestuis que trust who were defrauded by the conveyance of the trustee." See also Sir W.M. James L.J. at 268-9.

¹⁰⁰ *Supra* note 1 at para. 306.

¹⁰¹ *Ibid.* at paras. 307-309.

The following comments may be made on the Court's application of the doctrine of *bona fide* purchaser for value without notice to defeat the aboriginal title of the Chippewas:

(a) the doctrine only applies if the interest being defeated is equitable rather than legal. The Court had earlier found that aboriginal title should not be classified as falling exclusively within either category. Accordingly, there was no justification for applying this doctrine. It is a technical rule that is based on such classification of interests in land. The doctrine has no meaning if one rejects, as the Court did, the distinction between legal and equitable interests in land. By rejecting such a distinction, the Court of necessity rejected the relevance of the doctrine. It is as if a taxonomist had declared, despite all the scientific evidence to the contrary, that apples and oranges were the same fruit but went on to declare a preference for the taste of oranges.

(b) the doctrine only applies if the interest being given priority is legal rather than equitable. Since the landholders were claiming under a Crown grant made in breach of the *Royal Proclamation of 1763*, it is difficult to see how they could establish any interest let alone a legal interest in the lands sufficient to bring the doctrine into play: see the *Easterbrook*¹⁰² and *St. Ann's Island*¹⁰³ decisions of the Supreme Court of Canada discussed above.¹⁰⁴ In this regard, it must be kept in mind that the onus lies on the purchaser to prove that he is a *bona fide* purchaser for value.¹⁰⁵

(c) the doctrine is an exception to the basic rule of both equity and law that interests in land rank in the order of creation.¹⁰⁶ Since aboriginal title pre-dates contact with Europeans,¹⁰⁷ there can be no doubt that such title enjoys priority over subsequent interests except to the extent such title has been validly extinguished or surrendered or its infringement can be justified applying the test established by the Supreme Court of Canada based on section 35(1) of the *Constitution Act* 1982.¹⁰⁸ There was neither valid extinguishment nor surrender on the facts of the *Sarnia* case and the Court of Appeal did not apply that test.

¹⁰² *Supra* note 18.

¹⁰³ *Supra* note 83.

¹⁰⁴ See text accompanying notes 77-86. It is significant that the Ontario Court Of Appeal does not say that the patents were valid in law. Rather, the Court states that, as the result of its refusal to grant a remedy to the Chippewas, they are valid for practical purposes: "Accordingly, for practical purposes, a patent that suffers from a defect that renders it subject to attack will continue to exist and to have legal effect unless and until a court decides to set it aside", at para 261. See Waters, *supra* note 1, at 127 for concerns from the viewpoint of the landholders: "The approach of the Court of Appeal in *Chippewas of Sarnia*, viewing the patent as voidable and a remedy as discretionary, is not a guarantee to landowners that the patentee and his or her successors in title win win."

¹⁰⁵ Megarry & Wade, *supra* note 7 at para. 5-005; *Snell's Equity*, *supra* note 7 at para. 4-09.

¹⁰⁶ *Hanbury & Martin Modern Equity*, *supra* note 41 at 33.

¹⁰⁷ See *Guerin*, *supra* note 10 at 379, *Delgamuukw*, *supra* note 30 at 1082.

¹⁰⁸ *Supra* notes 26-31.

(d) the doctrine is not an exception to the rule of *nemo dat*¹⁰⁹ rule so that, to the extent that the rule applied to prevent Cameron from transferring good title to the landholders, the doctrine has no application. In the words of the Circuit Court of Appeals, Eighth Circuit: “the good faith of a purchaser cannot create a title where none exists.”¹¹⁰

(e) the Court seems to confuse the equitable nature of the remedy being sought with the nature of the interest of the claimant. The doctrine is based on the classification of the relevant interests in land not on the nature of the relief being sought.

