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# History of Equity

Maitland: *The Origin of Equity*

* Comes from Court of Chancery (England) prior to 1875 when *Judicature Acts* were passed that fused the previously separate courts.
* Were not strictly bound by precedent.
* Not to interfere where a court of common law offered an adequate remedy.
* Chancery had upper hand to courts of law – could prevent men from going to courts of law.

Blackstone:

* Equity procedures and modes of investigation are superior.
* Can make more far-reaching applications than the law could.
* Equity cannot claim the power to mitigate law’s rigors or depart from standards of conduct, merely supplements law in respect only to its procedural inadequacies.

Equitable Maxims: Not rules, greater flexibility to particular circumstances: vulnerability of parties, conduct of parties, ethical worthiness.

1. Equity will not suffer a wrong to be without a remedy (“wrong” = defect in law)
   1. *Re Macdonald*
   2. *Maitland*
2. Equity follows the law
   1. *Maitland:* “*At every point equity presupposed the existence of common law*”
   2. If conflict or variance, equity prevails.
   3. *Re Macdonald*; *Canson*
3. Where the equities are equal, the law shall prevail.
   1. “equities” = ethical positions of the parties
   2. “law” = common law or statute (legal result)
4. Where the equities are equal, the first in time prevails.
   1. Priorities, ranking of competing equitable claims
   2. Equities: fault, good faith, fraud, notice
   3. Common law: first in time, first in right
5. He who seeks equity must do equity
   1. Plaintiff must act equitably; equitable decree may impose “terms and conditions”
   2. If the plaintiff MUST do something, THEN they can have the benefit of the remedy.
6. He who comes into equity must come with clean hands
   1. Plaintiff’s conduct must not have been inequitable in the particular transaction or litigation.
   2. Court can refuse relief if the plaintiff’s hands are unclean.
7. Delay defeats equities
   1. Common law claims – statutory limitation periods are strict, must start the civil claim within two years.
   2. Equity – matter of discretion; unreasonable delay = delay, laches, acquiescence (estoppel)
   3. Does it cause prejudice to the defendant? Has it lead the defendant, acting reasonably, to think the plaintiff has given up?
8. Equality is equity: equity prefers “equal” division rather than “winner take all”
   1. Proportionality, balance, fairness, rival claimants to property = exact equality not required.
9. Equality looks to the intent rather than form
10. Equity looks on that as done which ought to be done
11. Equity imputes an intention to fulfill an obligation.
12. Equity acts *in personam.*

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| ***Re Macdonald*, 1972 DLR (3d) 147 (Ont HC)** |
| **Facts:** Lawyer was bankrupt, payment plan of $100 per month then would be discharged from bankruptcy. Last payment due, sent two cheques: (1) $99 (2) undated for $1. Didn’t want discharge to be rushed for embarrassment reasons. Trustee did not cash $1 cheque, lawyer died 7 months later. Life insurance payable to his estate – but he technically was still not a discharged bankrupt.  **Analysis:** Houlden J   * “*I believe the rule* (Ex p James: prerogative of mercy reposing in the court to alleviate cases of unusual hardship in which a regard to strict legal or equitable rights only would work manifest injustice) *should be invoked in this case to prevent the bankrupt’s dependants from being deprived of $37,768 because of the bankrupt’s failure to pay $1 to his trustee”* Paras 20-21. * On balance, injustice to dependants of deceased outweighs injustice to creditors – they are trade creditors who have written off losses against profits. |

# Equity in BC

* Common law and equity are fused in BC courts (***Law and Equity Act***, 1879)
  + Does not apply to statutory courts – tax court, small claims without inherent jurisdiction of superior courts.
* In the event of a disparity between common law and equitable results, equity should prevail.

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| COMMON LAW | EQUITY |
| Damages = rights | Remedies = discretionary. Maxims, rather than strict rules apply. Orders are unique to each case bc equity acts in personam |
| $ awards = damages | $ awards = equitable compensation or Equitable damages in substitution or addition to an EQ remedy |
| No interlocutory remedies | Interlocutory remedies (*L&E Act, s. 39)* |
| Enforceable *in rem* (against things) | Enforceable *in personam* |

***Law and Equity Act*, 1879 BC**

* **s.1:** The rules of law enacted and declared by this Act are part of the law of British Columbia and must be applied in all courts in British Columbia.
* **s.2:** Subject to section 3, the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.
* **s.4: Equitable relief for plaintiff -** If a plaintiff or petitioner claims to be entitled to an equitable estate or right or to relief on an equitable ground against a deed, instrument or contract, or against any right, title or claim asserted by a defendant or respondent in a cause or matter, or to relief founded on a legal right that, before April 29, 1879, could only have been given by the court as a court of equity, the court, either as a court of law or equity, and every judge of it, must give the plaintiff or petitioner the relief that ought to have been given by the court in a suit or proceeding in equity for the same or similar purpose properly commenced before April 29, 1879.
* **s.5: Equitable relief for defendant -** If a defendant claims to be entitled to an equitable estate or right or to relief on an equitable ground against a deed, instrument or contract, or against any right, title or claim asserted by a plaintiff or petitioner in a cause or matter, or alleges an equitable defence to a claim of the plaintiff or petitioner in the cause or matter, the court, whether as a court of law or equity, and every judge of it, must give to every equitable estate, right or ground of relief claimed, and to every equitable defence alleged, the effect by way of defence against the claim of the plaintiff or petitioner, that the court ought to have given if the same or similar matters had been relied on as a defence in a suit or proceeding commenced in that court as a court of equity for the same or similar purpose before April 29, 1879.
* **s.7: Judicial notice -** The court, and every judge of it, must recognize and take notice of all equitable estates, titles and rights and all equitable duties and liabilities appearing incidentally in the course of a cause or matter in the same manner in which the court sitting in equity would have recognized and taken notice of those estates, titles, rights, duties and liabilities in any suit or proceeding properly commenced in that court before April 29, 1879.
* **s.8:** Stay of proceedings abolishes the common injunction.
* **s.9: Judicial notice of legal/statutory rights, claims and liabilities -** Subject to this Act, the court and every judge of it must recognize and give effect to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute, in the same manner as they would have been recognized and given effect to in the court if this Act had not been enacted.
* **s.10: avoidance of multiplicity of proceedings -** Subject to this Act, the court and every judge of it must recognize and give effect to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute, in the same manner as they would have been recognized and given effect to in the court if this Act had not been enacted.
* **s.31: Stipulations not of essence -** Subject to this Act, the court and every judge of it must recognize and give effect to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute, in the same manner as they would have been recognized and given effect to in the court if this Act had not been enacted.
* **s.32: Damage by collision at sea -** In any cause or proceeding, other than in the Federal Court of Canada, for damages arising out of a collision between 2 ships, if both ships are found to have been in fault, the rules in force in the Federal Court, so far as they are at variance with the rules of the common law, prevail.
* **s.44**: If rules of equity and law conflict, equity prevails.

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| ***United Scientific Holdings v Burnley Borough Council,* [1977] 2 WLR 806 HL. – total fusion** |
| *Conventional view prior to this case was that fusion operates only at the procedural level and does not affect the distinctions between law and equity in matters of rights and remedies.*  **Facts:** ‘Time of essence’ clause in a lease contract. Law & Equity act says that equity prevails in these cases.  **Analysis:** Lord Diplock   * Challenges Ashburner’s “*though they run in the same channel, run side by side and do not mingle their waters”* metaphor, calling it mischievous and deceptive. * States the “*two streams*” are now mingled = fused and indistinct. |
| ***Canson Enterprises v Boughton & Co,* [1991] 3 SCR 534 – fusion monetary damages.** |
| *SCC approved Lord Diplock’s approach to fusion, decided principles governing the award of CL damages in tort and contract apply to equitable compensation.*  **Facts:** Canson bought land and wanted to build. Engineering firm had to drive piles, but pilings defective. Canson suffered a loss. Canson’s lawyer didn’t disclose a secret profit they made = breach of fiduciary duty. Sought to recover from law firm.  **Issue:** (1) should compensation/daages be the same in law as it would be in equity? (2) Should fiduciary be subject to rules of causation, which would limit law firm’s liability?  **Analysis:**  Majority **-** La Forest J (Sopinka, Gonthier, Cory JJ concurring):   * Legal damages should be limited by causation, but breach of fiduciary duty is an equitable wrong with no common law remedy. * C seeking monetary relief, quantum should be measured by same principles whether you go through common law or equity. * Equity not frozen in time; remoteness, causation, intervening cause can influence; equity maxims can follow common law rules in applying $ damages.   Dissent: Agrees with result, but should base result in equity, which has its own goals and foundation and can evolve on its own without turning to common law. |
| ***Cadbury Schweppes v FBI Foods –* equitable compensation** |
| **Facts:** FBI licensed to make Motts Clamato. Cadbury terminates license. FBI makes competing product, but one that doesn’t actually use clams. Conceded there was breach of confidence. Cadbury seeks injunctive relief  **Issue:** Can equitable compensation be granted?  **Court:** Authority to award financial compensation for breach of confidence is inherent in exercise of general equitable jurisdiction and does not depend on niceties’ of *Lord Cairns’ Act* or its statutory successors. Monetary relief in equity given rather than more usual remedy of injunction. |

# Distinctions Between Law and Equity

* Equity acts against people not things (*in personam*) – power the court has over a defendant’s person, court must therefore have jurisdiction over the person.
* Assets in dispute may be extra-territorial.
* Territorial jurisdiction – defendant must be domiciled (Domicile of origin, Domicile of Choice) or doing business in the jurisdiction (*Google* for corp – if company is doing business in the jurisdiction then it is resident there and submitting itself to the jurisdiction of the court).
* Note: All equitable remedies are discretionary. To appeal it – what is the error you are looking for?
  + Error of fact
  + Error of law
  + Do not care if decision was correct, only care if they made an error.

## Illustrations of Equitable Interests

**Subpoena**

* Hallmark of Chancery procedure
* Order to an adversary requiring them to attend at court

**Common Injunction**

* Order in chancery stopping litigants from enforcing a judgment or litigating in the CL courts
* Addressed to the party, not the judges in the other court

**Specific Performance**

* Order against a person to perform contractual obligations.
* Sometimes with damages, sometimes instead of damages.

