**Class 1**

Remedies

* court orders, what the court can do for a litigant, the ultimate outcome of litigation.
* injunctions and specific performance. Injunctions are extremely popular because they are so versatile and useful and can come up in so many different contexts.
* Equity has a religious aspect to it – it is a body of law that is concerned with ethics and morality, natural law – the law of God, wherein humans have dignity and rights. Equity offered discretionary relief from the common law and its courts. The common law courts gave remedies and results but in many cases these results were not the highest level of justice and something was needed to correct the deficiencies in the common law system
* equity is a correction of legal justice – the common law and our legislation enacts general rules but the problem is that these rules or laws don’t get the right result in every case. There is then need for some judicial recognition of the exceptional case where the legal result is not the best and we need individualized justice, which is what equity offers.
* Usually a question of whether the claimant would suffer irreparable harm without an injunction
* For equity to kick in, there MUST be some defect with the common law.

Common Law vs. Equity

* Earl of Oxford: where there is a conflict, that is different results by common law/legislation and equity, the equitable result prevails. This is codified in our Law and Equity Act, s.44.
* court of chancery tried to be more consistent in its outcome, coming up with principles guiding the exercise of its discretion to become a more consistent body of law.
* Equity and common law are administered by the same court but there are differences in the way of thinking and approaches to solving problems. So there’s been fusion on the administrative front in that the courts are now in the same place, but the way of thinking and the remedies and rights of common law and equity are distinctive..
* Big difference is method of enforcement of orders: a common law order to pay damages is enforced by the creditor seizing and selling the debtor’s assets to pay the judgment under court supervision. But equity acts in personam and decrees in equity are punishable by contempt. It can be civil punishment: a fine or penalty, or it can be committal (imprisonment) imposed by the party obtaining the order, or it can be criminal – a prosecution by the attorney general. Only way out of imprisonment is to purge your contempt by apologizing and following the order.
* Civil contempt = imprisoned on the other party’s request/insistence. or criminal contempt is where they’re showing flagrant disregard for the court/public system and that is prosecuted by the AG. Even civil service can be thrown in jail for contempt.

Equitable Damages

* Lord Cairns’ Act in 1858: It’s a statutory remedy that can be granted in addition to or in substitution for an injunction or specific performance. We have it under s.2 of Law and Equity act. It is also discretionary.

Equitable Jurisdiction

* Judicature Acts of England fused law and equity. The physically separate courts are now merged in the High Court of the Judicature. It’s only the high courts that have equitable jurisdiction, from the BCSC upward.
* Equity is seen as a gloss or appendix or supplement to the common law to cover off inadequacies and in the event of a conflict, equity prevails..
* Inequitable conduct denies relief, discretionary consideration. Plaintiff must be morally blameless in regards to the particular transaction. Court of equity also looks at the defendant’s conscience and looks at their ethical/unethical conduct in deciding whether to grant a decree, like whether they had good faith or bad faith. They look at breaches of contract, whether it’s a wanton and wilful breach of a good-faith/innocent breach. The judge acts as the public conscience in deciding what’s fair.
* Equitable remedies are thus discretionary, as opposed to legal remedies which are as of right.

**Class 2**

Proportionality

* equitable idea whereby the basic approach is that the remedy should be appropriate to the circumstances and should not be excessive in regard to the particular situation. So when granting a remedy, look at the nature of the breach and match it with an appropriate remedy depending upon the conduct of the defendant in making the breach.
* Injunctions can be granted where other statutory penalties have failed to bring any effective remedy against a party. For instance, a guy is just willing to swallow damages or a criminal fine as the cost of doing business.
* Has to be proof for why you want specific performance, why you can’t accept just damages

More on Conflicts Between Law and Equity

* where there are conflicts, equity prevails, but there are very few conflicts due to principle of equity assuming the law to be what it is: it doesn’t assume law is wrong as far as it goes, it just doesn’t come to the right result in this particular case. So equity acts as an appendix to the common law, not a complete system in its own right like the common law does.
* If, however, there is an inadequacy of the legal remedy, equity corrects that inadequacy. So generally equitable remedies are only available where an equitable right has been violated) as there would be no common law remedy for such a violation, or if there’s a legal AND equitable remedy but the equitable one is available because the available legal remedy (damages usually) is not adequate. So the common law is the rule and the equitable is for the exceptions.

Fusion of Law and Equity and more on Contempt

* substantive common law and substantive equity remain distinctive and the remedies are granted on different bases.
* They are both administered by the same channel, superior court of the province, and they run side by side, they are distinctive, they don’t merge, and they don’t lose their identity.
* anyone who violates an equitable decree, whether they are the defendant or third person, if they violate an equitable decree knowing that it exists, are guilty of contempt. That can be enforced civilly by the party who obtained the order (which results in a fine or committal/civil imprisonment) or it can involve criminal prosecution if it involves public defiance of the court. Public derision or public defiance of court orders = criminal contempt and has an actus reus and mens rea. Has to have this public aspect to be criminal contempt.

Re Macdonald – Equity’s discretion

* lawyer with an alcoholism problem and went into bankruptcy owing $45,000.
* guy was given a court order that if he paid $100 a month for 3 years towards all these $45K debts, you can go to court and get discharged from bankruptcy.
* In one month, he sends a check for $99 and one undated cheque (which hence can’t be cashed) for $1, which meant he failed to pay. He then dies, technically as an undischarged bankrupt. As such, the $37,000 of his life insurance after death would belong to the trustee in bankruptcy.
* court said that in law, under Bankruptcy Act, that’s the situation: money goes to the trustee, but court said this strict legal rule is inappropriate in this case; it is fairer to distribute the money to the surviving members of the MacDonald family. Judge made that order instead.
* In Macdonald, judge lays out maxims of the basic equitable approach in its equitable jurisdiction to resolve such a dispute. The Bankruptcy Act was applied first to see what was to be done; We have a statutory scheme saying “here’s how you do it” in the Bankruptcy Act but there are exceptional cases where the statutory rules should not be applied because they would lead to an unfair result in a specific situation. In such a specific situation, court with equitable jurisdiction can change a statutory outcome, saying statute shouldn’t apply in this case due to the unusual circumstances.

Re Macdonald – Maxims and Remedies

* Judge outlines equitable maxims underlying court of equity that give it coherence and consistency, which would be affirmed in Elta. They are general principles, not hard rules
* The commonality of all equitable remedies is that they are awarded in the judge’s discretion. Judges do not apply strict rules in equity, but follow general guidelines illustrated by maxims which are dependent on the social fabric.
* Equity has greater range of remedies, not just damages. Common law remedies are also rules, as of right, apply automatically, while equitable remedies are not automatic and are subject to a discretionary, flexible process governed by the specific circumstances and issues of conscience and ethics. It’s about what is the right thing or ethical thing to do, recognizes moral principles.
* Equity = situation where rule does not necessarily apply, as in MacDonald case, where to apply the rule would’ve gone against conscience and would be unethical. It was against the trustee’s conscience to follow the rule and fairer to depart from the rule under these circumstances.
* this case is reflective of how to approach a problem from an equitable point of view. Equity is an appendix or gloss on the common law; it is corrective of the common law and some areas of the common law are in greater need of correction than others, so equity is uneven in its application to our legal system and so in order to give coherence and structure to the subject matter of equity, we have equitable maxims, which are general principles that guide court of equity. Remedies of equity are a discretionary call by the judge and that discretion had been regularized by reference to maxims/general principles that explain the equitable approach.

**Class 3**

Elta (role of maxims and discretion)

* court compares common law and statute, the legal approach, to equity. Judges in equity do not have strict rules, unlike common law. Judges applying equity do not use strict rules, just general guidelines illustrated by maxims
* Court says that application of equitable principles is dependent on the social fabric; equitable maxims reflect the ethical quality of equity, which is the determination of conscionability, court of equity looks at conduct of the parties and determines if it has been equitable or inequitable in the matter at hand, trying to do justice to the parties in the particular dispute. Look at conduct according to moral principles.
* Only awards of money can be enforced in other jurisdictions – common law does not have any room for discretion as regards other forms of relief.
* Equity is concerned with the circumstances of the particular case and the state of the parties and therefore equitable orders are tailored to the facts of the particular case, they are not standard form orders, they must be structured to the circumstances of the case.

Elta (on differences between common law and equity)

* Elta emphasizes that equity is distinctive and has not been merged with common law. Common law is rule-based and equity looks at each case individually. Equity is particularly interested in protecting the vulnerable, like Macdonald with his mental health issues. Also looks at the conduct of the parties and whether they have behaved inequitably: doctrine of clean hands and whether defendant’s breach was wilful.Looks at conduct of the defendant as well: was the breach wilful or deliberate? Tailors to particular circumstances.
* Common law remedy is just damages, but equity has a whole bunch of remedies in addition to that: injunctions (interlocutory or final – common law only has final relief), specific performance (if damages are inadequate, court can order both parties to perform the contract), equitable compensation (for breach of fiduciary duty), equitable damages (Lord Cairns act: awarded in addition to or in substitution to an injunction/specific performance)

“Equity will not suffer a wrong to be without a remedy”

* where common law answer or statute, creates a wrong or does not correct a wrong, equity then gets a jurisdiction to step in and correct the wrong that the legal system has left uncorrected.
* In MacDonald, there was the legal outcome according to the statute. However, this was not a fair answer, inequitable answer and the role of the court in its equity jurisdiction is to correct that wrong. Macdonald: “the injustice in the present case calls out for a remedy”: the legal outcome is unjust and offends the sense of fairness in equity and so court of equity can change that outcome. This was not, however, a general rule. Tailored to that case.
* it could also be a situation of an irreparable harm, meaning that it can’t be compensated by damages, that can give rise to an injunction due to injustice otherwise.
* In common law, damages are awarded only after a judgment, a final remedy. Equity however could grant its remedies, the injunction, before the final judgment. Useful in situation where there must be some relief, can’t wait for a trial.
* Common law can also only grant remedy of damages after the wrong has occurred and damages have been suffered, it’s the remedy after something has happened. In equity, if you can anticipate the wrong will occur to you in the future, you can get an injunction to stop an anticipated wrong from happening. Common law can’t do anything about the threatened wrong, so equity created quia timet, the plaintiff fears a wrong, and can get an order to prevent the wrong from occurring, an anticipatory injunction.

“Equity follows the law”

* Canson: who has the legal title is a big deal for equity, wants to know what the rights of the legal titleholder are before messing around. At every point equity presupposes the existence of the common law, wants to see who has the legal rights here and then whether there is some inadequacy or exceptional circumstances that require them to go one step beyond those legal rights and only then will equity step in.
* first will look to the common law rights of the legal owner, then consider if there’s a higher ethical obligation. Equity thus doesn’t conflict with the common law, instead it accepts it but goes one step further. Judge says equity follows the law, always apply common law concepts first. Equity sees the legal title, but says it’s nevertheless not the best answer to just strictly apply the law in this case, inadequate, so equitable remedy.
* This means first thing we do is “what’s the legal position here?” Who’s got the legal title? Follow the law and then see if there should be a higher/better outcome.

“Where the equities are equal, the law prevails”

* “equities” means the ethical positions of the parties. If two parties are before the court, both claiming property, equity asks what their moral or ethical positions are. If they are equal, then the law, the legal rule, prevails.
* Conversely, if the equities are unequal, then the legal rule should not apply. In Re Macdonald, the judge said the equities were unequal: it was a hardship to the dependents of Macdonald (prerogative of mercy to relieve hardship where strict legal rules will cause manifest injustice), the children are on a higher ethical plain. Critical thing is finding where the balance are; here, they found the injustice to the kids outweighed the injustice to the creditors. The creditors have likely written off their losses while the kids have nothing but these assets to look to.

“Where the equities are equal, the first in time prevails”

* we go in chronological order, first in time first in right, where people are of equal equities.
* Here though, we didn’t have two equitable claimants: just a legal claimant in the trustee with legal title to the money and the kids with equitable claim, that was battle between legal owner and equitable claimant. However, if the equities are equal between two equitable claimants, the earlier claimant to resolve the dispute wins out.

“He who seeks equity must do equity.”

* if you come to court for equitable relief, you must be willing to do equity.
* means that court, as part of its discretion to grant equitable remedies, can say to the plaintiff that they’ll only get that remedy if they do something, the imposition of terms and conditions. So a court of equity can grant as an injunction, but as a condition, if they want that injunction, the plaintiff will have to do X and Y and will not get that injunction unless they accept.
* Court in granting a remedy can impose any terms it “Sees fit’ which means discretion. An example can be for interlocutory injunctions: Plaintiff wants an interlocutory injunction - Court orders the plaintiff to accept terms and conditions that they’ll personally guarantee the injunction so that if it turns out they don’t have a good claim, weren’t entitled to an injunction, the defendant can collect.
* Ex parte injunction: you’re in such a hurry for an injunction that you don’t have time to notify the other party that you’re going to court. If the order is made, other side will scrutinize what was said to the judge and if the applicant didn’t make full and frank disclosure, court rescinds. For these injunctions, this is the operation of the maxim: must do equity to get equity.