V. Conclusion

In *Sarnia*, the Ontario Court of Appeal purported to apply equitable principles to defeat the title of the Chippewas to their reserve land. For the reasons give above, it is submitted that the Court misapplied these principles to the facts as found by them. In particular,

(a) equitable principles were not relevant to the claim for damages for trespass to land which is a claim based on the common law and not equity, and

(b) the Court wrongly rejected the distinction between equitable and legal interests in land at least so far as aboriginal title is concerned and, by doing so, it removed any justification for applying the doctrine of *bona fide* purchaser for value without notice in order to defeat the aboriginal title in the land.

Further, in order to defeat the aboriginal and treaty rights of the Chippewas to the land, the Court largely ignored the most basic principle of property law: the *nemo dat* principle. It also ignored relevant decisions of the Supreme Court of Canada and, in particular, the *Easterbrook* and *St. Anne's Island* cases as well as section 35(1) of the Canadian Constitution. All in all, it is a most inequitable decision which gave the Band no remedy for the wrongful taking of their land.¹¹¹ On the other hand, by using judicial discretion and equity's blunt tool

¹⁰⁹ “The plea of purchaser for valuable consideration without notice is not available to a person claiming under a void deed, because if there is no transmission of estate, legal or otherwise, there is no basis upon which to found such a plea: *nemo dat quod non habet*.” (Di Castri, *Law of Vendor and Purchaser*, 3rd ed (Toronto: Carswell, 1988) at section 522).

¹¹⁰ *Iowa Land and Trust Co. v. United States*, 217 F. 11 (8th Cir. 1914) at 13; See also *Moffat v. United States*. 112 U.S. 24 (1884) at 31-32.

¹¹¹ The Court may have been unduly influenced by the claim against the Crown for breach of fiduciary duty which was not before it: see para. 246. Recent decisions of that Court and others have eroded the availability of a remedy for breach of that duty: *Ardoch Algonquin First Nation v. Ontario* (1997), 148 D.L.R. (4th.) 96 at 123-25 (Ont. C.A.); *Fairford First Nation v. Canada*, *supra* note 2 at paras 23-67; *Tsartlip Indian Band v. Canada*, [2000] 2 F.C. 314 at paras. 33 — 38 (Fed. C.A.); *Mathias v. The Queen*, (2001) F.C.T. 480 at paras. 464-527 (Fed. T.D.); see J.L. Reynolds, “Guerin After Sixteen Years” prepared for Conference on Aboriginal Law 2000, Pacific Business & Law Institute, 19 & 20 October 2000. On the Band's suggestions on how to reconcile their claim with the interests of those now occupying the land, see E.K.P. Grace, “The Assertion of Aboriginal and Treaty Rights in Unsurrendered Reserve Lands” at 28-30 prepared for National Conference on Aboriginal Law and Governance 2001, *supra* note 77.

of the doctrine of the bona fide purchaser for value without notice to effectively defeat the interest of the Chippewas in their land, the Court missed the opportunity to contribute to the jurisprudence on the justificatory test mentioned above which was established by the Supreme Court of Canada to reconcile aboriginal interests with those of the rest of Canadian society. The interests of the current innocent occupants of the lands wrongly taken from the Band have to be reconciled in some manner with the interests of the Band. The Band recognized this and suggested some ways in which it might have been achieved. The Court ignored these suggestions and treated the matter as a zero sum game. This is not the way to fairly deal with such sensitive and important issues.

The *Sarnia* case is also an example of what Prof. Glanville Williams describes in his book for first-year law students as the "prevailing ignorance of legal history" which sometimes causes modern courts to express "the heretical opinion that law and equity have become fused."¹¹² Unfortunately, even the Supreme Court of Canada is not free of this criticism and, as demonstrated in *Canson* and more recently in *Cadbury Schweppes v. FBI Foods*,¹¹³ judges of that court have made casual references to "the merger of law and equity." Unless carefully understood in the context of the particular case and legal history, these references could reverse centuries of legal development, abolish the law of