**Injunctions**

* “enjoined to pull down the work”
* Punishable by contempt

**Equitable Damages/Compensation**

* Enforceable in personam. Failure to pay punishable by contempt, and not against property

**Decree**

Crafted in accordance with specific circumstances. Worded specifically

## **Equity Acts *In Personam***

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| ***Penn v Lord Baltimore*** |
| **Facts:** Penn = Quaker. Came to NA with colony of Quakers seeking religious freedom from Anglican Church. Got Charter from King to create colony (eventually Pennsylvania). Lord Baltimore = RC wanted to establish colony for Catholics. Got Charter from King to establish Maryland as colony. Issue = boundary between Maryland and Pennsylvania. Went to arbitration = Mason-Dixon line, Lord Baltimore refused to accept. Penn seeks specific performance.  **Issue:** Is a decree enforceable despite the fact that the property in question is outside UK jurisdiction?  **Court:**   * Equity acts *in personam.* * As long as defendant is available within court’s jurisdiction = decree enforceable. * Defendant bound by agreement within jurisdiction = ordered to abide by it. * Wouldn’t happen in common law court = enforceable *in rem,* but here is extra-territorial. |
| ***West & Partners (Inverness) v Dick* – Specific Performance in Civil Law Jurisdiction** |
| **Facts:** West sold Inverness House in Scotland to Dick but Dick reneged. West seeks specific performance. Dick argues UK court can’t make decree over property in civil law jurisdiction where specific performance doesn’t exist.  **Issue:** Can a common law court order specific performance re: property in a civil law jurisdiction?  **Court:**   * Equity won’t act in vain (won’t make unenforceable decree). * Dick has property in UK = he is under court’s jurisdiction * Order can be enforced *in personam,* therefore SP ordered |

***Law and Equity Act* – Enforcement; Converting *In Personam* orders to *In Rem* Enforcement by Statute**

**s. 37 Vesting Orders: (1)** If a court has the authority to order the execution of a deed, conveyance ,contract, transfer, or assignment of property, etc, the court can do so by order. **(2)** An order under (1) will have effect as though the property, etc, had actually been assigned to that person. (e.g. in *West,* if Dick refuses to complete conveyance, court may vest poperty in West as if deed or transfer has been executed).

**s.38: (1)** If a person neglects or refuses to comply with a judgment/order directing them to execute as above, the court may order that deed, etc, be executed or endorsed. **(2)** If an order is made under (1), then it operates as if it had been executed by the person and not the court.

***Enforcement of Canadian Judgments and Decrees Act***

* **General:**
  + Other province’s CL and EQ judgments are enforceable, with no requirement of reciprocity. Only applies to Canadian decrees.
  + Provinces that offer this: Maritimes; Manitoba; Sask; BC; Yukon. NOT: AB, Ont; Que.
* **S 1:** Canadian judgment = judgment, decree, order, that requires:
  + **(a) (i):**  an order for money payment made by Canadian tribunal that is enforceable;and
  + **(a) (ii):** an order made under s. 741 of the Criminal Code
  + **(b)**  OR under which a person is required to do or not do a thing (injunctions)
* **S 2:** (1) Canadian judgment may be registered for purpose of enforcement whether final or not; but (2) if it’s a $ judgment, can’t be registered unless it’s a final judgment (3) can if there are also other provisions for relief that can’t be enforced, the order can still be registered, just not in respect of those parts.
* **S 3:** (1) Have to pay a fee to register, and file (a) a copy of the judgment, (b) and any additional info required by rules of court
* **S 4:** Registered Canadian judgments may be enforced in BC as if they were entered in the BCSC
* **S 5:** (1) Can’t register more than 10 years after the date on which the judgment became enforceable in the province it was made in, or after the time for enforcement has expired in the place where the judgment was made. (2) Equitable doctrines re: delay apply to enforcement.
* **S 6(3):** Full faith and credit is given to the foreign judgment. BC court can’t question the reasoning or a difference in findings.
* **S 6(4)(b):** Ex partes interim injuctions will require application for instructions before it can be enforced via contempt.

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| ***Pro-Swing v Elta Golf –* court won’t recognize contempt order** |
| **Facts:** Pro-Swing obtained injunction in an Ohio court to prevent Elta from using a confusing trademark. Elta didn’t comply – PS obtains contempt order.  **Court:** In appropriate cases, injunctions from foreign jurisdictions can be enforced   * Injunction can be enforced but contempt order cannot * Wording of order must be clear. Here, prohibition on “*confusingly similar variations of the mark”* wasn’t clear * Injunction enforceable against too many parties * Equitable decrees are discretionary * Contempt = borderline criminal here. Court won’t recognize a contempt order because it is too drastic. |
| ***Equustek v Google*** |
| **Facts:** Advertising counterfeit routers for sale on Google– “passing them off” called them Datalink (real = Dlink). Prospective purchasers confused as to who was manufacturing what. People looking for Equustek would click on datalinks website on google and purchase inferior product. Datalink was in Vancouver for a while – injunctions granted but ignored by Datalink. Morgan Jack = Datalink, ignored contempt and went to Mexico. Datalink site kept popping up on Google. Equustek gets injunctions ordering Google to take down links to Datalinks.  **Court:**   * Plaintiff must show there is a serious question to be tried NOT “frivolous or vexatious” * If there is a serious question, would damages be an adequate remedy for the plaintiff? “irreparable harm” to the plaintiff * Weighing the balance of convenience.   **What should Google have done?** 1. Cave right away and avoid a judicial precedent 2. Prove injunction would be unenforceable in USA or elsewhere (won’t give unenforceable) – use Freedom of Expression. |

# Certain Equitable Defences

* Court of Chancery = court of conscience
* Plaintiff’s conduct that is seen as misconduct will not lead to getting an equitable remedy (clean hands)
* Focus on Plaintiff’s conscience

## Laches, Delays, and Acquiescence

### General Rules

**Maxims:**

* “Delay Defeats Equity”
* “Equity aids the vigilant, not those who slumber on their rights”

**Laches:**

* Delay plus a further circumstance (waiver or acquiescence)
* Consider the length of delay and the nature of the acts done (Lindsay v. Hurd)
* Delay after deprivation of rights and full knowledge of existence of rights (Lindsay v. Hurd)
* Delay and prejudicial change of circumstances (Lindsay)
* lapse of time has caused D to do something in reasonable reliance of delay, making it unfair to grant the remedy (*Cadburry Schwepps*)
* Historically, statute of limitations didn’t apply to equitable claims, so the courts of equity developed their own limitation defences. Now, statute of limitations bars both equitable and legal claims, but within the time set by statute, one can still claim laches or delay or acquiescence.
* Discretionary (not rules based)
* Effect of delay is more important than the duration (*Lindsay*)

Should consider P’s explanation for the delay, and their lack of knowledge of their legal rights.

**Acquiescence**

* Wherein the P stands by and watches the deprivation of her right and yet does nothing” (similar to Estoppel) – *(MK v. MH)*

**Delay**

* Simple lapse of time
* Limitation Acts apply to both legal and equitable claims and remedies. Laches ONLY applies to equitable claims and remedies.
* Can be a defence on its own
* Valid defence to ex partes injunction- if you delayed, then there obviously wasn’t urgency
* *Limitation Act s. 5(b) Laches* – subject to *Limitation Act.*
* P’s **unreasonable delay** (no explanation for procrastination) + either **substantial prejudice** to D (inability to defend - loss of evidence; economic harm to D – expenses) OR D’s **reasonable belief** that P by failing to assert rights had **waived** enforcement (acquiescence) (D thought P has given up any claim) – The waiver is kind of a psychological thing – P doesn’t do anything and that makes you blv that they have waived their right.
* S.8 *Limitation Act:* When plaintiff could have reasonably discovered their claim. Sets out the test for discovering claim – limitation period only runs when 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 person is aware they have a legal claim, they have two years to start court proceeding.

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| ***Lindsay Petroleum v Hurd*** |
| **Court:**   * Equitable Rescission: change of circumstances may prevent parties to be restored to their original position (e.g. decline in value of property). * Where it would be unjust to give a remedy because the party has done that which is equivalent to a waiver of it; or where by conduct and neglect he has put the other party in a situation that it would not be reasonable to place him if the remedy were afterwards asserted, lapse of time and delay are material defences. * Plaintiff’s unreasonable delay with full knowledge: Consider length of delay and nature of acts done during the interval. Plantiff’s explanation for delay, lack of knowledge or right and whether there is a waiver. |
| ***Erlanger v New Sombrero Phosphate Co*** |
| It must always be a question of weighing the diligence required and the change that has occurred. Discretionary.   * Laches/delay doesn’t apply to common law remedies of damages * Plaintiff guilty of “unreasonable delay” = where plaintiff has no explanation for failing to act. |

**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).

### The Length of Delay

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| ***Canada Trust v Lloyd* – defendant knew wrong – laches/delay will not serve as defence.** |
| **Facts:** Canada Trust brings action to recover from estates of deceased defendant’s money they had misappropriated from company 43 years earlier in breach of fiduciary duty. Defendant argues laches prevented compensation by interest.  **Issue:** Is defendant’s breach of fiduciary duty to the company defended by laches?  **Court:** Delay is long (43 years) but that is not determinative of whether equitable relief should or shouldn’t be granted. No colour of right, mistaken belief, or other factors that might warrant some consideration exist here – where defendant’s knew they were in the wrong, mere delay won’t serve as defence. |

### Knowledge of the Parties

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| ***M(K) v M(H)*** |
| **Facts:** Incest case – 12 year delay in bringing an action as party wasn’t capable of realizing her problems as an adult resulted from sexual abuse. Jury ward barred by statute of limitations. Incest = breach of fiduciary duty of a parent to refrain from injuring one’s child. Plaintiff entitled to equitable compensation.  **Issue:** Is the plaintiff barred from recovering because of delay? 🡪 NO!  **Court:** Unreasonable delay only starts to run when the person knows of their rights and that they have a claim, which in an incest case, may not be until the person receives psychiatric treatment. |

***Limitation Act***

**s.2 Exemptions: (1)** Act doesn’t apply to following court proceedings: (a) appeals (b) judicial review application (c) court proceeding under *Offence Act* to prosecute an offence (d) CP in which only relief sought is declaration (e) CP to enforce local judgment for possession of land (f) CP enforce injunction or restraining order (g) CP enforce easement, RC. **(2)** Doesn’t apply to aboriginal and treaty rights in *Constitution Act*

**s.3 Exempted Claims: (1)** Act doesn’t apply to (a) claim subject to limitation period established by int’l convention adopted by an Act (c) life tenant/entitled to remainder of estate (e) claim by debtor in possession of collateral (i) claim relating to misconduct of sexual nature including sexual assault if misconduct occurred while claimant was a minor (j) sexual assault (k) assault or battery if claimant was a minor or intimate relationship with accused (l) child support.

**s.5 Rules of Equity not Overriden:** (a) doesn’t interfere with rule of equity refusing relief b/c acquiescence (b) rule of equity that refuses relief based on inexcusable delay.

### 4. *Vigilantibus non dormientibus aequitas subvenit*

“*Equity aids the vigilent, not the indolent”*

* A court of equity has always refused its aid to stale demands, were a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive, and does nothing.
* **Chitty: Law of Prerogative of the Crown**
  + No laches can be imputed to the sovereign, whose time and attention are supposed to be occupied by the cares of government. The kind should not suffer by negligence of his officers.

