KEY PROVISIONS

* L&E Act s.44: Conflict btwn L & E, E prevails
* L&E Act ss.2, 4-10, 31, 44: Fusion, court of general juris can administer E
* L&E Act s.39(1)(2): Interlocutory injunctions where “just or convenient”, may impose terms & conditions
* L&E Act s.24: Relief against penalties and forfeiture
* Lord Cairns’ Act s.2: Gave E courts the power to grant damages
* Enforcement of Canadian Judgments and Decrees (2003): BCSC to recognize and enforce monetary judgment and decrees from w/in the country.
* BC Limitation Act 2012: s.2 E&L limitation periods. 2yrs from discoverability
* Property Law Act BC 1996: Gives the court a broad discretion to substitute money for the right of an encroachment

MAXIMS

* **Equity follows the law** (pg.1):
	+ E accepts the L position but then imposes it’s own obligations, adds something to the L decision
* **Equity will not suffer a wrong to be without a remedy**:
	+ Re MacDonald. L rem must be inadequate before an E rem is ordered (ex. injunctions prevent a threatened wrong, CL only offers damages after the wrong has occurred). See also Polai
* **Where the equities are equal, the law shall prevail**:
	+ Equities = ethical positions of the parties, Law = CL or statute (ex. Re MacDonald, unequal Equities)
* **Where the equities are equal, the first in time prevails**:
	+ Chronological ranking and prioritization of competing E claims.
* **He who seeks equity must do equity**:
	+ P must act equitably, court may impose terms and conditions on receiving the equitable relief (ex. for SP, applicant must be ready & willing to perform their side of the agreement (“mutuality”), ex. *ex parte* injunctions need “full and frank disclosure”).
* **He who comes into equity must come with clean hands**:
	+ P must not have acted inequitably in the particular transaction or litigation leading to the E case. Polai, Tinsley
* **Delay defeats equity**:
	+ CL claims have statutory limitation periods, while E relies on discretion (delay, laches, acquiescence).
* **Equality is equity**:
	+ E prefers equal division, rather than “winner takes all”. Proportionality, balance, sense of fairness.
* **Equity looks to the intent rather than the form**:
	+ Ex. Re MacDonald, defect was only 1$, thought he was doing right
* **Equity looks on that as done which ought to be done**:
	+ Ex. Re MacDonald what ought to have been done was that MacDonald pay the $1. Equity assumes he paid it and proceeded accordingly (Walsh v Lonsdale, Manchester Brewery)
* **Equity imputes an intention to fulfill an obligation**:
	+ If you intend to take on an obligation, must carry it out.
* **Equity acts *in personam***:
	+ Equity makes decrees against people only, not against property or things
* **Equity will not act in vain**:
	+ E won’t make a decree that will not be effective (ex. Penn v Baltimore)
* **Equity aids the vigilant, not the inoldent** (*Vigilantibus non dormientibus aequitas, subvenit*): Blundon v Storm
* **Equity will not mend a bad bargain**:
	+ Parties to K are free to choose their own terms (Nuytten and Bakalryk v Stein)

HISTORY

|  |  |
| --- | --- |
| Basic Principles | - Equity gives discretionary relief from the CL, decrees in indiv cases* E remedies are discretionary, L remedies given as of right

- E only applies when there is an inadequacy in the L remedy* A correction of L justice

- E and CL have distinctive substantive rules & remedies, but all done through one court of general jurisdiction (Judicature Act, L&E Act)- CL damages are compensatory while E compensation is restorative- CL acts *in rem*, E acts *in personam* |
| 14th & 15th C | - Chancellor, head of Chancery, a “**court of conscience**”* Can’t get relief elsewhere, present petition to king and council

- Medieval times, a division of courts, CL v E, lots of tension |
| 16th C | - Earl of Oxford’s Case: Lord Chancellor Ellesmere vs. Chief Justice Coke* In the case of a conflict btwn L & E, E prevails (**L&E Act s.44**)

- Not many conflicts b/c **E follows the law** (maxim) |
| 18th & 19th C | - Concern about E becoming too systematic, procedural delay and cost- 1858 Chancery Amendment Act/**Lord Cairns’ Act*** S.2: Rem of **E damages** in addition to/substitution for inj or SP. Awarded partly for future wrongs, available for E or L wrong.
* Distinct from **E compensation**, awarded for past wrongs, paid to make up for loss from breach or loss of opportunity when other rem not approp. Only for E wrong (see Canson, Cadbury)

- 1873, 1875 **Judicature Acts**: **Fusion** of the courts* L&E Act: CL and E applied in court of general jurisdiction in BC

- Both are part of our **received law** in BC |

FUSION AND CONTINUING DISTINCTIONS

- Remedies have not fused (United Scientific, Canson, Cadbury)

- Decrees *in personam* are able to grant SP regarding foreign land (Penn v Baltimore, West v Dick), provided D is in the jurisdiction

|  |  |
| --- | --- |
| Re MacDonald1972 Ont | - Last payment $99 + undated $1 cheque, not discharged from bankruptcy. Died, group life policy payable to his estate, not a beneficiary. $ to creditors or to his executor (trustee)?- Court gave $ to the family - injustice to the family by withholding total b/c of $1, as in law, is greater than injustice to creditors. Apply E |
| United Scientific Holdings v Burnley 1977 Eng | - Lord Diplock argued that fusion (Judicature Act) went past procedural matters and fused substantives rules and remedies.- Contrary to the orthodox view of purely procedural fusion* **Most accepted view is orthodox view**
 |
| **Canson** Enterprises v Boughton 1991 SCC | - P bought warehouse at big markup, intermediary said that was what they paid. D lawyer for both intermediary and P, knew of profit.- Began building, land not stable, piles too shallow, building sunk- P claimed E comp for breach of fiduciary duty* Majority: CL req of causation should apply to E compensation, incl mitigation, foreseeability, and contributory negligence.

- Dissent says b/c E has unique goals of enforcing duties and obgs, not compensating for them. Causation shouldn’t be applied as strictly* E compensation should remain completely distinct
 |
| **Cadbury** Schweppes v FBI Foods 1999 SCC | - P produced Mott’s Clamato Juice, terminated FBI license to manufacture. FBI took the recipe, minus clam juice- No claim in CL b/c technically no violation, but E breach of confidence* Court ordered E comp, a monetary rem less powerful than an inj, so FBI could keep making it but would have to pay

- **Laches** a factor. Delay + harm to FBI foods (pg.5)* Based on Storm (pg6), can be degree of laches. Didn’t get inj but still got E comp – so **laches is a bar to inj but not to E comp**

- Followed Canson dissent: E comp an E rem separate from L damages* **CL & E not fused in remedies**: Overturned Canson
 |
| Penn v Lord Baltimore 1750 Eng | - Border btwn Pennsylvania & Maryland, agreed to arbitration. Penn brought litigation in Eng for decree of SP for using arbitration* E decrees *in personam* enforceable even if asset is elsewhere
* **E will not act in vain** (maxim) – couldn’t enforce CL across borders, but could enforce against person who is in Eng, indirectly impacting property outside the juris

- Remedy of **sequestration**. If D leaves the juris, can seize assets in the juris and hold them to coerce compliance w decree |
| West & Partners v Dick 1969 Eng | - Eng vendor, Eng purchaser, land in Scotland. Purchaser backed out- P brought a case for SP* Court has E juris to give SP *in personam* b/c parties in juris

- Decree would only not be made if Scottish law would actually prohibit the execution of the decree. Enforceable through contempt |
|  | - Limits on territorial jurisdiction:* Futility: Conveyance not recognized in other juris
* No *in rem* enforcement against foregin assets (ex. Colettis v Colettis, can order transfer of prop in Greece, but can’t order it to be signed)
* Must be extra-territorial recognition of the E decree. BC has the Enforcement of Canadian Judgment and Decrees statute.
 |
| Pro Swing v **Elta** Golf 2006 SCC | - **Enforcement of foreign non-money judgments**- Pro Swing in Ohio, Elta in Ont. Trademark infringement, settled by consent permanent inj. Elta didn’t follow, civil contempt decree in Ohio* Pro Swing wanted to bring order to Ont and have it enforced