“He who comes into equity must come with clean hands”

* Defendant can point out inequitable conduct on the part of the applicant/plaintiff and tell judge to refuse the relief because that party is unworthy
* The inequitable conduct that is relevant is only in connection with the transaction that is the subject of the litigation. Look at the litigation and the transaction and the plaintiff’s conduct in those two contexts. The conduct being looked at for unclean hands runs the gamut all the way from minor unconscionability all the way up to criminal activity. Not just illegality like in CL.
* In Macdonald, the plaintiff did nothing to notify MacDonald as to the error on his cheque. Judge absolved him of this though. He said trustee came to court with clean hands, after looking at the equity of his conduct in his dealings with Macdonald

“Delay defeats equities”

* court is interested in the conduct in terms of delay or passage of time between when a wrong occurs and when a party goes to court.
* Laches: delay = inexplicable passage of time plus prejudice to the other party resulting from that delay or the other party being led to believe that the applicant has abandoned the case, and we have acquiescence.
* unlike common law, historically equity has no limitation period, but operates with analogy to those limitation periods by looking at delay or passage of time as a discretionary factor.
* In Macdonald, showed the court considering the meaning of the delay (whether it was inexplicable): “did he really not want to pursue his case, or was he just so befuddled due to his mental state?” Because it was the latter, was able to disregard it. But normally, saying “I’m in no hurry” is bad. Doing nothing MUST be explained. If not, it counts against them in equity.

“Equality is equity”

* It’s about proportionality, balance, sense of fairness. It can be equality, but it’s more about proportionality, a balance between what each side gets and that balance should be fair and result from fair-dealing for that particular case.
* Weigh the balance of inconvenience: what will plaintiff gain if given the remedy and what will they lose and similarly what will the defender gain if it’s not given and what will it lose if it is given. That balance is crucial to equitable discretion. Also look at consequences to 3rd parties..

“Equity looks to the intent rather than the form.”

* Looking at the substance of what the parties intended as opposed to the form.
* Macdonald: form was that he wasn’t discharged due to not paying $1. Substance was that his intention was to do right by his family, but messed up.
* Equity is thus trying to do his intent, for which the form could be overlooked.

“Equity looks on that as done which ought to be done”

* Macdonald ought to have paid $3600. If he’d done what he should’ve done, he’d’ve paid the $3600. Court of equity sees the best in people and he’s treated as if he’d done what he ought to have done.
* Looks to consequences of what would’ve happened had he done what he’d ought to have: the insurance would go to his estate. And so that’s what court does. court will thus do what ought to have been done and give the proceeds to the kids.

“Equity imputes an intention to fulfill an obligation.”

* if you accept an obligation to do something, equity expects you to carry it out, if you become obliged to do something, court says you’re obliged to do what you’re supposed to and do it well.
* As a trustee, you’re a fiduciary with duties of loyalty and as officer of the court, duties to the court to conduct yourself on high plain of conduct. Court says that in chancery we assume that this is what you wanted to do, do the best you could in these circumstances. Says generally as officer of the court, he’ll be ordered to do the fullest equity, higher standard of conduct. A trustee is expected to do the right thing – he assumed the role and is thus expected to fulfill it. Ethical considerations expect him to do the right thing, which is give kids the money.

“Equity acts in personam”

* court of law was a court of legal rights, acts in rem, and equity fulfills the law by making decrees against people affecting their conscience.
* In personam looks at each case individually and says that this case, on its facts, is outside the ordinary rule, which is fine in normal cases, but exceptional circumstances here make the ordinary rule inapplicable. It’s not creating new rule, just a little exception in this case.
* In personam also means that equitable decrees are enforceable by contempt. If you know about the order and breach it, it’s contempt.
* In personam also means court has jurisdiction over the dispute so long as defendant is in the jurisdiction of the court, regardless of where the asset is, even if the location is indeterminable, unlike common law, where the asset must also be in the jurisdiction.

**Class 4**

United Scientific Holdings (fusion of law and equity)

* Judge talks about one fused system. This is not the orthodox view.
* orthodox view is also stated: two streams of jurisdiction, common law and equity, are now brought into the same court so that fusion only operates at the procedural level. two streams of jurisdiction flow together, administered in the same court, but they run “side by side,” they are in the same channel, but judge now has two compartments, must know both approaches.
* Diplock says conservatism makes lawyers slow to recognize that the two systems were actually fused, He says they are fused together and are indistinguishable, can’t really define the two, so just say it’s all one body, one system of law, they are merged into one system of law, no longer separate. This can’t be right: trusts couldn’t exist, since that’s a split between an equitable claim and a legal claim. Systems must be separate.
* Reality: the streams are developing over time, but doing so separately.
* A breach of common law right/relationship (like breach of contract or tort) will get remedy of damages. If the common law remedy is inadequate, equity will step in and give a remedy. So for common law rights, remedies in both common law and equity. If you have an equitable right, like fiduciary relationship, you’re looking for an equitable remedy. However, you CAN’T get a common law remedy for an equitable right.

Canson

* claim by a client of breach of fiduciary duty by Boughton law corp. Canson paid an inflated price because property had been flipped before they bought it and had they known, they wouldn’t have bought it. They bought the property and built a warehouse on the property, which then collapsed due to negligence of builders. Canson sued the builders and won, but still out money, so they then sued Boughton claiming breach of fiduciary duty, duty in equity, by not telling us about the secret profit that you knew about. Never would have built the crappy warehouse since they never would have bought the property had they known about the secret profit.
* BCSC said boughton can’t be liable for the negligence of the builders.
* Tried to argue that now we have fusion of law and equity, so you can combine equitable claim with a common law remedy, but court said no, this takes fusion too far. Equity always recognized common law rights, but not vice versa. You cannot combine common law remedies with equitable claims. Common law damages governed by remoteness and causation cannot be applied to an equitable claim.
* Ration is that remedies retain their individuality, cannot combine common law remedies with equitable wrongs. They must continue to have their separate existence.
* If a court of Chancery could have given effect to this equitable claim or defence before fusion, now he can do that as a judge of the supreme court with both jurisdictions. Gets over hump of common law courts not recognizing equitable rights, now supreme courts sitting in equitable court HAVE to pay attention to equitable rights and hear equitable claims.. Equitable rights and defences however only apply to cases where before 1879 fusion, in a court of equity, those rights and defences would have been recognized. As such, they are still kept separate. Just have to give effect to equitable claims as the court of chancery would.

s.9 of Law and Equity

* legislatures said we have system where these dual systems of law are administered by the same judge just as they were administered by those separate courts but physically in the same judge so litigants don’t have to runa cross town to get their remedies. So equity always recognizes legal owners, s.7 and 9 protect that and give BCSC in it’s equity jurisdiction the same status that it had before fusion.
* BC supreme court has all the remedies of the old courts of common law and of chancery and can administer them all in the one court, but only in cases where prior to fusion, those remedies would have been administered by those courts. So BCCA had taken s.10 (section that says this) one step too far by saying common law damages to an equitable right, and SCC said no, must apply common law to common law and eqauitable to equitable and only where the common law right is inadequate, you give equitable remedy, neither court could apply common law damages to equitable claim prior to fusion, so can’t do that now.

Conflicts Between Law and Equity

* Earl of Oxford: an injunction by court of equity to stop proceedings in common law courts. Since it’s all one court, we no longer need that. Just a stay of proceedings.
* before fusion it was established that equity prevails if there’s a conflict (Earl of Oxford). s.44 of law equity preserves idea that equity prevails over the common law.

Elta – Equitable Approaches to Granting Remedies

* SCC says that equity is more flexible than common law and the principles applicable to these remedies are distinct. Distinct approaches to granting remedies pre-fusion continue today: common law are still a matter of right while equity are discretionary and act against the person.
* Common law damages provide monetary relief. Before fusion, the court of equity was very leery of monetary relief. To improve on that, English legislature enacted Lord Cairns’ Act which said that Court of Chancery could give damages in addition to or in substitution to injunctions or specific performance: equitable damages, preserved in s.2 of Law and Equity Act. So the indirect result of fusion is that you can more readily get monetary relief from equity.
* common law has no interlocutory remedies.

Common Law vs. Equitable Defences

* Equitable defences: delay, laches, acquiescence, and unclean hands. These only apply as discretionary factors in the granting of equitable remedies.
* Common law defences: limitation periods (statutory), acquiescence, and illegality. Delay and laches are not applicable to common law remedy of damages. Can’t say plaintiff delayed n going for their right to damages, common law the only time period is the limitation period.
* Acquiescence: before fusion, it was a defence to both equitable and common law claim, and that remains the case.
* In equity, decrees are enforced in personam. It didn’t matter in equity where the property was located, as long as the defendant himself is in the jurisdiction.
* If he however leaves the jurisdiction, traditionally, the defendant is no longer here so the remedy of enforcement in personam can no longer be enforced. To overcome this, we have sequestration, in rem remedy, mentioned in Penn case where if the defendant has left the province but left assets here, they can be seized and held until the defendant obeys the decree.

United Scientific Holdings – assessing equitable damages (bringing common law concepts to equity)

* monetary relief should be consistency and coherence between common law and equity, harmonized, and same amount should be rewarded if you have a claim that could be brought in common law OR in equity. If you can sue someone for breach of retainer OR fiduciary duty, you should be awarded the same in both claims.
* Where there are overlapping claims and you’re able to try for both, they’d be same amounts either way. Also cannot get both.
* Case was about “time is of the essence” clause: Equity looks at the substance and not the form, and use of the phrase “time is of the essence,” is just a matter of form and equity wold look behind that phrase and see if it REALLY is “of the essence” to the parties.
* common law would enforce that clause literally. Equity, before fusion would look behind that clause and see if it really was of fundamental importance to the parties and if not the chancery would overrule common law, not require strict compliance with the time period, unenforceable.

Canson on Damages

* said that if you have a claim that could be brought in common law for damages or in equity for breach of fiduciary duty and are claiming equitable compensation (which is also monetary relief), the common law and equitable outcomes should be consistent, the same award for damages in common law that you’d get in equity (though can’t get both).
* Common law concepts of remoteness and causation are incorporated into equity and equitable compensation to harmonize the law where remedies overlap. NZ also brought mitigation and contributory negligence into equitable compensation to achieve consistency of outcome.
* Mclachlin dissents, says that there are policy differences between law and equity, equity wants to enforced loyalty and deter people from breaching duty, while common law says freedom of action and if they breach, pay compensation. Fiduciary has trust and not self-interest as its core. Equity is about loyalty and reliance and not freedom of action: Equity has a deterrent aspect that common law lacks, where there is freedom to breach and walk away. Should not be decided by same questions
* The original version, which McLachlin supports: common law damages are determined by causation: did the loss flow from the breach? Here, no, the breach of duty was reflected only in paying too much for the property, not the collapse of the building. Equity: would the loss have happened without the breach? If no, strict liability for all loss: restitution.
* Majority says seek equitable compensation but prevent the extra claim being made by saying the common law question for damages now applies to equitable compensation.

Cadbury Schweppes

* court says equity like common law is capable of ongroing growth and development and having regard to equitable principles in case law, the authority to award financial compensation for breach of compensation is inherently in equitable jurisdiction and is not contingent on Lord Cairns’ Act. Usual remedy for breach of confidence is an injunction in a case like this, but here, monetary relief for the breach is more appropriate.
* Court says that fusion of law and equity allows for the expansion of remedies and more flexibility in granting remedies and so we can find new uses for the remedy of equitable compensation, here we award it as monetary relief where it’s preferable under the circumstances to a specific remedy like an injunction, which would shut down the defendant’s business entirely, which is over the top. Fairer and tailored to circumstances of the case.
* Monetary relief in equity was given rather than the more drastic, but more usual remedy of injunction. Fusion thus permits the growth of these remedies, goes against archival view.

**Class 5**

Canson Cont’d

* Lamber JA had said that there’s a breach of fiduciary duty by Boughton and can combine that breach with the common law remedy of damages: SCC rejects this, you can’t combine legal and equitable and say it’s one body of law and attach legal remedies to equitable claimants. Before fusion, the legal courts did not recognize equitable claims.
* Canson ratio: If the facts give rise to equitable claim OR legal claim, it should give rise to the same amount regardless of how the claim is brought forward. Can’t outright merge equitable claims with common law damages, but equity in its separate stream can borrow from common law ideas so that we have consistency in claims.
* equity borrows from common law idea of contributory negligence, mitigation, and causation.

Penn: Equity Acts in Personam – Equity’s In Personam Jurisdiction

* Common law was in rem, focused on title, focuses on transfers of property or on the estate of the holder of property. It was against the whole world and affected legal title. Equity instead made decrees against persons; injunctions act against persons.
* Penn: Penn and Baltmore agree to submit it to arbitration to determine where our boundary lines should fall. Then Baltimore reneged. Sued Baltimore in English courts for specific performance, to force him to submit to arbitration. Baltimore argued you can’t make an order affecting land outside England, but equity has an in personam jurisdiction and Baltimore himself is before the court and so the agreement is enforceable in personam against him.
* Ratio: the conscience of the party was bound by this agreement; Baltimore was present in this court and thus within boundaries of England and court’s jurisdiction and so subject to its law.
* Equity will not act in vain: if it would be in vain to make a decree, Baltimore can show me that this decree is not enforceable or won’t work, I’d agree with him and say equity will not make a decree if it cannot be enforced. However, conversely, they’ll try hard to make it enforceable.
* If this was a common law judgment, which would be enforced in rem, like if court was being asked to declare title to the property in US or say where the boundary line runs, that would be in rem, against the property, which it couldn’t do because land was outside England. But Penn isn’t asking for this, he’s asking for an order in personam, that Baltimore abide by his promise.
* as long as the party is within the jurisdiction, the equitable order can be enforced, as equity is in personam. If it’s in rem, the property must be within the jurisdiction.

