

HISTORY OF EQUITY + EQUITABLE MAXIMS

“EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY”

- The role of equity: is to supplement the common law and to provide remedies where the common law remedies are inadequate or non-existent: the Court of Equity was the Court of Conscience
- Impossible to make a law that is universally apt; there is always bound to be a case where the rule results in fairness: these are the cases where the Court of Equity provides a remedy.
- 1858 reception of UK law in BC (*Law and Equity Act*); 1873: Fusion of law + equity: merged into the High Court of Justice (also merged all together at the same time: admiralty, probate, matrimonial); came to BC via *Law and Equity Act* passed in 1879
- **Section 44 of the Law and Equity Act** codifies the principle of the **Earl of Oxford (1644) case: if rules of equity and law conflict, equity prevails**

BASIC PROPOSITIONS

- (1) common law is a complete system; equity is supplementary; equity follows the law: equity presupposes and builds upon the CL; acts on the premise that legal rule is correct, but should not apply in the particular case
- (2) If law and equity conflict, equity prevails: “yes that is so but your rule is not the whole truth”
- (3) equity jurisdiction: inadequacy of legal remedy (can only get an equitable remedy where the legal remedy is inadequate)
- (4) chancery is a court of conscience
- (5) equitable remedies are discretionary (whereas legal remedies are as of right): can tailor and fine tune remedies to enhance fairness

COMMON LAW	EQUITY
All Canadian courts	Court of inherent jurisdiction only (not PC or Tax Court ie statutory Courts unless provided for in their statute like in the <i>Federal Court Act</i>)
Order	decree
Rules of general application	Specific and Personal Rules based on the particular facts and applicable only in that specific case against that specific person (<i>in personam</i>)
Relief after a wrong	<ul style="list-style-type: none"> • Allows relief <i>quia timet</i> “because he fears” • Can seek equitable relief (injunctions) to prevent a wrong or to stop the continuation of a wrong
Relief as of right	Discretionary relief
<u>Damages</u> only	<ul style="list-style-type: none"> • <u>Injunctions</u> <ul style="list-style-type: none"> • TIME: <ul style="list-style-type: none"> • temporary decree <ul style="list-style-type: none"> • interlocutory (until trial) • interim injunction(for specified time) OR • final decree (permanent / perpetual injunction) • NATURE: mandatory (do something); Prohibitory (do not do something) • <u>Specific performance</u> • <u>Equitable damages</u> or expropriation doctrine (damages in lieu of other equitable relief) created by the <i>Chancery Amendment Act (Lord Cairns Act) 1868</i>
Enforceable by execution (creditor’s remedies – seizure and sale, etc.)	<ul style="list-style-type: none"> • Enforceable by civil or criminal contempt proceedings as equity acts <i>in personam</i> • An equitable decree is enforced against the conscience – so until party apologies to the court; until they “purge their contempt”
	There are some defences only applicable in equity

EQUITABLE MAXIMS

- Use these to support my position on ALL QUESTIONS

Equity suffers no wrong to be without a remedy	Dual meaning: will not allow a wrong to not be remedied, but if there is no wrong there is no role for equity
Equity acts <i>in personam</i>	Equity make personal orders against individuals
Equity acts specifically	does not create universally applicable rules like the common law – makes decrees applicable in the specific situation
Equity imputes an intent to fulfill an obligation	
Equity regards that as done that which ought to have been done	equity creates equitable interests in property even before the remedies are granted (ie specific performance would be retroactive to the time of the contracting for sale)
Equality is equity	
Equity follows the law	<ul style="list-style-type: none"> • It recognizes, respects and obeys the law (s. 9 L&E Act), but says we can do better
He or she who comes to equity must do equity	<ul style="list-style-type: none"> • Must do what the court orders because equitable remedies are always discretionary, whereas legal remedies are as of right • In order to do justice between parties, a court acting in its equity jurisdiction will make terms and conditions to attempt to balance the situation between parties • This maxim is evident in the <i>Law and Equity Act</i> – s. 39(2): if one asks for an interlocutory injunction (pre-trial, temporary) – an order may be made either unconditionally or on terms and conditions the court thinks just (often undertaking as to damages)
He or she who comes to equity must come with clean hands	<ul style="list-style-type: none"> • The court will not endorse unequitable conduct on the part of a P who has acted in an improper manner • This is a ground for refusing equitable relief (although can still get CL remedies) • This is an <u>equitable defence</u> only: clean hands does not apply to legal remedies
Equity aids the vigilant (not those who slumber on their rights)	<ul style="list-style-type: none"> • you must pursue your equitable relief in a diligent, timely manner • delay, laches is defence clarify when done that section
“in equity you need clean hands and fast feet”: Where the equities are equal the law will prevail	the judge must weigh “ <u>the balance of convenience</u> ” and where the parties are equal the holder of the legal holder of right prevails
Where the equities are equal the first in time prevails	
Equity regards the substance and intent, not the form	whereas CL looks to form, the intent of the parties is key in equity – a court will look behind form to purpose
Equity will not allow a statute to be made an instrument of fraud	<ul style="list-style-type: none"> • the court of equity will not allow a statute to effect an unjust result • <i>MacDonald</i> case the <i>Bankruptcy Act</i> – the fraud is the harmful outcome to the kids as a result of the operation of the statute
Equity will not act in vain	<ul style="list-style-type: none"> • D must somehow be within jurisdiction of the court making the equitable decree (<i>Penn v. Lord Baltimore</i>)

Re MacDonald (1972 Ont. H.C.)**FACTS**

- alcoholic bankrupt lawyer did not want to discharge his bankruptcy for misguided fear of bad publicity so he paid up less 1\$ of agreed amount, but remained an undischarged bankrupt when he died shortly thereafter. He had life insurance, but had not designated a beneficiary, so the legal result was that proceeds went into his estate, where creditors could access it (per *Bankruptcy Act* designated life insurance is not exigible)
- family argues that he was only 1\$ short of discharge and not in the best mental state and that it would be unfair for them not to get the insurance money in the circumstances

ISSUE

- Should the insurance money should go to his creditors (since technically he was an undischarged bankrupt) or to his surviving dependents?

HELD / REASONING

- the legal result that the insurance proceeds would be distributed amongst creditors was unfair – this is how equity operates: it corrects injustices flowing from the CL or from statutory law

RATIO

→ equity can override law if the legal result (from CL or statutory law) would be unfair / inequitable

THE INTRODUCTION OF EQUITY INTO BRITISH COLUMBIA

- 1858 reception of UK law in BC (*Law and Equity Act*); 1873: Fusion of law + equity: merged into the High Court of Justice; came to BC via *Law and Equity Act* passed in 1879

Law & Equity Act, ss. 1, 2, 4-10, 31, 32, 44

1 Application of Act

- 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.

2 Application of English law in British Columbia

- British law as of Nov 9 1858 inherited if not inapplicable due to local circumstances and can be modified by legislation in BC

4 Equitable relief for plaintiff

- Court must give relief that would have been given in equity before April 29 1879

5 Equitable relief for defendant

- Court must give relief that would have been given in equity before April 29 1879

7 Judicial notice of equitable estates

- court and every judge must recognize and take notice of all equitable estates, titles, rights, duties, liabilities

8 No restraint by prohibition or injunction

(1) A cause or proceeding pending in the court must not be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of that cause or proceeding might have been obtained before April 29, 1879 . . . may be relied on by way of defence.

- this abolishes the old common injunction (from Earl of Oxford's case – so now judges in the BCSC court do not issue injunctions against each other)
- BCSC judges can issue anti-suit injunctions against lower court, or other jurisdictions
- instead of old common injunction, to stop a proceeding it is done by way of defence (plead an equitable defence), or . . . ask for a stay per 8(2) for parties and 8(3) for certain non

9 Judicial notice of legal and statutory rights, claims and liabilities

- . . . 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.

10 Avoidance of multiplicity of proceedings . . .

- . . . the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

31 Stipulations not of essence

- Stipulations in contracts, as to time or otherwise, that are not deemed to be or to have become of the essence of the contracts according to the rules of equity, must receive the same construction and effect as they would receive in equity.
- *see United Scientific Holdings v. Burnley*

44 If rules of equity and law conflict, equity prevails

- Pedigree: *Earl of Oxford* (1644) case
- Basic idea: there is no conflict between CL and equity, because equity does not make general rules it makes a specific individual particular decree
- Contemplates that equity and common law are still two streams of law

United Scientific Holdings (1977 UKHL) *Fusion of law and equity; not frozen and separate, but mingling*

FACTS

- Party sought relief against the strict enforcement of a contractual clause stipulating that “time is of the essence for payment”

ISSUE

- Does the court have jurisdiction to grant equitable relief against a contractual stipulation?

HELD / REASONING

- Equitable relief granted: the “time is of the essence” clause at common law mean that if payment is late the contract is terminated, equity **looked beyond form to the substance of the contract** to see if time really is of the essence and found that late payment would not necessarily result in termination (*L&E Act s. 31*)
- old idea that common law and equity are two streams which run side by side and do not mingle their waters is out of date and there is no reason to maintain the antiquated distinction between common law and equity

RATIO

- Fusion of CL and equity
- the UK *Supreme Court of Judicature Act* 1873 fused the systems of equity and common law: **“the waters of the confluent streams of law and equity have surely mingled now”**
- concept: Diplock L.J. rejects the old idea that the two streams were frozen and separate: be mindful of origins in law and equity but must allow law and equity to continue to grow and change.
- HOWEVER They are still separate doctrines and just because they change and shift, this does not mean that the distinctions between them have been erased and are no longer relevant.

NOTES

- *L&E Act 31 Stipulations not of essence* Stipulations in contracts, as to time or otherwise, that are not deemed to be or to have become of the essence of the contracts according to the rules of equity, must receive the same construction and effect as they would receive in equity.
- adopted in Canada in *Canson*

Canson Enterprises (1991 SCC) *SCC adopts UK HL’s approach to fusion: equity is not rigid and can borrow from the common law*

FACTS

- lawyer breached fiduciary duty to client by failing to disclose that a third party was making a secret profit in the P’s purchase of land; engineering problem led to the building collapsing; Canson sued lawyer to recover the secret profit AND damages

ISSUE

- There is no legal remedy because the enforcement of trusts and fiduciary obligations are matters for a court of equity: compensation for breach of such obligations is an equitable remedy
- Generally, where there is a breach of a fiduciary duty, the fiduciary is strictly liable for all losses to the beneficiary thereafter – but do common law principles of (foreseeability and remoteness) apply to equitable compensation?

HELD / REASONING / RATIO

- However, “It would be wholly inappropriate to interpret equitable doctrines so technically as to displace CL rules that achieve substantial justice in areas of common concern, thereby leading to harsh and inequitable results.”
- **Equity cannot be rigidly applied – its doctrine must be attuned to different circumstances**
- Equity and CL flow side by side by do not mingle waters
- There are two separate systems, but when it comes to monetary relief – equitable or damages – there should be consistency: CL principles can apply to reduce damages if it would create the equitable result.

Cadbury Schweppes (1999 SCC) - *new remedy of “equitable compensation” created***FACTS**

- After being fired by Motts (Cadbury), FDI began to make Clamato juice itself; Cadbury sued for breach of confidence re stealing, modifying and selling the recipe

HELD / REASONING

- An injunction would have been too harsh as it would have put FDI out of business - balancing

RATIO

- **Creates new remedy of equitable compensation**, which is not tied to another equitable remedy (ie such as damages in lieu of specific performance)
- Equity is capable of growth and development, it is not set in stone: “authority to award financial compensation for breach of confidence is inherent in the exercise of equitable jurisdiction and does not depend on the niceties of the *Lord Cairns Act* or its successors (which created equitable damages in 1868) . . . the court has ample jurisdiction to fashion appropriate relief out of the full gambit of available remedies, including appropriate financial compensation”
- Sheppard says SCC referred to CL and equity as distinct (rather than totally fused) but said they are capable of growth to meet new circumstances, and each can transform the other

NOTES

- Note: the point of equitable damages is to compensate for the harm that took place before the injunction or specific performance. So, it can be awarded in addition to an injunction or specific performance.