- Court said consent inj enforceable in theory, but terms too uncertain- Said **contempt** order not enforceable b/c of penal nature (dissent)- SHEP: Just a K, governed by stat, shouldn’t enforce US leg in Canada |

EQUITABLE DEFENCES

|  |  |
| --- | --- |
| General | - Claims: breach of fiduciary duty, breach of confidence- Rems: Discretionary. Inj, SP, E damages, E comp- Defences (discretionary factors affecting E rem): **Laches/Delay** (Delay + harm/prejudice), **Acquiescence/proprietary estoppel** (Denial of both L and E), **Unclean hands** (P’s conduct in the immediate dispute)- Also consider: Futility**,** Consequences (“hardship”) to D or 3rd persons**,** Public interest**,** Weighing the balance of convenience |
| Laches, Delay & Acquiescence | - BC Limitation Act now gives limitation periods to E under s.2(a)(b). Defences act w/in those 2 years. Past that, just SOL* S.8 general discovery: date from which knew or reasonably ought to have known of injury, that it was caused by D, and that a court proceedings would be appropriate to seek rem

- Laches doesn’t operate against Crown (Nova Scotia v City of Halifax), except in contract cases (Bank of Montreal v AG Quebec) |
| Estoppel | - Equitable estoppel (promises of future facts, intentions)- Proprietary estoppel: Shield OR a sword (Diking District)* Party to be estopped must have acted unconscionably (misleading but knowing encouragement). Doesn’t require a mistake of L rights
* Party asserting estoppel must have reasonably relied on the encouragement & suffered prejudice
 |

LACHES

|  |  |
| --- | --- |
| Lindsay Petroleum v Hurd 1874 Eng | - Laches = Unreasonable delay + prejudicial change of circumstances for D OR D’s reasonable belief that P had waived enforcement* Any delay in proceeding w claim may give rise to laches

- Question of degrees, case-by-case (Erlanger v New Sombrero 1878) |
| M(K) v M(H) 1992 SCC | - P claim damages incest, 12 years. Breach of fiduciary duty.* Considers: Explanation for delay & **P’s lack of knowledge of rights**

- Can’t be said to acquiesce until P has full knowledge of facts – P only discovered upon going to therapy, reasonable |
| Canada Trust v Lloyd 1968 SCC | - Length of delay. 43 years btwn cause of action and bringing the claim. **Passage of time not enough, effect on D is more important**.* Consider: conduct of parties, effect of the delay, public interest, knowledge of the parties (M(K) v M(H))

- D benefited from the delay, rather than suffered, no defence |
| Wewaykum Indian Band v Canada 2002 SCC | - 2 Indian bands had land allocated by gov in 18th C. Claim breach of fiduciary duty - gov mixed up lands, want E comp* Barred by laches. Hadn’t the claim known in recent years, bands spent $ establishing lives on what they thought was their land
 |
| **Blundon v Storm** 1970 Nova Scotia | - **Equity aids the vigilant, not the indolent** (maxim)- Treasure hunt. D ending partnership. Ps said no, took no legal measures. D found the treasure, Ps claim for their share of profits.- TJ: Storm got 75%, Ps split the rest- CA: Storm got 100% b/c of laches – partners wouldn’t have said anything if he failed. Should have got interlocutory inj in first place- SCC: Restored TJ’s decision – would have been large cost for Ps to get inj when they didn’t know if they would need it- **Laches can be a partial defence**: bar to inj but not to E comp (Cadbury 3) |

ESTOPPEL

|  |  |
| --- | --- |
| Trethewey-Edge Dyking District v Coniagas Ranches 2003 BCCA | - Property owners incorporated a diking district. Ranch allowed ppl to enter for maintenance. Change in mgmt, banned from entering prop* Court found **proprietary estoppel** (sword) – no K, lease, or easement ever made, but had an E easement.
* Estoppel by acquiescence – D led P to believe they wouldn’t enforce strict L rights, P relied on that (unconscionable)

- Considered 3rd parties: Residents paid taxes to maintain district |

UNCLEAN HANDS

|  |  |
| --- | --- |
| City of Toronto v **Polai** 1969 Ont | - D renting out house against by-law. P had a list, weren’t enforcing- **Equity will not suffer a wrong to be w/out a rem** – L rem not adequate, D repeatedly violating, said would continue. P wanted inj- No unclean hands b/c operation of other suites did not relate to *her* operation, no “immediate and necessary relation” to P’s breach. Inj suspended for 1, give a chance to fix it first. Terms & conditions w inj* Public interest in enforcement prevails over D’s private interest
 |
| Tinsley v Milligan 1994 Eng | - Owned lodging house. Both contributed but registered in P’s name so D could claim welfare. P left, asserted L title. D claimed an E interest.* P brought defence of unclean hands

- Majority: A party to an illegality can recover through an E or L prop interest only if he can establish title w/out relying on their illegality* D could show contribution (w/out justifying $), created a trust
* So no unclean hands here, not related enough
 |

INJUNCTIONS

|  |  |
| --- | --- |
| Basic Elements | **1)** Wrong – actual or threatened. **2)** Acts *in personam*.**3)** Inadequacy of the legal remedy (damages)? **4)** Discretionary- L&E Act s.39(1): Can be granted in any case where it is “just or convenient”, (2) May add terms and conditions (Polai) (ex. Und Dam)- Can’t get inj against Crown, not punishable by contempt (Crown Proceeding Act s.11). Get a declaratory order instead. Not a coercive order, just a judicial statement of legal position (SCourt Civil Rules s.20-4) |
| Types of Injunctions | - Effects:* Negative “prohibitory” = order to stop doing (common)
* Positive “mandatory” = order to do (rare, hardship to D)
* SP = type of mandatory inj, order to do K promise
* Quia timet = “b/c he fears”, to prevent future wrong

- 3 main types: **1)** Interim/*ex parte*, **2)** pre-trial interlocutory/interim, **3)** Permanent/perpetual |

INTERIM EX PARTE INJUNCTIONS

**Virtually the same as interim injunctions in BC, just *ex parte***

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| --- | --- |
| Framework | - Very temporary, until trial or further notice* **Requirements**: Urgency + full and frank disclosure. Und Dam
* Tries to prevent irreparable harm (inadequate remedy)
* W/out notice of application to D, only P in court
* *Mareva, Anton Piller, Norwich Pharmacal*
 |
| Gulf Islands Navigation v S.I.U. 1959 BCSC | - P wanted inj to prevent union from striking. Granted. D challenged, said unclean hands b/c P didn’t do what they said they would, breach of promise* Inj set aside on these grounds

- *Ex parte* to be made with “utmost scrupulosity and care”- If possible, bring challenges before judge who granted them- Need not show irreparable harm b/c negative covenant |
| AGBC v Wale 1987 BCCA | - AG inj prohibiting FN bylaws for fish on, flouting prov laws.- BCCA found TJ didn’t forget irreparable harm, just dealt w it in BoC* If BoC is ~equal, best to preserve the **status quo**.