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| ***Blundon v Storm* – Partial Laches, Partial recovery** |
| **Facts:** Treasure-hunting partnership. One member quits and starts his own company and found treasure. Other four claimed treasure on grounds that you can’t unilaterally quit a partnership and Storm still owed a fiduciary duty thus an accounting for profits. Storm argues laches/delay, plus he was entitled to go ahead b/c other parties did nothing.  **Issue:** Are the partners entitled to take some of the treasure?  **Court of Appeal:** Where a plaintiff takes no effective steps to protect any rights they have and by their actions done that which might fairly be regarded as equivalent to a waiver of those rights, they will not be able to recover.   * Plaintiffs had no confidence in Storm’s ability to find treasure and unfairly left him to do all the work, but came forward to claim a share when treasure was discovered. * Nothing was done by plaintiffs to assert their rights under partnership agreement until after the fact. * A finding of laches bars the plaintiffs recovery.   **SCC:**   * Chief elements in laches = acquiescence and change in position on the part of defendant * In this case, defendant continued to dive at the same sites and knew that the plaintiffs were continuing the search, therefore couldn’t have thought they had acquiesced. * When a partner stands by without protest and lets another do all the work and spend all the money to bring the enterprise to a successful conclusion, he will be denied total recover (75/25 split) |
| ***AG Nova Scotia v City of Halifax*** |
| **Facts:** Provincial statute imposed liability on a municipality for patients in the provincial mental hospital after Superintendant had requested their removal to municipal institution. City disputed that a particular patient was to be in their care. 2-year dispute – AG sues municipality for amount expended in upkeep of patient in provincial hospital during that time  **Issue:** Is AG guilty of laches?  **Court:**   * Equitable defence of laches can only be opposed to an equitable claim. When one is faced with a claim in law as opposed to a claim in equity, mere laches or delay is not enough. * Here, AG sued city for a debt imposed by laches. Therefore, defence of laches is not available. |
| ***Cadbury Schweppes v FBI Foods*** |
| **Facts:** FBI licensed to make Motts Clamato. Cadbury terminates license. FBI makes competing product without clams. Concedes breach of confidence. Cadbury seeks injunctive relief.  **Issue:** Did Cadbury’s delay bar their recovery? Yes and no.  **Court:**   * There may be delay combined with prejudice which has less drastic effect that is sufficient to deprive the plaintiff of specific relief but not to bar the action altogether. * Here, info was nothing very special, there was room in market for more than one participant and 11-years had passed since Caesar Cocktail went into production. CS not entitled to injunction but entitled to equitable compensation. |

### 5. Estoppel

* 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 inconsistent with 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: plaintiff can apply estoppels against a defendant. 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 defendant from raising a legal defence.
  + Requirement 1: Encouragement/Acquiescence:
    - Party to be estopped must have acted unconscionably.
      * E.g. making it seem like they have no problem with people trespassing for years, suddenly say they cant.
    - Has to be an element on the part of whoever is going to be estopped of misleading words or actions/inaction that amount to knowing encouragement.
  + Requirement 2: Reliance
    - Detrimental reliance on the encouragement

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| ***Clarke v Johnson,* 2014 ONCA – Modern Approach to Proprietary Estoppel** |
| **Facts:** Camp located on lake in Ontario.  **Issue:** Did Johnson have an equitable right to use the camp during his lifetime?  **Court:**   * Trial judge – claim for proprietary estoppel had been established * ONCA: Propietary estoppel arises where   + There has been a representation or assurance by one person   + That has been relied upon to the detriment of another   + An equitable Court must intervene to prevent an unjust or unconscionable result * Considers 5 Probanda Approach: (1) p must have made a mistake as to legal rights to a property (2) p spent money on faith of mistake (3) owner knows their rights and that they are inconsistent with p’s rights (4) owner is aware of the p’s mistaken belief of their rights (5) owner encouraged p to spend money/perform other acts. * Considers “Modern Approach” from *Schwark:* (1) owner of land induces, encourages, or allows claimant to believe that they have or will enjoy some right or benefit over property (2) in reliance on belief, claimant acts to detriment to knowledge of owner (3)owner seeks to take unconscionable advantage of claimant by denying right/benefit they expected to receive * Court concludes it is not preferable to adopt Modern Approach to proprietary estoppel. |

## B. Clean Hands

* He who comes into equity must do so with clean hands
* Inequitable conduct must be within the transaction in dispute, or in the litigation regarding that transaction
* Does not require that one lead a blameless life
* Note: defence of unclean hands is not necessarily an absolute bar to equitable relief and the plaintiff can prevail despite unclean hands if the plaintiff was less at fault than the defendant or application of the defence would confer an unjustified windfall on the defendant (*Conner v Bulla,* 2016 BCSC 906).

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| ***City of Toronto v Polai* (Ont HC)** |
| **Facts:** Plaintiff had an illegal secondary suite in an area zoned for single occupancy housing. The city repeatedly prosecuted her under zoning bylaws but she didn’t comply despite fines (flouter of the bylaw – regular remedy = inadequate). City therefore went to the court in its equitable jurisdiction to restrain her breach via contempt.  **Argument:** Plaintiff argues the city’s hands are unclean because they knew of many others with secondary suites, and had a deferred list of people it wouldn’t prosecute, which constitutes political favouritism.  **Issue:** Are the city’s hands unclean, thus disentitling them to the ability to seek an injunction against plaintiff?  **Court:** The city acted inequitably in having a deferred list, and the city was therefore precluded from invoking the equitable jurisdiction of the court. City must discontinue deferred list, and injunction would then be deferred until she had reasonable opportunity to dispose of the property. |
| ***City of Toronto v Polai* (ONCA)** |
| **Court:**   * City, like an AG, represents the public interest. Different from an ordinary litigant. Unless the by-law was invalid on its face b/c of discrimination, the court should not intervene. By-laws here were valid. Record IN THE TRANSACTION must be clean. Transaction must not be interpreted too broadly, against a P who had not led a blameless life. Favouring other violators wasn’t part of the transaction, so there were no unclean hands in this transaction. * Persistent and deliberate FLOUTING of the law, which was injurious to the public interest, and statutory sanction was ineffective. * Judgment should provide for a suspension of 12 months b/c plaintiff would need to dispose of property and find a substitute where she may lawfully engage in her means of livelihood. * P’s hands were dirtier than the city’s hands, and the court shouldn’t assist the greater wrongdoer. |
| ***City of Toronto v Polai* (SCC)** |
| **Court:**   * Lax enforcement of a zoning bylaw cannot afford any defence against an application for an injunction under the municipal act. * Where there is persistent and defiant infringement, if allowed, the defence would amount to a claim for immunity until the bylaw was properly enforced. Not fair to neighbours complaining of the infringement. Those neighbours were the ones protesting in this case. * Upheld suspension of judgment as above. * Where there is an inadequacy in the criminal justice system, injunctinos can be used to assist in the administration of criminal justice. |
| ***Tinsley v Milligan -* Illegality** |
| **Facts:** T&M lived common law. Owned and operated a boarding house in T’s name, to which M contributed money. Committed welfare fraud to buy the house = criminal offence.  **Issue:** Is M’s equitable claim to an interest in the property defeated because of Social Security frauds? NO  **Court:**   * Plaintiff entitled to recover if not forced to plead or rely on their illegality even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction. Same rule in equity and common law * CL recognizes defence of illegality: can’t profit from ones’ own wrong. * In equity, judge’s discretion how unclean hands will affect remedy. * Here, court fuses law and equity: where unclean hands amounts to illegality, CL rule will apply. * However, collateral rights arising out of arrangement are enforceable so long as plaintiff need not rely on illegality to assert that right (e.g. M doesn’t need to rely on wrongful act to assert right). * Equity presumes T holds house in trust for M. |

***Labour Relations Code***

**s.71: Refusal of Order:** The board may refuse to make an order under Part 9 in respect of a matter arising under this Part if it believes it is just and equitable to do so in view of the improper conduct of the person applying for the order.

# Injunctions

## A. General and Historical

* Equitable remedy to enforce a legal right or equitable right or to support the administration of justice, or to grant an equitable remedy where the legal remedy is inadequate.
* Equity acts *in personam:* 
  + Remedy is criminal or civil contempt if injunction is breached whether injunction valid or not.
  + Can be extra-territorial, or world-wide (Mareva, anti-suit injunctions)
  + Contempt may be brought as soon as the defendant has actual notice of the injunction and doesn’t obey
* Injunctions are discretionary in nature. If a legal remedy is inadequate or unavailable, equity will intervene because its deemed irreparable harm.
  + If legal remedy is adequate and available, injunction will be refused
  + Legal remedies are irreparable/inadequate if they’re unavailable, nominal, speculative, difficult to quantify or cant be paid (*RJR Macdonald*).
  + Defences of laches, acquiescence, delay, unclean hands, impossibility or futility will apply.
  + Court will weigh balance of (in)convenience by considering irreparable harms to P,D or 3rd party and public interest.
  + Terms and conditions may be applied to balance conveniences
* May be used for enforcement of legislation if criminal justice or penalties ineffective (see *Polai*)

**Classification of Injunctions by Results:**

* Negative/prohibitory = an order not to do something
  + *Elta,* Injunction can be an order to a party to refrain from doing a particular act.
  + More common than positive injunctions.
  + Anti-suit injunctions, stay of proceedings
  + Negative covenant – restrains party from breaching a clause in contract
* Positive/mandatory injunctions = positive obligations to act, repair, or undo a wrongful act.
  + More onerous wording: requires work and expenditure so terms must be specific
  + Court supervision often required
  + To authorize civil search & seizure – Anton Piller Order
  + To preserve evidence for trial – *MacMillan Blodel*
  + To compel performance of a positive act – *Elta Pro-Swing –* had to provide pro-swing with notice of all confusingly marked golf clubs etc.

**Classification of Injunctions by Stage of Proceedings**

* Before the wrong is committed- Quia Timet
* Before the proceedings are commenced- BCSC Rule 45(2)
* At time or writ/pleadings/discovery- interim/interlocutory injunction; to be re-named a “pre-trial injunction”
* At trial/judgment- BCSC rule 45(7)- Can apply after a judgment is made

**Classification of Injunctions by Duration**

* **Interim:** Very temporary- until a specified date, or, in BC, until trial or further order (NO DISTINCTION between interim or interlocutory in BC)
* **Interlocutory:** Temporary- until trial or further order. Now called “Pre-trial”
* **Permanent/Perpetual:** Final order after trial.

## **The Interlocutory or Interim Injunction**

### General

***Law and Equity Act***

**s.39 – Injunction or Mandamus may be granted or receiver appointed by interlocutory order**

**(1):**  Court may grant interlocutory injunction when the court finds it just and convenient

**(2):** An interlocutory injunction may be unconditional, or on any terms and conditions the court deems fit

* + This allows the court to balance the conveniences and ensure that he who seeks equity does equity. Usual requirement is an undertaking as to damages, BCSC rule 45(6)

**(3):** If an injunction is requested either before, or after hearing of a cause of matter) to prevent any threatened or apprehended waste or trespass – the Qui Timet injunction may be granted if the court thinks fit, whether or not the person against whom it is sought is in possession of/claims a right to do the act sought to be restrained, and whether estates claimed are legal or equitable. If an injunction is requested either before, or after hearing of a cause of matter) to prevent any threatened or apprehended waste or trespass – the injunction may be granted

***BC Supreme Court Civil Rules***

**Part 8 – Applications**

**8-1(2): How applications must be brought**

To apply for an order from the court other than at trial or at the hearing of a petition, a party must do the following:

1. In the case of an application for an order by consent, apply in accordance with this rule or rule 8-3
2. In case of application of which notice need not be given, apply with this rule or rule 8-4
3. In case of urgent application, apply with Rule 8-5.