Pro Swing (2006 SCC) - *equity as distinct approach based on discretion***FACTS**

- Pro Swing wanted its Ohio injunction and contempt order against Elta enforced by the ON courts after Elta continued to sell its “Rident” golf clubs which infringed Pro Swings’ “Trident” copyright

ISSUE

- Can Canadian courts recognize the equitable decrees of foreign courts?

HELD / REASONING

- Order was not R&E because found not to be sufficiently precise; however, recognized that such orders may be R&E by Canadian courts if sufficiently precise
- Because equitable orders require judicial supervision the imprecision rationale is highlighted in this case: such an order requires the Canadian court to supervise, so must be very clear about what it has to do

RATIO

- Equitable remedies are primarily distinguished from CL remedies by the fact that all equitable remedies are awarded at the judge’s discretion: there are no strict rules, just guidelines

NOTES

- Again, the idea that there are still two streams administered together, but not totally fused

CONTINUING DISTINCTIONS BETWEEN LAW & EQUITY

Equity acts in personam

- As long as the D is physically in the jurisdiction of the court, the court can make equitable decrees with respect to the D's property *anywhere* in the world because the decree is enforceable against the person via contempt proceedings – this is the court of conscience
- Examples of equitable decrees which have extra-jurisdictional effects: *Mareva* injunctions; anti-suit injunctions

Penn v. Lord Baltimore (1750 UK Ch. Div.) equity acts in personam – D must be in the jurisdiction

FACTS

- Both Penn and Lord Baltimore had been granted land in the US, but disagreed as to boundaries; both agreed to arbitration, then Baltimore backed out; Penn brought action in UK for specific performance – to have Baltimore submit to the arbitration

ISSUE

- Could the UK Court make an equitable decree with respect to land in the US?

HELD / REASONING

- Decree of specific performance issued against Baltimore
- Baltimore was in UK, so it does not matter where the subject matter of the dispute is located: equity acts *in personam* so as long as the D is within the jurisdiction issuing the decree there is jurisdiction
- The UK court could not decide the boundary dispute, as that would be acting *in rem* rather than *in personam*

RATIO

- **Equity will not act in vain:** if a D is within the jurisdiction, it will not be in vain even if the property in dispute is not because equity acts *in personam* and the decree can therefore be enforced
- Equitable decrees are *in personam* decrees: they **are enforceable against the person**

NOTES

- If the D has left the jurisdiction but has left property behind, an equitable order can also be enforced by a **writ of sequestration**, which is a seizure of the D's assets in the jurisdiction to coerce obedience to the decree: the assets cannot be sold, but any income from the assets while sequestered can be kept – this is just to coerce obedience, not to collect damages (ie writ of seizure and sale in common law creditors remedies)

West & Partners (Inverness) (1969 UK Ch. Div.) equity binds conscience

FACTS

- An English purchaser and vendor contracted to buy land in Scotland. The purchaser did not want to go through with the deal; the vendor applied to the English court for specific performance.

ISSUE

- Can an English decree be enforced against the purchaser if the land is in Scotland?

HELD / REASONING

- Yes, decree of specific performance issued

RATIO

- There is high authority for the existence of the jurisdiction to make a decree of specific performance for the sale of foreign land: the inability of the court to enforce the decree *in rem* is no reason for refusing a P equitable relief
- Equity acts *in personam* and binds the D's conscience

Law & Equity Act, ss. 37 and 38**37 Vesting orders**

- (1) Where the court has authority to order execution of a deed/conveyance/contract/etc., the court may, by order, vest the property in the person and in the manner and for the estates as would be done by that [instrument] if it were executed.
- (2) An order under subs. (1) has the same effect as if the legal or other estate/interest had actually been conveyed.

- **Equity regards that as done that which ought to have been done**

38 Execution of instruments by order of court:

- (1) If any person neglects/refuses to comply with an order directing them to execute a conveyance etc, the court may, on terms/conditions as may be just, order that the [instrument] must be executed.

Enforcement of Canadian Judgments and Decrees Act (2006)

- Provides for the full faith and credit recognition and enforcement of judgments and decrees from other Canadian courts (not administrative tribunals)

What types of decrees can be enforced in BC?

- Decrees for specific performance s. 1
- Decrees for injunctions s. 1
- Interlocutory injunctions s. 2(1)
- Ex parte interim injunctions s. 6(4)(b)

How are they enforced?

- s. 2(1) allows registration for purposes of enforcement of Canadian Judgments and Decrees whether final or not (2(2) orders to pay money must be final)
- s. 4 **effect of registration**: the decree may be enforced in BC as if it were an order of or entered in BCSC

Any exceptions of note?

- s. 5(2) equitable doctrines of delay will apply to consideration of enforcement of equitable decrees
- 6(2)(c)(iii) if an order limiting / staying the equitable relief is made in originating jurisdiction, party can apply to BCSC to reconsider its R&E order

Pro Swing (2006 SCC) - equity as distinct approach based on discretion**FACTS**

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ISSUE

- Can Canadian courts recognize the equitable decrees of foreign courts?

HELD / REASONING

- Order was not R&E because found not to be sufficiently precise; however, recognized that such orders may be R&E by Canadian courts if sufficiently precise
- Because equitable orders require judicial supervisions the imprecision rationale is highlighted in this case: such an order requires the Canadian court to supervise, so must be very clear about what it has to do

RATIO

→ **Foreign equitable decrees may be enforced (in principle) if:**

- (1) **the terms are certain and precise**
- (2) **it is not a quasi-criminal / penal order**
- (3) **it is a final order** (Canadian interlocutory orders can be enforced in BC under *Enforcement of Canadian Judgments and Decrees Act* (2006))
- (4) **discretionary considerations** (laches, etc)

→ advances the idea of fusion: Court says an equitable decree is like a CL monetary judgment in that it can be enforced in a foreign jurisdiction

CERTAIN EQUITABLE DEFENCES

WHY SHOULD THE INJUNCTION BE DENIED??

- applies only to equitable claims
- Equitable defences (like equitable remedies) are **discretionary** no strict rules, judges are governed by the general equitable principles: **the court looks at what would be just and considers the conduct of the applicants**
- **Equitable remedies require equitable conduct on the part of the claimant** – clean hands

(1) LACHES, DELAY, ACQUIESCENCE

General Rule - *equity aids the vigilant, not the indolent*

- **Once aware of D's conduct is violating their rights, P must act promptly if she wants to seek an injunction**
- **delay defeats equity**: even where an action is not statute barred, a court has equitable jurisdiction to refuse relief on the basis of an unreasonable delay in the action being brought or proceeded upon (**BC Limitations Act s. 2**)
- **HOWEVER equity will not EXTEND a statutory limitation period**: equitable defences only operate within the statutory limitation period

Delay v. Laches v. Acquiescence

- **Delay** is a lapse of time = stand alone factor, and an element of laches and acquiescence
- **Laches** is delay + prejudicial effect of delay on D
- **Acquiescence** is delay + waiver/estoppel of P so that D thinks P waived claim

DELAY – lapse in time alone

- Some equitable remedies can be affected by the lapse of time alone (*e.g.* must show urgency to get an *ex parte* interim injunction, interlocutory injunction, or mandatory interlocutory injunction)

LACHES - delay + prejudicial effect of delay on D

When does laches not apply?

- (1) cannot defend against a purely legal claim or remedy (ie an action in debt) it is an equitable defence against equitable claims
- (2) cannot defend against a statutory scheme (ie cannot claim laches in a tax action)
- (3) cannot defend against the Crown in its public capacity or as part of a statutory scheme, but *can* apply to the Crown when it acts in a private capacity (ie as a party to private contracts)
- (4) cannot defend if the D has unclean hands

Elements of Laches

- **Delay + prejudicial change in circumstances**: Laches is an equitable defence which may be raised if there is a prejudicial change of circumstances for the D or a 3rd party as a result of the delay of the P (witnesses dead, spent money etc.) (*Lindsay*)
- **The court must examine**

(1) LENGTH OF THE DELAY AND

- The effect of the delay is more important than the duration (*Lindsay*)
- **Length of delay is NOT determinative** (*Canada Trust*): **Court must examine**:
 - (i) Degree of change which has occurred
 - (ii) How far they have affected the parties
 - (iii) Where lies the balance of justice/injustice

(2) NATURE OF THE ACTS DONE DURING THE INTERVAL AND

- (i) degree of diligence which might reasonably be required of a P

- as with legal remedies, the limitation period for equitable remedies may be postponed by the principle of reasonable discoverability (*M v. H*)
- not having knowledge of the damage / right / parties may be a good explanation for delay in bringing action (*M v. H*)
- (ii) **degree of change in circumstances**
 - which has occurred as a result of the delay (whether the balance of (in)justice is in favour of granting or withholding the remedy)

(3) **USE ITS DISCRETINARY JURISIDCTION**

- Laches is discretionary (not rule-based) and must be assessed on equitable principles
- thus, it is inherently uncertain and flexible (*Blundon*)
- **whether or not the defence of laches will be granted depends on the facts of each case**
- **There is such a thing as partial laches – the defence can be fine-tuned to suit the circumstances** (*Blundon*)
- **demonstrates the discretionary nature of these defences: can be tailored to the circumstances because they are not universal rules** (*Blundon*)

In defence of claim for accounting - Jarvis

- Delay can be a strong defence in a claim for accounting of profits – particularly if the plaintiff has not risked anything in the business but left the risk up to the defendant

Laches Generally

Lindsay Petroleum (1874 PC) → **test for laches**

RATIO

- Laches is an equitable defence which may be raised if there is a prejudicial change of circumstances for the D or a 3rd party as a result of the delay of the P
- Laches is discretionary (not rule-based) and must be assessed on equitable principles
- The effect of the delay is more important than the duration
- **The court must examine the (1) length of the delay and the (2) nature of the acts done during the interval**

Erlanger (1878 UK) → **degree of diligence and change**

RATIO

- Whether or not to grant the equitable defence of laches is discretionary, thus, it is inherently uncertain
- **Judge should consider: (1) degree of diligence which might reasonably be required of a P and (2) degree of change in circumstances which has occurred as a result of the delay (whether the balance of (in)justice is in favour of granting or withholding the remedy)**

Length of Delay

Canada Trust (1968 SCC) *length of delay not determinative*

FACTS

- A 43 year delay in bringing an action to recover shareholder money (and an equity-based remedy of interest therefrom of 5% / year because of fiduciary relationship) misappropriated by director was non statute barred, nor did it invoke laches

REASONING

- There were no extenuating circumstances to bar the e

RATIO

- **Length of delay is NOT determinative: Court must examine:**
 1. **The nature of the acts done in the interval**
 2. **Degree of change which has occurred**
 3. **How far they have affected the parties**

4. Where lies the balance of justice/injustice

Re Jarvis (1958 Ch. Div.) accounting of profits

FACTS

- Testator left his confectionary/tobacco business and lease equally to 2 daughters, but only 1 daughter ran the shop. The other only worked occasionally, but did not make any claim until 10 years later when she claimed a half-interest and accounting of profits. D conceded there was a constructive trust, but argued it was barred by laches, acquiescence, and delay

ISSUE

- Does delay bar the plaintiff's claims for (1) rent or (2) accounting of profits?

HELD / REASONING

- must account for rent, but not for profits: while the action did progress it did so "at the pace of a snail"
 - RENT court was not asked to give a discretionary remedy, it was asked to enforce the right of the P as a beneficiary under a constructive trust
- ACCOUNTING FOR PROFITS a business or trade requires time, effort, and risk, so a person having an adverse claim in equity on the ground of a constructive trust should pursue the claim promptly, and not merely in words – she should show herself in good time willing to participate in possible loss as well as profit, not play a game in which she alone risks nothing

RATIO

- **whether or not the defence of laches will be granted depends on the facts of each case**
- **delay is relevant when the court is asked to exercise a discretionary remedy** (ie injunction, specific performance)
- **Delay can be a strong defence in a claim for accounting of profits – particularly if the plaintiff has not risked anything in the business but left the risk up to the defendant**

Knowledge of the Parties

M(K) v. M(H) (1992 SCC) → knowledge of parties (reasonable discoverability)

FACTS

- A 28-year old woman sued for tort (assault) and breach of fiduciary duty against her father for incest that occurred when she was a child. She only realized the damage when she entered sexual abuse therapy at age 28. The father argued that the action for tort was barred by the statute of limitations, and the action for breach of fiduciary duty was barred by laches.