Enforcement

* Civil contempt. If Baltimore continued to defy the order of the court, , Penn could bring him before the court for punishment for contempt, the goal being to coerce obedience.
* If it’s a public defiance, like protesting and such, public defiance of the court order = criminal contempt with prosecution brought by the Attorney General in criminal court system. This means that actus reus + mens rea with punishment under Criminal Code.
* if the guy avoids contempt by absconding from jurisdiction, use sequestration. Sequestration is actually in rem, it’s in Civil ruels s.13-2(4) to be used if the person has left the jurisdiction. If he leaves assets behind him, those assets can be ordered to be seized and held by the court.

West v. Dick – Specific Performance, Futility, and In Personam Jurisdiction

* Dick refused to perform agreement, so the vendor, West, sued him for specific performance of the deal. Dick argued this land was in Scotland and therefore outside the jurisdiction of court.
* judge says if the decree was futile, he wouldn’t make it. Court of equity will however strive to make the decree enforceable however they can before giving up.
* Specific performance: can’t order just one party to perform, must order both parties to perform. To get decree of specific performance, the plaintiff must show the court that they are ready, willing, and able to perform their side of the contract. Concept of mutuality. If Dick is going to be ordered to perform, West must show that he’s ready to perform and willing (want to go through with the deal) and able (they CAN perform it). He who seeks equity must do equity.
* That the property in Scotland doesn’t matter: obligation of conscience, in personam, Dick had agreed to buy and his conscience is bound.

Anti-Suit Injunction (In personam element)

* prevents someone from initiating a lawsuit in another jurisdiction: the litigant is in this jurisdiction so can be ordered not to sue somewhere else.

Mareva injunction

* may be given against someone to restrain someone from taking their money out of the jurisdiction. Even if the debtor has absconded, these decrees are enforceable against third persons, so if he has money in a bank, it’ll be served on them and require them to freeze the debtor’s bank account in the jurisdiction.
* a court cannot make an order in rem against property abroad (Colettis).

Barrick Gold – ways of avoiding futility

* Ontario court granted injunction against him even though he lived in BC and hoped it would be enforceable by BC courts but if it isn’t, we can give the order and make it effective against the ISPs that are giving this guy a venue for defamation. It’s enforceable against third persons.
* the order was also at least enforceable against the defendant if he ever came into the province.
* If defendant put up bad message, Barrick could give notice to ISP and they’d be violating if they let it stay up. So third party enforcement makes it enforceable and not futile.
* Even if there are no third parties, they can bar the defendant from litigating in the jurisdiction, which means the plaintiff would get a default judgment against him. Bars the defendant from defending in the event the order is disobeyed – this is the final method for making equitable decrees enforceable if other ways can’t be found.

Enforcement – Converting In Personam Orders to In Rem Enforcement By Statute

* s.37: where the court has authority to order conveyance of a deed. This is like West: where the court orders Dick to complete the conveyance, if he refuses to, court may vest the property in the person and in the manner as would be done by that deed or transfer had it been executed. So basically avoid the person by just ordering the execution to be completed and just transferring the title in your name and you’ll pay for it.
* This in rem order simply moves the title and can’t be done, even by statute, if the property in question is outside the jurisdiction
* s.38: can order somebody else to execute the document on the non-performing party’s behalf and can nominate someone for that person. Dick won’t sign, so court orders someone to sign on his behalf and that’s satisfactory and we can complete the conveyance. Again this is in rem: you’re moving the title from West to Dick, either doing it by simply making an order in s.37 or an order to execute the document in s.37 and that can’t be done if property is outside.
* S.38 is only preferred where the LTO wants an actual executed document for their records.

Extra-territorial recognition

* traditionally when a court makes an in personam order, it is enforceable against the defendant when he is in the jurisdiction but has no extra-territorial effect.
* Comity: another court can give recognition to it and say its enforceable, making it a valid order in their jurisdiction as well. It’s one court recognizing another and enforcing.
* Andler: Canadian court does not have to recognize an American equitable decree.
* Barrick: court just says they hope, comity, BC courts will recognize their injunction where the defendant is hiding out. Also, they can instead enforce it against third persons in the jurisdiction or order the defendant ineligible to defend an action by virtue of disobeying an order.
* Uniform law conference of Canada proposed a statutory scheme whereby equitable decrees and common law judgments could be enforced across Canada.

Enforcement of Canadian Judgments and Decrees Act – Registered Judgments

* any province that has enacted this legislation makes this possibility available. Say PEI court grants injunction against defendant, who then flees to BC thinking he’s safe, as judgment is only enforceable in PEI. But the plaintiff can just take that judgment from PEI, bring it to BC and register it in the BCSC and then have in personam enforcement against the defendant in BC, who then must obey the decree or be punished for contempt in BC.
* s.6(3): must not make an order staying or limiting a registered Canadian judgment solely because there’s some defect in it. So if defendant argues there was a defect in the procedure followed by court of another province in giving this judgment, this section says BC courts should pay no attention to this: must give full faith and credit to the judgment and if defendant has a problem with it, go fight it out with the court that gave the judgment or decree in the first place.
* if a plaintiff registers a judgment in BC because defendant has moved here, it becomes registered and takes affect as a judgment of BC court and that the BC court would’ve reached a different conclusion or there’s a defect in the proceeding, it is irrelevant. Must enforce it and if the defendant wants to challenge the judgment, they have to go back to court that granted it.
* Same goes for money judgments or common law judgments: can be enforced across all provinces of Canada under this legislation. Any judgment from any province or territory in Canada, if defendant comes to BC, that judgment is enforceable against them here or if it’s an in rem type judgment, if they have assets here in BC, the judgment is enforceable against them.
* A registered judgment becomes in effect a judgment not just of the province from which it came, but also BC. It’s as if it were a judgment from a BC court.

Ex Parte

* Can apply without notice. If guy has notice of the injunction, he’d use that notice to start hiding assets before the plaintiff could get their order. So the plaintiff will often apply for the order without notice to defendant to get them by surprise.
* As the only the applicant being heard from, not the other party, before the injunction can be registered and enforced, you must apply for directions. Because it’s not obtained with notice, in fairness to this person, the party applying for registration is supposed to get directions from the court as to how it will be enforced.
* ex parte order is not enforceable UNTIL you get directions from the BCSC as to its enforcement.

**Class 6**

Equitable Estoppel

* applicable to legal claims. s.8 says it’s pleaded as a defence but for proprietary estoppels and acquiescence it can be pleaded by both a plaintiff as basis of civil claim for an interest in someone else’s land or defendant as a defence.
* estoppels was used as a way of asserting a right in equity for property against the legal owner of that property

Equitable defence of Delay

* discretionary way of limiting remedies in equity.
* Delay is the passage of time between the time when the plaintiff suffered or anticipated a wrong and the time when that person came to court to get a remedy.
* BC Civil Rules ss.8-5 talks about the need for urgency. If you ask a judge for a pre-trial injunction/equitable remedy, it betrays the sense of urgency if you waited several months to bring it to court. Can also stop an ex parte injunction: obviously not that urgent, so we can wait to hear from the other side. Or interlocutory: we can wait for the trial.
* Court looks at the conduct of the applicant and sees whether it squares up with what they’re saying, the urgency must be shown by objective conduct.
* Delay is associated with pre-trial injunctions because it is the opposite of urgency.

Laches/Delay

* doesn’t apply to common law remedies of damages. (New Sombrero)
* New Sombrero: first the plaintiff is guilty of “unreasonable delay.” This is where the plaintiff has no explanation for failing to act. We’re looking at delay, the passage of time, but the question then comes up as to what the explanation is for it, what can plaintiff offer as excuse or justification for the delay. If the plaintiff can explain the delay, then it doesn’t count. “Unreasonable delay.”
* M(K): important aspect is the plaintiff’s knowledge of her rights, not enough that she knows of the facts that give rise to equitable claim, but has to KNOW that it gives rise to that claim. Question is then whether it is reasonable for plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to her claim. So we look at the mental state of the applicant: time does not start to run in working out laches until the plaintiff knows the facts and knows the rights that arise out of those facts and is able to then know she can go to court.
* M(K): Father argued laches, she’s not sought redress for 12 years. Court said however that there was an explanation here, she was suffering from post-abuse syndrome of denial. That was an explanation that explained this passage of time – it was not an unreasonable delay.
* Cadbury Schweppes: Cadbury tried to explain the delay by saying they got rotten legal advice, their lawyer told them that they couldn’t sue FBI (when they really could).

Laches – Substantial Prejudice and Acquiescence

* Other element of laches is that there has to be either substantial prejudice to the defendant caused by the delay or the delay must have caused the defendant to think that the plaintiff has given up or waived or accepts, given up on their claim, they’re not pursuing it (acquiescence).
* For laches to work, there must be unreasonable delay PLUS either the defendant has been placed in position where they can no longer effectively defend thanks to delay (like loss of evidence, witnesses are gone, records are lost) or the defendant during the period of delay suffers economic harm (defendant spends money in the interim period before the plaintiff kicks up the action, like in Cadbury case FBI Foods spent $1 million buying a business during period of delay), whether the delay results in circumstances that makes prosecution unreasonable.
* Lindsay Petroleum: it would be practically unjust to give a remedy where the party by his conduct has done something that would be a waiver of it (because the plaintiff has delayed acting, the defendant has reasonably concluded that the plaintiff is not going to pursue a claim then they turn around and do pursue a claim, that’s laches)
* the other branches of laches are where plaintiff’s conduct and neglect, while not waiving the remedy, puts the other party in a position that would not be reasonable were the remedy to afterwards be sought after, either because they can no longer defend themselves or have incurred expenses that would be money thrown away pointlessly if now subject to the claim.
* It’s unreasonable delay + substantial prejudice (no defence or economic harm) or unreasonable delay + acquiescence.

Limitation Act

* equitable concept of discoverability triggers the start of the limitation period: time does not begin to run until you know about your claim and realize you have rights.
* It’s when yhe plaintiff could have reasonably discovered their claim, that is the facts and the rights. This is s.8 of the new Limitation Act, which sets out the test for discovering the claim and says the limitation period only runs when the person first knew or reasonably ought to know about the loss or damage, that it was caused by an act or omission of the defendant, and that a court proceeding would be appropriate means to seek to remedy it. Once the person is aware they have a legal claim, they have two years to start a court proceeding.
* Limitation Acts apply to both legal and equitable claims and remedies. Laches applies ONLY to equitable claims and remedies. The limitation act involves a fixed period of time of two years from discoverability. Laches continues to operate within that limitation period, but is not fixed; the defendant can change their circumstances by spending money on reasonable reliance on plaintiff not pursuing a claim or witnesses move away within the 2 year period preventing plaintiff from pursuing equitable remedies (but they CAN still go for a legal remedy if in 2 yrs).

Partial Laches

* Limitation Act does NOT bar any claims until the 2 year period elapses.
* Within that period, laches may bar or completely prevent an equitable remedy or it may only limit, that is confine the scope of available remedies in some way. This is partial laches.
* Statutory limitations totally bar legal and equitable remedies, but laches can operate in a modified way where it doesn’t have to be a total bar to all equitable relief, it can be partial relief and a partial bar to claims (laches barred Cadbury from getting an injunction, but still got equitable compensation).

Acquiescence/Proprietary Estoppel

* bars both legal and equitable claims.
* If proprietary estoppels is used as a defence, it’s used as a shield, but it can also be used as a sword to create an interest in someone else’s property – for instance, if I lead someone to believe they have an interest in my property, I can’t then deny them. They can then sue to get.
* proprietary estoppels/acquiescence is a defence to both common law and equitable claims, but can also be a way to launch an equitable action to get an equitable interest in real property.

Unclean Hands

* bars plaintiffs action due to their conduct either in the situation itself or in the process of the litigation. Defendant argues plaintiff is unworthy of equitable relief and should be left to common law remedy if any because of their conduct.
* Nova Scotia: court of equity refusing to grant equitable relief to the plaintiff because of his wrongful conduct in the very matter which was the subject of the suit in equity.
* not about whether the plaintiff has led a blameless life. We just look at the conduct of the plaintiff in relation to the subject matter of the dispute and the litigation.
* Common law claims are only subject to illegality. Unclean hands = unconscionable conduct (need not be illegal; immoral or unethical is enough) and only applies to bar equitable claims. Flouting the by-law for years in Polai is an example.

Discretionary Defences

* Laches, estoppel, and unclean hands are certain equitable defences – bars to remedies. Discretionary defences are factors court can way when deciding whether to exercise discretion and grant remedy.
* Discretionary defence: futility. If the decree of equity will be unenforceable, if the defendant could disregard it, the court won’t give that decree if defendant can just ignore it.
* Hardship: consequences of the remedy involve hardship to the defendant, like in Cadbury where the injunction would’ve put FBI Foods out of business, so court substitutes for a lesser relief.
* Public Interest: Where does the public interest lie? This is another consideration for the court that can be weighed in discretionary power of court to determine what the proper remedy is.
* “Weighing the balance of convenience”: whenever court is called on to weigh various factors of whether or not to grant an equitable remedy.

Acquiescence

* Laches can either bar equitable relief or just limit what’s available due to the delay and the consequences of the delay to the defendant. Unreasonable delay plus effect of the delay.
* Acquiescence: the party by his conduct done that which might be fairly regarded as a waiver of it, causing me to proceed as though they’re not going to sue me, accepted the wrong and not going to do anything about it. If the plaintiff can show that this wasn’t acquiescence, that they didn’t proceed against the defendant for a reason, like bad legal advice, or that they didn’t know that they had a claim, it won’t be waived.