**8-4 Applications of Which Notice is not Required**

1. An application of which notice is not required may be made by filing
   1. A requisition in Form 31
   2. A draft of the proposed order in Form 35, and
   3. Affidavit or other evidence in support of the application.
   4. **Short Notice/Urgent Applications**
2. Without limiting subrule (6), in case of urgency, a person wishing to bring an application (“main application”) on less notice than would normally be required may make an application (“short notice application”) for an order that the main application may be brought on short notice
3. A short notice application may be made by requisition in Form 17.1, without notice, and in a summary way.
4. The time limits and notice requirements provided in these Supreme Court Civil Rules do not apply to a short notice application.

(5) If an order is made under subrule (4) that the main application be heard on short notice, the time limits and notice requirements provided in these Supreme Court Civil Rules do not apply to the main application.

(6) The court may make an order without notice in the case of urgency

(7) Promptly after an order is made without notice by reason of urgency, party who obtained order must serve a copy of entered order and docs filed in support on each person who is affected by the order

(8) On the application of a person affected by an order made without notice under subrule (6) the court may change or set aside the order.

**Part 10 – Property and Injunctions**

**Rule 10-4: Injunctions**

(1) An application for a pre-trial injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed

(2) Application for pre-trial injunction may be made before the start of a proceeding and in the injunction may be granted on terms providing for the start of the proceeding.

(3) If an application for a pre-trial injunction is made without notice, the court may grant an interim injunction.

(4) An injunction must be imposed by order of the court

(5) Unless court otherwise orders, order for pre-trial or interim injunction must contain the applicant’s undertaking to abide by any order court may make as to damages (arising from injunction).

(6) In proceeding in which injunction has been or might have been claimed, party may apply by petition after judgment to restrain another party from repitition or continuance of wrongful act or breach of contract established by judgment or from commission of any act or breach of a like kind.

**Part 22 – Chambers Proceedings**

**Rule 22-1(5)**

Except in cases of urgency, a chambers proceeding must be heard in a place open to public, unless court directs for special reasons the chambers proceeding ought to be dealt with in private.

**Rule 13-1 Orders**

(19) When making an order under these Supreme Court Civil Rules, court may impose terms and conditions and give directions it considers will further the object of these Rules.

### 2. *Ex Parte* Interim (REquirements of Urgency, Full&Frank Disclosure)

* In BC, ex-partes interim injunction will continue an injunction through a trial without a 2nd hearing to continue an interim into an interlocutory injunction, unless D contests and applies to have it dissolved. (Gulf Islands)
* Distinct from inter-partes in that only the applicant is heard from.
* Must be URGENCY- not time to give notice to the other side- or providing notice would do harm- BCSC Rule 52(12.1)
* Applicant must make FULL & FRANK DISCLOSURE, and essentially argue both sides of the case
* Usually will be an UNDERTAKING AS TO DAMAGES (BCSC rule 45(6); Law & Equity Act, S. 39(2)

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| ***Gulf Islands Navigation v Seafarers International Union,* 1959 BCJ** |
| **Facts:** Seafarers broke a no-strike clause, and Gulf Islands sought an *ex-parte* injunction. Seafarers wants to contest.  **Issue:** Should the injunction be set aside? YES  **Court:** Contesting ex-parte injunction:   * English practice is to grant them for a short stated period with liberty to plaintiff to apply on notice to continue. * In BC, usual order is to enjoin until trial, with leave to defendant to apply to dissolve * Proper remedy to contest an *ex-parte* injunction is to go before same judge who first heard matter because it is much easier for them to admit to their own errors than another judge to say the original judge overlooked something. Must at least go before judge of same court. * **Full and Frank disclosure:** those wishing to obtain *ex parte* injunction must use utmost good faith, and if they do not, they cannot keep results of their application. All matters must be stated. * Suppression = NO INJUNCTION! * Injunction will not be dissolved if it appears the first judge did consider all facts and arguments, even if second judge might have decided case differently.   + Here, injunction shouldn’t have been dissolved b/c no omission. BUT, company neglected to perform some tests and didn’t come with clean hands. * **Urgency:**    + There must be such urgency that the delay necessary to give notice might entail some serious and irreparable injury to plaintiff. |

### 3. Requirements for Obtaining an Interlocutory or Interim Injunction

* With notice of hearing to defendants, *inter partes* in chambers (discretionary order)
  + Chambers judge is not in a position to assess facts – if disputed, leave to side.
* Temporary: usually granted before trial.
* Normally to prevent some legal wrong – plaintiff must demonstrate irreparable harm. Whatever happens between time of anticipated wrong and the trail will cause harm to the plaintiff that can’t be compensated by an award of common law damages. Must show alternative remedy is not adequate
* Usually granted until trial or a further order, can be amended by further order (*Google*). Court retains jurisdiction to change the terms of the injunction.
  + Plaintiff can apply to expand, defendant can apply to restrict
* Sometimes have injunction continue until judgment.
* Purpose is to maintain the status quo until trial. Want to hold the situation in its current state (From time of application). Sometimes the applicant can say to the court a harm has already been done, and they want the court to undo the harm that has already occurred.
  + Turning clock back and going to *status quo ante* – as the situation was before the wrongdoing started to occur
  + Interlocutory mandatory injunction: put things back the way they were
  + Why? Reduces risk of injustice to the plaintiff or defendant.

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| ***American Cyanamid v Ethicon*** |
| **Facts:** American Cyanamid developed first absorbable sutures that were available in UK. Ethicon developed similar product and planned to enter market. AC thought it would infringe on their patent and sought injunction until trial.  **Issue:** What are the requirements for obtaining an interlocutory injunction?  **Court:** Requirements for an interlocutory injunction   * Serious problem to be tried that is not frivolous or vexatious (not strong *PF* case)   + Undertaking to damages * Irreparable harm to plaintiff if injunction not obtained   + If claimant would be adequately compensated by an award of damages if succeed at trial, and D could pay, no injunction however strong case is. * Balance of (in)convenience favours granting an injunction |
| ***MacMillan Bloedel v Michael Mullin*** |
| **Facts:** MB had the right to log Mears Island. Mullin claimed aboriginal title and sought an injunction so it wouldn’t be logged – destroying symbolic and cultural evidence of their title. MB sought injunction prohibiting picketing  **Issue:** What are the requirements for obtaining an interlocutory injunction?  **Court:** BC ADOPTS THE TEST FROM AMERICAN CYANAMID   1. Is there a fair question to raise? 2. Balance of convenience    1. Should the status quo be preserved?    2. Weighing balance as above   Here, logs are simply a commodity. There is greater significance for the aboriginal band. Both parties given injunctions and an early trial date. NO undertakings as to damages. |
| ***BC (AG) v Wale*** |
| **Facts:** AG BC applied *ex partes* for injunction restraining Wale from enforcing fishing bylaws allowing unlimited fishing. Wale appealed injunction.  **Issue:** Is AG BC entitled to keep its injunction? YES.  **Court:**   * Grounds for overturning IL injunction:   + As injunctions are discretionary, there must be an error in principle, error in evidence, or injustice if injunction is to be overturned.   + It is neither the practice nor appropriate to require an undertaking as to damages where the crown seeks to enforce by injunction what is *prima facie* the law of the land. * Two stage test for Interlocutory Injunction applied:   + Fair/serious question to be tried: YES, power of Fed gvt to delegate power to bands   + Balance of convenience:     - Evidence law would be flouted if no injunction     - Salmon stocks could be effected irreparably     - Status quo of no bylaws is preserved. |
| ***RJR Macdonald v Canada (AG)* 1994 SCC = irreparable harm is own step** |
| **Facts:** Federal ban on tobacco ads. RJR argues this violated their charter rights. QB CA upheld ban. RJR wanted to appeal, but needed a stay of proceedings to prevent execution of the ban pending the appeal. The injunction test would apply in this case.  **Issue:** Is RJR entitled to a stay of proceedings, preventing a ban on tobacco ads from taking effect bending appeal?  **Court:** The test for an interlocutory injunction and a stay of proceedings is the same, as both are “interlocutory relief”  Three-stage test:   1. **Fair/serious question to be tried?** Can’t be frivolous or vexatious – must be an arguable case. No careful consideration of the facts/merits except in exceptional circumstances (if the right can only be exercised immediately and there’s no benefit in proceeding to trial; if constitutionality presents itself as a simple question of law alone, or if the factual record is settled and no dispute to facts. 2. **Irreparable harm to applicant’s interest?** Would refusing injunction cause harm to the applicant that couldn’t be corrected by damages at trial. 3. **Balance of convenience:** Which of two parties would suffer the greatest harm if the injunction is granted? Public interest will weigh in favour of a government position, as there is a presumption that the government is acting in the public interest. |
| ***BMWE v Canadian Pacific –* administration of justice/broadening jurisdiction** |
| **Facts:** CP planned to change BMWE workers’ days off. BMWE filed a grievance, sought injunction to prevent days off change.  **Issue:** Can a court grant an interlocutory injunction when there is no cause of action to which the injunction is ancillary? YES  **Court:** The court can supplement the administration of justice in another court or tribunal with an injunction. Courts have jurisdiction to grant injunction where there is a justiciable right, wherever that right may fall to be determined. Courts may grant interim relief where final relief will be granted in another forum (broadens injunction jurisdiction) |

### Negative Covenants

* A negative promise in a contract
* The court can imply a negative covenant out of a positive covenant (*Warner Bros v. Nielson*)
* “Stop doing what you promised not to do”
* Ex: No-strike; Non-competition clauses; confidentiality agreements
* **American Cyanade approach replaced by the rule in *Doherty v. Allman*: If a negative promise is made, an injunction will be made without weighing the balance of convenience (interlocutory prohibitive injunction)**.