ISSUE

- Is the legal or equitable claim barred by the amount of time that has passed, regardless of P's age/knowledge when the wrong occurred?

HELD / REASONING

- Claims were not barred
- LEGAL: even if the statutory limitation period applied, the court could extend it on the basis of discoverability: the running of the limitation period is postponed by the principle of reasonable discoverability
- EQUITABLE Incest is a breach of the fiduciary duty of a parent to refrain from physically injuring one's child – the plaintiff is entitled to equitable compensation
- While the defence of laches is available in equitable claims, here it is not given because the daughter had a good explanation for failing to bring the claim sooner, and nothing in her conduct indicated that she acquiesced

RATIO

- **Knowledge of the parties may be a good explanation for laches/delay in bringing action.**
- **The principle of reasonable discoverability can operate**

Equity Aids the Vigilant, Not the Indolent

Blundon (1970 SCC) - partial laches; tailoring to specific circumstances

FACTS

- Partnership to search for a sunken treasure ship. One partner (D) decided to search for the treasure on his own in 1965 and sent notice terminating his association with the partnership.
- Other partners considered the partnership agreement still in effect, but took no legal action until 1966 when D found the treasure.
- They sued for an accounting of their share of the profits (based on the fiduciary duty owed by one partner to the others).

ISSUE

- Was there laches? Is there such thing as partial laches?

HELD / REASONING

- awarded only 25% to the partners – a small amount because of their laches
- the other partner's actions do not establish abandonment/acquiescence: they continued to dive; could not compel D to perform under the agreement (would have required personal services); D conducted himself with secrecy

RATIO

- **There is such a thing as partial laches – the defence can be fine-tuned to suit the circumstances**
- **demonstrates the discretionary nature of these defences: can be tailored to the circumstances because they are not universal rules**

Nova Scotia v. Halifax (1969 NSCA) → *laches is only a defence in equity*

FACTS

- Provincial statute imposed liability on a municipality for certain mental patients after the Superintendent requested their removal to municipal institutions.
- Municipality refused to take responsibility for a certain patient – dispute lasted 2 years. The Province sued the municipality for the amount expended in upkeep of the patient in the Provincial Hospital, the municipality raised the defence of laches.

ISSUE

- can laches apply to a purely CL action? Can laches run against the crown?

HELD / REASONING

- no, laches does not apply
- Defence of laches was not available to the City because it faced a claim in statutory debt (legal claim, not equitable)

RATIO

- **Where legal rights alone are claimed, mere laches/delay is not enough: the equitable defence of laches can only be opposed to an equitable claim**
- ***nullum tempus occurit Regi* - laches do not run against the Crown in its public capacity (but will run in a private contract with the Crown or where the Crown acquires rights by way of assignment)**

Cadbury Schweppes (1999 SCC)- *partial laches: injunction may not be appropriate*

FACTS

- Cadbury sued over the secret recipe for Mott's Clamato juice. FBI started marketing their product in 1983, but Cadbury did not sue until 1987 because their lawyer had advised that they had no legal remedy (because FBI did not use the secret formula).
- In 1987, they consulted a new lawyer who suggested seeking a remedy in equity for breach of confidence.

HELD / REASONING

- Partial laches awarded: 1 year profit was granted to Cadbury (payment of \$ was awarded rather than the injunction to stop manufacturing)
- The four year lapse in bringing the equitable claim was because Cadbury's lawyers did not give them proper advice

RATIO

- **Again- tailoring to circumstances; balancing prejudices and effects of the delay; the big equitable principles at work**

ACQUIESCENCE / PROPRIETARY ESTOPPEL

= delay + waiver/estoppel of P so that D thinks P waived claim

→ **defence to both legal & equitable claims, a cause of action in itself**

→ **Acquiescence**: when someone stands by and does nothing while they know a wrong is being done to them: attempting to enforce a right where there has been acquiescence is equivalent to **equitable fraud** (unconscionable behaviour)

→ nothing in the *Limitations Act* interferes with a rule in equity that refuses relief on grounds of acquiescence of the applicant (*Weyweykum*)

→ Equitable remedies require equitable conduct on the part of the claimant

→ **The overall Q for acquiescence is if a party has by her conduct done that which might fairly be regarded as equivalent to waiver and such conduct results in circumstances that make prosecution of the action unreasonable (*Wewaykum*)**

TEST

→ Acquiescence which will deprive a person of her legal rights **must amount to equitable fraud**, and has **FIVE REQUIREMENTS**

- (1) **P must have made a mistake as to her legal rights** (e.g. where the property line is, access road etc)
 - (2) **P must have expended some money or must have done some act on the faith of her mistaken belief**
 - (3) **D, the possessor of the legal right, must know of the existence of her right which is inconsistent with the right claimed by the P**
 - (4) **D must know of P's mistaken belief of her rights**
 - (5) **D must have encouraged the P in her expenditure of money or other acts, either directly OR by abstaining from asserting her legal right**
- THEN D is estopped from making claim of that legal right.**

Property?

- proprietary estoppel prevents an owner from raising her legal right to title to prevent another from claiming an interest in her property where there has been acquiescence
- proprietary estoppel is more than a defence: it creates an equitable interest in the property
- **Trethewey**: recognized that even in BC's Torren's land title system, an interest in property can arise by virtue of how the owner and claimant behave with regard to that property
- Can defeat an entire claim

Trethewey-Edge (2003 BCCA) → *test for proprietary estoppel*

FACTS

- Ranch allowed the District to maintain water facilities on their land for 40 years; dispute arose and Ranch refused future access; District applied for a declaration that it had acquired an easement by acquiescence or proprietary estoppel

ISSUE

- Did the District's expectation of permanent access create an easement by way of acquiescence/proprietary estoppel?

HELD / REASONING

- Yes, an easement had been created in equity
- The Ranch, by its words and conduct led the District to believe the Ranch would not rely on its strict legal rights, and this created an equitable interest in favour of the District
- It would be inequitable for the Ranch to deny the District access to its facilities on the Ranch land – it would amount to equitable fraud

RATIO

- Proprietary estoppel is not just a defence, it creates an equitable interest in the property
- Clear acceptance of the doctrine of proprietary estoppel in BC law
- **Acquiescence which will deprive a person of her legal rights must amount to equitable fraud, and has FIVE REQUIREMENTS**
 - (1) **P must have made a mistake as to her legal rights** (e.g. where the property line is, access road etc)
 - (2) **P must have expended some money or must have done some act on the faith of her mistaken belief**

(3) **D, the possessor of the legal right, must know of the existence of her right which is inconsistent with the right claimed by the P**

(4) **D must know of P's mistaken belief of her rights**

(5) **D must have encouraged the P in her expenditure of money or other acts, either directly OR by abstaining from asserting her legal right**

→ Then D is estopped from making claim of legal right. P would be allowed to encroach of D's property.

Wewaykum (2002 SCC) → delay, knowledge, prejudice to 3rd parties

FACTS

- In the 19th century, a government surveyor was sent to settle a territorial boundary dispute between 2 Indian bands. Both bands were unhappy with the outcome, but did not bring action for breach of fiduciary duty against the government until 2000. The government raised the defence of laches.

ISSUE

- Is the Band's claim for breach of fiduciary duty barred by laches?

HELD / REASONING

- claim is barred by laches because: prejudicial effects on third parties (inhabitants built houses, roads, etc); conduct equivalent to waiver (evidenced by representations, failure to assert rights in circumstances that required assertion); policy reasons supported the finding (band members died, documents destroyed, etc)

RATIO

→ even if not statute barred, equitable remedies can be barred by equitable defences

→ Equitable remedies require equitable conduct on the part of the claimant

→ **TEST for acquiescence: (1) where a party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver; (2) such conduct results in circumstances that make prosecution of the action unreasonable**

CLEAN HANDS

- *One who comes into Equity must come with clean hands*

- *He who seeks equity must do equity*

- **Nobody is expected to have lived a blameless life, BUT the applicant must have a clear conscience in the particular transaction/litigation before the court**
- As distinct from legal remedies, in equity **remedies are discretionary** and one consideration in the exercise of that discretion is the **conduct of the person applying for equitable relief**
- The respondent can point out to the court inequitable conduct of the applicant (does not have to be illegal, just unethical, inequitable, or somehow offensive to the court of equity)
- **Conduct must be relevant to the transaction or litigation:** this principle does not require that a person lead a blameless life, **only inequitable conduct relating to issue in dispute is relevant** (*Tinsley*)
- **Unclean hands is a complete defence** No such thing as “partial unclean hands” (unlike laches) (*Tinsley*)
- **Injunction will be refused if** (1) right being asserted by P has been obtained unlawfully; (2) the P is guilty of equitable fraud in dealings with D or 3rd party with respect to matter in dispute; (3) where the injunction would further a deception by the P on the D or 3rd party

City of Toronto v. Polai (1972 SCC) → *public interest; suspension of decree*

FACTS

- Mrs. Polai had many convictions / fines for renting illegal suites, but she continued to flout the law; on this basis the City argued the legal remedy was inadequate and equity must intervene and issue an injunction, a breach of which would trigger contempt proceedings and she could be imprisoned
- Mrs. Polai argued that the City had unclean hands as its enforcement of the housing bylaws in question was discriminatory and biased: there were tons of other people breaking the same bylaw and not being prosecuted, and there was even a list of people who would not be prosecuted for having these illegal suites

HELD / REASONING

- TJ agreed that the City had unclean hands and refused the equitable relief (injunction) on that basis
 - City’s special deferred list was secretive, open to political abuse, tainted with political favouritism
 - “He who seeks equity must come with clean hands”: to grant the injunction would be to sanction the City’s inequitable practice
 - “He who seeks equity must do equity”: would grant injunction if the City scraps the list
- CA overturned TJ: the city cannot prosecute everyone, and it is in the public interest to selectively enforce because of general deterrence; Mrs. Polai’s hands were less clean than the City and the court will not assist a wrongdoer; injunction granted, but suspended for a year while appeal
 - Equity is concerned with the consequences of its decisions, and attempt to be fair to all parties
 - “Unclean hands” doctrine should not apply where the result would be to deny a claim in which the public has a direct and substantial interest – municipality is acting in the public interest, has prosecutorial discretion
 - **Misconduct must relate directly to the transaction in dispute, and not the general conduct/morals of the party seeking relief:** City had not behaved unscrupulously in Mrs. Polai’s transaction
 - Further, Mrs. Polai cannot attach the City for unclean hands – her hands were dirtier, she had flouted the bylaw for years → **Court will not assist a wrongdoer**
 - However, the injunction is suspended for 1 year because an immediate injunction will impose hardship on tenants (“he who seeks equity must do equity”)
- SCC agreed with CA; upholds the injunction: (1) the “unclean hands” doctrine does not apply where the public has an interest in seeking equitable relief granted, and (2) City did not have unclean hands (while Mrs. Polai had flouted the bylaw for years)

RATIO

- **“Unclean hands” doctrine does not apply where the public has an interest in seeking the equitable relief**
- **Cannot claim the defence of unclean hands where you yourself have unclean hands (the Court will not assist a wrongdoer)**
- **Court has discretion to suspend an equitable remedy if it would otherwise impose hardship on third parties.**

→ **Misconduct must relate directly to the transaction in dispute, and not the general conduct/morals of the party seeking relief**

Tinsley (1994 UKHL) → *misconduct must relate to equitable relief claimed*

FACTS

- Parties operated a lodging house in Wales. They committed welfare fraud by transferring ownership of the property solely to P splitting the welfare money. They had a falling out, and P started action for possession (legal ownership of the whole house). D claimed P held ½ the house in trust for her.

ISSUE

- Do “unclean hands” prevent M from getting equitable relief?