¹¹²*Learning The Law*, 11th ed (London: Stevens, 1982) at 27. He comments, "the general proposition that law and equity are now fused is not sustainable". The heresy may have taken root more easily in Canada because of the lack of Canadian texts on equity at large: Waters, *supra* note 35 at 621. For Canadian texts on limited aspects of the law of equity, see Berryman, Ellis and Sharpe, *supra* note 41. See also C.E.D., *supra* note 37. L.D. Smith comments in his review of 3 Australian books on equity, "(u)nlike the situation in the United Kingdom or in Australia, there are no Canadian books about equity as such. Few Canadian law schools offer a course called 'Equity'; their courses tend to be organized on functional lines not historical ones. As a result, Canadians learn their equity in bits and pieces." L.D. Smith, Book Reviews (1996) 75 Can. Bar Rev. 388 at 389-90. Mitchell McInnes has pointed out, "(e)quity, like unjust enrichment, does not receive the scholarly attention that it deserves in Canada. There are no modern texts on the subject and the leading work on equity's most significant contribution, trusts, is now fifteen years old. — As might be expected in the circumstances, problems have arisen." M. McInnes, "Reflections on the Canadian Law of Unjust Enrichment" (1999) 78 Can. Bar Rev. 416 at 439. He also notes, with respect to the law of restitution, that Canadian courts may find it desirable to consult the large and sophisticated body of literature that has recently developed in England: at 444. If the fusion fallacy becomes orthodoxy in Canada, that will not be of any assistance as England has effectively rejected the fallacy; see *supra* note 49. In his discussion of Lord Cairns' Act in Canada, Prof. Edward Veitch has drawn attention to the forgetfulness of judicial officers, practitioners and academic lawyers in Canada of the origins of the courts of equity, of the import of the Chancery Amendment Act and its successors in Canada. He comments, with refreshing frankness, "[a]nd that in turn may speak to inadequacies in our law school teaching over an extended period": E. Veitch, "An Equitable Export — Lord Cairns' Act in Canada (1980) 12 Ottawa L. Rev. 227 at 234.

¹¹³[1999] 1 S.C.R. 142 at 177 per Binnie J. As noted by Meagher, Gummow & Lehane, *supra* note 5 at para. 221, "(t)he fallacy is committed explicitly, covertly, and on occasion with apparent inadvertence. But the state of mind of the culprit cannot lessen the evil of the offence." See also *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 at 202 (S.C.C.) and *Western Canadian Shopping Centres Inc. v. Dutton* 2001 S.C.C. 46 at para. 24

trusts and equity¹¹⁴ and generally throw the law into disarray in numerous areas¹¹⁵ just as the *Sarnia* decision makes nonsense of the doctrine of the *bona fide* purchaser. The relationship between law and equity must continue to develop in a well-thought out fashion and may, indeed, lead to a hybrid form of

¹¹⁴ See Lord Selbourne L.C., *supra* note 38 and *Joseph v. Lyon*, *supra* note 39 at 287 per Lindley L.J.: "Reliance was placed upon the provisions of the *Supreme Court of Judicature Acts*, 1873, 1875, and it was contended that the effect of them was to abolish the distinction between law and equity. Certainly that is not the effect of those statutes: otherwise they would abolish the distinction between trustee and cestui que trust"; Waters, *supra* note 35 at 690-91: "texts on equity law would then disappear." In *Law of Trusts in Canada* 2nd ed. (Toronto: Carswell, 1984), he notes at 11: "(t)hus, these two sets of estates, the legal and the equitable, became the base upon which the modern trust is built." See also G. La Forest, *supra* note 61.