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| ***Cascade Imperial Mills v Lindsay –* challenging negative covenant** |
| **Facts:** Lindsay signed a non-compete agreement stating he wouldn’t work for a competitor. Several options for court to find a breach (within x miles etc). The idea was the court would strike out the unreasonable options. Lindsay left and immediately started working for a competing lumber company. Cascade seeks injunction to enforce non-compete clause.  **Issue:** Is Cascade entitled to an injunction to enforce the negative covenant? NO  **Court:** Normally, a negative covenant is enforceable in equity. However, if there is doubt as to the validity of a negative covenant, then *American Cyanamid* test will apply.   * Covenant in this case was too broad because of the options, and therefore invalid as an unreasonable restraint of trade. BofC should therefore apply. Here, there would be major hardship to Lindsay as he would be forced into unemployment. Balance lay in Lindsay’s favour. |

### Constitutional Cases

* Note the tension:
  + Granting an interlocutory injunction could be to deprive the public of the benefit or protection of a statute that may be constitutionally valid
  + Constitutional rights are the most important and fundamental in our system of law and it is surely of grave concern if the P is deprived of a constitutional right because the courts cannot move quickly enough

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| ***Manitoba (AG) v Metropolitan Shoe Stores Ltd* (1987 SCC)** |
| **Facts:** Metropolitan shoes resisted unionizing. AG had the right to impose a collective agreement, but MS claimed this infringed their Constitutional rights.  **Issue:** Is MS entitled to an injunction? NO  **Court:**   * Interlocutory injunction and stays are both governed by *American Cyanamid* test. * In constitutional disputes, a special factor to consider is that the public interest will normally lie in the continuation of government services. * The public interest will almost always tilt the balance in the government’s favour * Early trial date set: in this case, serious question to be tried and would be irreparable harm to MS but the public interest still tilts BOC towards AG. |

### 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).

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| ***Niemela v Malamus* – 2015 BCSC “Right to be forgotten”** |
| **Facts:** Plaintiff is a lawyer in Vancouver who has been victim of online harassment and bullying resulting from one of his former clients. Post describes him as a scam artist and dishonest. Lawyer reported to police – no further posts appeared. Law practice declined b/c of posts – individuals would access them through websites and see comments through google search previews. Wants google to remove URLS from searches on google.com or google.fr (Google voluntarily removed from Google.ca; 95% of Canadian internet google searches through .ca).  **Issue:** Can plaintiff get an injunction against Google ordering them to remove the worldwide url?  **Court:** *RJR* three-part test:   * Strong evidence words are defamatory * Failure to grant injunction will result in irreparable harm; and * BOC favours granting injunction   Court determines unable to satisfy second and third parts of test.   * Many of the searches probably originated from himself * Other explanations for decline in law practice including disciplinary history with Law Society * Court reluctant to make order cannot be complied with. Legislation in the US prevents Google from complying with an order compelling it to block defamatory search results = broad order uneccesary. |

### Mareva Injunction

* An injunction sought be unsecured creditors against a debtor attempting to hide/ dispose of assets to make them “judgment proof”
* *Ex Partes* interim injunction to freeze assets: if you give notice to debtor of this application, that would probably just mean faster disposition.
* Can be served on a third person holding a defendant’s assets if they have notice.
* Punishable by contempt
* No need for a separate Mareva Injunction in each province b/c of *Canada Judgments & Decrees Enforcement Act.*
* 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.

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| ***Aetna Financial Services v Feigelman et al*** |
| **Facts**: Feigelman was controlling SH of a company that borrowed $ from Aetna. A then took F’s assets to satisfy a loan, but was going insolvent himself, and was disposing of the assets negligently. F brings an action against A seeking monetary damages. F discovers A would likely move assets to Ontario, and applies for a Mareva injunction to freeze the assets.  **Issue:** Is this type of injunction available in Canada? YES; Is it available in these circumstances? NO  **Court:**   * Generally, the CL will not allow execution before judgment as it would retrain the ability of corporations to operate. There are exceptions, including when the **assets sought to be preserved are the very subject matter in dispute**, and to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute (codified in rules of court); where the processes of the court must be protected; to prevent fraud; or in the form of a **quia timet injunction in extreme circumstances that include a real or impending threat to remove contested assets from the jurisdiction**. Mareva injunctions, or freezing orders, are part of this last exception, and therefore valid law in Canada. * Injunction only issued when there is a **genuine risk of the disappearance of assets**. * A mareva **will not give unsecured creditors better priority as creditors because of the injunction**. D will still have to pay legitimate creditors first. * OBITER: mareva is profoundly harsh because it ties up assets and can lead to abuse. * TEST:   + **Claim must have a cause of action jusiticiable in BC for a $ judgment**   + **Must show a strong PF case**   + **D must have some assets in BC (or abroad w/ worldwide Mareva)**   + **Genuine risk the assets will be disposed of**   + **Balance of convenience**     - *HERE, A was a federally incorporated company, and could do business anywhere in Canada as a federally incorporated company. ∴ had the right to capital mobility, and wasn’t trying to evade by moving assets. Injunction dissolved; F stuck on undertaking as to damages.* |

### Anti-Suit Injunction

* When litigation has effects in multiple jurisdictions, it is advisable not to have parallel proceedings in multiple jurisdictions.
* Injunction to prevent parties from pursuing litigation in other jurisdictions

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| ***Anchem Products v BC (WCB)*** |
| **Facts**: BC workers get cancer from asbestos. WCB paid benefits and subrogated the workers’ right to sue manufacturers. WCB chose Texas as litigation forum because they can award punitive damages and there would be a jury trial. Amchem applied to BCSC for an anti-suit injunction to stop the WCB from litigating in Texas.  **Issue:** Is Anchem entitled to an anti-suit injunction? NO  **Court:**   * Parties to a proceeding should be able to litigate in whichever court they desire. AC will not apply. Comity is an important consideration in deciding whether an injunction should be granted, because, although equity works in personam, the injunction will have the effect of restraining a court in another jurisdiction. **Comity requires that injunctive relief should not be granted until the foreign proceeding has been launched and the applicant has sought and been refused a stay or similar relief by the foreign court.** TEST:   + **A foreign proceeding is pending**   + **Is BC the natural forum?** Consider whether BC has the closest connection with the action and the parties, or if there is another forum that is clearly more appropriate. **If the other forum declined a stay on the basis of forum non-conveniens or another consistent principle, comity may require deferral**. If no other forum more appropriate, move to next ?.     - ***HERE,*** *Both BC and TX were natural fora, meaning that no one was more appropriate than the other. Might have to respect comity and not grant injunction b/c texas was appropriate and had refused to grant a stay. In the alternative, judge also considers step 2.*   + **Does the alternative forum offer P an advantage of which it would be unfair to deprive them?** (weighing the balance). IF the answer to this is yes, then no anti-suit injunction will be granted.     - ***HERE,*** *there were advantages (jury; punitive dmgs) that it would be unfair to deprive WBC of. Therefore, no injunction*. * **NOTE:**  It’s almost impossible to get an anti-suit injunction following this case. P’s are entitled to take personal or juridicial advantage. |

### Anton Piller Order

* Injunction used to preserve property/documents involved in the proposed or pending suit from future destruction: fear is that the person would destroy the evidence against them.
* Examples include: Employment law: employee stealing trade secrets or other intellectual property; copyright infringement; breach of contract; breach of confidence.
* *American Cyanamid* doesn’t apply.
* Always granted *ex partes* interim injunction (without notice)– want to take the wrongdoer by surprise.
* Applicant can enter D’s property with their consent, NO FORCE allowed. If no consent is given, the D is guilty of contempt.
* To preserve evidence from destruction by defendant (*Mullin*)
* To recover intellectual property wrongfully taken or possessed by defendant (piracy, industrial espionage) (*Celanese Canada, Vinod Chopra*).
* Ancillary to Mareva Injunction, to obtain defendant’s financial records (*Malik*)
* Search and seizure is OK to preserve documents and property BUT civil = need consent, criminal = by force if necessary.
* Requires an undertaking as to damages

**Requirements:**

1. Strong *prima facie* case against defendant
2. Very serious actual or potential damage to plaintiff
3. Convincing evidence of defendant’s possession of incriminating documents or things.
4. Real possibility of destruction of (3) if defendant is forewarned
5. Full and frank disclosure of material facts
6. Undertaking as to damages – improper granting or execution (ii)
7. Independent supervising solicitor (ISS) – neutral officer of the court, attends the execution of the APO, explains APO to defendant, independent advice to defendant.

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| ***Celanese Canda v Murray,* SCC** |
| **Facts**: Celanese had a vinyl acetate plant in Edmonton – demolished it and hired Murray Demolition. MD given plans for plant including location of equipment. Rogue employee of MD decided to take plans and sell them to Canadian Bearings who used them in the process of building a vinyl acetate plant in Iran. Celanese wants to search premises of CB to recover plans. Applied for and got AP order. Went to execute on premises of CB – searched computers/downloaded emails indiscriminately. Took what turned out to be solicitor-client privileged info. Celanese copied docs and turned it over to Cassells Brock (their law firm).  **Court:** Celanese did not act in accordance with the AP order. CB removed as legal counsel.   * Terms of the order:   + D must consent or be held for contempt   + Usually time limited because of urgency   + Terms must be detailed and standardized   + Independent solicitor must be present at the search to ensure its integrity and   + D must provide undertaking as to damages   + No material shall be removed unless covered by the terms of the order.   + A term setting out the procedure for dealing with solicitor/client privilege should be included * Search should proceed as:   + begin during normal business hours;   + D or agent should be present;   + person searching should be specified in order;   + Council should provide a copy of the order and explain its nature and effect;   + D given reasonable time to consult with counsel;   + Detailed list of all evidence seized should be made and given to the D for verification at the end, before materials removed OR info should be given to independent solicitor;   + documents with uncertain ownership goes to solicitor.   + Solicitor should file a report with the court within a set time limit.   + *HERE- these protections were inadequate. C copied hard drives and took cmns covered by professional privilege. P’s lawyers are removed*. |
| ***BC(AG) v Malik,* 2011 SCC** |
| **Facts**: Crown bringing action against respondents to recover monies advanced to fund defence costs. Crown got *ex parte* Anton Piller order. Crown seeks reimbursement of $5.2 million it paid to fund Mr. Malik’s defence in the Air India bombing trial in which Mr. Malik was acquitted. Claim is based on claims of debt, breach of contract, conspiracy and fraud.  **Court:**   * Chambers judge granted *Anton Piller* order authorizing the search of the business and residential properties of the Malik family for evidence that they helped conceal Mr. Malik’s assets * Chambers judge relied on facts found against the Malik family in prior judicial proceedings brought by Mr. Malik to obtain non-repayable provincial funding for his defence. * BCCA set aside *Anton Piller* order because in its view the findings and conclusions of the prior proceeding were inadmissible. * SCC: confirms *Celanese Canada* requirements:   + Strong prima facie case   + Serious damage to plaintiff as a result of defendant’s alleged misconduct, potential or actual   + Convincing evidence that the defendant has in its possession incriminating documents or things   + A real possibility that the defendant may destroy such material before the discovery process can do its work * Test met here. AP order = private search warrant only should be granted on clear and convincing evidence. Crown litigant enjoys no special privilege or priority. * Judgment from prior case is admissible as evidence in interlocutory proceedings |

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| ***Vinod Chopra Films v John Doe –* copyright infringement, counterfeit copies/rolling AP order** |
| **Facts**: Federal court – national jurisdiction. Rolling Anton Piller order. Chopra is a filmmaker, made “The Three Idiots” and got word there were pirated copies of the film being sold in flea markets and other retailers. Didn’t know who the retailers were or where they were. Got a sweeping Anton Piller order.  **Court:**   * **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. * **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 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.