HELD / REASONING

- No, a half interest in the house is granted
- The unclean hands defence does not arise because P could establish her entitlement without raising the illegal conduct (the rule in *Bowmakers*): P could establish a resulting trust by showing that she contributed to the purchase price and that there was a common understanding

RATIO

→ **misconduct which makes one’s hands unclean must have a direct relationship to the equitable relief claimed**

→ **Equity should not apply its discretion based on weighing the public conscience**

NOTES

- Subsequent courts have refused to follow this case: cannot blindly apply rules – must be discretion based on the actual facts

INJUNCTIONS

General History

- Injunctions are exclusive to the Court of Equity, and because of their discretionary, equitable nature, they are exceptionally flexible and can be tailored to the precise circumstances
- (1) **Can be issued to enforce (a) a legal right (b) an equitable right or (c) the administration of justice** (*BCGEU*)
 - (2) **If a legal remedy is unavailable or inadequate** (difficult to quantify, speculative, nominal value, no ability to pay) **OR there is prospect of irreparable harm** (harm which cannot be compensated via a legal remedy) **AND the order will not be futile or impossible to comply with** (if person in jurisdiction okay if property not - *Penn*)
 - (3) **There are no reasons for the judge to exercise her discretion to withhold** (ie equitable defences: unclean hands, laches, acquiescence, delay, impossibility or futility)
 - (4) **The balance of (in)convenience supports ordering the injunction** (weighing the consequences: balancing the relative irreparable harm to P, D, and 3rd parties; looks at the public interest in granting or refusing the injunction, and can issue it with terms and conditions (*Polai*) – often undertaking as to damages)
 - (5) **Parties (including third parties) are bound from the time of notice** (must serve, but bound at mere notice)
 - (6) **Compliance is required even if the order is eventually found invalid: it is no defence to argue the injunction should not have been granted**: you must obey a court order while it is in effect
 - (7) **Enforcement via contempt proceedings which result in fine or jail: equity acts *in personam* (*Penn*)** (civil contempt is brought by the other party; criminal attempt is a prosecution which requires *mens rea*)

TERMINOLOGY

Injunction an order granted by a court of competent jurisdiction which instructs a person to do or to not do a particular thing, and which is granted for the purpose of maintaining the *status quo* as of the time of application

- Injunction in BC is a temporary order “**until judgment or further order**” – *Gulf Islands Navigation*
- May be granted at any time up to judgment after trial, or even after trial pursuant to *BCSC Rule 45(7)*
- Comes into effect as soon as the other party has NOTICE of it (must serve, but bound at mere notice)

Interlocutory injunction: an injunction which preserve the *status quo* until the case can be tried (ie is in effect in the period prior to judgment)

Interim injunction usually *ex parte*; refrains the D until a specified date

***Ex parte* injunction** an interim injunction ordered after only hearing from the applicant and no notice of the hearing given to other party; however, the other party may apply to court to discharge or vary the injunction granted *ex parte*, but must obey the order while it is in effect from the moment of notice of the injunction

JURISDICTION TO GRANT INJUNCTIONS

TWO basis for jurisdiction to grant an interlocutory or interim injunction:

(1) **the inherent jurisdiction of the Court of Equity AND**

(2) ***Law and Equity Act, s. 39***

39(1) within the inherent jurisdiction of the court to make an injunction which appears to be just or convenient

39(2) may be granted unconditionally or on terms and conditions the court thinks just

- Here is an expression of the **discretionary nature** of the injunction: can be specifically tailored
- Usually granted on an undertaking as to damages (**BCSC Rule 45(6)**)

39(3) if it thinks it just, the Court can issue an injunction to prevent threatened / apprehended waste or trespass whether or not the person against whom the order is made is in possession of or claims a right to do the act to be restrained and whether or not the estates claimed are legal or equitable

Procedure: BCSC Rules 44; 45; and 51

Rule 44 – Interlocutory Application

(1) ask for an injunction in chambers as an interlocutory application (unless during trial **52(1)**)

(5) unless otherwise provided (ie *ex parte*) must serve each party and each non-party who may be affected by the order with Notice of Motion and supporting affidavits

(6) other parties / people served per sub (5) can file and serve a response

(7) and then file and serve their supporting affidavits

(9) unless everyone consents, or the court orders, no other affidavits can then be delivered.

Rule 51 Affidavits

(1) must file it if you want to use it on your application

(10) can only state what dependent would be permitted to state in *viva voce* evidence except on an application for an interlocutory order the deponent may make statements of as to their information and belief if they state the source of that information

(11) with leave of the court an affidavit can be used in evidence notwithstanding irregularity in form

(12) can use an affidavit that was created before the proceeding was commenced

Rule 45 Injunctions

(1) broad scope: can as for an injunction even if not sought as part of the final remedy

(2) may apply for an injunction *before* commencing the action, but an undertaking to commence is required

(3) *ex parte* on an application made without notice the court may grant an interim injunction

(4) an injunction is made by order of the court (not by writ of injunction): order takes effect immediately upon notice

(6) **undertaking as to damages unless the court otherwise orders**: automatically included unless specially excused (*MacBlo*) (to pay damages for loss occurring from operation of the injunction if later shown injunction should not have been granted)

(7) can get an injunction after judgment to restrain the other party from repeating / continuing the bad act established by the judgment or another bad act of the same kind (ie if that party is appealing)

Rule 52 Chambers

(1) interlocutory applications are heard in chambers unless made in the course of a trial

(12) on *ex parte* application the court may (a) dismiss (b) adjourn or (c) direct any order be served, if it thinks notice ought to have been given

(12.1) Allows for *ex parte* applications in situations of urgency

(12.2) If an order is made without notice by reason of urgency, a copy of the order and documents filed in support of it must be served on the person affected

(12.3) **On application of the person affected, the court may vary or set aside the order**

EX PARTE INTERIM INJUNCTIONS

- *Ex parte* interim injunction: only one party is heard – so urgent that notice is not given to the other party
- Equity allows a remedy to prevent a wrong from happening at all – *quia timet* (preventative remedy)

Requirements:

1. **Urgency**
2. **Full and frank disclosure:** because there is only one party before the court – not adversarial
3. **Undertaking as to any damages resulting – (BCSC Rule 45(6); Law & Equity Act, s. 39(2))**
 - Solemn promise to the court to pay any damages that the court may assess if it turns out that the injunction should never have been granted – *financial hurdle*
 - Unusual because ordinarily a party is entitled to attempt to get a remedy without any cost
 - BUT the court has discretion not to require an undertaking (e.g. *Michael Mullin* – Band lacked funds)
 - Can attempt to have the injunction set aside or varied **Rule 52(12.3)**
 - Party goes back to the same court (not a higher court) to appeal the injunction by letting the court hear the other side
 - Can be before the same judge that heard the original application, or a different judge of the same court

Requirements & Grounds for setting aside ex parte interim injunction

Seafarers (1959 BCSC)

→ Where the application is *ex parte*, the court must exercise the utmost care and, if give, the other party may apply to have it discharged or varied

• **TWO REQUIREMENTS for an *ex parte* interim injunction:**

- (1) **urgency** – urgency is a general requirement for an injunction, for an *ex parte* injunction must show great or extraordinary urgency (Rule 52(12.1))
 - (2) **full and frank disclosure** applicant must provide all relevant facts and portray both sides fairly, conducting themselves with the utmost good faith
- ... **AND undertaking as to damages (Rule 45(6)) unless a reason not too**

• **GROUND FOR SETTING ASIDE OR VARYING an injunction granted *ex parte***

- (1) evidence establishes there was a misstatement or repression of relevant facts
- (2) evidence establishes facts which were not known or concealed by the P, but which are relevant and establish that the order cannot stand
- (3) mistake of fact by statement or omission so vital that the order would have been refused if the court was aware of it
- (4) mistake of law if there is any applicable legal authority of so clearly a governing nature that the order would have been refused if the court was aware of it

INTERLOCUTORY OR INTERIM INJUNCTIONS

General Test

- *American Cyanamid* sets out the basic framework (that has been refined by subsequent cases)
- *MacBloe* confirmed this as the law in BC
- This is a holistic, global analysis; it is not mechanical or formalistic
- **The underlying consideration is whether legal remedy is inadequate (CP)**

Accessibility threshold

(1) serious question to be tried that is not frivolous or vexatious

- P must show he has a legal cause of actions supporting the demand for injunction on the facts – that there is “a real prospect of succeeding” – or some merit
- This is a fairly low threshold
- this analysis is not to be a prolonged examination of the merits (*RJR*)
 - **TWO exceptions to the general rule that a judge should not engage in an extensive review of the merits**
 - (1) When the interlocutory injunction will in effect amount to a final determination of the action (where there will be no practical effect of going to trial because the injunction has given the applicant everything that would have been obtained at trial) (*Cascade*) **AND / OR**
 - (2) When the issue presents itself as a simple question of law alone (is constitutionality or interpretation of a clause of a contract) (*RJR; Cascade*)

Discretionary phase

(2) spectre of irreparable harm

- Focused solely on the prospect of irreparable harm to the applicant
- “irreparable”: harm that is incapable of being remedied by any other means at the time of trial; that cannot be compensated for with an award at trial (ie the common law is inadequate)
 - if the common law remedy of damages is adequate, then equitable action is not justified
- degree of irreparability? “irreparable” refers to the nature of the harm suffered, not its magnitude (*RJR*)

non-exhaustive list of some types of injuries courts have found to constitute irreparable harm

 - harm to reputation or career
 - harm to viability of business – goodwill, market share
 - in support of a restraint of trade clause
 - some intellectual property infringements
 - even if damage can be quantified, unlikely to be able to recover (*Mareva*)
 - infringement of the public interest in some circumstances (*RJR*)
 - infringement of some natural resource of the quiet enjoyment of land (*MacBloe*)

(3) balance of (in)convenience

- here, the relative irreparable harm to both parties is balanced
- the court must balance the P’s need for protection against the corresponding need of the D to be protected against injury resulting from being prohibited from exercising her legal rights which may not be adequately compensated by the P’s undertaking as to damages
- the court will also consider possible irreparable harm to third parties

may weigh in favour of D

 - P not being financially able to fulfil undertaking as to damages
 - Unexplained delay on part of P (might show damage not irreparable)

American Cyanamid – test for an interlocutory / interim injunction**FACTS**

- American Cyanamid owned a patent on synthetic absorbable surgical sutures. They sought the remedy of a *quia timet* anticipatory injunction for breach of patent to restrain D from distributing its product, and also sought an immediate interlocutory injunction until the patent case was resolved. C.A. overturned the injunction on grounds that P had to show a strong *prima facie* case with over 50% chances of success) – they appealed to H.L.

ISSUE

- What is the test for granting an interlocutory/interim injunction? Must the applicant show a strong *prima facie* case?

HELD

- injunction should be granted

RATIO

→ rejects the *prima facie* Test for interlocutory / interim injunction, above

MacBloe v. Michael Mullin (1985 BC) – confirms American Cyanamid as the law in BC**FACTS**

- BC granted MacMillan Bloedel logging rights for Meares Island, which had old-growth cedar. First Nations and other protestors obstructed the logging.
- P brought an action seeking an injunction restraining D from wrongfully interfering with the logging.
- First Nations brought an action for Aboriginal title and sought an injunction restraining the company from logging until disposition of their action.

ISSUE

- Which injunction should be granted?