- To maintain status quo, BCCA upheld inj.* But this was status quo from before application by AG was brought
 |

MAREVA INJUNCTIONS

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| --- | --- |
| Framework | - Mareva gives right to freeze assets w/in juris, no matter where D resides* Prevents removal, concealment or destruction of assets before judgment, to prevent final judgment from being useless
* Drastic, ***ex parte*** (extreme urgency, notice impractical)
* Not a total freeze – D may do legitimate course of business

- Requirements: **1)** Valid claim in the jurisdiction, **2)** Genuine risk of the disappearance of assets |
| Aetna Financial v Feigelman 1985 SCC | - P wanted to move assets from Man to Ont. D got Mareva to prevent the move, - **American Cyanamid (7) does not apply.** Greater caution, hardship to D- Different reqs:* 1) P must have justiciable cause of action in the juris
* 2) P must have a strong *prima facie* case
* 3) D must have some assets in the juris
* 4) Must be a “real/genuine risk” of removal before execution
* 5) Balance of convenience

- Aetna fed incorp so could do business throughout Canada. Ordinary course of business, not sneaky. Also Enforcement of Canadian Judgments and Decrees Act |

ANTON PILLER ORDER

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| Framework | - A civil search and seizure order.***Ex parte*** interim inj ordered to preserve evidence from destruction by D.* Gives the right to enter & search D’s premises.
* Preservation purposes based on idea that party in possession will destroy evidence if given the chance

- Independent Supervising Solicitor (ISS), ensure terms complied, guard confidential material. **American Cyanamid (7) does not apply** |
| Celanese Canada v Murray Demolition 2006 SCC | - P got Anton Piller order. During search copied info that was covered by solicitor-client privilege. Didn’t make a list or return it.- **Req for Anton Piller order**:* 1) Strong *prima facie* case
* 2) Very serious actual or potential damage
* 3) Convincing evidence of D’s possession of incriminating evidence
* 4) Real possibility of destruction
* 5) Full and frank disclosure of material facts
* 6) Undertaking as to damages
* 7) Independent Supervising Solicitor (ISS)

- Harsh consequences for P: Had to discharge lawyers and start again w new counsel. Warranted in the circumstances |
| BC AG v Malik 2011 SCC | - D accused of funding Air India bombings, got bail saying he had $11mil. Then asked gov for $ for defence, saying he couldn’t afford it. Gov lent $5.2mil, claimed he couldn’t pay it back.- Gov applied for both Mareva & Anton Piller. Both granted, allowed the search of Malik & relatives homes for evidence of fraud- Question of looking to previous proceedings to help w decision here:* Had previously lied to the court and committed fraud
* Ok to look at b/c same parties involved, x-exam etc.
 |
| Vinod Chopra Films v John Doe 2010 Can | - **Rolling Anton Piller order**: *ex parte* interim inj against unknown Ds, authorizing entry, w consent, to premises for search & seizure. Req same as for regular AP, but harder to prove first 4 reqs (Celanese 6)* Also consider: 5) Would inspection do harm to P? 6) Would inspection bring disrepute to justice system?

- D worried about new film being sold illegally at flea markets etc. Not a convincing case: Knew some of the names, didn’t tell (no full & frank disclosure), no evidence of real damage or possibility of destruction |

NORWICH PHARMACAL ORDERS

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| --- | --- |
| Framework | - Wrong has been done, don’t know by whom. But know someone who knows* These orders allow P to bring a proceeding against that person to release name & identity of perpetrator
* An “equitable bill of discovery” against a third party
 |
| BMG Canada v John Doe 2005 FC | - P wanted to know who was file sharing their music. Can identify users through Internet Service Providers (ISPs). ISPs claim privacy concerns. Not granted b/c privacy outweighed private copyright claim, but D could narrow down and try again- **American Cyanamid (7) does not apply**. Req (Norwich Pharmacal):* 1) *Bona fide* claim against proposed D
* 2) 3rd party must have been involved either innocently or knowingly (facilitator in some way, not just bystander)
* 3) 3rd party must be only practice source to obtain identity
* 4) Indemnification of 3rd party’s expenses + legal costs
* 5) Done in the interests of justice (balance, public interest)

- Usually also req Und Dam, and urgency and full & frank disclosure |

INTERIM/PRE-TRIAL INTERLOCUTORY INJUNCTIONS

**Virtually the same as *ex parte* injunctions in BC, just *inter partes***

|  |  |
| --- | --- |
| Framework | - Less temporary (other juris) – in BC, same time as interim, no distinction. Until trial or further order. Both parties present in court, hearing* **Requirements**: Have a civil claim.
* Tries to maintain status quo, preserve a L or E right
 |
| **American Cyanamid** v Ethicon 1975 Eng | - P patent on sutures. D developed same in UK market. P applied for inj- Applicant must show:* **Serious question to be tried**
* **Irreparable harm to applicant if inj not granted (damages)**
* **Weighing the balance of (in)convenience**

- Focus on BoC:* Irreparable harm to P if denied (consider adequacy of damages)
* If balance is even, consider relative strengths of cases
* Consider other special factors (ex. med community has a hard time accepting new products)

- Inj granted. If D in marketplace, hard for P to push them out if they won. But if P lost, D could just enter market at a later point |
| **MacMillan Bloedel** v **Mullin** 1985 BCCA | - Accepted American Cyanamid (7) into Canada, applies it to Ab title cases- P wanted to clear-cut Meares Island, had tree farm license from gov- Env actv (D) protested, FN claim Ab rights & title (markings on trees)- Court granted injs against picketing and against logging. On **BoC**: Ab would suffer greater harm, once trees gone, gone, lost evidence for title claim. MacMillan’s interest only economic, if delayed, trees still there |
| Haida Nation v BC 2004 SCC | - Inj not the best route in Ab title cases* Better to use duty to consult, try to accommodate, negotiate

- But SCC & lower courts have continued to grant injs in Ab title cases |
| BMWE v Canadian Pacific 1996 SCC | - Arbitration agreement, union wanted interloc inj to restrain CPR from making changes until matter determined by arbitrator- Even though final decision wouldn’t be made in that court, BCSC has **E jurisdiction to grant inj where there is an inadequacy in the leg*** In this case, nothing in leg to delay change until decision

- Can also do this to support the administration of justice in another court or tribunal, upholding RoL (BCGEU v BC) |
| Church of Scientology v Radio NW 1974 BCCA | - LIBEL AND SLANDER **– American Cyanamid** (7) **does not apply**- Bonnard case: courts to be cautious about granting inj in these cases: Now w Charter be even more careful, s.2(b) free speech* Only grant inj in **clearest cases of defamation**, slam dunk

- Church suing for defamation, wanted inj to restrain radio from further broadcasting the defamation* No doubt about defamation, not even contested by D
* Also clear threat of repetition (*quia timet*) aspect
 |

ANTI-SUIT INJUNCTIONS

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| --- | --- |
| Framework | - Inj to enjoin D’s proceeding in foreign courts. Arises when D wants lawsuit in different juris than the on P brought it in. D becomes P in foreign court- Against D *in personam* as P in new court, not against the court itself- Multiple proceedings of same dispute – abuse of process? Comity, overreach of jurisdiction? |
| Anchem v BC Workers Compensation Board 1993 SCC | - BC paid comp to workers in prov who were exposed to asbestos. Brought case against manufacturers in Texas (favorable to workers, bigger awards)- P wanted anti-suit inj to prevent BC from pursuing suit in Texas- SCC denied anti-suit inj, set bar too high, essentially killed it. Req:* 1) Is BC the natural forum? If no, deny inj. This case maybe so go to:
* 2) Does the foreign juris offer either part legit advantage of which it would be unjust to deprive them of?

- Better comp = legit reason. No serious damage if allowed in T |

PERMANENT/PERPETUAL INJUNCTIONS

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| --- | --- |
| Framework | - Final order after trial, may be for a fixed period (Elta, Polai)* Requirements: Wrong (actual or threatened) + irreparable harm to P + balance of convenience in favour of granting
 |
| **Cadbury Schweppes** v FBI Foods 1999 SCC | - IP/BREACH OF CONFIDENCE. Elements: 1) D’s receipt of info from P, 2) Communicated in confidence, 3) Misuse by D (Includes “springboard doctrine”, head start), 4) Detriment to P- Must be an element of novelty to be considered confidential: Denning “nothing very special”, “something special”, “very special indeed”* Quality of info (novelty) dictates amount of E comp.
* This case, commercial value “nothing very special”

- Permanent inj denied b/c of laches, so couldn’t give E damages either * D got E comp, separate rem, doesn’t depend on Lord Cairn’s Act
* E comp restores loss – loss of profits from FBI spring-boarding
 |

MANDATORY INJUNCTIONS

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| Framework | - Order to do positive act, ancestor of SP. Court is leery of these. Concerns:* Ambiguity: Clear & careful wording req. Can’t enforce *in personam* if the person doesn’t know what they have to do, danger of contempt of court (Kennard, Sonoco)
* Constant supervision by the court is req (Doucet-Boudreau)
* BoC: Weigh hardship to D vs. benefit to P (Redland Bricks)
 |
| Kennard v Cory Brothers 1922 Eng | - D leasing land, mine tailings slipped downhill onto Ps’ land. Had to build a drain, which clogged. P wanted mandatory inj to clean it out. D cleaned it out but **wanted clarification of order*** Order just said “execute such works as might be necessary”.