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| ***BMG Canada v John Doe*** |
| **Facts:** BMG seeks injunction against internet service providers to disclose the names of people who are filesharing.  **Issue:** Is BMG entitled to an NP order? NO  **Court:** When applying through rules of court (ie- BCSC 28; Fed Crt Rule 238(1)), the same test will apply. **TEST:**   * + Bona fides claim (not prima facie case, as the applicant doesn’t know the ID of the persons they wish to sue) against John Doe for breach of patent, copyright, fraud or tort- **must believe a wrong was done, and will commence an action, except the wrongdoers name is unknown.**   + 3rd person from whom info is sought must be in some way involved in the matter under dispute. **More than an innocent bystander**   + Third party must be the **only practical source of the info available** to the applicants (REMEDY OF LAST RESORT)   + 3rd person must be **reasonably compensated for expenses** arising out of compliance with the discovery   + Public interests in favour of disclosure must **outweigh** the legitimate privacy concerns.     - *Here, P’s commercial interest did not outweigh the privacy concerns of file-sharers.* |

## Intellectual Property/Breach of Confidence

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| ***Cadbury Schweppes v FBI Foods*** |
| **Facts:** Cadbury makes Motts Clamato. FBI learned secret recipe for use only in manufacturing under license. FBI license terminated; had non-competition clause in effect for 5 years saying no manufacturing a product with clam juice and tomato juice. FBI immediately started making own product – just without clam juice. Cadbury doesn’t do anything for 3 years despite knowing of the breach. With new legal advice, claims breach of confidence for misusing the recipe.  **Issue:** Is Cadbury entitled to an injunction? NO  **Court:**   * A claim for breach of confidence does not depend on an underlying claim for breach of fiduciary duty, so CS can still bring an action against FBI despite it not breaching FD or contract. * **TEST:**   + **Confidential information**   + **Received in confidence**   + **Used without authorization (wrongful misuse)** * Usual remedy would be an injunction, but that is inappropriate here because the secret formula wasn’t very special, and CS was guilt of laches in its unreasonable delay from 1983-1986, which led to FBI spending close to $1mil in building a facility for rival product.   Unsuccessful claim for equitable dmgs under Lord Cairns’ Act as a substitute for injunctive relief b/c CS wasn’t entitled to an injunction. **Equitable compensation can be awarded where an injunction would be too harsh, independent of the need for an injunction (which would be equitable damages** |

## Contracts of Personal Service

* Equity will not enforce a contract of personal service by means of a decree of specific enforcement or a mandatory injunction b/c
  + Damages often an appropriate remedy
  + Would force a reluctant employer to take on someone not wanted or trusted
  + Would also impose slavery or involuntary servitude
* Two Exceptions:
  + Equity can enforce express or implied non-competition agreements by granting a prohibitory injunction that is limited to avoid imposing slavery. This implies a negative covenant. (Bette Davis)
  + Equity can grant a mandatory injunction reinstating a terminated EE to a former position if the ex-employer wants the former EE back, and imminent legislative changes would abolish the grounds of termination. (Hill v. Parsons)

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| ***Warner Bros v. Nelson*** |
| **Facts:** Bette Davis entered into a K to render her exclusive services as a motion picture and/or stage actress to WB. Non-competition clause, too. Broke K.  **Issue:** Is WB entitled to a mandatory injunction, forcing Bette Davis to work for them? (Yes & NO)  **Court: When a contract of employment contains both positive and negative covenants, Chancery will not enforce the positive covenants, but may grant a prohibitory injunction to restrain breach of negative covenants, so long as the injunction does not amount to a decree that the person must perform the personal services or remain idle.**   * **TEST**: when an injunction restraining breach of a negative covenant will be granted:   + **Breach or threatened breach of a negative covenant occurs during the term of employment**   + **The EE has a unique talent, so that damages are inadequate**   + **The injunction is worded so that the EE has reasonable alternative means of earning a living, instead of being forced to work for the P or remain idle** |
| ***Hill v. Parsons & Co*** |
| **Facts:** H effused to join union in a closed shop. Union insisted H be terminated. ER agreed. Legislation outlawing closed shop was coming into effect, and H would only work for a few more years before reaching age of mandatory  **Issue:** Can H obtain a mandatory injunction reinstating him to his former position? YES  **Court:** Equity can order an employee’s reinstatement in exceptional circumstances where the grounds of termination have short-lived validity, and the ER wants the former EE back. Also note the amount of notice given was inadequate in this case. |

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## Mandatory Injunction

### General

* Order for the D to do an act (Clean & repair drains- Kennard; continue making monthly disability payments- Hedstrom)
* 2 difficulties in making a mandatory order
  + Ambiguity affects enforcement (Kennard; Elta)
  + Courts do not want to become tied up in long-term supervision of performance
  + ELTA: the terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance

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| ***Kennard v. Cory Bros and Co. Ltd.- Broad Orders Not Enforceable*** |
| **Facts:** C operated a coal mine above K’s land, mine slag slides down hillside. K sued C and C was ordered to construct drains. Drains clogged, and K seeks a perpetual mandatory injunction ordering the D to clean and repair the drains.  **Issue:** Is the mandatory injunction’s wording valid? NO  **Court:** May not make orders to do undefined works which may require continuous supervision.   * + *Wording of “execute such works as might be necessary” is too vague*.   + **Mandatory injunctions must specify original works, and the exact thing to be done**, *here, the clearing of an agreed and specified drain.* |
| ***Doucet-Boudrea v. Nova Scotia*** |
| **Facts:** Declaratory order that the ministry of education use its best efforts to provide French-language instruction up to grade 12, and that the ministry report back from time to time to court on its compliance.  **Issue:** IS the wording too vague? NO  **Court:** Wording and constant supervision are not such important consideration when granting the equivalent of a mandatory injunction in the form of a declaratory order against a government. “Best Efforts” language is fine. NOTE- vigorous dissent. |
| ***Hedstrom v. Manufacturers Life Insurance*** |
| **Facts:** H claimed total disability benefits after being electrocuted. MLI paid from 1993-2002. H then underwent medical exam that found that H was fit to return to work. D cut off, then seeks mandatory injunction to continue the benefits until trial.  **Issue:** What are the requirements for obtaining an interlocutory mandatory injunction?  **Court:** Prior to this, courts didn’t follow AC- had to show unusually sharp and clear case, which is much more onerous than serious question test and strong PF case. **AC test should henceforth apply to IL mandatory injunctions, but with close scrutiny to irreparable harm and the balance of convenience.** *Here, H didn’t offer evidence of his personal financial situation or of dire consequences of cutting H off monthly benefit, or chance of irreparable harm.* |

## Expropriation Doctrine

* In the case of nuisance, trespass to land, or encroachment on land, under the Lord Cairns Act, equity can effect a partial expropriation of the P’s land by the D, and **grant equitable damages in addition to or in substitution for an injunction to prohibit future wrongdoing**.
* If the court decides to grant damages instead of an injunction, D can continue the act into the future (Blake- compensation is the price payable for the compulsory acquisition of a right. D is permitted to perpetuate the wrongful state of affairs he has brought about)

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| ***Rombough et al. v. Crestbrook Timber Co* - Nuisance- more willing to grant compensation instead:** |
| **Facts:** C owned an operated a sawmill, whose burner caused actionable damage to nearby landowners from smoke and ashes. R brings a suit for a permanent injunction to shut down the sawmill because the discharge was a nuisance that affected the use and enjoyment of P’s land.  **Issue:** Is R entitled to an injunction? NO  **Court: Damages can be awarded in substitution for an injunction. The damages must cover not only the injury already sustained, but also any injury that would be inflicted in the future by the commission of the act not enjoined.** C was a large employer, and it would lead to mass unemployment if the injunction was granted. R granted equitable damages for the adverse effect on land value, and D could continue its operation. (essentially a licensing of the wrongdoing). |

***Trespass & Encroachment: Property Law Act s. 36***

* Where a fence of a building encroaches over the property line onto a neighbour’s parcel of land, the BCSC has a broad discretion to (a) award compensation to P and an easement, (b) or vest land title in the defendant, or (c) grant a mandatory injunction requiring it to be torn down at the wrongdoer’s expense.
* **NOTE: If it isn’t a fence or building, rule from Shelfer v. London will apply-** the court protests against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. *Restricted use of discretion to substitute* *damages* for an injunction in trespass or encroachment.

## Quia Timet/Anticipatory Injunction

* A negative injunction to prevent an apprehended/future wrong
* Literally, “because he fears”
* 2 Types:
  + Where D threatens to do works which would render irreparable harm
  + Where P has been compensated for damage, but alleges D’s earlier actions may lead to future damage
* Different from legal remedies, which are only available after a wrong has been done
* EX- Mareva injunctions
* Reluctant to grant quia timet injunctions; esp. mandatory ones. Must show that (Redland Bricks):
  + There is a very **strong probability of grave damage** in the future
  + If the damage occurs, it will cause **irreparable harm**
  + The **balance of convenience** favours granting the injunction.
    - If D has acted wantonly/unreasonably, court will grant a mandatory injunction ordering it to undo its wrongdoing even if the cost of doing the work exceeds the benefit to the plaintiff of restoring the status quo
    - IF D has acted reasonably, the P must convince the court that the cost of doing the work is reasonable in relation to the benefit to the P to get an injunction
  + The injunction can be **worded so clearly** that the D knows exactly what must be done

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| ***Redland Bricks Ltd. v. Morris*- Consider the cost to the D** |
| **Facts:** R ran a clay quarry that removed lateral support causing the land to subside. M applied for a QT prohibitory injunction restraining further quarrying because it would cause subsidence (Not at issue). Also, a mandatory QT injunction ordering D to restore lateral support to P’s land b/c further subsidence was anticipated to follow what had already occurred.  **Issue:** Is M entitled to a WT mandatory injunction? NO  **Court: It’s the second type of qui timet- the quia timet mandatory injunction.** R acted reasonably, and the cost of the work grossly exceeded the benefit to M. Order was worded improperly b/c it did not clearly inform R what it should do and how much it should spend. Such an order could not stand. |

## Delayed Injunction

* Court of equity may impose terms and conditions on the party obtaining an injunction to balance the equities between the parties in accordance with the maxim “he who seeks equity must do equity.”
* EX- may suspend operation of injunction to minimize the inconvenience or hardship to the D (Polai Case; suspended 1 year to minimize the disruption to P’s livelihood, and tenants’ plight if they had to move out immediately)

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| ***Woolerton and Wilson v Richard Costain* (1970) – avail of injunc for trespass in absence of damages** |
| **Facts:** Defendants = building contractors and required use of crane - crane they were using overhung the claimant’s land approximately 50 ft above ground level. This is the only position available for the crane but caused to damage or risk thereof. Defendant admitted trespass to claimant’s airspace and offered compensation. Claimant wouldn’t accept compensation and asked for interim injunction preventing trespass.  **Issue:** Is an injunction prohibiting trespass available where no damage was caused by the defendant and there was no risk of any such damage occurring.  **Court:** “In principle there ought to be an injunction, but on the particular facts of this case, not until the defendants had a chance of finishing the job”.   * In situation where no damage occurs, only remedy available = injunction * Injunction is available but not given in this case – nature of claim & surrounding circumstances permits court discretion to suspend injunction. * Injunction suspended for a period that allowed the defendant to complete the work that required use of crane (economic reality). * Note: very fact specific. |
| ***Charrington v Simons and Co*** |
| **Facts:** Defendant raised level of land to where it adjoined the plaintiff’s land, impeding the plaintiff’s access in breach of a covenant. Injunction granted requiring the defendant to restore the prior height of the land. Was suspended for three years to do the work with the plaintiff’s consent.  **Issue:** Could the court delay implementation for three years? NO  **Court:** Delay of an injunction will not be appropriate where it will cause hardship to the applicant.   * Court has jurisdiction to suspend injunction but three years was an excessive delay because it had the effect of depriving the winning party of the fruits of its successful litigation. |
| ***Harper v Canada (AG) –* Test for stay of injunction pending appeal.** |
| **Facts:** Government imposes spending limits on 3rd party groups. Harper, as head of National Citizen’s Coalition, attacks validity for breaching freedom of expression. Seeks interlocutory injunction restraining implementation of the legislation on spending limits until after the election. Obtains IL injunction. Government seeks stay of injunction pending appeal.  **Issue:** Should an injunction that suspends enforcement of certain legislative provisions be stayed? YES  **Court:**   * Applications for IL injunctions against enforcement of legislation raise special considerations in the balance of convenience. Weighing BOC should favour the public interest in continuity of legislation, which would maintain spending limits until proven they’re unconstitutional. |