HELD

- injunction granted to both P and D (P not to log; D not to obstruct P in what they were still permitted to after the injunction was in place)
- No undertaking for damages required from either party

REASONING

- Both sides argued that it should be granted an injunction because it had a serious question to be tried, would suffer irreparable harm, and the balance of convenience favoured it
- Claim to Aboriginal title cannot be rejected at such an early stage – complex case, substantial evidence

RATIO

→ **Affirms American Cyanamid as the test in BC**

→ **PURPOSE of an interlocutory injunction is to preserve the *status quo* until a determination of the merits**

→ **May not have to provide undertaking for damages (but RULE 45(6) displaces this for *ex parte* injunctions)**

NOTES

- it was easier for BC to accept the *American Cyanamide* test, because it had never developed much the “*prima facie* case” test (unlike other provinces like Ontario)
- Dissent (MacDonald J.A.): injunction should be granted to P – Aboriginal title is a complex action not amenable to early trial; he was right: there still has not been a trial about Meares Island, injunction persists to this day (ecotourism is now booming there)
- High water mark for granting of injunctions for Aboriginal title
- Haida Nation Case* the SCC disapproved of interlocutory injunctions as only partial, imperfect relief in the context of Aboriginal claims because:
 - injunctions cover only part of the full scope of the Crown’s duty
 - balanced reconciliation of interests is preferable to the drastic, all-or nothing result of an injunction
 - the often decisive factor of balance of convenience prefers economic interests over Aboriginal ones
 - holder of injunction has the upper hand and less desire to settle – disputes drag on

BC (AG) v. Wale**FACTS**

- 3 First Nations Bands passed bylaws claiming the right to catch unlimited quantities of fish for sale purposes. The government sought an interlocutory order enjoining the bands from catching/transporting/bartering/selling fish contrary to general regulations. The Chambers judge granted the injunction, the Bands appealed because the judge considered irreparable harm to the P under the balance of convenience

HELD government's injunction upheld

REASONING

- the court is not a "prisoner of formula", and although the Chambers judge did not expressly refer to irreparable harm, she clearly considered it under the balance of convenience

RATIO

- **failure of Judge to specifically address irreparable harm separately was not fatal:** the question of irreparable harm may be properly reviewed as part of the assessment of the balance of convenience between the parties, notwithstanding its treatment as a separate element in *American Cyanamid*'
- **Crown not required to give an undertaking as to damages where it represents the public interest in upholding the law of the land.**

NOTE

- **standard of review** a discretionary ruling will not be overturned unless it is demonstrated that
 - (i) the judge erred in principle or
 - (ii) made an order not supported by the evidence, or
 - (iii) circumstances have sufficiently changed
- if any of these are satisfied, the appellate court may exercise its discretion as if the matter was *de novo*

BMW v. Canadian Pacific Ltd (SCC 1996) - inadequacy of legal remedy, no underlying cause of action**FACTS**

- BMW had a labour agreement; in response to CP changing shift patters, BMW filed a grievance under its collective agreement and sought an injunction against CP to prohibit instituting the change until the grievance was heard by an arbitrator
- CP argued that BCSC had no jurisdiction because it was a federally regulated industry under the Canada Labour Code

ISSUE

- BCSC have jurisdiction to issue injunctions in connection with a dispute in a federally regulated industry?
- Can BCSC issue interlocutory injunctions even if there is no cause of action to which the injunction is ancillary?

HELD

- Injunction granted

REASONING

- Inadequacy of legal remedy: no recourse for the Brotherhood under the collective agreement or *Labour Code* – no place to seek relief in law
- No need for an underlying cause of action – Court is assisting another court/tribunal with administration of justice

RATIO

- **The KEY consideration is whether legal remedy is inadequate**
- **Absence of an underlying cause of action does not deprive BCSC from granting an injunction**
- **Court can assist another tribunal with the administration of justice**

Negative Covenants

- **A negative covenant is an agreement to refrain from doing something which is commonly seen in employment and sale of business contracts seeking to restrict an employee or a vendor in a from working/starting up as a competitor to the employer/vendee**
 - Includes confidentiality clauses
- **Because of the importance of the temporal nature of these clauses, people often seek interlocutory injunctions while seeking their contract action**
- Where there is a negative covenant, a prohibitory injunction is generally readily granted (*Doherty*)
- **Under the rule in *Doherty* a negative covenant is enforceable in equity unless there is doubt as to the validity of the clause at common law (ie unreasonable or against public interest because it is in restraint of trade)**
- **In those circumstances, apply the *American Cyanamid* test**
 - **HIGHER threshold for TEST exceptions to the general rule that a judge should not engage in an extensive review of the merits**
 - (1) When the interlocutory injunction will in effect amount to a final determination of the action (where there will be no practical effect of going to trial because the injunction has given the applicant everything that would have been obtained at trial) (*Cascade*) **AND / OR**
 - (2) When the issue presents itself as a simple question of law alone (is constitutionality or interpretation/reasonability of a clause of a contract) (*RJR; Cascade*)

Cascade v. Lindsay (1985 BCCA)

FACTS

- D was a broker for the P forest products wholesaler; employment contract included a negative covenant that D would refrain from competing for 1 year
- D quit and went to work for a rival
- P sought injunction to restrain D from working at the competitor

ISSUE

- Should the injunction be automatically granted to enforce the negative covenant?

HELD

- Generally, negative covenant is automatically enforceable in equity - unless there is doubt as to the validity of the clause (ie restraint of trade; unreasonable).
- Application for injunction refused

REASONING

- There was doubt about the validity of the clause and because the covenant might be unenforceable, the Judge correctly applied the test in *American Cyanamid* in considering irreparable harm and balance of convenience
- Balance of convenience favoured Lindsay: he would suffer irreparable harm as he would lose his job with the new company, while Cascade would not lose much (only one employee, Lindsay had not solicited business from their customers or use trade secrets)

RATIO

- **Under the rule in *Doherty* a negative covenant is enforceable in equity; however, if there is doubt as to the validity of the covenant the test from *American Cyanamid* must be applied**

NOTES

- **HIGHER threshold for TEST exceptions to the general rule that a judge should not engage in an extensive review of the merits**
 - (1) When the interlocutory injunction will in effect amount to a final determination of the action (*Cascade*)
 - (2) When the issue presents itself as a simple question of law alone (is constitutionality or interpretation/reasonability of a clause of a contract) (*RJR; Cascade*)

Constitutional Cases

- In the constitutional context, parties will often seek a stay pending appeal or an injunction against the government to temporarily suspend the operation of the impugned law
 - (a) as against the parties OR
 - (b) as against everyone

General Introduction

- **American Cyanamid** sets out the basic framework (that has been refined by subsequent cases)
- **MacBloe confirmed this as the law in BC**
- This is a holistic, global analysis; it is not mechanical or formalistic
- **The underlying consideration is whether legal remedy is inadequate (CP)**

In the constitutional context:

- The SCC has reaffirmed American Cyanamid approach with some modifications to take account of the various private and public interests at stake (**RJR**)
- There is no presumption of constitutionality operating during this test

American Cyanamid for Constitutional Cases

Accessibility threshold

(1) serious question to be tried that is not frivolous or vexatious

- P must show he has a legal cause of actions supporting the demand for injunction on the facts – that there is “a real prospect of succeeding” – or some merit
- **Higher threshold in the constitutional sphere** - While generally analysis is not to be a prolonged examination of the merits, when the issue presents itself as a simple question of law alone (is constitutionality or interpretation of a clause of a contract (**RJR; Cascade**) **this is an exception to the general rule that a judge should not engage in an extensive review of the merits (RJR)**)

Discretionary phase

(2) spectre of irreparable harm

- Difficult to assess in the constitutional context
- at this point in the jurisprudence, a claimant will generally pass this stage quite easily even if the damages are theoretically quantifiable
- note that in **RJR** the ultimately unsuccessful tobacco company applicant was able to demonstrate irreparable harm EVEN though can quantify what it would cost to change the packaging to conform because of the constitutional nature of the case – would not = irreparable harm in a non-constitutional case (but lost at stage 3 because it was merely financial loss v. aim of the regs re health risk – balance!)

(3) balance of (in)convenience

- Applications for interlocutory injunctions against enforcement of legislation raise special considerations at the **THIRD STAGE** of *American Cyanamid* (**Harper**)
 - Granting the injunction may have the effect of depriving the public of a statute which has been duly enacted and may be valid in the end
 - Refusing the injunction may deprive applicant of constitutional rights simply because courts are too slow
- **this stage becomes the most important in the constitutional context because of the importance of the public interest in this type of litigation**
 - **public interest must be considered as a special factor at this stage in constitutional cases – goes beyond the parties to look at the consequences for the public**
 - while in private actions it is possible to measure the respective economic interests of the parties, here are highly symbolic public individual rights at stake
 - (i) **applicant who alleges public interest harm is presumed to be acting in self instars and** must demonstrate the benefits to the public which will flow from the injunctive relief

- (ii) **public authority is entitled to a lower burden than a private applicant re establishing irreparable harm** does not have to demonstrate *actual* irreparable harm (underlying assumption makes sense because legislation = public good)
- (iii) **weigh the extent of the requested relief's impact on the public** (negatively effect a few or a lot of people)
- (iv) **maintaining the *status quo* is of limited value** because the whole purpose of the *Charter* is to challenge laws

RJR Macdonald (1994) – balance of (in)convenience in constitutional cases

FACTS

- Pending SCC appeal RJR sought stay of CA order; wanted the coming into effect of Regulations which were being tested for constitutionality to be postponed until appeal was resolved
- Stays and interlocutory injunctions operate under the same principles

HELD / REASONING

- The stay was refused
- **BUT** applicant was able to demonstrate irreparable harm **EVEN** though can quantify what it would cost to change the packaging to conform because of the constitutional nature of the case - **would not = irreparable harm in a non-constitutional case**
- **Ultimately** lost at stage 3 because it was merely financial loss v. aim of the regulations re health risk – balance!

RATIO

- **Expansion of the balance of (in)convenience in constitutional cases** – public interest is a special factor to be considered the court can look at possible consequences to the public from granting / refusing the injunction
- **TWO exceptions to the general rule that a judge should not engage in an extensive review of the merits**
 - (1) When the interlocutory injunction will in effect amount to a final determination of the action (where there will be no practical effect of going to trial because the injunction has given the applicant everything that would have been obtained at trial)
 - (2) When the question of constitutionality presents itself as a simple question of law alone

MB v. Metropolitan Stores (1987 SCC) – can consider public interest in the balance of (in)convenience

FACTS

- Store sought to challenge the constitutionality of the statutory power of the MB Labour Board to impose a collective agreement, and sought to stay the imposition of the collective agreement on the parties until after the constitutional question had been answered
- (remember – stay and interlocutory injunction are governed by the same test)

HELD/ REASONING

- stay was refused at the third stage: the public interest favoured the refusal of the suspension
- Interlocutory relief is not appropriate in constitutional cases because it is too disruptive of government: the Court directed an early trial date for the constitutional question

RATIO

- **Where the authority of a law enforcement agency is constitutionally challenged, the court must take into consideration the public interest on an application for an interlocutory injunction/ stay of proceedings**

Libel and Slander

- A much higher test than *American Cyanamid*
- **An injunction to restrain defamatory speech or publications will only be granted in the clearest of cases, where the *D* admits the falsity of the comments, or where it would be impossible for the D to raise a viable defence**
- The court will NOT issue an injunction if the D intends to raise a defence (ie justification, qualified privilege, fair comment) unless the defence is clearly without merit or the D is acting with malice
- POLICY – because of importance of the wider public interest of freedom of speech: the Court of Equity will be slow to restrain a party from exercising otherwise legitimate rights of freedom of speech
- **TEST in order to grant an injunction in a defamation case, the Court must find:**
 - (1) clear case of defamation
 - (2) to which there is no viable defence
 - (3) which will likely be repeated

Church of Scientology v. Radio NW et al. (1974 BCCA) – clear case + repetition

FACTS

- Radio NW had a show called “The Investigators” that began broadcasting exposés of the Church of Scientology, including an interview of Harry Rankin. The Church sought an injunction to prevent them from continuing.