Discretionary Factors in Determining Laches

* Lindsay petroleum: laches is discretionary, the effect of the delay is more important than the duration, what are the consequences of misleading the defendant
* Erlanger: discretionary factors: length of the delay, conduct of the parties, effect of the delay on the parties. Also, cannot raise laches against the Crown. It only applies against private litigants.
* Length of the delay: Canada Trust v Lloyd: there was 43 years between cause of action and issuing of the writ. Court rejected this defence, looking at relative positions of the two parties. Lloyd had the property and use of it for 43 years and made money of it, so they haven’t lost money at all because of the delay and so defence of laches isn’t established. They had profited from their own wrongdoing and it was wilful breach, their conscience affected by deliberate breach, so they could be sued. So length doesn’t matter if no prejudice.
* M.(K.): had the plaintiff been guilty of laches in waiting 12 years? Court said that there had been no change in circumstances, the delay hadn’t caused any prejudice to the defendant, the only issue was whether the delay had possibly led the defendant to believe the plaintiff had abandoned the claim; court said for either of these two branches of laches, must look at the concept of unreasonable delay: when did the plaintiff realize she had a claim? Court said that because of the nature of repressed memory and post-abuse syndrome, not unreasonable.
* Laches didn’t run because there was no unreasonable delay.

Wewaykum (successful laches defence (both branches))

* band brought claim of breach of fiduciary duty against the government, claiming that the government, thanks to surveyors’ errors in 19th century, had misallocated the property. This happened in the 19th century and continued like this ever since
* aboriginal claims are also exempted from the limitation periods
* Court said that both branches of laches applied: where the party has by its conduct done what may be fairly regarded as wavier: knowing about this wrong for 100 years and doing nothing about it, the government was entitled to think the Wewaykum had given up the claim.
* Also, the delay resulted in circumstances that makes the prosecution of the claim unreasonable: the bands were saying they should exchange properties and switch places but court said one band had made improvements, built houses, makes it inequitable for them to relocate and give up all that they’ve done and improved on that property. Change of circumstances that leads to unreasonable prosecution.
* The band knew the facts and the claim and should’ve asserted their rights years ago. Govn’t was entitled to think they’d waived and looking at the consequences to the other band, a third party to this proceeding, would be prejudice to third party. So there was delay plus waiver and delay plus prejudice.

**Class 7**

Blundon

* Storm started as member of partnership, but then the other partners got discouraged. Storm continued on his own looking for treasure with new partners in new partnership, had not formally withdrawn from his previous partnership. The new group found the treasure. Problem: a partner is in a fiduciary relationship with his other partners and so a fiduciary cannot unilaterally withdraw without consent of those he’s in fiduciary relationship with. Should’ve gotten consent before withdrawing and pursuing treasure on his own. Old partners sued saying he was bound by original partnership to split it with them.
* Wanted an equitable remedy of accounting for profits: remedy that is available when a fiduciary has received property held in a fiduciary relationship and incurred expenses, the fiduciary is required to make a court declaration to the plaintiffs of revenues received minus expenses and then that profit is what’s accounted for, a financial statement of revenue and then profit is given to those to whom fiduciary duty is owed. Way to get person to account for the money, where it’s gone, the profit of the transaction, and that profit is subject to the fiduciary duty.
* CA said the defendant, Storm, did all the work and made all the efforts and he should get 100% because of their laches, the plaintiffs should get nothing. CA had taken the view that laches, if established, is a complete bar to equitable remedies – just look at the conduct of the plaintiffs here, were they guilty of delay and did this cause a waiver in the mind of Storm or a change of circumstances/prejudice?
* there’s delay (they stood by and didn’t do anything) and unfairly left Storm to do all the work (change of circumstances – prejudice to Storm in that he did all the work by himself and took on all the risk) and waiver (if there hadn’t been a recovery, they wouldn’t have been heard from and so Storm was entitled to think they’d given up). So CA said this was a 100% defence

SCC Ruling in Blundon – Partial Larches

* SCC says however that it’s possible to have partial laches.
* Partners argued there was nothing they could’ve done, but CA said they could’ve gotten an interlocutory injunction restraining Storm’s search.
* SCC said unrealistic to expect the partners to have sought an interlocutory injunction when there was nothing to fight about, didn’t know there was treasure there to pursue.
* SCC did not actually SAY that there is such a thing as partial laches or a degree of laches, just gave a division. Like Cadbury, delay plus detriment do not necessarily bar the action entirely, there may be delay combined with prejudice that has a less drastic effect – may deny specific relief but not the action altogether.
* Blundell gives more flexible approach to laches, may not be an absolute bar to equitable relief, may just be a partial bar or partial consideration in weighing the discretion for determining the fair outcome.

Cadbury – Modifying Remedy due to Laches

* because of legal advice, Cadbury didn’t do anything for years, then eventually started an action in equity in BCSC seeking an injunction to shut down FBI, but Cadbury then didn’t actively pursue this injunction application.
* the trial judge refused Cadbury the injunction due to Cadbury’s not pursuing the action vigorously – some of that time period was excused due to their relying on the legal advice, so there wasn’t complete laches over that period, but as soon as they heard from a lawyer that they DID have a claim, they were STILL slow to get going with their litigation. Looking at that entire course of conduct of Cadbury, the plaintiff, they were guilty of delay.
* Usual remedy for breach of confidence is permanent injunction, but would be very drastic here – result would shut FBI down.
* BCSC said that Cadbury’s delay led FBI to get into the manufacturing of the cocktail and even bought a plant for that purpose. So there is the prejudice. So trial decides that laches bars entitlement to the injunction, but we will give them a lesser remedy which is a monetary sum which affects profits without shutting them down.
* laches is a partial defence, it is a bar to injunction but you can have the lesser remedy.
* Delay by Cadbury when they knew the facts and that they had a remedy for breach of confidence, they still dilly dallied for a few years. There was detriment to FBI in that they made expenses to get geared up for production – this doesn’t necessarily barred Cadbury’s action entirely, there may be delay + prejudice that has a less serious effect. Remedial choice of equitable remedies can be affected by laches so that the more drastic remedy of an injunction is denied but not bar the action altogether.
* So laches can be a partial defence to equitable claims. It’s a bar but can also just be a factor that limits the equitable remedy, so here it was a bar to injunction but not to equitable compensation, a matter of doing equity between the two parties.
* Like in Blundon, case also shows that the lack of an application for an INTERLOCUTORY injunction may also be taken as a sign of delay. Why not go to court ASAP?
* Remember that if laches is bad enough to bar any equitable remedy, the plaintiff can still go for legal damages if within the 2 year Limitation Period – delay for equity just happens quicker.
* there is no defence of laches against of the Crown, other than Askov defence of unreasonable delay in prosecution.
* Nova Scotia: laches is not a defence to a legal claim.

Estoppels

* Unlike laches, estoppel applies as a defence to both legal and equitable claims.
* Common law estoppel by representation: if someone made a statement of fact and that statement was relied upon by the other party, that would be considered binding on the person making that statement – they are estopped from asserting facts that inconsistent with the statement of fact they made.
* Promissory estoppel: equity took this further – a promise could have the same effect as a statement of fact.
* Proprietary estoppels: this takes it a step further and says that a plaintiff can apply estoppels against a defendant. It can be used as a defence to a claim by plaintiff in common law or equity and also can be used by plaintiff to prevent the defendant from raising a legal defence.
* Trethewey-Edge dyking: plaintiff was making a claim seeking an equitable easement across the ranch and alleged that the defendant is estopped or prevented from raising their legal title to assert exclusive possession/trespass. Their defence would be legal title, but dyking says we’ve had amiable relationship for years, we developed and maintained pumping station on mutual understanding we could cross your land to maintain it, and now you’ve reneged on this understanding, so we claim estoppel, you are prevented in equity from reneging because we relied on your conduct for many years in letting us cross your property. So ranch was estopped.

Requirements for Proprietary Estoppel: Encouragement/Acquiescence

* Trethewey-Edge: Party to be estopped must have acted unconscionably.
* in this case, for years, they made it seem that they had no problem with the people going across their property, now out of nowhere they say they can’t, and that is inequitable/unconscionable.
* Has to be an element on the part of whoever is going to be estopped of misleading words or actions or inaction that amount to knowing encouragement.
* here, actions in allowing the dyking district to cross the land and misleading words, which amounted to knowing encouragement.

Second Requirement for Proprietary Estoppel: Reliance

* The dyking district then says they relied on this encouragement and are now suffering prejudice: we put a lot of money into the station and now they’re retracting permission, we suffer prej.
* it’s action or inaction + reliance.
* there’s knowledge of a wrong being done, there’s violation of a legal right with permission.
* the ranch “stood by” and let them trespass for years, creating the expectation of a property interest and then during the wrongdoing there is element of encouragement, during the wrongdoing they encourage by not stopping the district from trespassing
* the final element is that there is detrimental reliance on this encouragement.
* Detriment = you built this million dollar property but now you can’t get to it so you’ll have to tear it down. It’s unconscionable conduct for the owner of the land to stand by and let this all happen and allow access and now pull the rug out and say tear down your building. Standing by while the wrong is occurring.
* Estoppel bars both equitable and legal remedies: can neither get damages for trespass nor an injunction to tear down the trespassing property.
* On the other hand, cannot be estopped from getting a remedy if you never knew about the infringement by the other part. If you didn’t know about it, you were never “standing by” or encouraging.

Five Probanda of Wilmot and Barber

* The five probanda are strict proof of proprietary estoppel.
* 1) A must have made a mistake as to his legal rights
* 2) A must have spent money or done some act on faith of mistake belief
* 3) B knows about his legal right that A’s mistakenly claimed right is inconsistent with
* 4) B knew A was mistaken
* 5) B must have encouraged A to spend money or do the act either directly or by standing by.
* Detrimental reliance = they’ve done something, done work, or spent money.
* Trethewey-Edge: Newbury J. gives simplified version of Wilmot: true test of proprietary estoppels is that the facts must be such that the owner of the legal right, the ranch, has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict (legal) rights. Estoppel estops someone from asserting common law legal rights. The wrongdoer must have acted to his prejudice on the basis of that belief.
* Party who has been misled gets whatever remedy which is appropriate in the circumstances and degree to which they’ve been misled, here a registrable easement, whatever is appropriate to do justice between the parties.

Clean hands

* he who seeks equity must come with clean hands, must have blameless conduct with respect to the transaction in dispute or the litigation arising out of that dispute.
* City of Toronto: Statute didn’t work, she didn’t care about the by-laws and willing to just eat the penalty, so they instead sought an injunction restrain her from operating these illegal suites, equity acts in personam so they could even imprison her if she breaches the injunction.
* Defendant argues that the City is being discriminatory because they’re letting other people get away with what I’m doing and this amounts to unclean hands/unethical conduct
* Ontario CA and SCC held that the City did not have unclean hands because City did have a case against defendant, she broke by-laws, and what she was claiming as unclean hands was the City’s treatment of OTHER people – unclean hands must mean unethical conduct towards the defendant, plaintiff acted unethically towards the defendant. She breached by-laws so city has every right to attack her and how they treat others has no impact on that.

**Class 8**

Clean hands

* Court of equity can refuse equitable remedy to a plaintiff with unclean hands, though not a legal remedy. The plaintiff who comes into equity seeking an equitable remedy, their conduct is subject to the scrutiny of the court, discretionary consideration.
* unclean hands is a complete bar to equitable remedies, no such thing as partial unclean hands.
* it is not in the public interest to lend judicial countenance to immoral conduct or unethical behaviour on the part of the plaintiff.
* this doesn’t mean a general depravity, plaintiff’s wrongful conduct must have an immediate and necessary relation to the equity sued for and it must be depravity in a legal as well as in a moral sense. It must relate to the equity sued for and it must be an immediate and necessary relation to it. Must relate to the dispute and the conduct towards the defendant or the litigation and the way the plaintiff has conducted it.

City of Toronto (immediate and necessary relation – clean hands)

* City of Toronto: injunctions can be used to enforce crim or quasi-crim law where the penalties aren’t working – equity steps in and provides remedies when legal remedies aren’t working. The by-laws are legislation, they aren’t working, and they have a legitimate purpose, so equity steps in to enforce it. Contempt if she breaches the injunction. Notice would be given to her and the tenants: injunctions are effective against the defendant AND third parties if notice.
* Plaintiff argues deferred list/discriminatory enforcement amounts to unclean hands. Trial judge agrees: he who seeks equity must do equity and if they want injunction, must give up the list.
* court can postpone injunction’s enforcement for a period of time so tenants could find other accommodation (otherwise, hardship to third parties). Court can word these injunctions so as to do justice between parties.
* On appeal, decided that an unrelated wrongdoing by the plaintiff doesn’t relate to the dispute, it lacked immediate and necessary relation to the equity sued for.. How had the City behaved towards her: that’s the necessary and immediate relation; the treatment of other people is not immediately and necessarily related to treatment of you. There was also no indication that this deferred list was corruption, if it was the result of corruption/bribery or there was some other shady background to it, then maybe Polai had a point, but there was no immorality.
* This was legitimate prosecutorial discretion.
* Unclean hands has to be tied to the relationship between two parties.
* There’s also the consideration of public interest: does it support the granting of the injunction.