## Enforcement of Legislation

* Equity will not issue an injunction to restrain the commission of a crime because criminal sanctions are presumed adequate. In the past, equity would exercise discretion in this way—
  + 17th C court of Start Chamber- jurisdiction to suppress crime. Did so to serve the political aspirations of the monarchy. Characterized by imprisonment before trial, torture, self-incrimination, and trial in camera. Abolished in 1641. Led to chancery judges shying away from criminal proceedings.
* NOW- may grant an injunction where criminal sanctions are inadequate to deter the commission of a crime or to deprive the criminal of the profits of crime
  + EX- restrain flouting (*Polai*); public nuisance from recurring (Couillard)
  + IF the nuisance involves a public protest, the courts should weigh the balance considering the harm of granting an injunction that stifles freedoms of assembly and expression (Hall)
  + May issue an injunction to restrain picketing of a courthouse because the activity interferes with the administration of justice, amounting to criminal contempt of court and denying public access to justice (BCGEU)
* If a criminal publishes an autobiography detailing his wrongdoing, Equity will prevent the culprit from profiting from the life of crime by typing up the proceeds through an injunction, equitable damages, and/or an account of profits (Blake).

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| ***Kent District v Storgoff and AGBC*** |
| **Facts:** Kent passed bylaw prohibiting Doukhobours (terrorist group) from entering the district to squat in protest of members being held in a prison. Kent seeks injunction restraining breach of the bylaw.  **Issue:** Is Kent entitled to an injunction? YES  **Court:** Even though the validity of a bylaw is doubtful, when a bylaw prevents a public nuisance, affecting the property, health and safety of local residents, and public officials will refuse to enforce a bylaw, a legal remedy will be inadequate (ie- irreparable harm to the PUBLIC) and it is appropriate for the court to grant an injunction. |
| ***Provincial Rental Housing v Hall*** |
| **Facts:** Squatters outside woodwards building protesting homelessness. PRHC seeks ex partes interim injunction to prohibit squatters from occupying the sidewalks around the building. To permit the use of force, an enforcement order explicitly authorized the VPD to remove squatters.  **Issue:** Entitled to injunction? YES  **Court: An order that unnecessarily infringes on freedoms of expression, and is granted ex partes when the parties were present despite a lack of formal notice (as it means that urgency notice and lack of time to give notice, first element for an ex partes interim injunction, isn’t met) will not be valid.**   * Ex partes injunction **that stifles protest should be limited to a short fixed period of time** so it will expire quickly unless extended, as it would better protect the right to make a public protest. |
| ***AGBC v Couillard and Alexander*** |
| **Facts:** AG weeks injunction against prostitutes operating around Davie St. and their customers, and an IL injunction to restrain public nuisance  **Issue:** Injunction? YES  **Court: Equity can supplement the law when the legal remedy is insufficient.** Where a statute does not sufficiently deter a public nuisance, an injunction will be granted until such time as the statute is adequate protection.   * *Criminal Code, at the time, did not provide an adequate deterrence to street prostitution.* * **NOTE:** After the code was amended, the court rescinded the injunction. |
| ***Lakehead Region Conservation v DeMichele,* ONCA 2010** |
| Court upheld permanent injunction preventing a developer from further dredging and filling in wetland without a permit. DeMichele had a history of developing land without a permit, and argued that the Authority cannot enforce its regulations against him because it failed to do so in past.   * Further dredging or placing of fill in wetland might damage wetland * In the public interest to ensure unauthorized work on the wetland is ceased * LRCA cannot force DiMichele to remediate work conducted in the past when the LRCA knew or ought to have known he was doing it. |
| ***BCGEU v BC(AG)*** |
| **Facts:** McEchern gives himself an injunction to stop picketing of the courthouse  **Issue:** Injunction? YES  **Court:** Picketing that obstructs public access to the courts, interferes with the administration of justice, and is a criminal contempt of court. The injunction will preserve public access to the courts and give notice to union members that their behaviour is criminal. |

## Undertaking as to Damages

* Undertaking as to Damages- applicant can be required to pay damages if injunction should never have been
* granted; judicial discretion to dispense w/ P’s undertaking (*Delta*)
* • “one who seeks equity must do equity”
* • only applies to interlocutory/interim injunctions (not perm injunctions)
* • includes all reasonably foreseeable damages at the time of the undertaking (*Fletton*)
* • Survives discontinuance of a claim (*Bird Construction*)
* L&E Act, s.39(2): court can impose “terms and conditions” on granting an injunction order
* BCSC Rule 45(6): unless court otherwise orders, an order shall contain the applicant’s undertaking to abide by
* any order which the court may make as to damages

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| ***Vieweger Construction v Rush and Thompkins*** |
| **Facts:** Vieweger obtained injunction against removal of construction equipment, Rush later won main action for damages.  **Court:** Rush (defendant) has right to claim undertaking damages. Plaintiff punishable by contempt is he does not comply. Court will only deprive defendant of damages in special circumstances (i.e. defendant guilty of unethical conduct) = doesn’t apply in this case. |
| ***Manitoba Dental Association v Hyman and Holstead*** |
| **Facts:** injunction against dentists practicing without a license.  **Court:** Dental association required to undertake damages because they sought the injunction |
| ***Delta (municipality) v Nationwide Auctions*** |
| BCSC Rule 45(6) confirms there is judicial discretion to dispense with the plaintiffs undertaking of damages “unless the court otherwise orders”. Special circumstances = impecuniosity of plaintiff (no money). |
| ***Bird Construction v Paterson*** |
| **Facts:** Bird obtained injunction against picketers, then voluntarily discontinued action.  **Court:** Bird still liable to pay undertaking damages. Undertaking survives discontinuance – is a promise to the courts rather than a promise between parties.   * By discontinuing action, plaintiff is admitting injunction was improperly granted * Better to apply to have injunction dissolved, then court can decide to relieve undertaking or not. |
| ***Fletton v Peat Marwock*** |
| **Facts:** P obtained injunction for laundry units to be preserved until trial. Action was dismissed and defendant sought damages to cover expenses incurred during storage/preservation of units.  **Court:** Defendant is entitled to reasonably foreseeable damages as part of undertaking; common law principles apply. |

## Proper Form of Injunction

Proper form of injunction = must be clear enough so parties know **what is expected and who it applies to**.

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| ***Marengo v Daily Sketch Ltd* (1948) - NO LONGER GOOD LAW** |
| **Facts:** Injunction granted against coporation by “their staff servants and agents”. Wording doesn’t restrain third parties.  **Court:**   * Old Rule – third parties who were not named could not be held in contempt for violating an injunction (this becomes overruled in *Macmillan Bloedel.* |
| ***Macmillan Bloedel v Simpson* (1996) – THIRD PARTIES** |
| **Facts:** MB obtained an injunction against Simpson and “John Doe, Jane Doe” and unknown other parties from blocking logging road.  **Court:** Injunction is enforceable against third persons.   * Knowingly disobeying an injunction = impeding the administration of justice * Requires that they are:   + Informed of the order; and   + Given an opportunity to comply with the order * Third parties who violate an injunction may be prosecuted for contempt of court. |
| ***Sonoco v Local 433, Vancouver Converters* (1970) – clear wording** |
| **Facts:** Appellant charged with contempt for blocking logging road, violating an injunction prohibiting “unlawfully persuading or attempting to persuade”.  **Court:**   * Word “unlawful” = unclear, therefore injunction = unenforceable. * An injunction must be worded clearly enough so a defendant knows what behavior is being enjoined. |
| ***Doucet – Boudreau v Nova Scotia* (2003)** |
| **Facts:** Francophone parents applied for mandatory injunction to provide French-language education under Charter rights, court ordered province to use “best efforts”.  **Court:** Order upheld – wording considered clear enough to be enforceable.   * Note: political/civil rights issue that would never likely occur again (in general, legislation prohibits courts from issuing injunctions against the Crown). |

* Permanent/Final Injunction: (9-49) awarded after judgment
  + 1) Has the party established its legal rights?
  + 2) Is an injunction the appropriate remedy?
* Irreparable harm/balance of convenience = discretionary considerations on the question of
* appropriateness
* \*no undertaking as to damages for a

## Contempt

* *Criminal Code* s 9: court may impose punishment for contempt at CL
* s.127: disobedience of court order- indictable or summary conviction
* • Crim contempt requires MR + AR, BRD; A knew, intended or was reckless as to the fact that the act
* would publicly bring the court into contempt (United Nurses)
* BCSC Civil Rule 22-8: court may impose punishment (fine/committal/sequestration) for civil contempt
* D had actual notice/knowledge of the order and disobeyed it (proof BRD)
* Corp can be held in contempt = “piercing of the corp veil”
* Element of public interest in upholding any court order

• Due diligence can be a defence (*Alberta v MB*)

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| ***United Nurses of Alberta v Alberta (AG),* 1992** |
| * Simple breach of court order = civil contempt * Element of public defiance of the court’s process, calculated to lessen societal respect for the court + breach = criminal contempt * Respect for rule of law, administration of justice – must be enforced. |
| ***Videotron v Industries Microlec Produits Electroniques*** |
| **Facts:** Failure to comply with a permanent injunction, refusal to testify in contempt proceedings. Alleged contemptnor cannot be compelled to testify.  **Court:** Contempt of court is quasi-penal in nature; would be inconsistent if respondent cited for contempt could be compelled to testify. |
| ***Carey v Laiken,* 2015 SCC** |
| **Facts:** Ms. Laiken sued her broker claiming he defrauded her of $800k. Obtained *Mareva* order prohibiting him and anyone having notice of the order from “*disposing of, or otherwise dealing with*” any of his assets. Broker was represented by Mr. Carey – a Toronto lawyer. A few months after freezing order, broker sent $500k cheque to Carey for payent of fees. Carey used funds to pay his fees – payments were permitted under order. Broker told Carey to use remaining funds to settle claims of other creditors. No settlement achieved = broker instructed lawyer to return remaining funds which he did. Broker business failed and disappeared. Laiken awarded $1mill judgment.  **Court:** SCC confirmed Carey guilty of contempt of court when he transferred funds to his client.   * To be guilty of contempt, person need not have the deliberate intent to breach a court order. * Only need to show that person did a deliberate act that was contrary to the terms of the order. * Argument that he shouldn’t be in contempt b/c he was complying with what he understood to be his professional obligations in following his client’s instructions. |
| ***Nissho (Canada) v International Longshoreman’s and Warehouseman’s Union*** |
| **Facts:** no one was given a copy of the material upon which the order was founded.  **Court:** Not necessary in contempt proceedings to prove valid service of the order but it is necessary to prove that the person or persons alleged to be in contempt had knowledge of the order and that the plaintiff intended to enforce it.   * INCLUDES people not named in the action. |
| ***Isaacs v Robertson* – erroneously issued injunction** |
| **Facts:** Failure to comply with interlocutory injunction on basis that injunction was erroneously issued.  **Court:** Order must be obeyed unless and until it has been set aside by the court; invalidity of order is not a defence to contempt but may be a mitigating factor. |
| ***Ouellet v BM*** |
| **Facts:** Director of Child, Youth, Family Enhancement convicted of civil contempt of court.  **Issue:** Can liability for contempt of court be imposed personally on the holder of a public office who is in charge of a government department where the public officer is named as a party to an action and the department fails to obey a court order directing the public officer to act? Can occur.  **Court:**   * Liability for civil contempt cannot be vicarious because of quasi-criminal nature * Could attract liability for wilful blindness * Delegation of duty doesn’t relieve them of obligation/due diligence |