- Undefined works, continuous supervision required. Not a good inj |
| Hedstrom v Manufacturer Life Insurance 2002 BCSC | - P hurt at work, got disability benefits. Med exam said fit to work, benefits cut off. P sought mandatory inj to have payments reinstated until trial- This case lowered the standard from unusually clear case w high likelihood of success. Instead, just **American Cyanamid** (7) **applies*** On BoC, risk to D is higher in these cases b/c req D to directly pay a cost, not just refrain from doing something

- Inj denied, failed to show irreparable harm – damages would be reasonable and full compensation, no inj needed |

NEGATIVE COVENANTS

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| --- | --- |
| Framework | - Act to enforce negative promises (won’t do’s), prohibitory inj- Conflict over whether American Cyanamid applies. Arguments:* 1)Rule in Doherty v Allman: Parties Kd that something won’t be done, court just enforcing the K. Don’t need principles from AC
* 2)Should avoid absolute rules in E, about principles, use AC
 |
| Cascade Imperial Mills v Lindsay 1985 BCCA | - Non-competition clause, required interpretation- Unclear whether clause was valid, would be ridiculous to apply Doherty v Allman rule, so American Cyanamid applies:* Hardship to D of enforcing (unemployment) outweighs hardship to P in denying the clause

- Result: **American Cyanamid applies in negative covenant cases** |

CONTRACTS OF PERSONAL SERVICE

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| --- | --- |
| Warner Bros v Nelson 1937 US | - **Courts won’t enforce positive covenant of personal service*** **Won’t enforce negative covenants (through inj) if it would lead to starvation or SP of positive covenant**
* Look at substance, not just positive or negative wording form

- Bette Davis K of personal service to provide talents to D, then went elsewhere. D wanted prohibitory inj to prevent the breach of the neg cov* Inj granted, enforcement of negative covenant b/c D won’t have to choose btwn suffering or performing positive covenant
 |
| Hill v CA Parson & Co 1971 Eng | - P refused to join union and was given one-month notice by union. He was 63, would retire at 65, new leg coming in soon to protect him. Sought interloc inj restraining D from terminating him- Inj granted, **mandatory inj** to protect employment under K of service, to prevent wrongful dismissal or order reinstatement* Inj granted b/c damages not an adequate remedy

- **Not well received in Canada** |

CONSTITUTIONAL CASES

|  |  |
| --- | --- |
| RJR Macdonald v Canada 1994 SCC | - **Charter cases** – **American Cyanamid applies**. D wants relief from new tobacco labeling leg that was under appeal until case decided- **Stay of proceedings**: temporary, stops enforcement of leg. Req:1) Serious question to be tried2) Irreparable harm if application denied (damages adequate for P?)* In C cases it is never clear if $ will be given, so even possibility of $ damages is considered irreparable

3) BoC (key in C cases): Public interest critical in C cases* Consider blanket suspension vs. specific exemption

- Stay denied, BoC: Public interest for leg enforcement (health), w/out serious harm to rich tobacco companies- **Exceptions where P must show strong *prima facie* case** (rare):* 1) Interloc would be a final determination (ex. no trial)
* 2) Constitutionality, where it is a question of law alone
* 3) Private litigation where the facts are undisputed
 |
| Manitoba v Metropolitan Stores 1987 SCC | - D employees wanted to unionize. Charter s.2(d) right to free collective bargaining. D wanted stay of proceedings to prevent imposition of collective agreement, challenged Man Labour Code- Followed RJR, a Stay like an interloc inj, use American Cyanamid- **Public interest** particularly important in C cases, BoC special factor* Blanket suspension vs. specific exemption: This was a suspension case b/c if went through, all employers would want
* Suspension very injurious to public good b/c public interest is served through functioning of leg

- Stay denied, but granted early trial date |

EXPROPRIATION DOCTRINE

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| --- | --- |
| Framework | - E damages “in substitution for”/in lieu of, or in addition to a final/permanent inj or SP* Lord Cairns’ Act s.2. In all cases where BCSC has juris to grant an inj or SP, they can award **E damages** too/instead (discretion). Court-ordered purchase of right to continue a wrongful act, enforcing damages for future wrongs

- Distinct from E compensation (past damage, not tied to Act) |
| Rombough v Crestbrook 1966 BCCA | - D owned a sawmill that was causing damage from smoke and ash- P’s claim for inj denied, would shut down the business.* Instead gave E damages: pay for present and future nuisance

- Ps got damages for past injury, a limited inj to restrain certain future nuisance, and some damages for expected future damage* Lord Cairn’s Act s.2 = E damages instead of anticipatory inj

- In effect, gave D a **license to carry on committing nuisance*** BoC: commercial interest vs. private property rights – D very important to area’s economy, wins out
 |

QUIA TIMET or ANTICIPATORY INJUNCTIONS

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| --- | --- |
| Framework | - *Quia timet* = b/c he fears (future wrong occur). Exercise w caution. Req:* 1) Very strong probability of grave damage in the future
* 2) Irreparable harm (damages inadequate)
* 3) BoC: Where D acted reasonably & didn’t know harm would be caused, must consider cost to D of preventing future apprehended harm. Exception where D acted unreasonably, wantonly, or deliberately
* 4) Certainty of wording – must be very clear what D must do
 |
| Redland Bricks Ltd v Morris 1969 Eng | - D had strawberry farm, P’s neighboring clay excavations caused subsidence and wrecked part of D’s land. P sought inj restraining further quarrying that would cause further subsidence* Granted on both interloc and permanent basis

- D also wanted P to have to provide lateral support to unstable soil (mandatory inj). Denied. **On BoC P acted reasonably & cost of restoration would be disproportionately high to any benefit to D** |

DEALYED INJUNCTIONS

|  |  |
| --- | --- |
| Framework | - Inj granted but effect temporarily suspended* May be suspended as a term or condition of order (Polai (5))
* May be granted as stay of proceedings on American Cyanamid (7) requirements (maintain status quo, RJR Macdonald (10))
 |
| Woolerton and Wilson v Richard Costain 1970 Eng | - D using crane that swung over Ps factory only when not loaded. P sought inj to restrain trespass of airspace. **American Cyanamid applies**- Interloc inj granted, but on BoC inj suspended for one year. P were being a bit ridiculous, gave D a chance to finish project first |
| Charrington v Simons 1971 Eng | - D, who covenanted not to pave a track above ground level, did, causing trouble to P. P sought mandatory inj to remove track- TJ gave inj w 3-year suspension. Suspension deleted at CA* **Delay of inj limited when it causes hardship to applicant**
 |
| Harper v Canada AG 2000 SCC | - Leg limiting 3rd party ad for political parties. P challenged on s.2(b) FoE* Lower court granted inj, preventing application of the Act.