Delayed injunction

* won’t bring it into effect immediately if it’ll result in hardship.
* Discretionary factor: would there be a hardship if it took effect immediately (normally injunctions take effect as soon as defendant has notice of it)
* court can give a period of time before the injunction takes effect.

Tinsley (resulting trust)

* the two parties operated a boarding house; to buy these houses they conspired to commit welfare fraud: the registered legal ownership of the property was in Tinsley’s name and they agreed Milligan wouldn’t be on the title so she wouldn’t be publicly known to have an interest in the property, which would allow her to commit welfare fraud . Milligan said her money was in the house so entitled to an interest reflecting the money she put into it. Tinsley argued doesn’t matter she put money into it, I have legal title, and the money you used came from fraud.
* judge said they were both involved in the welfare fraud, equally culpable, so fair to divide you half and half. CA also said public conscience, both are equally implicated in the welfare fraud and she did put half the money into the house, so should get a half interest in the house.
* unclean hands also doesn’t work because the illegality of Milligan didn’t relate to Tinsley – unclean hands must have an immediate and necessary relation to the equity sued for – Milligan was screwing the government, not the defendants, so no unclean hands.
* Majority said you have to look at the situation relative to the two parties and it’s a rule of equity that if you put money into a property and you’re not named as the legal owner of that property, you get a resulting trust automatically, get a beneficial interest in the property and the legal owner holds a proportionate share relating to your contribution in trust for you.
* All Milligan needs to show to establish her claim is to show that she put money in and she gets resulting trust in the property for that amount if her name isn’t on the title.
* in a case where the plaintiff, Milligan, is not seeking to enforce an unlawful contract but founds case on collateral rights gotten under a contract, can’t reject the claim unless illegality founds plaintiff’s case. It wasn’t necessary for Milligan to say where she got the money from, just had to say she put money into the house and that it’s in Tinsley’s name

Tinsley (unclean hands where plaintiff and defendant are complicit)

* court of appeal used discretion: they’re both equally complicit in welfare fraud, unclean hands both, split the money in relation to amount they put in.
* Resulting trust = beneficial interest bounces back, you put money in you get a beneficial interest back. Doesn’t matter that the money was stolen, that’s against the person you stole it from, it has nothing to do with the dispute and whether you get a resulting trust, it was a side matter.

When an Injunction can be Granted: Equity’s Exclusive Jurisdiction and Inadequacy in Common Law

* can’t get injunction in small claims court or family court, an injunction is only available from the BCSC or the Federal Court of Canada. Must be a superior court. It is an order of the court that takes effect when notice is given. That person could be the defendant or could be a non-party.
* A plaintiff who fears or anticipates a wrong against them, but it’s not happened yet, can also apply for an injunction to prevent it from happening. (Gulf Island) May be harmed or fear harm.
* equity’s exclusive jurisdiction: to enforce an equitable right, breach of confidence, or fidicuiary duty. There is no legal remedy for these equitable wrongs like breach of confidence or fiduciary duty. Only the court in its equitable jurisdiction can give remedy for equitable wrong, can’t give common law damages to enforce equitable rights.
* you CAN give equitable remedies, an injunction, to enforce a legal right like breach of contract, right to support of land, or torts (eg trespass). Injunctions can restrain a breach of contract. Equity gives a boost to a common law wrong: the legal remedy for the legal wrong must be inadequate. This obviously isn’t an issue in the exclusive jurisdiction, where there isn’t a legal remedy. But where there is a legal wrong, the court of equity can only give remedy where legal remedy is inadequate, this is called irreparable harm, cannot be compensated with money after the harm.

Administration of Justice

* Court of equity can also grant it when it’s necessary to support administration of justice even where no wrong being claimed. Plaintiff is not claiming any wrong, legal or equitable, committed by the defendant. The plaintiff is going to court of equity jurisdiction strictly to get an equitable remedy because that would assist with the administration of justice in a different court or tribunal.
* Big example was the case of BCGEU: government employees picketed the courthouse and judge couldn’t get into the parking lot because of this, granted an injunction against the picketers who are blocking access to the halls of justice. So there was no legal proceeding by anybody, it was just on his own motion – supports administration of justice.
* BMWE: Brotherhood seeks injunction until arbitrator has chance to decide. Court agreed: restrain pacific railway from imposing change of work schedule because it assisted with administration of arbitral justice, would defeat purpose of arbitration if the CP just went ahead.

Enforcement of Legislation

* Polai: if there’s an inadequacy in the criminal justice system, injunctions can be used to assist in the administration of criminal justice too.

Contempt and Enforcement

* Equity acts in personam: this means civil contempt (committal – civil imprisonment) or criminal prosecution for contempt.
* Civil contempt: litigant hauls the defendant before the court and says that the court gave an order against the defendant, we gave notice, they are disobeying: coerce them to obey. Elta.
* Criminal contempt: If it’s a public defiance, then s.9 of Criminal Code. When there’s public defiance of a court order then criminal contempt and prosecution with mens rea (public defiance of the court order) and actus reus (the disobedience). This is brought by AG. third persons can also be prosecuted if they violate court order after having notice of it.
* Once they have notice of it (must be ACTUAL notice), defendants and third parties MUST obey the injunction/court order, even if they think it’s invalid or never should’ve been granted. Until it’s dissolved or discharged, it must be obeyed. If disobeyed, they are in contempt.
* If the plaintiff doesn’t know the name against whom the order is enforceable, that is they know the defendant but don’t know who the others are, they’ll say “John Joe, Jane Doe, and other persons having notice of this order”. This is so non-parties know it applies to them too.
* Defendant cannot attack court orders when they are in contempt.
* Territorial Jurisdiction: is the defendant physically present in the jurisdiction?
* Anti-Suit injunctions prevent you from suing in another jurisdiction.

Inadequacy of Legal Remedies

* Fundamental to equitable jurisdiction is looking at the inadequacy of the legal remedy which can be damages at law or statutory remedies. If inadequate, it’s irreparable harm.
* If it’s a loss of profit, it can usually be monetized and can be damages but if it involves personal rights or property rights that transcend money, then court of equity can step in to give an injunction restrain the breach because the legal remedy is inadequate, irreparable harm.
* It’s the nature of the harm and not its magnitude that is critical in deciding whether the legal remedy is inadequate.
* If it’s an equitable right, there’s no problem of inadequacy: there IS no legal remedy.

Weighing the Balance of Convenience

* The big discretionary consideration involves a broad looking at hardships, weighing consequences to the parties and third persons.
* RJR-Macdonald makes it the balance of inconvenience: hardship to the plaintiff if they don’t get the remedy of an injunction (is there an adequate legal remedy) versus what is the hardship to the defendant if the remedy is granted. If there was no hardship to the plaintiff, don’t bother giving remedy, but if there’s hardship to both, we weight them both and try to achieve a just outcome that minimizes hardships all-around.
* Will there be irreparable harm to the plaintiff if the order is refused, will there be irreparable harm to defendant or third parties if granted, and finally where does the public interest lie, how is the public interest served if we look beyond interests of the litigants: Deterrence? Or will this cause more injustice or bring administration of justice into disrepute.

Terms and Conditions

* s.13-1(19): power of court of equity to impose terms and conditions on its granting of equitable orders (Law and Equity Act).
* postponing the remedy to reduce hardship is an example. Allows court to tailor the remedy.

Interlocutory Injunction: Undertaking as to Damages

* must give undertaking to the court that you will be responsible for paying any damages that the defendant may suffer if it turns out that this interim injunction should not have been granted.
* American Cyanamid: Plaintiff has a problem, want injunction before trial and can’t wait the 2 or 3 years to get to trial. The usual condition for an interlocutory injunction is a promise to the court, punishable by contempt, that the plaintiff makes a solemn promise to court that if they lose the case at trial or discontinue the case after getting this interlocutory injunction, they promise that they will abide by any order court gives to pay compensation/damages to defendant because this injunction messed up their business or what not.

**Class 9**

Prohibitory Injunctions

* order by the court to a defendant to stop doing something.
* Negative order = stop digging. Positive order = undo the wrong by filling in the hole.
* Prohibitory: stop committing a tort (trespass), stop breach of the contract, stop violating a statute, stop polluting, stop infringing IP rights. Basically an order to stop doing a specific wrongful act. Easier to get than mandatory injunction.
* Extremely easy to get an order to enforce negative covenants: where defendant has made a promise of a negative nature, like in Gulf Island case where union made agreement with management not to go on strike, court says you’ve made a negative promise and you should keep it. So bring contempt to bear on what you’ve already promised.
* wording of prohibitory injunctions is much easier than mandatory, which requires describing exactly what the defendant is supposed to do. Important that it be clear, as penalty is contempt, which must be strictly proven (violation of the order must be strictly proven)
* Elta - requirements: terms of order must be clear and specific, the defendant must know from the order what they have to stop doing to comply with the order. To impose contempt, must be able to show that the defendant has notice of the order and that the order is clearly worded so they know what they’re supposed to do. Then prove they’re guilty of not doing it.

Mandatory injunctions - Requirements

* rarer and more difficult to obtain, an order to a party to do an act, often to undo a wrong.
* Requirements are more onerous: Elta again said wording is a critical issue because of the sanction of contempt. As such, specificity is required so that non-performance can be followed up with contempt proceedings.
* may require the court to exercise constant supervision over the defendant to ensure performance. SCC in Elta thus says that courts generally do not watch over or supervise performance, would mean re-litigation and expenditure of judicial resources. Court is saying that they don’t like to get embroiled in a situation where they are required to provide constant supervision of the performance of some activity under an injunction – critical issue: they will not order injunction that would lead to constant issues arising with plaintiff continually coming back to court trying to get an order for performance of some aspect of the project/contract.
* Other issue is hardship to the defendant: mandatory injunction requires defendant to do something which will require effort and funding.
* Specific performance: derives from mandatory injunction. Meant to address breach of contract – compels defendants to perform their contractual obligations. The contract must be supported by consideration, bound by law, valid contract.

Quia Timet/Anticipatory Injunction

* injunction that anticipates a future wrong that’ll happen to the plaintiff, who then wants an injunction to prevent, in advance of its happening, a future wrong.
* If plaintiff can anticipate trouble ahead, that the defendant is going to do something dastardly in the future, the court of equity can give an injunction to restrain the defendant from committing the future wrongdoing. If defendant then does it, contempt.
* there has to be more than fear on part of plaintiff, there must be a convincing likelihood that this is a genuine fear that something will happen.
* Must also show that the harm is serious before you’d get some remedy. Must be a substantial harm or loss.

Pre-Trial Injunctions

* Equity does not require you to wait until trial to get your remedy, can get it immediately. Must be cases of urgency, must be element of urgency with plaintiff needing immediate relief.
* s.10-4(2): an application for a pre-trial injunction may even be made before the start of a proceeding - must then give undertaking to the court that you WILL start the action, file a notice of civil claim and serve it on the defendant.
* Can also get injunction after the action has started after notice of civil claim, or at any time during pleadings or discovery. Can get interlocutory injunction in any of these stages.
* There’s a possibility of injunction even after judgment, go to court of appeal for the injunction.

Ex Parte Injunctions

* In the most urgent type of situation, a plaintiff can apply on their own, without notice of the application to the defendant that they are going to get a court order.
* Gulf Island: first requirement for ex parte interim injunction is urgency: if there’s going to be an immediate harm or we can’t tell the defendant because he’ll speed up his wrongdoing if he finds out we’re applying for an injunction. Must be a case of urgency or harm or bad character of def.
* we apply without telling him and then give notice of the injunction after we get it, serve it to him them, at which point he is bound from time of notice (but not until then)
* In other jurisdictions, it’s only granted for a few days, a specific, short time period, but in BC, the practice is to grant it to last until trial.
* Defendant can apply for it to be set aside, but until then, it must be abided by.

Ex Parte: Requirement of Full Disclosure

* Second requirement: full and frank disclosure. Seafarers International: the defendant is not there to oppose the application so the plaintiff is required to make a full and frank disclosure, meaning that you’ve got to disclose not only the good, but also the bad, disclose not just the positive aspects of your case for the injunction, must mention all jurisprudence or any defences that would be open to the defendant. If there has not been to the judge a full and frank disclosure of relevant facts, the order would be voided.
* It’s not just the material facts the plaintiff knows, but also what he ought to have known had they made reasonable enquiries.
* Plaintiff applies to court without notice for ex parte injunction, the court only hears from the plaintiff and gives the order, but then after that the order and the supporting documents must be served on the defendant; defendant will scrutinize this info and if he sees the plaintiff knew something material and significant that they didn’t disclose, defendant can get an inter partes hearing with both parties represented in chambers and judge will have discretion to void it.
* Plaintiff is usually given an undertaking to be answerable in damages in these interlocutory and interim injunctions. r.10-4(5): unless the court otherwise orders (discretion), an order for a pre-trial (interlocutory) or interim injunction (ex parte) must contain applicants agreement to abide by any order for damages - as a condition of getting the order, plaintiff makes an undertaking to the court promising that if they were wrong about this and shouldn’t have gotten this order, they will pay the consequences/damages/harm suffered by the defendant as a result of this order that I shouldn’t have gotten.

Interlocutory Injunction

* either not so urgent as interim ex parte injunction or maybe defendant isn’t a bad guy, so we can give notice to defendant that we’re going to apply for it and have a hearing.
* In all jurisdictions, it’s temporary, but lasts until trial or further order. “Further order” means plaintiff or the defendant can apply at any time during course of existence of this pre-trial injunction to set it aside or vary it (reduce its scope), it’s not a final order and is subject to modification or dissolution as circumstances change.
* Requirement for urgency remains (thought not as urgent as ex parte) but because there is an inter partes hearing, th ere is no requirement for full and frank disclosure.
* 10-4(1): you can seek an interlocutory injunction even if you’re not seeking an injunction as your final remedy. eg: Mareva Injunction is to prevent disposal of assets and the final remedy is to get at that money.
* Again, subject to undertaking as to damages.