¹¹⁵ In *Perry v. Outerbridge*, (May 7, 2001) C34942 (Ont. C.A.), the Court noted the relevance of its decision in *Sarnia* to a claim for relief under the Fraudulent Conveyances Act and the possible availability of equitable defences to a statutory claim: paragraph 35. See Perell, *supra* note 53 for a detailed account of nine areas of law which would be affected by the Court's adoption of the fusion fallacy. Prof. Waters concludes that, with a few exceptions such as set-off and probably tracing, there is little to be gained from a merger of law and equity: "(t)he 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", *supra* note 35 at 694. The damage caused by the indiscriminate merger of law and equity and the consequent disappearance of equity as a distinct body of law may go beyond doctrinal chaos and unpredictability caused by the ever expanding role of judicial discretion. Prof. Waters also notes at 690-91, "(e)very 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 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. — 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 the courts would no longer have the means of filling." Sir Frank Kitto, former justice of the High Court of Australia, was moved by the fusion fallacy to write in the Foreword to the First Edition of Meagher, Gummow & Lehane, *supra* note 5, "[a]nd Equity remains also, the saving supplement and complement of the Common Law at the ends of the earth as in England, prevailing over the Common Law in cases of conflict but ensuring, by its persistence and by the very fact of its prevailing, the survival of the Common Law and the enduring influence of English jurisprudence as a whole in the history of civilisation. The task of successfully carrying forward the two bodies of law together, in a world that is changing swiftly but in some respects is ever the same, is for constructive but reverent hands to undertake." In his Foreword to the 30th edition of *Snell's Equity*, *supra* note 7, written in October 1999, Lord Millet said, "equity is on the on the march again. After long years of slumber during the post-war period — it is now fully awake. Indeed, it is rampant." It would be ironic and sad if this awakening force for greater justice (see *Pettus v. Becker* [1980] 2 S.C.R. 843 at 847-8 per Dickson J., Reynolds, *supra* note 111) were to be silenced so soon after its revival.

law¹¹⁶ but, as La Forest J. recognized in *Canson* “indiscriminate attempts at melding the whole of the two systems” should give room for concern.¹¹⁷ The practical result of the attempt in the *Sarnia* case was to allow principles of equity to defeat the common law claim in trespass. This turns on its head the famous dictum of Prof. Maitland that, “equity had come not to destroy the law but to fulfill it.”¹¹⁸ The *Sarnia* case should indeed give great cause for concern to all lawyers and not just those practising in the aboriginal law area.

¹¹⁶ Chief Justice McLachlin has written of the need to work toward reconciling equity with other rule systems to create a single, coherent doctrine of civil remedies: Beverley M. McLachlin, “The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective”, in D.W.M. Waters, ed *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993) 37 at 40; see also *Tinsley v. Milligan*, *supra* note 49 at 371, 375-76; *Napier and Ertick (Lord) v. Hunter*, *supra* note 49 at 743 per Lord Goff: “No doubt our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole.” For a recent example of this gradual, reasoned process of reconciliation, see the judgement of Lord Millet in *Foskett v. McKeown*, *supra* note 49, in which he said at 128: “Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense maintaining different rules for tracing at law and equity. One set of tracing rules is enough.” Another recent example is the decision of the House of Lords in *Bank of Credit and Commerce International S.A. v. Munawar Ali*, *supra* note 49, where the Court rejected different rules for construction of documents at law and in equity. See generally, R.A. Pearce & J. Stevens, *The Law of Trusts and Equitable Obligations* (London: Butterworths, 1998) at 11-17.

¹¹⁷ *Supra* note 61. Smith, *supra* note 112 at 389 refers to the approach in *Canson* as an example of “equity pragmatism” as opposed to the “equity purism” advocated by Meagher, Gummow and Leane, *supra* note 35. He notes at 390 that “(t)he careful equity pragmatist takes full account of the historical development of the law and understands the continuing importance of both legal and equitable doctrines and modes of reasoning.” With respect, the decision of the Ontario Court of Appeal in the *Sarnia* case cannot be said to be follow this carefully considered approach.

¹¹⁸ *Supra* note 42 at 17, see also Sir Nathan Wright L.K. in *Lord Dudley and Ward v. Lady Dudley* (1705), Prec.Ch. 241, 24 E.R. 118 at 244, 119. The fact that equitable doctrines were used to deprive the Chippewas of a remedy for their rights in the land is especially ironic in view of the following statement by Sir Nathan Wright L.K. in *Lord Dudley and Ward v. Lady Dudley* (1705), Prec. Ch. 241, 24 E.R. 118 at 244, 119: “Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in its constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it” (emphasis added.)