- Gov wanted stay of inj pending decision at SCC, granted. Leg applies- **Charter case, special considerations in BoC**:* Public interest in enforcement outweighs Harper’s C right to FoE in this case (assume leg serves valid public purpose)
 |

INJUNCTIONS FOR THE ENFORCEMENT OF LEGISLATION

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| Framework | - Civil remedy: An inj restraining criminal activity.* Supplements crim law where AG won’t enforce crim law or where there is a gap in crim law. Can be used in cases of:
* 1) Flouters (Polai – perm inj to restrain bylaw violation)
* 2) Public nuisance, emergency
 |
| Kent District v Storgoff 1962 BC | - Dukhobors threatening to camp in town, would cause an emergency. P enacted bylaw against camping in town, RCMP wouldn’t enforce it- **Inj against breaking bylaw** granted to maintain status quo until trial could decide whether valid or not (met American Cyanamid req)* Added threat of contempt to make it more forceful
 |
| Provincial Rental Housing Corp v Hall 2005 BCCA | - Squatters in P’s building, violation of bylaw. P applied for *ex parte* interim inj. Squatters found, got a lawyer to go to court. Judge refused to hear him and continued *ex parte.** TJ granted inj, said P could dispute on short notice

- AG indicated he didn’t intend to enforce crim contempt, like Kent- BCCA said inj should not have been granted. Other party in the court, should have been heard from, particularly as had notice* No **evidence of enough urgency to be *ex parte***
* Also, **if FoE is in question, inj should be very temporary**

- Note: Police asked for Enforcement Order (MacMillan v Simpson (13)) |
| AGBC v Couillard 1984 BCSC | - AG applied for interloc inj against prostitution in West Van, as it constituted public nuisance- Permanent inj granted, met American Cyanamid reqs + inadequacy of crim law (prostitution not yet a crime)* **CL supplementing leg for protection of public**
 |
| Lakehead Region Conservation v Demichele 2009 ONSC | - D violating reg against interfering w river flow w/out permit. P wanted perm inj to prevent more breaches and mand inj to require removal of existing unlawful alterations* **Can apply for inj even when other remedies available (the Act) under certain reqs** (incl lack of effectiveness) (Pharmascience)

- Prohibitory inj granted, including against employees etc.- Mand inj denied b/c they knew for a long time (laches) |
| BCGEU v BC(AG) 1988 SCC | - Picketing of courthouses, judge issued his own *ex parte* inj, on **criminal contempt as interference w administration of justice*** Also interferes w court officers in executing their duties
* Also infringed public’s Charter rights

- Picketers given notice, appealed, inj upheld* Inj protects the rule of law, access to the courts is part of that
 |

UNDERTAKING AS TO DAMAGES

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| --- | --- |
| Framework | - L&E Act s.39(2): Interlocutory/*ex parte* interim injunctions usually required as a term/condition. He who seeks E must do E* Also SC Civil Rules s.10-4(5) req Und Dam for interim

- Covers damages that might be caused if it turns out that P was not entitled to the interim inj/rem* Ex. Fiegleman (6) P had to pay D damages for losses incurred by having assets tied up in Manitoba for 2 years

- Crown doesn’t have to give Und Dam (AGBC v Wale (6))- Undertaking is to the court, so the court must retain control |
| Vieweger Const v Rush & Thompkins 1964 SCC | - D got inj against equipment removal, w Und Dam- D successful at trial. Usually means a hearing to assess damages on P’s undertaking, but discretion to refuse hearing.* Rarely exercised, but happened in this case. Overturned at SCC. **Damages enforced if P not entitled to inj, not necessary for P to have acted unfairly in any way**

- May be “special circumstances”, but not this case so P has to pay |
| Delta v Nationwide Auctions 1979 BCSC | - P tried to pass bylaw repealing first bylaw, cancelling K. D seeks inj- Strict req of Und Dam changed to view of **judicial discretion to dispense w it in special circumstances**:* D’s impecuniosity (couldn’t pay – this case)
* D has strong case that damages not adequate remedy
* nj will cause nominal harm to P +no real damage will incurred
 |
| Bird Construction v Paterson 1960 Alberta | - P got interloc anti-picketing inj, but discontinued main action- Discontinuance = admission that seeking inj was wrongful* Und Dam applies. Otherwise, would allow them to start an action and change their mind w/out consequence
 |
| Fletton v Peat Marwick 1986 BCSC | - P tied up D’s inventory w inj, which was later overturned. - **Principles for assessing damages in Und Dam are the same as CL principles in assessing damages in breach of K*** Damages recoverable only if you can deal w causation, remoteness, mitigation, and reasonable foreseeability

- D is entitled to reasonably foreseeable damages as part of Und |

PROPER FORM OF INJUNCTION

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| Framework | - Who are the appropriate parties? P🡪 D. What about 3rd parties? |
| Marengo v Daily Sketch 1948 Eng | - **Old Rule**: 3rd parties can only be implicated in inj if they knowingly assisted D in violating the inj (aiding and abetting).* Guilty of crim contempt (not civil b/c inj not against them, but still violated a court order)
 |
| MacMillan Bloedel v Simpson 1996 SCC | - **New rule: Third parties are captured when they knowingly disobey the inj**, may be guilty of contempt- P wanted to restrain protesters from blocking logging road. One named D, 4 unnamed Ds, “John Doe, Jane Doe and Persons Unknown”Got *ex parte* inj against all persons having notice (Anton Piller)* All anonymous public caught by this wording if impeding the administration of justice. New rule
* Language must reflect this, alert them to it

- AG policy not to enforce against env groups (Kent (12))* Police won’t enforce inj w/out **Enforcement Order** (Provincial Housing v Hall (12))
 |
| Sonoco v Local 433 Vancouver Converters  | - **Orders must be clear and unambiguous**, so know what is expected- This case, “unlawful” acts not clear enough. Elta (3) |
| Doucet-Boudreau v Nova Scotia 2003 SCC | - Francophone parents wanted French schools under Charter s.23- Crown is immune from inj b/c generally can’t be held for contempt, so court orders declarations instead- TJ gave declaratory order: D to use “best efforts” to provide edu facilities & courts “retain juris to hear reports”, implying supervision* 5 said close enough, not so vaguely worded as to render it invalid.
* Dissent: unclear & should keep courts out of public admin

- Wording problematic, b/c subjective and ambiguous |

CONTEMPT

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| Framework | - Crown not capable of contempt (Crown Proceeding Act s.11)- Civil contempt: Committal* D disobeys the inj. P has to show D had notice & disobeyed
* Governed by Supreme Court Civil Rules s.22-8
* Punishable by fine and imprisonment
* Brought as part of a civil proceedings
* Goal is to coerce future conduct

- Criminal contempt:* D disobeys the inj. Crown must show United Nurses req
* Crim Code s.9: Disobedience of court order is CL offence
* Crim Code s.127: Disobedience of court order
* Crown prosecution - fine or imprisonment
* Distinct proceeding from original cause of action
* Goal is to punish for previous wrongful acts
 |
| United Nurses of Alberta v Alberta 1992 SCC | - Nurses went on strike in public defiance of inj- **Criminal contempt, Crown must prove**:* Disobeyed court order in a public way (AR)
* W intent, knowledge or recklessness as to the fact that it would tend to depreciate the authority of the court (MR)
 |
| Videotron Ltee v Industries Microlec 1992 SCC | - **Civil contempt proceedings quasi-crim in nature, quasi-penal*** Alleged contemnor therefore can’t be compelled to testify
* Imposes proof BARD for proving civil contempt, even when used to enforce a purely private order (respect for the court is always at issue, always a public aspect)

- Service not req to bring civil or crim contempt, just knowledge of inj |
| Isaacs v Robertson 1984 Eng | - D had notice of inj but didn’t comply, P went for committal- Inj should not have been granted, but that is no excuse for disobeying it. **A mistaken order is no defence to contempt*** Will, however, mitigate the penalty
 |
| Alberta v M(B) 2010 | - Child protection didn’t follow a court order. Director was held personally liable for contempt (denied b/c set right & already served)- Crown is immune from contempt (king can do no wrong)* But **servants of the Crown are w/in the scope of contempt**
 |