Permanent Injunction

* An injunction can also be asked for as a final order, the order after trial. They call this a permanent or perpetual injunction. Doesn’t mean it’s going to go on in perpetuity, though it can be. It can also be an injunction as to a contract with a fixed period, therefore injunction would also only be for fixed period.
* It is not a temporary order and, subject to appeal, it is the final order o f the case.
* Can be worth seeking an interlocutory/pre-trial injunction before getting a final injunction to demonstrate need, but is not required. Not getting one does not bar you from final remedy
* No need for undertaking as to damages for final order
* a full trial then the injunction is granted after hearing of merits.
* can also be varied and subject to change and is subject to appeal to BCCA.
* To get this remedy, plaintiff must show a wrong or threatened wrong at trial, an irreparable harm which will occur after the trial if the injunction isn’t granted (can’t be monetized), and discretionary considerations (will the plaintiff or defendant suffer more – balance of convenience, and things like laches and unclean hands and hardship factor here).

Appeals

* Must give notice of the order to the defendant, who is bound from time of notice. Can serve them, but could also just call them or email them or whatever, and all this counts as notice, and then it’d be binding until trial or until after the inter partes hearing if it’s an ex parte injunction where the defendant is challenging the disclosure.
* For ex partes and interlocutory, it’s an appeal in chambers, not a higher court. If it’s dissolved on basis of failure to disclose, plaintiff can re-apply with bolstered info.
* Defendant must obey the injunction while it remains in effect, or it’s contempt. Cannot ignore it until a judge has dissolved or otherwise modified it.
* Defendant must give notice to the plaintiff that they wish to dissolve or modify the injunction, of the inter partes hearing
* In chamberes, judge decides whether to continue the injunction as an interlocutory injunction or can refuse to continue it due to defendant’s argument. Not enough urgency, no disclosure, or whatever. This decision is then appealable decision to the BCCA.
* If the injunction is continued to trial, it may be rendered permanent after trial.

American Cyanamid – requirements for getting an interlocutory injunction

* feared that a rival company was going to introduce surtures into Brit market so applied for interlocutory pre-trial injunction, with notice. Inter Partes hearing and ultimately AC prevailed and got the interlocutory injunction.
* the plaintiff must show that there is a serious question to be tried. Means looking forward to the trial and saying today what the likelihood is that the plaintiff will win at trial, gets into strength of plaintiff’s case. This case abolished the old way, where plaintiff had to establish a prima facie case with at least a 50% chance of success.
* Court said that all that is required is whether there is a serious question to be tried or, in BC’s Wale case, that there is a fair question to be asked. Essentially, plaintiff’s case must have merit, must be a claim that is not frivolous or vexatious like one that would be subject motion to simply dismiss the case before trial for being worthless or without foundation.
* Must then show irreparable harm: whether if plaintiff succeeded at trial, he could be adequately compensated by reward of damages for the losses he sustained from plaintiff continuing to do what the injunction would’ve enjoined between time of application and time of trial.
* Third element: balance of convenience – a weighing of the pros and cons of granting an injunction on an interlocutory basis. After finding irreparable harm for the plaintiff, we’re looking at that harm done to the plaintiff if no injunction versus the harm done to the defendant if injunction is given for this period. Judge weighs to see who suffers more.

Mareva

* get an injunction for money to remain in BC, freezes deadbeat’s assets in BC and prevents him from disposing or hiding them until creditor can get judgment against him.

Anton Piller Order

* civil search and seizure. This person is a bad dude and we need access to their home or business because there is incriminating info that this defendant has and he’s likely to destroy it or hide it if given a chance, so we want to take him by surprise with an injunction that permits us to go into his premises and recover this stuff that he’s got there before he can destroy it.

Negative Covenants

* Gulf Island Navigation: plaintiff anticipated a strike, applied ex parte to prevent illegal strike. Get ex parte, quia timet injunction. No-strike clause is a type of negative covenant, very easy to get an injunction for.
* Negative covenants are enforceable without proof of irreparable harm.
* readily enforceable by injunction because defendant already promised not to do something, so easy for court, as court of conscience, to say you promised not to do it, so order you to live up to promise.

Quia Timet injunction’s Relationship to Equitable Damages

* can go hand in hand for equitable damages to make the plaintiff whole: get equitable damages for the harm already occurred and a quia timet to prevent further harm. So you can ask for equitable damages to compensate for the harm that has occurred up till the judgment where you got the injunction to prevent further harm from occurring.
* Equitable damages can be in addition to or in substitution for permanent or perpetual injunction. Lord Cairns Act s.2.

**Class 10**

Ex parte (without notice) Interim Injunction

* requires urgency: some dramatic change in circumstances like a building being torn down or a defendant with bad character – giving defendant notice would alert them and cause them to speed up their dastardly deeds.
* any ex parte application, regardless of remedy, the applicant must give full and frank disclosure to the court, giving both the positive and negative side to their case.

Interlocutory injunction and the Status Quo

* an injunction seeking an order to last until trial or until a further order. We’re looking to a trial that will occur in the future but we need a remedy now
* there’s a sense of urgency, though not necessarily so drastic to justify ex parte, but there is a sense that harm will occur to the plaintiff between now and the trial unless something is done.
* this harm is irreparable harm – harm that can’t be compensated for by damages.
* inter partes hearing that both parties attend in chambers. They’re asking for discretionary notice of the court. Not as frantic as ex parte, but still abbreviated, in chambers. There are no witnesses in chambers, just affidavits and pleadings. Court makes a quick decision without fully accessing the merits as they would in a full trial seeking a permanent injunction.
* Primary concern is that the applicant must be facing irreparable harm before the trial/judgment takes place. What is often given as underlying objective of interlocutory injunction is to preserve the status quo: there’s a danger here of doing injustice to the plaintiff if relief is not given and also risk of harm to defendant if the relief is given and the idea is to minimize the risk of being wrong and preserve the status quo. If the injunction is granted and defendant is enjoined from doing something he hasn’t done before, the status quo is the safest position for the judge to take. Keeping things as they are.
* Status quo is the situation prior to the irreparable harm and whether that can be maintained until the trial.
* RJR-Macdonald: SCC disagreed with this. Too conservative. Status quo isn’t the main objective, but the issue is trying to do justice to the parties and not conversely not trying to do injustice to the parties.

American Cyanamid – Standardized Approach to Interlocutory Injunctions

* Old: ask on the application whether the plaintiff has an at least 50% chance of winning at trial.
* HoL killed standard of strong prima facie case, deciding instead to worry about the balance of convenience: who is going to suffer more harm: plaintiff without injunction or defendant if it’s granted. Here, they felt it favoured plaintiff: they were already in the market and Ethicon had not yet entered, so its harm is less.
* instead of prima facie case, just ask the plaintiff to show that their case isn’t hopeless. If a person makes an allegation and the claim is a type of claim not recognized by the courts, courts can dismiss it before trial as not disclosing a cause of action. HoL said this is the standard that should be applied to merits of the plaintiff’s action: just have to show it’s not frivolous or vexatious, that they do have a claim worthy of trial. Then weigh balance of convenience.
* If judge still can’t make up their mind after this, chambers judge can look at other special factors: plaintiff’s laches, plaintiff’s unclean hands, or in AC, the nature of the market, hardship, where the public interest lies in whether or not to grant interlocutory injunction
* Rule 10-4(5): unless court otherwise says, order for interlocutory application must include undertaking as to damages. So basically, if AC lost this case at trial and turned out not to have a valid patent claim, the result would be that the trial judge would order a subsequent hearing after the trial to allow Ethicon to prove its damages. Have to pay the damages incurred by the interlocutory injunction that they never should’ve gotten. Financial risk is thus on the plaintiff.
* Rule 10-4(1): not necessary to be seeking a permanent injunction as a final remedy to get an interlocutory injunction

Irreparable Harm

* RJR Macdonald added “irreparable harm” to the AC test: AC test is now show the claim is not frivolous, then show irreparable harm to applicant, THEN balance of convenience.
* Court here said that irreparable harm should be a separate consideration: all equitable remedies presuppose legal remedy is inadequate. AC thus must show they’ll suffer irreparable harm if they don’t get equitable relief prior to trial.
* We’re looking for harm between the time of the application and time of trial and plaintiff must convince the court that if they don’t get the injunction, they will suffer irreparable harm.
* Defendant can however chirp up and say: they’ll suffer, but WE’LL suffer irreparable harm too. At that point, the balance of convenience kicks in: which party suffers the greater harm? If balance tilts in favour of plaintiff, it’s granted, if goes to the defendant, it’s refused.

General test for Balance of Convenience(American Cynamid)

* First establish that that the applicant’s claim isn’t frivolous vexatious.
* Next: is there irreparable harm to the plaintiff if it’s refused? If no, refuse it.
* Is there irreparable harm to the defendant if it’s granted? If no, grant it.
* If both parties suffer irreparable harm, weigh the two and decide which is the worst.
* if it’s even, preserve the status quo until trial, what’s the current state of affairs at time of the application? Stick with that. Or…..
* if even compare the uncompensatable disadvantage to the P and D, which side will suffer more? If plaintiff’s irreparable harm is greater, grant the injunction, if defendant’s is greater, refuse
* or, if even, relative strengths of the plaintiff’s and defendant’s cases as disclosed in affidavits, if plaintiff’s case is stronger, grant it, otherwise don’t.
* If not clear, can also look at special factors: unclean hands, laches, acquiescence, delay, extraordinary hardship to one party or the other, where the public interest lies. Here, goodwill was a special factor: having to push Ethicon out of the market later would make AC look bad.
* This is not a universal formula and doesn’t apply to more specific types of injunction applications. There are different ones where the standard is easier: negative covenants – injunction is readily granted and standards for the plaintiff are lower than AC. Meanwhile, cases like libel and standards, anti-suit injunctions, Anton Piller orders, Mareva injunctions are higher.

MacMillan Bloedel (American Cynamid in Aboriginal context)

* BC applies AC and accepts it as the applicable standard to apply in Abo rights cases.
* chambers judge fell into trap of looking into merits of abo rights and title claims and spent days hearing evidence about the strengths and weaknesses of these claims, ultimately deciding that the abo claim would fail and therefore refused to grant the injunction .
* mistake: went back to the old standard AC rejected: the chambers judge isn’t in a position to assess merits/likelihood of who wins at trial. Better not go there and instead look at balance of convenience, what will happen if injunction is granted vs. what if it isn’t.
* All the evidence the abos were hoping to establish their title will be destroyed if the area is logged and all the trees will be gone if injunction is not granted. On the other hand, if the injunction is granted, worst that can happen to MacMillan is that they lose profits.
* Court used its discretion to not order an undertaking as to damages for either side: to do justice, won’t order it. Bands can’t afford to pay. This is within court’s discretion under rule 10-4(5)
* As part of ameliorating the consequences of an injunction, the court can grant an earlier trial date so lapse of time will be shortened up. Can do this where there’s been lots of notice and the parties seem ready.
* where only one side gets injunction or injunction app is refused, that can be a huge milestone in the dispute that can affect negotiation/settlement, gives the upper-hand in negotiating.
* Haida Nation: SCC thought that contrary to MacMillan, injunctions aren’t the best solution to abo title claims and felt that instead of granting an injunction to protect the area from development until the band’s case is resolved in courts (takes forever), require the fed and prov govn’ts to consult with the bands over the proposed development and accommodate their concerns insofar as possible but not giving them a veto over the development.

Wale (status quo)

* BCCA said purpose of interlocutory injunction is to preserve the status quo.
* for purpose of status quo, it is the last PEACABLE state of affairs before the dispute arose, so the status quo is without the bands’ regulations that are being contested under injunction. So the interlocutory injunction would be preserving the status quo as it existed prior to the bands’ passing these by-laws.
* Where the interests are relatively evenly balanced as between the AG and the bands, and the one side bases its rights on existing rights while enforcement of the other side would lead to new rights – the bands’ were changing the status quo. Interlocutory injunction should be granted to preserve the status quo – no by-laws.
* If a public body gets an interlocutory injunction, they do not make an undertaking as to damages
* Initially, application was refused due to a lack of irreparable harm: no property rights in question, but fishing is a riparian right, so this was reversed. Normally, this would be an appeal of a discretionary order (equity), which is hard, as there is leeway, but here there was a clear error in principle: judge didn’t see the obvious property right in the AG’s claim.
* Case shows BC traditional approach is like AC: 1) fair/serious question to be tried, 2) irreparable harm, 3) balance of convenience. If equal, or close, maintain the status quo.

RJR Macdonald – Stay of Proceedings

* court granted stay of proceedings: a stay of the enforcement of these tobacco regs until their constitutional validity had been determined.
* Stay of proceedings: it’s a temporary order – it prevents enforcement of regulations/legislation temporarily until the case can be heard at court. SCC said that the same framework of analysis should apply to stay of proceedings that applies to the interlocutory injunction, the three-step process. It’s a temporary suspension of enforcement of legislation or, in private context, the enforcement of a judgment or litigation.