HELD / REASONING

- Injunction was granted because:
 - (i) The statements were clearly libelous
 - (ii) There was no possible defence
 - (iii) There was probable repetition

RATIO

- **TEST above**

Mareva Injunctions

- **an injunction which operates *in personam* to restrain a party from removing assets from the jurisdiction before judgment on threat of contempt of court**
- it restrains current AND future assets, and anyone with notice of the order (ie if a person knowingly holds your assets for you in contravention, they too can face contempt proceedings)
- this is an extraordinary remedy because it freezes assets before a determination on the merits
- on application in Chambers, almost always *ex parte* (obviously) **so there is an obligation to give full and frank disclosure of all material facts and law**
- remember to actually serve the order on third parties holding assets (ie the Bank Branch)

Law and Equity Act, s. 39

39(1) within the inherent jurisdiction of the court to make an injunction which appears to be just or convenient

39(2) may be granted unconditionally or on terms and conditions the court thinks just

- Here is an expression of the **discretionary nature** of the injunction: can be specifically tailored
- Usually granted on an undertaking as to damages (**BCSC Rule 45(6); Mooney**)

Enforcement of Canadian Judgments and Decrees Act (2006 BC):

- can take an *ex parte* interim injunction from anywhere in Canada and enforce it in BC – covers both judgments (CL) and decrees (equity)

Mareva Injunction adopted into Canadian law; TEST for granting; harsh and exceptional remedy

Aetna Financial v. Feigelman (SCC 1985)

- confirmed that the Mareva injunction is adopted into Canadian law (Denning creation)
- Mareva injunction is a harsh and exceptional remedy that should only be available in the clearest of cases
- **TEST for whether to grant a Mareva injunction:**
- (1) P must demonstrate that she has a strong prima facie case (from *Reynolds*);
- (2) must be assets of the D within the jurisdiction susceptible to the execution (ie in BC) (*Feigelman*)
- (3) must be a real risk that remaining significant assets are going to be removed from the jurisdiction or disposed of so as to make any later judgment a nullity
- courts must assess the balance of (in)justice and will also look at: (Mooney)
 - past conduct
 - nature of the transactions and their risks
 - where D is residing and what the enforcement rights are there (ie recognition and enforcement of Canadian judgments - *ON v. Brunei*)
- **World-wide Mareva (Mooney)**
 - *Mareva* can apply world-wide as long as the party is within the jurisdiction because it is an *in personam* order
 - Must have some evidence of assets outside the jurisdiction which you want frozen
 - Assets within jurisdiction of sufficient value to satisfy potential judgment, less likely to get worldwide;

Silver Standard

- **Mareva injunctions should not be issued** where funds and assets are being removed in the normal course of business and there is no evidence of scheme to avoid payment (Courts want to stop unusual transactions that are designed to frustrate the court process)
- Can combine *Mareva* injunction with **Anton Piller Order**; disclosure order (defendant must file an affidavit disclosing where assets are); order appointing a receiver under *Law and Equity Act*, section 39 (requiring transfer of assets to a receiver)

Anton Pillar Order

(A) WHAT IS IT?

- an *in personam* mandatory injunction which allows a search of premises and seize property to preserve evidence
- the injunction gives you the right to ask for entry with the remedy of contempt if you are denied
- PURPOSE is to preserve evidence, not more discovery there can be collateral purposes, but must be set out in the order

(B) HOW DO I GET ONE

- difficult to obtain and are very expensive to carry out (at least 100K generally)
- application to BCSC in Chambers brought *ex parte* AND given on undertaking as to damages (full & frank disclosure of all relevant facts and law) but being strategic in order to preserve and obtain what you need; tailor the order to obtain your objectives as much as possible (ie you allow for an extended period of time between service / entry of IS and actual search so that you can go early in the morning and then wait for D's counsel)
- *Anton Pillar KG v. Manufacturing Processes (CA 1975)* three conditions for an Anton Pillar order
 - (1) need extremely strong prima facie case on the facts
 - will only be granted where it essential for justice to be done
 - (2) potential damages for P must be very real and irreparable
 - higher degree than "irreparable harm"
 - (3) must have clear evidence that D's have incriminating documents that they may destroy the material
 - to prove intent to destroy – can be inferred from facts showing they are dishonest, fraudsters, past behavior
 - Terms must be clear and will give exact time window (and expiration date of the order); what can be

(C) EXECUTION

- court appointed solicitor independent of the parties is required to attend at the cost of the applicant (to make sure D gets legal counsel and search is carried out to the strict letter of the order, and they get the evidence)
- Avoid carrying it out at the same time as police search – DO NOT want to get the Charter involved!

(D) WHAT SHOULD I KNOW IF I ACT FOR THE D

Celanese Canada v. Murray Demolition (SCC 2006)

→ PROTECTIONS for party against whom an Anton Pillar order is granted

- (1) Must be executed during business hours for the most part (so D can have counsel there)
 - (2) A carefully drawn order which identifies the material to be seized and sets out safeguards to deal with privileged documents.
 - (3) A vigilant court appointed supervising solicitor who is independent of the parties
 - (4) A sense of responsible self-restraint on the part of those executing the order with a focus on its limited purpose to preserve relevant evidence not to exploit it.
- **Use of evidence** - evidence obtained not to be used in other proceedings (default position) unless there is a specific term in your order (which you'd have to fight for)

(E) ROLLING ANTON PILLAR ORDER

Fila Canada v. Jane Doe (1996 FCTD)

FACTS

- Fila successfully applied for an *ex parte* rolling *Anton Pillar* order against unknown street vendors allegedly selling knock-off Fila products

RATIO

- Courts will grant a P a "rolling" *Anton Pillar* order against unknown Ds
- The test is strict
 - (i) Courts will be very cautious in granting an order against an unknown D
 - (ii) Counsel has a duty to the Court to explicitly call attention to any weaknesses in the case
 - (iii) The P's must have taken reasonable steps to name the D's
 - (iv) As soon as P knows the names of the D she must apply to amend the order with the correct name
 - (v) P's rights must be clearly identified and demonstrated – a very strong prima facie case
 - (vi) The order is subject to constant review and can be terminated by the Court at any time
 - (vii) Independent supervising solicitor must be present at its execution, so he can later report to the Court

Anti-Suit Injunction

→ An in personam injunction prohibiting a P from bringing a suit in another jurisdiction

Anchem Products v. BC (1993 SCC) – natural forum + balance of convenience (alternative forums)

FACTS

- Class action asbestos litigation; exposure occurred in BC; about 75% of claimants in BC; litigation in Texas; asbestos companies sought an anti-suit injunction in BCSC, restraining the claimants from continuing the Texas action, on the basis that BC was the proper forum for the action
- Alternative forums (Texas Court has already dismissed a stay application there on the grounds of *forum non conveniens* because it did not apply that doctrine at the time)

HELD/REASONING

- No anti-suit injunction granted
- The fact that the D's carried on business in Texas was sufficient to overcome the fact that BC was also a natural forum

RATIO

→ **There are two remedies to control choice of forum**

- (1) local stay: local court stays its own proceeding pending the determination in the foreign jurisdiction OR
- (2) anti-suit injunction: domestic court takes jurisdiction and prohibits parties from continuing an action elsewhere

→ **Courts should use caution in granting anti-suit injunctions, because of considerations of comity** – should only be used where a foreign court has departed from *forum non conveniens* to an extent that the assumption of jurisdiction there amounts to a serious injustice

→ **TEST for an ANTI-SUIT injunction:?**

(1) the foreign forum has already assumed jurisdiction and rejected its equivalent of a local stay of proceedings

(2) the applicant can show that BC is the most appropriate forum

(i) BCSC must ask itself if is there a foreign court that is more appropriate than the domestic court? BCSC must taking into consideration that foreign court has already determined it is, the court must respect that UNLESS that court did not act on similar principles to *forum non conveniens* AND

(ii) If there is a real and substantial connection between BC and the action or parties the court must consider connecting factors

→ *the action should be tried in the jurisdiction that has the closest connection with the action and parties*

(3) Weigh the balance of (in)convenience with respect to juridical advantage

→ *Court must ensure it does not secure a juridical advantage to one of the litigants to the expense of others*

NOTES

→ This case is not applicable to single forum cases

Norwich Pharmacal Order

- An interlocutory order compelling a 3rd party to discover or disclose the identity of parties to enable the P to identify the wrongdoer
- It is an equitable bill of discovery
- TEST
 - (1) P has a *bona fide* claim against the unknown parties
AND
 - (2) P has actual intention to bring a suit on the basis of the information it obtains under the order
AND
 - (3) There is no improper purpose for seeking the identities of the parties
AND
 - (4) There is clear evidence that the information is not obtainable from another source (Person from whom discovery is sought must be the only practical source of the information)
AND
 - (5) The person from whom discovery is sought is more than a mere bystander (ie somehow involved in the matter – knowledgeable and benefiting from the wrongdoer)
AND
 - (6) Person from whom discovery is sought must be reasonably compensated for the expense arising out of compliance and legal costs
AND
 - (7) Public interest in disclosure must outweigh legitimate privacy concerns
- Other option: a John/Jane Doe order (which binds person whose actions fall within the scope of the order – ie logging protesters – if a cause of action exists and the D, once known, has the chance to challenge the order)

BMG. v. John Doe, [2005] (F.C.C.A.) – test

FACTS

- BMG wanted to sue people who were infringing their copyright by uploading and sharing music on the internet; internet service provider refused to reveal these people's identities citing privacy concerns
- BMG applied for a Norwich Pharmacal Order

HELD / REASONING

- Order refused because the commercial interests did not outweigh the privacy concerns (see (7) above)

RATIO

- **TEST, above**

INTELLECTUAL PROPERTY / BREACH OF CONFIDENCE

- *American Cyanamid* with a higher threshold on the basis that interlocutory proceedings in this area are likely to be determinative – so P must have a higher-strength case than normal
- Also, these often follow *Anton Pillar* orders, which require a very strong *prima facie* case
- **Confidential information** information that has a quality of confidence that has been conveyed to another in a manner to make clear to that other that it was communicated in confidence – an action for breach arises when that person then uses the information in an unauthorized manner
 - Two categories / two types of privacy interests
 - (i) Personal privacy – interlocutory injunction to prevent public disclosure of personal details
 - *Courts will generally intervene unless strong public policy reason to do so*
 - (ii) Commercial privacy (customer lists trade secrets) - interlocutory injunction to prevent public disclosure of information which will cause commercial exploitation to the financial detriment of the applicant
 - **Basic American Cyanamid test**
 - **UNLESS the information has already been placed by the P into the public forum (will be refused relief)**

Cadbury Schweppes (1999 SCC) → new remedy of “equitable compensation” created

FACTS

- After being fired by Motts (Cadbury), FDI began to make Clamato juice itself; Cadbury sued for breach of confidence re stealing, modifying and selling the recipe

ISSUE**HELD / REASONING**

- An injunction would have been too harsh as it would have put FDI out of business - balancing

RATIO

- **Creates new remedy of equitable compensation**, which is not tied to another equitable remedy (ie such as damages in lieu of specific performance)
- Equity is capable of growth and development, it is not set in stone: “authority to award financial compensation for breach of confidence is inherent in the exercise of equitable jurisdiction and does not depend on the niceties of the *Lord Cairns Act* or its successors (which created equitable damages in 1868) . . . the court has ample jurisdiction to fashion appropriate relief out of the full gambit of available remedies, including appropriate financial compensation”
- Sheppard says SCC referred to CL and equity as distinct (rather than totally fused) but said they are capable of growth to meet new circumstances, and each can transform the other

NOTES

- Note: the point of equitable damages is to compensate for the harm that took place before the injunction or specific performance. So, it can be awarded in addition to an injunction or specific performance.

CONTRACTS OF PERSONAL SERVICE

- *Equity will not grant specific performance of a contract for personal service*
- *Equity will not enforce slavery*

BUT

- **Equity will grant a mandatory injunction to stop a party from breaching a contract for personal service by enforcing the negative obligations of the contract (both express and inferred) as long as the decree (1) does not amount to a decree of specific performance of the positive covenants of the contract OR (2) result the D must either remain idle or perform positive covenants (*Warner Bros*)**
- Basic concept that damages must be inadequate applies
- *Lumley* could not force Wagner to sing at his theatre per their contract, but he could restrain him from singing at Covenant Gardens!

Warner Bros. V. Nelson (Betty Davis Case) 1937 KB**FACTS**

- Bette Davis entered into a contract with WB in the US wherein she agreed to “render her exclusive services as a motion picture and/or stage actress” for 8 years; she breached this by working for a 3rd party in the UK; WB applied for a permanent injunction to restrain the breach, and for damages

HELD

- Granted for 3 years (court has discretion as to appropriate time)

RATIO

- **The Court will enforce the negative covenants of a contract for personal service as long as it (1) does not amount to a decree of specific performance of the positive covenants of the contract OR (2) result in a decree under which the D must either remain idle or perform positive covenants**

Bell & Atkins – can enforce a negative covenant not to fire**FACTS**

- P agreed to manage a company that was in trouble; contract provided that he could not be discharged except for good cause; he guaranteed some of the company’s debts; directors tried to fire him and he applied for an injunction

HELD / REASONING

- Injunction granted
- Court can enforce a negative covenant (even if it ends up meaning that a personal service will be performed)

RATIO

- **“It is quite true that the Court as a general rule will not enforce specific performance of a contract for personal services by injunction but they can and do have the power to restrain the breach of any agreement whereby any of the parties covenanted not to do a certain thing.”**

NOTES

- maybe it is distinguishable on the basis that it is a company – better bargaining position

Hill v. Parsons (1971) – injunction to compel reinstatement by employer**FACTS**

- Hill was fired at age 63 because he refused to join the union, would have retired at age 65. He sought an injunction to restrain the company from acting on the notice of his termination of employment. The company claimed specific performance should not be awarded in personal contract for service.