SPECIFIC PERFORMANCE AND FUSION

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| Basics | - Damages = Usual remedy for breach of K at CL- SP = E order requiring D to perform what it agreed to under K* Also requires P to perform what is agreed, must be “ready and willing” (doctrine of mutuality)
* Available as final remedy only (no pre-trial)
* Available only in K, commercial arbitration, or small claims

- SP developed out of mand inj – wording is important- Can’t get SP against Crown, b/c can’t be punished for contempt (Crown Proceedings Act s.11), but no immunity for Crown servants |
| Harris v Robinson 1892 SCC | - **Elements of SP**:* 1) Existing K btwn P and D (must be valid and binding)
* 2) Breach of K or anticipatory repudiation by D (says won’t)
* 3) Inadequacy of damages as rem (“unique” subject matter)
* 4) Discretionary factors, “conduct of the party seeking relief”: P’s laches, P’s unclean hands.
* - Can’t get SP in K for personal service (Warner Bros (9))
* - Can’t get SP in K requiring constant supervision to enforce
* - Can’t get SP for a K P can’t perform (mutuality)
 |
| Semelhago v Paramadevan 1996 SCC | - P (vendor) refused to close property sale. Prop values rose btwn K and trial, so D lost $. But his home also went up, didn’t have to sell- D sued for SP and/or damages under Lord Cairns Act s.2.* **Doctrine of election: Innocent party always has the choice btwn SP and damages** (Beauchamp (16))

- D chose damages – how to determine the amount?* SCC gave diff btwn new market value of the house and the purchase price (would keep the gain in his house)
* SP would have been given if asked for. In order for $ to be truly equal, damages assessed at date of trial, b/c SP would include the increased value

**- E no longer considers each piece of land to be unique**. Now subjective/objective approach based on purchaser’s intention:* Purchase for personal occupation as a home = unique
* For a business location, investment, etc. = not unique
 |
| Southcott Estates v Toronto Catholic District School Board 2012 SCC | - P single-purpose corp to buy & develop specific land owned by D. P paid deposit, D failed to complete. P claims SP and/or damages- P didn’t mitigate losses in the meantime, didn’t buy other prop* Couldn’t get SP b/c purchase for profit only = not unique
* Couldn’t get damages b/c unreasonable **failure to mitigate**

- SCC said single-purpose restrictions self-imposed, could have rearrange. Gave $1 nominal damages, as E won’t suffer a wrong w/out a rem. SHEP: Inadequate, so no real remedy here |
| Ryan v Mutual Tontine 1893 Eng | - P (tenant). Lease - landlord would provide a doorman. Sued for SP of the lease and/or damages. **D brought defences**, successful:* 1) K for personal services: Employer/tenant D and employer/employee Ks inseparable b/c the latter is for the benefit of the former. Can’t SP just a piece of it
* 2) Constant superintendence by court over long time: Long-term lease, tenants would be back. Problematic
* 3) Performance of part of a K: Lack of mutuality. Also, prohibitory inj enforcing negative covenant (Warner Bros (9)) can be used to enforce just part, SP can’t

- P wanted SP but only got damages instead. Not a case for SP |
| Walsh v Lonsdale 1882 Eng | - Lease said D could, at any time, demand 1 year’s rent in advance. Lease never executed, P seeking SP and/or damages.* Denied: P holds same terms in E as if lease was executed (both admit relief could be given through SP). Can’t complain D does too

- B/c of fusion, can just accept they are landlord and tenant in equity w same rights as if lease was executed* **Equity regards as done that which ought to have been done**
* “Fusion fallacy” that only E prop now, takes fusion too far

- Conflicts w Semelhago (15) b/c said SP could apply to commercial prop |
| Manchester Brewery v Coombs 1901 Eng | - D leased hotel from B. Term that he would sell only B beer. Agreement never executed. B sold to D. P ceased performing* Can assume SP would be ordered btwn D and B. If that was done, and lease signed over to P, P could also get SP
* **E assumes this is done** (as in Walsh (15)), SP ordered

- Says elimination of distinction in Walsh (15)was incorrect* P has legal estate, D is E tenant. Not quite landlord and tenant at law, but close enough, created necessary relation

- Conflict w Semelhago (15) b/c said SP could apply to commercial prop |
| Beauchamp v Coastal Corp 1986 FC | - D (vendor) reneged K for sale of boat. P sued for SP/damages- P initially said would take damages, then changed to SP/damages, then (after judgment) changed to SP* D tried to force SP. Can’t do this, choice is for innocent party alone to make. But, can’t have both

- **Doctrine of election** (Semelhago (15)). Can choose at any time during litigation or after judgment, entitled to know damages amount first |

SPECIFIC PERFORMANCE CY-PRES

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| Framework | - SP requires mutuality, literal performance by both parties* But if this is not possible, SP Cy-pres = as nearly as possible

- Ex. SP w compensation: 10 acres $100,000. Discover it’s only 9.9 acres – SP to deliver prop + $1,000 comp for the change |
| Raaber v Coll-in-Wood Farms 1971 ABCA | - P selling to D, P backed out. P sold conditional sales agreements worth $12,000, offered cash in its stead. D didn’t want cash* Court ordered P to perform and order D to take cash. Conditional sales agreement a non-essential part of K that could be performed cy-pres
* **SP + compensation for lack of literal performance**
 |

TRACING

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| Basics | -Change of position defence applies to both E and CL tracing **Tracing in Equity**- **Tracing** = Process of identifying property in the hands of another (may change form). Ex. trustee buys car for $200, value now only $150. Beneficiary claims car + $50- **Following** = Process of following the same asset as it moves from hand to hand. Ex. trustee buys car for $200, beneficiary claims $200 from car dealer- **Claiming** = the remedy. May be personal or proprietary (Foskett (18)). Ex. could get car from trustee, or cash from dealer. What rem are you seeking based on the ideas of following/tracing?**Tracing at Common Law**- Limited ability to trace:* 1) Claimant must have legal title to subject matter (ex. beneficiary has E interest, cannot trace at law re Diplock (18))
* 2) Subject matter must be ascertainable in its original form. Change of form + mixed w other property = no tracing at law
 |

TRACING AT LAW

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| Framework | - Limited ability to trace: Change of position, dissipation squandering, mixture – all preclude tracing- The right of tracing at CL only ceases when the means of ascertainment fail (BMP) |
| BMP Global Distribution v Bank of Nova Scotia 2009 SCC | - P deposited a cheque at D bank (payer banked at C). Cheque cleared, and P disbursed $ to other accounts at D bank.- C then learned from D that the cheque was forged, asked for D’s assistance to stop payments from P’s account and to recover distributed $. D froze accounts of P and recipients of $- Did tracing: Form had changed from cheque to money* Account balances were very small, so anything left in them after payments could be said to be from cheque.
* **Still ascertainable, so still traceable at CL**

- SCC found for D, thwarting fraud (no damages to P) |
| Lipkin Gorman v Karpinale 1991 Eng | - A partner at P gambled w funds from firm client’s account at D’s club. P wanted full amount back from D**- D claimed change of position defence**:* Said they were BFPV. Rejected b/c no consideration given for $ (chips are only markers, no value). Also, BFPV only applies in E, not to issues of legal title
* But, it was accepted that D paid cash when fraudster won. Net gains btwn wins and losses was $154,000
* D acted in good faith (innocent reliance), and it had a change of position (paid winnings)

- P had legal title to the money, but could only recover D’s unjust enrichment (profit) b/c of change of position |

TRACING AT EQUITY

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| Framework | - Equity can trace into a mixture (re Diplock (18))- Canada’s req for an E proprietary claim of tracing are less onerous than England’s (Brookfield v Karl Oil (18))- Req come from Soulos v Korkontilas(not):* 1) D has E obj to P in relation to subject matter (ex. fiduciary)
* 2) D breached obj
* 3) P has E interest in subject patter (ex. P is beneficiary)
* 4) Resulted based on traing is just an equitable (ex. no BFPV, subject matter in traceable form, sharing, re Diplock, etc.)