# Specific Performance and Fusion

* Final remedy only
* Elements:
  + Existing contract between plaintiff and defendant
  + Breach of contract or anticipatory repudiation by defendant
  + Inadequacy of damages as a remedy: subject matter must be unique (plaintiff BurdenofProof)
  + Discretionary Factors:
    - “conduct of the party seeking the relief” (*Harris v Robinson*)
    - P’s laches
    - P’s unclean hands
    - Not a contract for personal services (*Ryan*)
    - Not a contract requiring “constant superintendence” by the court (*Ryan*)
    - Not a contract that plaintiff cannot perform – doctrine of mutuality

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| ***Harris v Robinson*** |
| Not sufficient to show that a contract existed; much regard is shown to the conduct of the party seeking relief. |
| ***Semelhago v Paramadevan*** |
| (sale of land).   * A party entitled to specific performance is entitled to elect damages in lieu thereof * Date of assessment = date of judgment * Specific performance should not be granted unless there is evidence that the property is unique to the extent that its substitute would not be readily available. * “*While at one time Common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case”* |
| ***Ryan v Mutual Tontine Westminster Chambers Association* (1893)** |
| **Facts:** Doorman services included in lease agreement, tenants sued landlord for specific performance. Refusal of specific performance = damages awarded for breach of lease.  **Court:**   * Relevant factors:   + Performance of personal services – cannot force someone to perform   + Specific performance unlikely when constant superintendence by the court is required to enforce it   + Cannot compel specific performance of part of a contract (ie appointment of doorman not sufficient) |
| ***Walsh v Lonsdale* (1882)** |
| **Facts:** lease agreement but no formal deed, refusal to pay the year’s rent in advance. Equitable lease; both parties admit that relief is capable of being given by specific performance.  **Court:**   * In this case, agreement to transfer legal title considered good in equity * “Equity regards as done that which ought to be done” |
| ***Manchester Brewery v Coombs* (1901)** |
| **Facts:** Agreement to buy beer from particular supplier but no formal deed. Specific performance granted = injunction to restrain purchase from other suppliers.  **Court:**   * Until a formal lease is executed in compliance with a decree of specific performance, there exists an equitable lease only * Principle in *Walsh v Lonsdale* has limited applicability? |
| ***Southcott Estates v Toronto Catholic School District -* mitigation** |
| **Facts:** sale of land to real estate developer = $1 damages awarded for breach of contract, failure of Southcott to mitigate losses. No specific performance because the land not unique.  **Court:**   * Investment property = not a “fair, real and substantial justification” for claiming specific performance unless it can be shown that the land has a “peculiar and special value” * For mitigation, must establish:   + That an opportunity to mitigate the loss existed; and   + Plaintiff acted unreasonably in failing to take that opportunity. * Dissent (McLachlin): P, acting reasonably cannot pursue SP and mitigate its loss at the same time; purchasing substitute property would undermine entire SP argument. |

## A. Specific Performance *Cy-Pres*

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| ***Raaber v Coll-in-wood Farms*** |
| **Facts:** sale of land, plaintiff unable to provide conditional sales agreement but willing to substitute cash.  **Court:** Where a non-essential term of the contract cannot be performed literally but can be performed *cy pres,* the court may order specific performance  \*\*\* Cy-pres = as near as possible. |

Crown Proceeding Act, s.11: No injunction or SP against Crown; however, court may make an order declaring the rights of the parties. Recall: no immunity of Crown servants or agents personally

# Tracing in Equity

* Tracing = legal process NOT remedy, by which a claimant demonstrates what has happened to his/her property, identifies its proceeds and those persons who have handled or received them and asks the court to award a proprietary remedy in respect of the property, or an asset substituted for the original property or its proceeds.
* Allows transmission of legal claims from the original assets to either the proceeds of sale of the assets or new substituted assets.
* Ordinarily facilitates an equitable remedy = subject to usual limits and bars on equitable remedies in common law countries.
* However, in many common law countries there are two concurrent processes – tracing at common law and tracing in equity. Equitable tracing is almost universally relied upon.
* Advantages:
  + Proprietary remedy not personal claim = if defendant insolvent, claimant can take title to goods rather than just receiving award of damages (of little value if bankrupt)
  + Where wrongdoer has made a profit, allows claimant to recover a greater amount than their original loss.

## A. Tracing at Law

* Does not require a fiduciary relationship
* id of assets that have changed form

**Limitations:**

* Change of position
* Dissipation squandering
* Mixture that precludes tracing

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| ***BMP Global Distribution v Bank of Nova Scotia* (2009)** |
| **Facts:** RBC cleared cheque and BNS released funds to BMP – later discovered forgery.  **Court:** RBC entitled to recover money as long as money can be identified – no damages awarded to BMP = cannot profit from fraud, even if they didn’t commit the fraud.   * Where money has been transferred in circumstances in which it can still be identified, tracing is permitted * Common law rule: claimant must demonstrate that assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them * Possible at CL to trace funds into bank accounts if funds can be identified * Mixing by recipient = not a bar to recovery * Doctrine of mistake of fact applies in this case |
| ***Lipkin Gorman v Karpinale* (1991)** |
| **Facts:** Law firm partner stole funds and gambled at Playboy club, firm brought action against club to recover the money.  **Court:**   * If appellant can establish a basis on which he is entitled to the money, may be entitled to succeed in claim against third party (though not if the third party has received the money in good faith and for valuable consideration). * In this case – gambling chips/chance of winning not valid consideration * Change of position defence applies – unjust to ask club to make restitution to the extent that he has changed his position in good faith. * Club acted in good faith = still liable to pay enrichment (money earned from partner’s overall gambling) |

## B. Tracing in Equity

* Requires a fiduciary relationship; relationship doesn’t need to have existed before misappropriation took place.
* The wrongdoer may mix misappropriated funds with own money and purchase an asset with mixed fund
* Where there are multiple innocent claimants
* Volunteer kept money in unmixed fund = constructive trust (proprietary remedy) “order to restore the unmixed sum of money”
* Volunteer mixed money with own funds = declaration of a charge (proprietary) on the mixed fund, ranking pari passu with claim of volunteer
* Third party mixes trust funds in real estate = no tracing, plaintiff can’t identify and claim as trust property, can’t sell (because bona fide purchaser for value)
* Third person uses trust funds to discharge or reduce debts = no tracing; can’t identiy trust property
* NO TRACING IF INEQUITABLE RESULT.
* id of assets that have been mixed/changed form

**Defences:**

* Good faith purchaser for value and without notice
* Dissipation
* Discharge of a debt (such that proceeds are no longer traceable and there is no substitute asset)
* Innocent change of position (usually, but not always, by an innocent third party.)

**Remedies:**

* An election to take the property (or a resulting trust)
* An equitable charge over the property
* An account of profits, secured by an equitable lien
* A constructive trust

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| ***In re Diplock*** |
| **Facts:** Estate distributed to various charities under an invalid will provision, children vs charities. Tracing exists in equity – however, money cannot be traced in this case and even if it could, declaration of a charge would not produce an equitable result.  **Court:**   * Equity can identify money in a mixed fund = more remedies available * Rights of equitable owner = in effect rights of property * Entitled to a charge ranking pari passu with the claim of innocent volunteer * However, declaration of charge would be inequitable here – altered and improved assets come from a combination of charity land and estate money. * Money spent by charity to improve its real property or to discharge debt cannot be traced. * Change of position defence applies * Equtiable tracing is discretionary |
| ***Foskett v McKeown* (2001)** |
| (misappropriated money paid for 2/5 life insurance premiums, children vs. trust beneficiaries) Declaration of a charge, plaintiffs have a beneficial interest in the proceeds and are entitled to 2/5 of the proceeds.   * + Children = innocent volunteers   + Essentially- 2 innocent parties, who should benefit from fraud?   + Dissent: only the cost of the premiums should be returned (pro rata based on original contributions) |
| ***Brookfield Bridge Lending v Karl Oil and Gas*** |
| **Facts:** co-mingled funds-express trust created by operating procedure, question of whether trust beneficiaries were entitled to proceeds when oil well was sold on behalf of secured creditor) **No entitlement to sale proceeds**, since trust no longer attached to funds. **No constructive trust**, since elements 2 and 4 of *Soulos* not satisfied. Clear breach of trust/fid duty (unauthorized spending of trust funds), but inability to trace funds into specific assets and unfair prioritization of creditors.  **Court:**   * Once trust funds are disbursed to bona fide third parties for value w/o notice, funds are released from trust * Further deposits are not presumed to replenish trust fund * Ranking of claimants:   + Trust beneficiaries = Karl/Choice   + Secured creditors/equitable charge-holders = Brookfield   + Unsecured creditors   \*trust beneficiaries should rank ahead of secured lenders, but only for trust monies   * **Lowest Intermediate Balance Rule (LIBR):** pro rata on the basis of tracing * investor cannot claim an amount in excess of the lowest balance in a fund subsequent to their investment = **$81,000 traceable to trust money, proportion split pari passu (equal footing) btwn Karl and Choice** |
| ***Boughner v Greyhawk Equity Partners* (2012)** |
| **Facts:** co-mingled funds – fraudulent investment scheme. LIBR applies in this case = most just and equitable result.  **Court:**   * General rule = LIBR = preferable approach to resolving competing claims to mingled trust funds. * In circumstances where LIBR is not practically possible (i.e. too many claimants, incomplete records), then distributions should proceed on a pro rata ex post facto basis – based on original contributions. |

Example fact pattern:

A invests $100 in a fund. Value of fund declines to $50. B invests $100, bringing balance to $150. Value of fund then declines to $120.

* **If LIBR applies:** A cannot claim more than $50 = lowest balance in the fund prior to B’s investment
  + B’s investment constitutes 2/3 of the $150 fund  
    o Of the remaining $120: B claims 2/3 = $80, A claims 1/3 = $40
* **If pro rata based on original contributions:** both A and B claim $60
* Equal contributions, therefore equal split
* Third possibility = **last in, first out** (or first in, first out- rule in Clayton’s case)  
  o B was last in, therefore B is assumed first out = loss borne by B; A claims $100, B claims $20
  + A first in, therefore A is assumed first out = loss borne by A; A claims $20, B claims $100  
    o Rule has been rejected as unfair, arbitrary; only applies to active bank accounts as a last resort