ISSUE

- Can an employee who has been wrongfully dismissed obtain an injunction to compel reinstatement by his employer?

HELD / REASONING

- Yes – injunction granted
- Inconsistent with the confidential nature of master-servant relationship that the employment relationship should continue contrary to the will of a third party

- Court will normally grant damages but there would have shortly been legislation preventing the Union from terminating Hill's employment
- Thus in this case the injunction must be granted because damages would not be an adequate remedy

RATIO

→ **"Where a man has a right, the law should give a remedy"**

→ **An injunction will be granted to prevent an employer from terminating employment where damages would not be an adequate remedy, or there are special circumstances which would make that unjust (ie here, the impending legislation which would have allowed P to keep working)**

NOTE

- "If ever there was a case where an injunction should be granted against the employers, this is the case" employer has done wrong, should to be allowed to break the law in this way

MANDATORY INJUNCTIONS

- **an interlocutory injunction ordering positive action**
- **two types**
 - (1) restorative mandatory injunction requires D to repair the consequences of her wrongful act
 - (2) mandatory injunction requiring fulfillment of positive obligation derived from contract or statutory undertaking
- historically harder to get than a prohibitive injunction – needed a high assurance that at the trial it will appear that the injunction was rightly granted –
- the order must be clear because (a) the parties must know what they are to do and (b) the court must be able to supervise
- **TEST *American Cyanamid***
- **SPECIAL THRESHOLD with an unusually strong and clear case + sufficient urgency**
- **Special considerations too look at while balancing the (in)convenience: the court will look to the nature of the dispute and the particular risks of injustice to the parties, and assess:**
 - (1) Will the order cause the D a greater waster of resources – time or money – than merely being delays
 - (2) Would the relief make it unlikely that the P continue (ie making injunction determinative)
 - (3) Can the order be made clearly and specifically
 - (4) Are there any due process concerns about the use of coercive and intrusive power without a full trial?
 - (5) Has the D increased wrongful omission / activity after knowing of P’s legal action?

Kennard v. Cory – “**Moving Mountain Case**” – *the order cannot be too broad*

FACTS

- D operated a mine on the mountain and dumped tailings which began to slide down onto P’s land
- P was successful in negligence and D was ordered to install proper drainage to prevent future harm; that drain became clogged; slides began again
- P sought mandatory injunction to “clear the drains” and “execute such works as might be necessary” to protect P’s buildings from the slide

HELD / REASONING

- Only the narrower “clear the drains” injunction was granted: “such works as might be necessary” was too broad conceptually and temporally
- The court is generally reluctant to grant orders that require continuous supervision

RATIO

- **Mandatory injunction must clearly specify the work to be done – if it is too broad, it will not be enforceable**

Shepherd Homes v. Sandham (1970) – *unusually strong and clear case*

FACTS

- Rogue sheep and horses because to cause havoc in an “open plan” subdivision so D built a fence
- P sought a mandatory injunction to force D to tear it down

HELD / REASONING

- The order was refused
- 5 month wait to bring application ≠ sufficient urgency
-

RATIO

- **Mandatory injunction will be granted only if the case is “unusually strong and clear” and if the applicant shows sufficient urgency**
- **Easier to get a prohibitory injunction** - Usually the *American Cyanamid* principles apply, but because of the drastic nature of the mandatory order (requires that the defendant do something and spend money), the Court will be reluctant to grant the injunction

Doucet-Boudreau v. Nova Scotia (2003 SCC) – court may have discretion to supervise

FACTS

- Court ordered that the Province use its “best efforts” to build French schools and to provide the court with progress report

HELD / REASONING

- Valid mandatory injunction

RATIO

- **Court has discretion to declare rights and to ensure those rights are enforced**
- **Demonstrative of the ability of equity to tailor a novel, particular remedy**
- Not likely to be repeated, this was an unusual situation

EXPROPRIATION DOCTRINE

- The court can award damages in substitution for or in addition to an injunction (*Lord Cairns Act s. 2, received per s. 2 of L&E Act*)
- Somewhat conceptually unusual because one of the first principles of equity is that the legal remedy be inadequate, yet damages are awarded
- **Must be**
 - (1) **entitled to an injunction, (*Cadbury*) BUT**
 - (2) **because of fairness in the circumstance and**
 - (3) **the weight of the balance of (in)convenience,****an injunction would be insufficient or too harsh, the court can add damages OR substitute the injunction for damages**
- Can get prospective damages for expected future damages
- Can get

Rombough v. Crestbrook Timber (1965 BCCA) – prospective damages if substitution for injunction

FACTS

- P sought an injunction against D whose sawmill caused damage from smoke and ashes
- TJ awarded limited injunction an an amount for expected future damages (which results in an effective licence for the D to commit the minor nuisance, but pay for it)

HELD / REASONING

- In weighing the balance of convenience, the benefit to Rombough of issuing the injunction is outweighed by the hardship to the rest of the community (would put too many people out of work)
- Damages were more appropriate to compensate for the loss of value of P's property

RATIO

- s. 2 of *Lord Cairns Act* (in operation of *L&E Act*) allows court to award damages in lieu of/in addition to injunction or specific performance
- **If damages are awarded in *addition* to an injunction they compensate for injury done, BUT if they are awarded in *substitution* for an injunction, must cover not only injury already sustained but also injury that would be inflicted in the future by the commission of the act not enjoined**

Property Law Act s. 36 – compensation for encroachment on adjoining land

- In cases of encroachment, the Court of Equity would only in the rarest of cases award damages rather than an injunction
- Legislature in BC reacted by enacting the *Property Law Act* to deal with encroachment, which broadened the Court's power to protect the property of the encroacher and compensate the owner
- **If a building / fence improperly encroaches on adjoining land the Court may, on application,**
 - (a) **declare an easement in favour of the encroacher;**
 - (b) **vest title in encroacher and make compensation order OR**
 - (c) **order the encroachment removed**

QUIA TIMET OR ANTICIPATORY INJUNCTIONS

- A specialized **perpetual injunction** granted to prevent a wrong or to stop the continuation of a wrong
- Equity allows a person relief *quia timet* “because he fears”
- Courts are cautious in granting these because the P can always bring a common law action should the loss actually happen
- **TEST (*Redland Bricks*)**
 - (1) **can the P show that the potential harm is imminent? AND**
 - a “strong case of probability”
 - **more than subjective fear**
 - if the harm is inevitable, harm need not be as imminent (if all circumstances are in place to cause the harm)
 - (2) **can the P show that the harm will be substantial AND**
 - **damages will not be sufficient to compensate**
 - easier to demonstrate where P is seeking to discontinue and existing harm
 - (3) **balance of (in)convenience**
 - **cost of prevention v. likelihood of future wrong**
 - **EXCEPT where D has acted reckless, unreasonably or deliberately**

Redland Bricks v. Morris* (1969 HL)*FACTS**

- Redland’s excavation caused damage to Morris’ land; Morris sought damages and an injunction restraining further quarrying, and a mandatory injunction to restore the land; Redland appealed

HELD

- The mandatory injunction was too broad and not upheld
- The *quia timet* injunction was upheld

REASONING

- Two types of *quia timet* cases: (i) where irreparable harm has not yet occurred; and (ii) where harm has already happened (and compensated for) but where it is continuing / likely to continue

RATIO

- See above test

NOTES

- Redland Bricks had been acting reasonably (not a case of wilful/deliberate wrongdoing)

DELAYED (SUSPENDED) INJUNCTION**General Suspension**

→ Generally, a decree is effectively immediately, but equity may suspend operation the decree if the D can establish on application that immediate enforcement of order will cause hardship (*Charrington*); then, the timing of the order can be tailored to the circumstances of the case (*Polai*)

Suspension of Decree Pending Appeal

→ See *American Cyanamid* – test for stay is the same as an injunction (*Harper*)

Charrington v. Simons (1971 UK) – delay appropriate where balancing = hardship to D

FACTS

- P applied for an injunction to have an obstacle to his property removed; granted, but TJ delayed its operation for three years

HELD

- The delay was removed on appeal and the injunction became immediately operative

REASONING

- Three years' delay would cause hardship on the faces

RATIO

→ **delay of an injunction is not appropriate where it causes hardship to the P**
 → **possible to delay operation of an injunction (*Polai*) but three years might be too long**

Harper v. Canada (2000 SCC)

FACTS

- Stephen Harper was president of National Citizens' Coalition; he sought a declaration that limits on 3rd party spending in the Canada Elections Act were unconstitutional because they restricted freedom of expression.
- He was granted an injunction to prevent the government from restricting 3rd party spending.
- Government applied to SCC for a stay of the injunction pending determination of its appeal so it would not affect the upcoming election

ISSUE

- Should an injunction that suspends enforcement of certain legislative provisions be stayed?

HELD

- Suspension granted

REASONING

- Applications for interlocutory injunctions against enforcement of legislation raise special considerations at the THIRD STAGE of *American Cyanamid*:
 - Granting the injunction may have the effect of depriving the public of a statute which has been duly enacted and may be valid in the end
 - Refusing the injunction may deprive applicant of constitutional rights simply because courts are too slow

RATIO

→ **Public interest in keeping the legislation in place pending constitutional review outweighs the detriment to freedom of expression – must assume at this stage that the legislation serves a valid public purpose**
 → **TEST for suspension of decree pending appeal - See *American Cyanamid* – test for stay is the same as an injunction (*Harper*)**

THE ENFORCEMENT OF PUBLIC RIGHTS (LEGISLATION)

- **Government actors (and in some cases individuals) can obtain injunctions to enforce public rights:**
 - (1) **criminal law;**
 - (2) **public nuisance;**
 - (3) **to protect administration of justice**
- Note that these are often used to enforce Administrative tribunal decisions

Criminal Law

- **Historically equity had no criminal jurisdiction, but courts are now willing to grant injunctions to prevent a continual flouting of the law where**
 - (1) the statutory penalty is inadequate to deter
 - (2) the statute provides no penalty for the violation OR
 - (3) there is a serious threat to public safety
- relief is not on the basis of protection of proprietary rights or irreparable harm, but is based on the **public interest of all citizens to see that all laws are obeyed**
- **WHY – because contempt is the punishment for disobeying a decree = jail**
- AG does not have to show that all other remedies have been exhausted BUT **if the AG is seeking an injunction in aid of at *Criminal Code* violation there will be greater scrutiny and the injunction will only be granted in extraordinary circumstances**

City of Toronto v. Polai (1972 SCC) → **public interest; suspension of remedy**

FACTS

- Mrs. Polai had many convictions / fines for renting illegal suites, but she continued to flout the law; on this basis the City argued the legal remedy was inadequate and equity must intervene and issue an injunction, a breach of which would trigger contempt proceedings and she could be imprisoned

RATIO

- fines under bylaw had no effect on Mrs. Polai – Equity could step in to restrain her from operating illegal suites because the legal remedy of prosecution under bylaw was inadequate to deal with the flouter

Public Nuisance Laws

- **public nuisance** according to Denning LJ. “a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large”
- **can be brought by**
 - (i) the AG as the guardian of the public interest OR
 - (ii) by an individual in the name of the AG (*ex realtor*) OR
 - (iii) an individual in her own name if they meet the requirements for standing
 - either the public nuisance also = private nuisance on the person’s property OR they can show some special or particular injury above that to the community at large
- **often for interference with property OR conduct already subject to a criminal law process**

AG v. Couillard (1984 BCSC) *equity can supplement legislation to protect the public*

FACTS

- West End residents complained about prostitution; AG applies for a decree to restrain prostitution in the West End on “public nuisance” grounds (solicitation for the purpose not yet a *Criminal Code* offence so there was no legal remedy)

ISSUE

- Can the AG obtain an injunction to prevent a public nuisance?