- Sharing: *Pro rata/pari passu/*rateable: E treats everyone equally where possible. A and B each give $100, get mixed. Take 50/50 (put in 50/50) no matter what happens to value after- Rules from re Diplock:* 1) Unmixed fund = constructive trust
* 2) Mixed fund = charge
* 3) Funds mixed in real estate = no tracing
* 4) Funds used to discharge/reduce debts = no tracing
* 5) Inequitable result from tracing = no tracing

- Rules from Brookfield:* 1) Beneficiary cannot trace into hands of BFPVWN
* 2) If facts are unclear, doubts resolved against wrongdoer
* 3) Presumptions must face realities of facts
* 4) Innocent beneficiaries share proportionately, *pari passu*
* 5) Beneficiaries cannot claim subsequent deposits unless wrongdoer intended to replenish trust funds w deposits, (“backwards tracing” disallowed)
 |
| **re Diplock** 1948 Eng | - Executors of the will distributed $ to various charities under an invalid provision (in good faith). Next-of-kin actually entitled to $* Sued executors. Got some E comp, but couldn’t get all

- Then went after the charities* If charities had been BFPV, they would have been ok. But they got the money for free, so are **innocent volunteers**. Innocent volunteers = E tracing

- Rules:1) If volunteer kept money in an unmixed fund = **Constructive trust/proprietary remedy*** Get back what you put in
* Get highest priority, ranked above other creditors

2) If volunteer mixed the money w own funds = **Declaration of a charge/equitable remedy** (proprietary)* Get an E interest in the property of third person
* Get back proportion of what you put in *pari passu*
* Ranking on same level as claim of the volunteer (ranked on same level as other creditors). Investments can then be sold and proceeds allocated btwn charity and estate

- This case = mixed funds = **Declaration of a charge**- **BUT** (see rules in Basics):* Charity mixed funds w real estate. Can’t be asked to sell to give the money back, as it would be inequitable
* Charity used funds to discharge debts
* Result would be inequitable (change in position defence)

- No tracing, refused on discretion to prevent inequitable results |
| Foskett v McKeown 2001 Eng | - Real estate scam, D collected money from investors & told them it was being held in trust for the development. D used some of that money to pay premiums on a whole-life insurance policy- D died, and policy paid out to D’s kids. Ps, the trust beneficiaries (investors) wanted back the 2/5th that was put in from their money* Children were innocent volunteers (re Diplock)

- Huge increase in value since the time of payment* Majority: 2/5th of new, higher value of total policy, to P, as proportion they put in, 3/5th to kids
* Dissent: 2/5th of premium costs only to P

- Somewhat inconsistent w re Diplock |
| Brookfield Bridge Lending v Karl Oil and Gas 2009 ABCA | - Vanquish operating a well w D (who had 45%, entitled to 45% of revenue). Under agreement, V was trustee for D, but could mix funds for purposes related to the particular well. V used $ from well for other projects. (P was lender to V)* Under agreement, D would have got $325,000 of $700,000 profit. V went under, only $40,000 left in account

- Ordinary ranking of claimants:* 1) Trust beneficiaries (D)
* 2) Secured creditors, E charge-holders (P)
* 3) Unsecured creditors

- $40,000. Two deposits:* $41,000 from shared well (= $81,000) & $337,000 from diff project (= $418,000). Account total = $418,000

- Always assume that money other than trust money was spent first. Can only claim additions to account if it’s clear they were meant to pay back the trust money. No evidence of that here, so beneficiaries limited to “**lowest intermediate balance rule**” ($81,000)* So, D got 45% of $81,000 (no way to trace $337,000 to trust money b/c from an entirely diff project)
* P able to get rest of total sum, not linked to trust project

- Mixed fund = charge = Karl & Choice (other company in operation) share *pari passu* from final value of lowest intermediate balance |
| Boughner v Greyhawk Equity Partners 2012 ONSC | - D was a ponzi scheme, guilt admitted. Investors lost ~3.5 million- How to allocate remaining funds among innocent investors? **3 methods of allocating the loss, court can choose**:* 1) *Pro rata/pari passu* based on original contributions
* 2) Lowest intermediate balance rule
* 3) (First in, first out) rule in Clayton’s case)

- **Preferred method is the lowest intermediate balance rule**: Take the lowest amount attributable to funds, and share *pari passu* |

RELIEF FROM FORFEITURE AND PENALTIES

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| Basics | - L&E Act s.24: Relief against penalties and forfeiture* Essentially a restatement of E’s inherent jurisdiction
* Gives breaching party relief from consequences
* - L&E Act s.28: Can’t give relief to same person more than once in respect of the same covenant or condition (stat limit)

- **Penalty clause** = A monetary payment in case of breach (Dunlop (21)) * Very harsh. Payment of a greater sum than the sum that ought to have been = a penalty, unenforceable
* May also be a penalty if the purpose is *in terrorem*, to deter a breach, even if sum is not extravagant. Then, upper limit on damages recoverable (Elsley (21))
* A matter of contractual interpretation (substance not form)
* Purpose is to deter breach

- **Liquidated damages** = Genuine pre-estimate of the loss that will be cause to the part if a breach occurs* Enforceable, no relief
* Purpose is to compensate for loss to the innocent party

- **Forfeiture** = A loss of property rights (Shiloh (20))* Mortgagee-mortgagor, landlord-tenant, condo-strata bylaws, membership in a union or partnership, etc.
* Must be explicit to be applicable (Shiloh)
 |
| L&E Act s.21 | Can the court grant relief under s.21 against a stat penalty or forfeiture?- Currie v Reed 1956: Relieved b/c acted in good faith- Magnussen v ICBC 1978: No discretion to relieve, up to the leg- Morris v The Queen 1977: Only leg can grant relief against harsh laws, but if a K w the Crown is subject to relief- Trans-West Development v City of Nanaimo 1980: No K, no relief |

FORFEITURE

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| Nuytten and Bakalaryk v Stein 1954 NS | - P were landlords, D the tenant, D breached the covenants. P sued D for forfeiture of the tenancy, granted in court* D claimed relief from forfeiture under L&E Act s.24

- BCCA: **s.24 nothing new**, just leg statement of inherent juris, a writing of the scope of E to relieve against unconscionable Ks balanced against the freedom of K* **Equity will not mend a bad bargain** (maxim): relief is rare

- SHEP: s.28 is something new, introduced a stat limitation |
| Emerald Christmas Tree Co v Revcon Holdings 1979 BCCA | - Agreement for sale, to be paid in installments. **Acceleration clause** enabled lender to demand payment of whole amount prior to final date in the event of a missed payment. P missed a payment- Under traditional view, an acceleration clause is neither a penalty clause nor a forfeiture clause* BCCA said loss of right to purchase is not a loss of a property right, so not a forfeiture clause

- Breach came out of an inadvertent mistake. But b/c not a forfeiture, no relief. Lost right of purchase and payments to dateSeemingly inequitable result, **leg enacted L&E Act s.25**: Allows relief against acceleration clauses, applies to mortgages and agreements for the sale of land |
| Shiloh Spinners v Harding 1973 Eng | - P tenants, assigned interest to D to look after fences and repairs, P maintained the right of re-entry (explicit right of forfeiture – must be explicit to be applicable). D breached, sought relief- **Traditional jurisdiction to grant relief**:1) Object of inserting the right to forfeit is to secure a payment of a sum of money2) Breach caused by fraud by A, accident, mistake, or surprise by A3) Breach was inadvertent, excusable, rather than a willful default- Relief to be given only in “appropriate & limited cases”. Consider:* Continuing breaches, which together made it serious
* Gravity of the breach(es)
* Disproportion btwn value of D’s prop being forfeited and damage to the P seeking forfeiture
* Ability to set things right in a short period of time

- D’s breach was willful & deliberate. No traditional juris for relief- Relief denied, on strict view of freedom on K (Lord Eldon)* Dissent took liberal view, relief (Lord Erskine)
 |