RJR Macdonald – Where the Old Prima Facie Case Standard DOES Still Apply

* first stage: preliminary assessment of the merits of the case as to whether there is serious question to be tried, not frivolous or vexatious. It just needs to be an arguable case, don’t need to know the last word, which is reserved for trial. Up to trial to determine its merits. Like court said in Cyanamid, avoid careful consideration of disputed facts and merits.
* there are exceptions where the chambers should look at the merits of the case in more detail than the superficial serious question to be tried: this threshold assumes that there WILL be a full trial later down the road. As the dissent in MacMillan pointed out, it may end up resolved between the parties on the basis of the interlocutory injunction. If the interlocutory injunction will, in reality, be a final determination, this needs the old school hard look at the prima facie case. There may never be a trial because, if the plaintiff gets the interlocutory injunction, this would be the entirety of the relief they’d want.
* Where interlocutory would be final determination and there would be no trial. Ifthere’s a situation where there’d never be a trial because once the interlocutoryi njunction was given, that’s all the plaintiff ever wanted. Interlocutory injunction was determinative, no point in a trial, in that situation, the chambers judge should look at the merits and see if plaintiff is going to win had there been a trial even though we know there won’t be.
* Often where the right the plaintiff seeks to protect must be addressed right away or not at all.
* Other exception: constitutionality. If there’s a constitutional issue and the question is one of law with no factual disputes then the court said you can look at merits, no concern that the evidence before chambers judge will be incomplete and the facts are not disputed.
* This may mean that chambers judge can look at the case in private litigation where there is no dispute as to the facts.

RJR-Macdonald –Irreparable Harm

* Second stage: irreparable harm to the plaintiff. Now a separate step. If it’s a common law claim or a statutory claim, court of equity to have jurisdiction requires inadequacy of the legal remedy. As such, interlocutory injunction only is given where there is an inadequacy of damages as a remedy to plaintiff only – irreparable harm between now and the trial.
* Third stage: compare the irreparable harm to both sides, weigh those two things and see who suffers greater, plaintiff or defendant AND also any consequences to third parties.
* irreparable = the nature of the harm suffered rather than its magnitude. Things like where assessment of damages is uncertain or difficult (can’t measure the amount of the loss in money that plaintiff will suffer – harm which either can’t be quantified in monetary terms or can’t be cured because one party can’t collect damages from the other)
* other examples: plaintiff is driven out of business if it doesn’t get the injunction, the plaintiff will have a permanent loss of market share/goodwill/market reputation/natural resources, or perhaps if the defendant can’t or won’t pay damages.
* Charter cases: money can’t substitute for violation of constitutional rights. It’s something that’s by its nature cannot be compensated by money.
* Third stage: balance of (in)convenience: weighing the greater irreparable harm to plaintiff or defendant and third persons plus other special factors.

Special Factor: Public Interest

* Of particular interest in charter cases
* One special factors where the public interest lies: the public interest generally lies in the continuity of government services – if govn’t operations are disrupted, not in the public interest.
* Also where it’s a public authority (+) vs private litigate (-)
* if it’s a blanket suspension (+) v. a specific exemption (-).

**Class 11**

Interlocutory Injunctions as a Stand-Alone Remedy – Administration of Justice

* BMWE: when there is no dispute before the court, there is no issue that is going to go to trial; the interlocutory injunction is sought by the applicant as a free-standing remedy– no point looking for a serious question to be tried as there won’t be a trial.
* Union applies to BCSC for interlocutory injunction to restrain CPR from making change to work schedule before arbitration. But there was no other relief sought out of BCSC.
* It was granted for assisting the administration of justice (makes the labour board arbitration meaningful): you didn’t need to be seeking any other remedy to get an interlocutory injunction.
* interlocutory injunction to assist with the arbitration process under the Labour Code.
* it’s to support the administration of justice. Also need not be a domestic arbitration, could be foreign, or could be to assist a foreign judgment. Whatever is necessary to support the rule of law, the interlocutory injunction can be sought as a one-off remedy without pursuing anything else later by full trial.
* Another example of administration of justice: where someone like Polai is flouting the law, which has no effect on her, and we need something heavier (contempt proceedings)
* BCGEU: judge granted to himself on his own motion an interlocutory injunction restrain picketing of the court-house: can’t have rule of law if there’s no access to justice, so this was a violation of the rule of law and an injunction, without any other proceeding going on, could be a final remedy to assist the administration of justice.
* Essentially, one-off interlocutory injunctions are to support the administration of justice, as opposed to attempting to preserve a legal or equitable right until trial.

Negative Covenants

* American Cyanamid approach does not apply. This is where parties have a contract that contains a negative promise, a promise not to do something.
* It’s thus very easy for the court to say to defendant “you promised not to do this, so we’re just supporting this promise with an injunction.” This does not involve any real harsh consideration or thorough examination and is virtually automatic (Gulf Island)(Warner Bros v. Nelson)
* Anything that is a negative clause can be enforced by an interlocutory prohibitory injunction. Includes non-competition agreements, confidentiality agreements, and restrictive covenants.
* Doherty Rule: if you say you’re not going to do something, don’t do it. You promised not to do it and therefore it’s binding and enforceable by an interlocutory or permanent injunction. A valid negative covenant makes for an automatic injunction.

Challenging a Negative Covenant

* Cascade Imperial Mills: agreed to negative covenant, brought to court proof that he had went to a rival employer. Lindsay tried to say this agreement was invalid: it was an unreasonable restraint of trade and the agreement also doesn’t apply to this situation. These are the classic ways to attack a negative covenant: say it’s invalid or doesn’t cover this situation.
* In the face of such a challenge, the injunction is no longer automatic, which takes us back to the American Cyanamid test: is there a serious question to try (a minimal chance of Cascade succeeding), would Cascade suffer irreparable harm if Lindsay worked somewhere else (couldn’t find any), and where the balance of convenience lies – who suffers more.
* Restrictive Covenants in employment, if challenged, will generally lose on the balance of convenience, as the employee generally suffers more: the employer loses sales, he loses his livelihood. Much greater hardship, injunction will rarely be granted.
* Where the negative covenant is challenged, for instance as being an unreasonable restraint of trade, it’s no longer automatic and requires AC analysis, but generally rejected due to hardship.
* Shafron: blue pencil severance is now invalid. Can no longer, as Cascade did, give the court a number of options for restraint, allowing the court to pick which one is reasonable, like ever smaller areas in which the employee cannot work with a rival. Employer must be specific.

Constitutional Cases

* Man AG v. Metropolitan Stores: Employees of Met Stores unionized and tried to negotiate a first collective bargaining agreement. Couldn’t reach agreement with Metro Stores, so applied for an administrative ruling imposing the first collective agreement. Metro Stores challenged the constitutional validity of this imposed collective agreement procedure as a violation of free association and free collective bargaining under the charter.
* Metro Stores sought a stay of proceedings, stay the enforcement of this first collective agreement process until its validity could be established by the SCC.
* SCC held that the American Cyanamid process applies to applications for stays of proceedings in constitutional disputes as well.
* Stay of proceedings is equivalent to interlocutory injunction so you need a serious question to be tried (reasonable chance of striking it down as a charter violation), would there be irreparable harm (once a collective agreement is imposed, battle is lost as far as bargaining), and finally, where does the balance of convenience lie?
* Public interest is a decisive factor in weighing the balance of convenience in constitutional cases. Public interest is always in the continuation and non-disruption of government services, so the interest is in this provision continuing as though it were valid – non-disruption of legislation.
* Court also said there should be an early trial date in determination of constitutional issues.

Libel and Slander

* American Cyanamid does not apply in these cases. There’s a much higher standard applicable for the obtaining of an interlocutory injunction in libel and slander cases.
* It’s quia timet: the person being defamed anticipates the defamation occurring and wants to prevent it, applying for an injunction ahead of the trial to prevent it from occurring, like restraining media from publishing material.
* Normally, there’s a trial, possibly with a jury, with a determination of damages and a permanent injunction to prevent future defamatory statements. Interlocutory is to prevent it altogether.
* Bonnard: key case in England, said generally no interlocutory injunctions in these cases: freedom of speech and freedom of expression are important, so the defamers should be free to say what they want and the plaintiff can sue afterwards.
* To get an interlocutory injunction in defamation case: it had to be an absolutely CLEAR case of defamation and also must prove the defamation would be repeated. AC is not applicable and there is extreme caution in granting interlocutory (permanent is not as strict).
* Bonnard: it has to be absolutely clear that this was libellous, there has to be basically no defence. If the slanderer said he had a defence, then that was not a clear case. Basically, a case where a jury would clearly rule it was libel and if they didn’t, their verdict would be set aside. It also must be proven that it would be repeated.
* Afterwards, there would generally be a trial with assessments and a perpetual injunction to prevent further repetition after trial (Church of Scientology).

Mareva Injunction

* Normally, where debtor won’t pay, creditor gets a judgment then starts execution proceedings. Problem: debtor can look forward into the future to a trial and a judgment against them and so will dispose of their assets so as to be judgment-proof. Mareva Injunction avoids this result.
* Idea is that the plaintiff anticipates that the debtor is going to dispose of the assets prior to the obtaining of judgment against them for the money that is owed, so apply to court
* Mareva are generally ex parte: if you give notice to debtor of this application, that’d probably just mean faster disposition. You then drop notice of the injunction both on the debtor and third parties who have assets of the debtor, freezing assets so he can’t dispose of them , object being to restrain the debtor from removing or dissipating assets pending trial.

Aetna Financial Services – Getting a Mareva Injunction Ancillary to Another Action

* Feigelman sues Aetna for damages for sale at rock bottom prices of the assets of his company. Feigel man hears Aetna is going to move its head office to Montreal, taking its assets with it, which will make it hard for him to collect judgment should he succeed in negligence claim in Manitoba, so as ancillary to that claim, he tries to freeze their assets in Manitoba. Successful: they couldn’t close their Manitoba office and had to leave $1 million (the amount he was suing for) in the jurisdiction. So can get a Mareva while pursuing another action to ensure payment
* Aetna appealed on hardship; after inter partes hearing, this was lowered to $250,000. After 2 years, it goes to the SCC, who say the injunction shouldn’t have been granted, leaving Feigelman on the hook for undertaking as to damages suffred by Aetna during the injunction.

Enforcing the Mareva

* Way you make the injunction work: serving/giving notice to the defendant’s bank, broker, or trust company, third parties, meaning they’re on the hook to abide by injunction and they’re guilty of contempt themselves if they let the defendant take the assets. So you tie up legitimate businesses too, not just the defendant.
* In personam jurisdiction: if the defendant is in the jurisdiction, it doesn’t matter where the assets are located, the injunction can be granted. A worldwide mareva can be obtained: ties up assets of defendant anywhere in the world; enforcement can be problematic (Schwarzinger)
* In Torrens system, you can also register the injunction on the title as a caveat over the defendant’s real estate in the jurisdiction.

Test for Mareva Injunctions

* American Cyanamid approach, whether it’s merely a serious question to be tried, is too lax for this: a higher standard of proof is required from the plaintiff to get this injunction
* Hardship to the defendant is also of particular concern here when weighing balance.
* usually ex parte, must be extreme urgency or notice impractical due to shady defendant.
* Ex Parte means you have the duty for full and frank disclosure as per Gulf Islands.
* The critical issue: must give the court convincing reasons why you believe the defendant will do something dastardly in way of hiding assets. Go into character of defendant, what they’ve done in the past, what there is in the way of facts/reasons and solid evidence (not just a subjective), a basis for this fear that they’re going to hide or conceal assets or move them from jurisdiction.
* Modifies AC: Plaintiff needs a cause of action justiciable in BC and it must be a STRONG prima facie case, not just a serious question to be tried. Must be very likely you’ll get a judgment.
* The defendant must also be shown to have some assets in BC so that the judgment can be effective against something. That said, you can get an injunction that has worldwide applications, but still must show that SOME assets are in BC.
* must show a real/genuine risk that the defendant will dissipate or remove the assets.
* Then we go to weighing balance of convenience. This is what the SCC overturn the injunction in Aetna. Said Canada is an economic union and Aetna was a federally incorporated company and has right to move its capital anywhere it wants in Canada, and it was just exercising that right, for legit business reasons, not to defeat the claim. Fiegelman could also still recover them (as they were just in Ontario) while the frozen assets caused extreme hardship on Aetna.
* not a total freeze: prevents hiding and concealing the assets, but if the defendant incurs legitimate expenses in the ordinary course, it can use the assets.

Ancillary Orders to Back Up a Mareva Injunction

* disclosure order (order to disclose the location of their assets on affidavit)
* Anton Piller Order (entitles the plaintiff to obtain financial records, go into defendant’s premises under civil search warrant and seize financial records to figure out where the assets are)
* can have a receive appointed under s.39 of Law and Equity Act so that defendant must transfer the assets to the receiver to hold those assets subject to the outcome of the trial.