HELD / REASONING

- Yes, a permanent injunction granted to restrain prostitution in the West End

RATIO

- **An example of equity supplementing the criminal law to prevent / discontinue a public nuisance**
- **The inadequacy of the *Criminal Code* to prevent the public nuisance allows equity to step in and supplement the criminal law**

Kent District v. AGBC (1962 BC) *must consider the public interest at the 3rd stage of American Cyanamid*

FACTS

- Kent District passed an emergency bylaw prohibiting a certain interest group from entering the community to protest the prison
- The group challenged the bylaw’s validity in court, but Kent sought an injunction restraining the group from violating the bylaw until its validity was tested at trial

HELD

- The injunction was granted on an undertaking by Kent to expedite the trial

REASONING

- *American Cyanamid test* (as usual)
 1. Serious question to be tried: even though the validity of the bylaw was seriously in doubt, the only requirement at the first stage is that there is a serious question to be tried
 2. Irreparable harm: ratepayers of Kent District will suffer irreparable harm if they are allowed the breach the law
 3. Balance of convenience: civil rights of Sons of Freedom were outweighed by the property rights of the ratepayers

RATIO

- **In deciding whether an injunction should be granted to enforce legislation, the Court should consider other interests such as third parties and the public interest**

NOTES

- The bylaw was eventually struck down

Provincial Rental Housing Corp. v. Hal (2005 BCCA) *where freedom of expression enjoined – interim, not interlocutory if ex parte – harm at 3rd stage not limited to financial harm*

FACTS

- Protest - Squatters in the old Woodward’s Building in violation of certain bylaws;
- Owner applied for an *ex parte* interlocutory John and Jane Doe injunction to end the squat
- Protesters found out about the Chambers application and appeared, trying to intervene
- Court refused to hear them because the application was made against unnamed D’s
- P successfully obtained an Enforcement Order to authorized forceful removal of the squatters by police
- Squatters appealed

ISSUE

- Should the injunction to enforce bylaws have been granted *ex parte* given that the squatters knew of the application and in light of the social or political protest which the injunction was restricting?

HELD / REASONING

- The injunction was overturned – should have granted *ex parte* interim injunction to prevent the immediate harm for a short specified time and enable notice to be given (even though an interlocutory *ex parte* order can be set aside on 24/48 hours notice)

RATIO**(1) Ex parte application**

- **Interlocutory injunction is an extraordinary remedy – should only grant *ex parte* if there is extreme urgency – interim is better**
- Where an interlocutory injunction is sought, **courts must ensure adherence to fundamental procedural safeguards, particularly the right to be heard**
- If the application is made *ex parte*, the first inquiry is “Why did you not give notice?” – if the answer does not reveal extraordinary urgency, the application must be refused

(2) Social / political protest – particular concern re right to expression in the THIRD STAGE

- Cannot use injunctions as a way to stifle unwanted public protest where there is no irreparable harm or the balance of (in)convenience does not support it
- **Notice could and should be given in these cases – particularly where failure to curtail their expression can result in jail**
- **“harm” is not confined to monetary loss – here, the balance between parties – Injunction was too onerous to squatters’ freedom of expression**

NOTE

- see above [Rolling Anton Pillar 30; Norwich 32] re John and Jane Doe order: can get an Order against anonymous persons – will be held in contempt once a person has notice of the Order (usual practice is to read the Order aloud to the crowd of protesters)
- wording of Enforcement Order: “John Doe, Jane Doe and Persons Unknowing Having Notice of This Order”

Administration of Justice

BEGEU v. BCAG (1988 SCC) injunction in protection of administration of justice (courthouse picketing case)

FACTS

- BCGEU on strike against provincial government and picketed the courthouse, urging people not to cross the line
- Union asked McEachern C.J. to adjourn court proceedings, but he responded that he had a constitutional duty to keep the courts open
- McEachern then issued an interim injunction *ex parte* and on his own motion, restraining picketing at all courthouses on the ground that picketing was a criminal contempt of court.

ISSUE

- Can the Court issue an injunction on its own notice to prevent picketing of the courthouse?

HELD / REASONING

- The injunction was upheld
- Interfering with the administration of justice impairs the public’s rights to justice (including people’s Charter rights)

RATIO

- **equity can assist in maintaining the proper administration of justice**
- **Court may act on its own motion and *ex parte* whenever there is interference with the courts of justice which will entail irreparable loss of rights**

NOTES

- Similar to ***BMW v. Canadian Pacific***: court can assist with administration of justice in other tribunals (ie administrative tribunals) (injunction could be granted although there was no underlying cause of action)

UNDERTAKING AS TO DAMAGES

- An undertaking is a solemn promise given to the court, not between the parties (*Bird*)
- **RULE: If the P's claim fails or is abandoned the D is entitled to recover all damages flowing from the wrongfully obtained interlocutory injunction UNLESS there are special circumstances to the contrary** (*Viewager*)
- May include damages AND costs - **Damages recoverable are governed by usual contract principle – reasonably foreseeable damages at the time of the undertaking** (*Hadley v. Baxendale*) ie something CRAZY happens ≠ that would be the tort principle
- Applies if action fails or is discontinued (*Bird*)
- **BASIS: one who seeks equity must do equity - applicant must carry the risk: equitable relief is not an absolute right, the applicant must be acting fairly**
- Undertaking as to damages **is required by the BCSC Rules of court for interlocutory and interim (not permanent) injunctions**
- *Law & Equity Act, s. (2)* court can impose “terms & conditions” on granting an injunction
- **Rule 45(6)undertaking as to damages unless the court otherwise orders:** automatically included unless specially excused (*MacBlo*) (to pay damages for loss occurring from operation of the injunction if later shown injunction should not have been granted)
- This rule allows for judicial discretion not to require the undertaking (*Delta*) if would not be just AND there are a few regular categories of exception
- **EXCEPTIONS:**
 - (i) **Crown is representing the public interest in upholding laws** (*BC v. Wale* – upholding fishing laws)
 - **BUT** where the Crown is **protecting its proprietary rights** it will be required
 - (ii) **Permanent injunction**
 - (iii) **Impoverished litigant** – the court may not require the undertaking as to damages if the P's case is compelling and she does not have financial capacity to give the undertaking (*MacBloe* the Band was not required to give an undertaking)

Viewager Construction v. Rush (1964 SCC) – *successful D entitled to damages flowing from interlocutory injunction*

FACTS

- Dispute over equipment rental on a construction project; D threatened to remove the equipment if he was not paid; P obtained interlocutory injunction against the removal that included an undertaking as to damages
- D ultimately won the action but was not awarded damages flowing from the operation of the injunction, and appealed that point

HELD

- Undertaking damages awarded

REASONING

- D who succeeds at trial is entitled to a hearing to assess damages
- P is punishable by contempt if he does not fulfil the undertaking
- Court will only deprive D of damages in special circumstances, *e.g.* where D has been guilty of unethical conduct
- No special circumstances are present here, so π should be required to make good the undertaking as to damages

RATIO

- **Where there has been an interlocutory injunction with an undertaking as to damages, and the D is ultimately successful, that D is entitled to a hearing to assess damages flowing from that decree UNLESS there has been unethical conduct on the part of the D** (ie clean hands!)

Bird Construction v. Paterson (1960) P discontinues - admission of improper injunction

FACTS

- Bird obtained injunction against picketers, then voluntarily discontinued action before trial; D sought damages flowing from the injunction

HELD/ REASONING / RATIO

- **By discontinuing the action, P admits the injunction was improperly granted and is not released from her undertaking: D is entitled to damages flowing from the injunction**
- **Undertaking is to the court, it is not a promise between parties**
- **While the injunction ceases at discontinuance, the undertaking survives**

NOTES

- **Procedure to discontinue** apply to have the injunction dissolved, and the court will determine whether the P's right to the injunction was actually meritorious, may be released from undertaking
- **Practice note** re settlement: this undertaking can make settlement difficult – if P make sure to have the D agree not to pursue damages per the undertaking

Fletton Ltd. V. Peat (1986 BCSC) *Hadley v. Baxendale* rule applies for quantifying damages

FACTS

- Contract action re purchase of washing machines; P sought interlocutory injunction to have the machines held until trial; P dismissed action; D sought damages per undertaking as to damages for expenses of holding (storage, insurance, etc)

ISSUE

- How are damages assessed?

HELD/ REASONING / RATIO

- **D is entitled to damages in the same manner as at common law of contracts (reasonably foreseeable damages at the time of undertaking; causation, remoteness, foreseeability, mitigation, etc)**
- **Burden of causation on D**
- **Special knowledge of P may increase damages**
- **Court of Equity can add exemplary damage for fraud / malice**
- **D also gets costs of the hearing**

PROPER FORM OF INJUNCTION

→ **is the order clear and specific enough so that (a) a person knows if she is bound AND (b) an enjoined person knows what she must or must not do?**

→ In the past, 3rd party strangers to the injunction decree were liable for criminal contempt as aiding and abetting the D; however, when 3rd party strangers are not aiding D, but acting in their own self interest

Marengo v. Daily Sketch (1948 HL) old rule = loophole for 3rd party strangers to act in self interest

- An injunction granted against “the corporation by their staff servants and agents” was only valid against the D corporation (an agents) was not competent to hold a man who was not a party to be bound by the injunction
- **Loophole: third parties who were not named specifically in the injunction could not be held in contempt for violating an injunction**

MacBloe v. Simpson (1996 SCC) third parties - John and Jane Doe order to remedy loophole

FACTS

- MacBloe obtained an injunction against Simpson and John and Jane Does from blocking the logging road
- Police read the order and then arrested 800 people for contempt, most of whom claimed not to have been included under the Order

HELD / REASONING

- the injunction enforceable against the unnamed protesters

RATIO

- **unnamed parties, while not technically bound by the order, are bound to obey the order**
- **third party strangers to the order who know of the order and willingly violate it are liable for contempt of court for obstructing justice**
- **BUT should be careful to word the order so as to alert 3rd parties via John and Jane Doe structure**
- **BEFORE an order can be enforced against 3rd party strangers they must be informed of the order and given the opportunity to comply (police reading = sufficient)**

NOTES

- **ENFORCEMENT ORDER** have to go back to court to get one for police to arrest / detain people on contempt who are violating an injunction

Sonoco Ltd. V. Local 433 (1970 BCCA)

FACTS

- Y was arrested and charged with contempt for violating an injunction that prohibited D’s from “unlawfully persuading or attempting to persuade” in relation to logging protests in Clayoquot Sound

HELD / REASONING/ RATIO

- **The wording was not clear enough to be enforced: “unlawful” ≠ not sufficiently clear**
- **Injunction should not reference the lawfulness or unlawfulness of acts: the people enjoined by the order should clearly know from the order what they must not or must do – should not have to decide the lawfulness of their actions**

NOTES

- See also *Pro-Swing* order must be clear enough so that the D knows what to do or not do; the OH order was too uncertain to be enforced in ON (“confusingly similar”, “surrender all infringing golf clubs or golf components”)

Doucet- Boudreau (2003 SCC)

- Court ordered that the Province use its “best efforts” to build French schools and to provide the court with progress report

ISSUE

- Is the order invalid for uncertainty (“best efforts”)

HELD / REASONING

- Injunction upheld: not so vague as to render invalid (also, made per *Charter* 24(2) which gives court a wide discretion to fashion the remedy it sees fit)
- Dissent: not clear enough to put party on notice of what is expected of them

RATIO

→ Court said that “best efforts” was clear enough

NOTES

- May not be likely to be repeated, this was an unusual situation (*Charter* jurisdiction AND supervision aspect)

CONTEMPT**Civil**

→ *BCSC Rule 56(1) – Contempt of court – Power of court to punish: The power of the court to punish contempt of court shall be exercised by an order of committal or by imposition of a fine or both.*

- Forward looking: attempts to coerce future conduct to obey the injunction

Criminal

→ *Criminal Code, section 708 – Contempt: A person who fails to attend to give evidence where required if guilty of contempt – punishable by fine or imprisonment.*

- Backward looking: attempts to punish for previous wrongful acts
- Criminal offence: requires proof of *actus reus* and *mens rea* BARD