PENALTY CLAUSES

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| Dunlop Pneumatic Tyre v New Garage & Motor Co 1915 Eng | - **General rules**:**1)** It is up to the court, not the parties, to determine whether the agreed payment is a penalty or LD. A matter of substance, not form**2)** Question is judged at the time of making the K, not time of breach**3)** Payment is a penalty if it is extravagant and unconscionable in amount in comparison w the greatest loss that could conceivably be proved to have followed from the breach**4)** Penalty if the breach consists only of not paying a sum of money and the sum stipulated is greater than what ought to have been paid**5)** Presumption that it is a penalty when a single lump sum is made payable on the occurrence of one or more or all of several events, some of which may occasion serious and other but trifling damage- Agreement that if D sold P’s products at lower prices than those set by P, D would pay 5 pounds per item as “liquidated damages”* Lump sum payment, disproportionate to diff losses

- Court decided LD anyways b/c very hard to calculate the damage after the breach. Enforceable* **When precise pre-estimation of loss is difficult or impossible, the amount agreed can be a genuine pre-estimate of damage**
 |
| Doman Forest Products v GMAC Commercial Credit Corp 2007 BCCA | - Loan agreement had clause that if either party terminated in first year, P would pay D $1 million as an “early termination fee”- Majority: **No breach, so no penalty**. Early termination fee was just an option in the K being performed. Court will let Ks stand where possible* Dissent: Extend powers of relief to cases w/out a breach
 |
| HF Clarke v Thermidaire 1974 SCC | - Non-compete agreement. If breached, P would pay D amount equal to P’s gross trading profit from the sale of competitive products as LD* P breached, claimed clause was a penalty b/c it was based on P’s profit rather than D’s loss
* P’s gross profit was $200,000, loss to D was only $90,000

- Court said it was a **penalty** even though it had a formula:* **Grossly excessive and punitive response to the problem**
* Not a flat amount, no actual predetermined figure (Dunlop)

- P relieved from paying $200,000 as disproportionate and unreasonable, but liable for provable damages of $90,000 |
| Elsey v Collins Insurance 1978 SCC | - Non-compete agreement, if breach P to pay $1,000 as LD- D got inj to restrain breach & E damages, if proven, up to $1,000 penalty* Inj prevents breach, so damages cover harm already done
* **Penalty clause is an upper limit on damages recoverable**

- Clause not oppressive to innocent party in this case, let the K stand- **Principles**:1) Where a fixed sum is stipulated, can choose btwn inj & LD2) If chooses LD, may recover that sum irrespective of actual loss3) Where sum is a penalty, may only recover such damages as he can prove, but the amount may not exceed the sum stipulated4) If chooses inj, may recover E damages for actual loss up to inj5) If LD, can recover that sum in respect of distinct breaches, and may also be granted an inj to restrain future breaches- This case, P got #4, and damages capped at penalty amount (#3) |

FORFEITURE OF DEPOSITS

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| Basics | - Deposits etc. are exceptions to penalties, but can exceed this exception and become penalties- **Deposit** = Payment by the purchaser at the time of acceptance or removal of conditions by the vendor. 2 aspects:* 1) **Part payment** = Goes towards the full purchase price if the transaction goes to completion
* 2) **Earnest money** = Good faith payment by purchaser, a guarantee of performance. Liable to forfeiture if the purchaser does not complete
* **Down payment** = Part payment of the purchase price, from the purchaser’s own funds. Balance to be financed by mortgage or agreement for sale
* No characteristic of being earnest money, can get it back

- **True deposit** = Liable to forfeiture on breach by purchaser, not a penalty- **Abusive deposit** = Unreasonable amount greater than a true deposit, considered to be part payment. This extra amount is penal/unconscionable (excess is a penalty – relief from forfeiture) |
| Tang v Zhang 2013 BCCA | - P vendors, D purchasers. Purchase price of $2 million for a residential property, deposit “on account of damages” of $100,000 (5% of purchase price). D breached, P resold for profit- **P entitled to forfeit the deposit even in the absence of loss*** “On account of” was interpreted to mean that, if P breaches, D can keep the deposit, and if the loss is greater, D can sue for the rest.

- “**On account of damages**” favours the vendor* “Liquidated damages” favours the purchaser, is a cap
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| Hughes v Lukuva 1970 BCCA | - Deposit on sale of land of $5,000, described as “liquidated damages”. * Total purchase price ~$60,000, deposit ~8%, very reasonable
* Vendor suffered no loss (Tang)

- Court said not a penalty. Amount not excessive, and not resulting from a breach, just non-performance of a condition precedent |
| Fraser v Van Nus 1987 BCCA | - K for purchase of a house for $750,000, deposit of $50,000. Purchaser breached, vendor lost $250,000- Deposit paid “by way of liquidated damages” – doesn’t expressly state it is meant to be a limit on damages, but acts as one:* “**Liquidated damages**” favours the purchaser (opposite of Tang, where “on account of damages” removed the cap, favoring the vendor)
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FORFEITURES UNDER AGREEMENTS FOR SALE

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| Basics | - **Forfeiture** = relinquishment of prop right resulting from the breach of a K- **Agreement for sale** = an installment K for the purchase of land- Maxims:* Equity abhors a forfeiture
* Equity will not mend a bad bargain
* Freedom of contract
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| Re British Columbia Development Corp 1986 BCCA | - NAB wanted to buy prop, got an agreement for sale, NAB to pay in installment. 1980s real estate market collapsed, NAB stopped making payments. But now P didn’t want prop either, no value.* Exercised their right of forfeiture: Vendor re-takes possession, purchaser loses interest and payments

- NAB sought relief from forfeiture. Refused b/c:* **1)** Purchaser has to show the clause was penal (not LD) at time of making K (out of proportion w vendor’s loss)
* **2)** Purchaser must show the exercise of the right of forfeiture was unconscionable at time of breach (inequality of bargaining power)

- In this case, it was not penal or unconscionable, nor unequal – both dealing in the market at the same time, knew the risks |
| Connor v Bulla 2010 BCCA | - P purchasing prop from D. &125,000 down payment + $125,000 in installments, no forfeiture clause. Money was partial payment, not a deposit. This means that w/out forfeiture clause, money back- D financed the purchase by having tenant in the property.* But tenant left, and P couldn’t pay. D took the property back
* D discovered the tenant had wrecked the house (grow-op)
* W/out a forfeiture clause, D can’t keep the purchaser’s payments. **P should get it back subject to deductions for damage**
* L&E Act s.24: “costs, expenses, damages, compensations and all other matter that the court thinks fit”.
* TJ gave liber allowance for losses suffered by D
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FORFEITURES UNDER OTHER AGREEMENTS

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| Popyk v Western Savings and Loan 1969 ABCA | - P started a savings plan w D. Put $100 down, and pay each month for 25 years to get a certificate worth $10,000. Made first payment of $100 then breached. Wanted his $100 back- No forfeiture clause, but amount subject to loss if no further payments, so substance is forfeiture- CA said 3 questions to be asked:* 1) Was there a forfeiture?
* 2) Juris to grant relief from forfeiture?
* 3) Should the court grant relief in this case?

- 1) Yes. SHEP: Disputable under next case b/c no loss of property- 2) Yes, AB has equivalent to s.24- 3) No. Admin costs of setting up the account, doing the work, paying employees, cancellation costs, etc. |
| Sport International Bussum v Inter-Foorwear 1984 Eng | - D had license to use names and trademarks, D to pay in installments. If failed to make a payment, whole sum to come due, and license terminated- Court held that there was no juris to grant relief from a forfeiture of a trademark license (K right) or payments:* Doesn’t involve land/property so no jurs
* Forfeiture requires loss of an interest in land. Shouldn’t expand to include this, no pressing policy considerations.

- Commercial parties, well advised companies. E won’t relieve bad bargain* Can maybe distinguish Popyk (23) by saying he wasn’t a commercial party so had lower bargaining power, inequality might give room for E to work
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