Foreign Enforcement

* Enforcement of Canadian Judgments and Decrees Act: if the defendant DOES move his assets out to a different province, you can use the injunction by taking the assets from the other province and freezing them anywhere in Canada where this statute has been enacted (s.6(4)(b)). An ex parte interim injunction can be registered in any province with this legislation.
* Can also be used for a foreign monetary judgment – judgment debtor assets in BC. If some guy comes into BC with a judgment against them elsewhere, that judgment can be brought to BC as basis for a mareva injunction freeze his assets in BC or elsewhere in Canada at court’s discretion

Anti-Suit Injunction

* in personam, grant injunction on defendant to stop the defendant from suing as a plaintiff in some other jurisdiction.
* Amchem Products: workers compensation board started proceedings against Amchem in Texas to get a judgment for the workers in BC who had been receiving WCB benefits due to asbestos. Amchem was in Texas and sued there because there were less limitations on damages than BC.
* Amchem went to BCSC for an anti-suit injunction stopping the WCB, who are in BC (so BCSC has in personam jurisdiction), from suing in Texas. WCB anticipated this and applied to Texas court for anti-anti suit injunction to restrain Amchem from seeking for an anti-suit injunction.
* BC Court is annoyed and ignores it and gives the anti-suit injunction against the WCB anyway. SCC overturns this on basis of comity: should be respectful of judicial processes/foreign courts.
* Comity means you have to have a VERY extreme case before someone can get an anti-suit injunction. We should just let the litigation take its course and not interfere or assert our superiority to other courts.

Amchem – Test for Granting an Anti-Suit Injunction

* SCC gave a two-step process in determining whether to grant: first step – whether the applicant can show the foreign court assumed jurisdiction contrary to the concepts of private international law (forum non conviens – if they’re not the appropriate litigation, we will refuse to allow litigation to continue, stay of proceedings. Here, Amchem was right: Texas has no rule of forum non conveniens and will take on anything).
* Second issue – would allowing the foreign court to have the litigation cause an injustice to the party seeking the anti-suit injunction? If both those elements are present, invoking the foreign court can be restrained. Otherwise, comity, respect for other jurisdictions.
* Amchem argued injustice: huge damages only gotten in Texas, but SCC said this wasn’t an injustice, just different system. These little criticisms of the Texas court system are inconsequential and the WCB is entitled to find the best jurisdiction to sue, to forum-shop, and to take advantage of the rules in that jurisdiction. That’s not enough to be called an injustice. That the Texas court rules are more favourable is not an injustice; the litigant is entitled to take advantage of more favourable rules in other jurisdictions.

Anton Piller Order

* allow applicant to enter premises of defendant, search for, and seize incriminating materials that may be found there. Basic purpose of it is to preserve evidence (Mullin), to preserve evidence from destruction – need an order from the court to take defendant by surprise, demand entry, looking for, because I know you’ve got it here, this stuff you’ve taken or, if it’s ancillary to Mareva, the financial records that say where your property is hidden (Malik).
* preserve evidence from defendant, who would destroy it if he knew you were coming.

**Class 12**

Anton Piller Orders - Consent

* always ex parte, can’t give the guy notice you’re coming.
* as opposed to criminal search warrant, which can be executed by force, the anton piller can only go in by consent of defendant and if consent is withheld, the defendant will be subject to contempt. But occupant must give permission, even if he is subject to contempt if he doesn’t.
* Idea is to preserve evidence from imminent destruction: if the wrongdoer finds out we’re coming, he’ll destroy them ASAP, so we must take them by surprise. Because it’s interlocutory, without notice, we are expected to give an undertaking to be answerable in damages if we weren’t entitled to this order.

Celanese Canada – Test for Getting Anton Piller Order

* There was a rogue employee of Murray who went to an Iranian company proposing to build a chemical plant and offered to tell them Celanese’s processt. Celanese found out and sought Anton Piller order to search premises of Murray to recover all this information that had been taken in breach of confidence.
* much higher standard than basic American Cyanamid due to invasiveness.
* First plaintiff must demonstrate a STRONG prima facie case, not just AC test of a serious question to be tried. Must be very likely that the plaintiff will establish their basic claim at trial and that they’ll be successful at trial.
* Second, the damage to the person seeking the order must be very serious actual OR potential damage – so it can be anticipatory, but the damage would be very serious
* Third – must be convincing evidence of the defendant’s possession of incriminating document or things. Not a fishing expedition to search someone’s premises, you must convince court that they have documents that you want back or some other info that you wish to recover.
* Fourth, must be shown to be likely that the wrongdoer will destroy the stuff in their possession, like if they know we’re coming to get them or are starting action. Real possibility of destruction.

Further Requirements for Anton Piller Order (ISS)

* must make a full and frank disclosure of the material facts in seeking the order.
* requirement of undertaking as to damages should your claim fail at trial.
* Independent Supervising Solicitor (ISS): an officer of the court who attends the execution of the order, explains anton piller order, and gives independent advice to defendant. He must be present at the search to ensure its integrity. So plaintiff has lawyer, defendant has lawyer, but we need a third lawyer, there as a resource person for both sides as an officer of the court and conducts or supervises the conduct of the search. Defendant is also supposed to be given time to seek their own legal advice, for instance if they are unsatisified with the ISS’ advice: this case suggested 1 hour would be appropriate time.

Anton Piller Orders and Priviledge

* Role of ISS is also concern about the protection of privileged communications. In this case, the SCC said the search became mildly chaotic and the plaintiff went beyond the terms of the court order in conducting its search and downloaded privileged emails. Cannot get privileged material in Anton Piller.
* Due to faulty search, plaintiff’s lawyer had access to privileged info and it was up to them to prove that they hadn’t used it or observed it. They couldn’t, so court fired them as the lawyer for the plaintiff.
* ISS is responsible to protect privileged info from getting into hands of other side. Here, they screwed up and allowed plaintiff’s lawyer access to these privileged emails. ISS is to ensure non-disclosure of private communications and allow defendant 1 hour of legal consultation with their own lawyer.
* Law society of BC has since made a standard form order that ensures the order isn’t deficient and makes clear that plaintiff is not entitled to privileged documents. Practice Direction PD-31.
* If you exceed the terms of the order, that imposes liability for trespass and you may be subject to common law damages.

Malik: Anton Piller Orders as Ancillaries to Mareva Injunctions

* plaintiff trying to collect sum of money from defendant, collections issue, and we want to know what is going on with the debtor’s financial affairs and where the money is and what assets are there to go after before we get the judgment so we know whether it’s worth pursuing.
* Mareva Injunction to freeze defendant’s assets, but what are those assets? Anton Piller order comes in. We can ask the defendant for an affidavit, a disclosure order, but can just go into his business premises and home and searching through the bank records, seizing the pertinent bank records about shifting moneys around, or look for unregistered conveyances of property.
* Malik said he was broke, couldn’t repay, so AG applied for Mareva Injunction to freeze his assets, but by the time they got that, he’d hidden those assets, so they wanted to go into his business and home and look for papers to find out where. SCC ruled that chambers judge was allowed to look at evidence from prior order applications by plaintiff as evidence to support.
* preserve financial records from imminent destruction so Malik can’t shred everything and govn’t can track these transactions: Malik had transferred funds to family members.

Rolling Anton Piller Order (and Recovering Pirated Copies)

* Vinod Chopra Films: Chopra said someone was out there selling my films as pirated versions, I don’t know who they are, but I want an order that authorizes me to search premises of anyone. This type of order can be granted out of the federal court, which is responsible for the jurisdiction over copyright and trade-marks.
* Rolling Anton Piller: type of order that can be given where you don’t know who the defendant is: you can apply for an order without naming the defendant and applicant just uses anonymous descriptor: “John Doe and Jane Doe and other persons whose names are unknown and anyone else having notice of the order.” Applicant who gets this order can go to ANYONE with this order and use it to enter their premises to search for pirated copies of movies or w/e other evidence. This John Doe must comply or face contempt.
* These orders can be executed anywhere within scope of the order: FC has federal jurisdiction, so if order is not limited to a particular jurisdiction, can be used throughout Canada.
* For appeals of these orders, you go back to the court that granted it, not a higher court.

Rolling Anton Piller Order Requirements (Vinod Chopra Films)

* Same Basic requirements: has the plaintiff demonstrated a strong prima facie case? (he demonstrated that there were violations of his copyright), is there serious potential or actual damage? Is there evidence of possession of the material? And is there real possibility that the defendant might destroy them?
* judge adds a few more for rolling orders: would the inspection do no harm to the defendant or its case? This injunction is against non-parties, don’t know who they are, may be future-named defendants, when we find out who they are, we put them in the claim.
* Also, would the interests of justice be brought into disrepute?
* Rolling is thus very hard to get. Here they couldn’t get it because there was insufficient evidence of there being damage suffered by Chopra if a small operator was selling these pirated films, no affidavits supporting serious damage. Also, John and Jane Doe are supposed to be unknown to the applicant – Chopra actually did know some of the defendants but didn’t insert their names into the order, it was just a blanket John and Jane Doe.
* This makes it hard to pass the third ground: if you just show evidence that someone you know possesses the stuff, can’t get rolling – has to be evidence that a whole lot of people possess it but you don’t know who they are.
* must also prove jurisdiction. So if only a flea market in Vancouver was shown to be a problem, can’t get nation-wide jurisdiction for the order. Geographic scope of the order is only meant to cover the extent of the problem. Proof of incidents in Ontario will only give provincial scope.

Norwich Pharmacal Order

* Norwich had patent across England but someone was importing stuff that they said violated their patent. But didn’t know who was doing this and who to sue, but they did know somebody who knows: Uk’s equivalent of CRA - applied for order against CRA to disclose name of the taxpayer who was paying duties on these imported goods.
* Norwich Pharmacal Order: an order from the court to get the identity of an anonymous wrongdoer with a view to the pursuit of remedies against this wrongdoer once we know identity
* BMG Canada: claimed people were file-sharing. Culprits were not known to BMG, but they identified someone who did know: the ISP. Applied for an order that the ISPs should reveal names of the customers who were using the file-sharing software. Method to know who to name in the litigation by going after third person who has info about who these people are.
* the third party, even if they aren’t likely to be a defendant, must be connected or somehow involved in the wrongdoing (CRA let the goods into the country in Norwich, or here ISPs are facilitating breach of copyright by allowing transmission), there must be a connection between the third person and this wrong that’s occurring either deliberately/explicitly or unknowingly/inadvertently.

Norwich Pharmacal Order Requirements (BMG)

* First: Applicant must show that they have a bona fide claim against the proposed defendant (John Doe). Proper test is bona fide claim: eg breach of copyright. Basic idea is that they don’t know who to sue and until they do, can’t start the action. They believe a wrong has been done, intend to commence action, but wrongdoer’s identity is unknown.
* Second: third person must be involved in some way with the wrongdoing, either deliberately or unknowingly
* Third: third person must be the ONLY practical source for the identity of the individual.
* Fourth: indemnification of third person’s expenses plus legal costs in tracking down these people and identifying them. Indemnified for costs of their compliance with order
* Fifth: interests of justice: there’s the privacy interest (people are entitled to privacy, not expecting to be disclosed) vs. the internet not being an anonymous thing people can hide behind. Discretion: weighing the balance between disclosure and privacy/confidentiality. Weigh the balance and see where the public interest lies.
* Since it’s ex parte, full and frank disclosure is required.
* Voltage Pictures: going after people file sharing the Hurt Locker, Norwich order against ISPs. Had a bona fide claim against them: copyright infringement. And if they find out who they are, will start sending out settlement letters.
* Norwich order is granted to identify a wrongdoer, but may be other reasons too: to determine whether a cause of action exists, to preserve evidence (preservation order), when to sue, who to sue, what remedy you should be seeking, help develop pleadings etc.

Perpetual injunctions

* Injunctions granted after a hearing of the full merits of the case.
* It’s after hearing trial, so need not worry about whether there’s a serious question to be tried. Irreparable harm and balance of convenience still come up though, and where the public interest lies in the balance of convenience.

Breach of Confidence

* FBI Foods decided to avoid breach of license by producing a product that tasted the same but had no clam juice, therefore not violating non-competition provisions of licensing agreement.
* Breach of confidence is an equitable claim, so common law remedies are not available, just equitable remedies. Remedy: for breach of confidentiality, trade secrets and privacy, the usual remedy would be an injunction. Damages, under Lord Cairns Act are also possible. SCC also said there’s another possible remedy in Canada: equitable compensation. Equitable compensation is a monetary remedy, won’t call it damages so don’t offend common law. Equitable damages are only in connection with Lord Cairns act which says damages in addition to or in substitution of injunction or specific performance, but if we’re looking strictly at jurisdiction of chancery, equitable compensation.
* Trial judge in Cadbury granted them equitable compensation saying that there was laches, delay on the part of Cadbury in failing to seek a remedy sooner and the amount of the loss suffered by Cadbury wasn’t serious and could be satisfied with monetary remedy rather than drastic remedy of injunction that would put FBI out of business.
* Finding breach of confidence: confidential info (1), communicated in confidence for a purpose(2), and misuse by the party to whom it was communicated (3)
* Equitable remedies: typically it’d be interlocutory injunction (but Cadbury didn’t apply for it), a permanent injunction (refused by trial court but granted by CA), plus/or equitable damages under Lord Cairns Act. So you get equitable damages for the wrong that occurred prior to the trial and then get a permanent injunction for the future to prevent them from doing further.

Equitable Compensation

* SCC said equitable compensation is possible, it’s in the Chancery’s inherent jurisdiction, not like statutory equitable damages. Give equitable compensation for the past harm prior to judgment. Here, remedy the advantage FBI gained by having a jumpstart of 1 year to create their product, so should give equitable compensation for what they made in that initial period.
* Common law damages are assessed at the time of the making of the contract: It’s a matter of foresight. Equitable Compensation uses hindsight. Plaintiff’s actual loss as consequence of breach is to be assessed with full benefit of hindsight. While common law looks at what parties thought at time contract was made would be damages of breach, equity looks at time of trial at the actual loss suffered by the plaintiff up to the trial.