THE FUTURE OF REMEDIES
Moving Beyond Divided Legal and Equitable Remedies in Canadian Law

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ABSTRACT

This work examines the scope of the divide between legal and equitable jurisdictions in Canadian law. It focuses in particular on the divide between legal and equitable remedies, which continues to mold the remedial approach in modern Canada.

It is concluded that the strict separation between legal and equitable remedies is detrimental to legal evolution. The judicial system must strive to serve justice by embracing a flexible and responsive remedial approach. The retention of a division between law and equity inhibits the legal response to the demands of an evolving society. Arguments based in history no longer justify a restrictive and divided remedial jurisdiction.

It is accepted that history and precedent cannot be abandoned altogether. A division between law and equity must be maintained on some level but the scope of this division needs re-evaluation. The distinction between legal and equitable rights does not in itself necessitate a division in remedies. Rather, it is time to move towards a flexible framework of remedies, which is responsive to the particular circumstances of the dispute, irrespective of the historical origins of particular measures.

It is noted in Chapter 1 that a remedial approach influenced by an intermingling of legal and equitable principles, is evident in recent Canadian jurisprudence. In particular, a
resurgence of equitable themes and the expansion of specific equitable remedies, has occurred. Therefore, it is the aspects of equity’s remedial jurisdiction that are focused on in the body of this work.

Chapter 2 provides a brief historical outline of the origins of equity’s remedial jurisdiction. This outline highlights the equitable themes, which retain significance in a modern context and must shape the remedial approach of the future. In the latter half of Chapter 2 the fusion of the administration of law and equity under the Judicature Acts is examined. It is concluded that a mingling of legal and equitable doctrine has occurred in the wake of this fusion and remedial law must embrace this development.

The Canadian judiciary has taken some active steps towards breaking down the divide between legal and equitable remedies. These steps are identified in Chapters 3 and 4, with reference to the evolution of the constructive trust and equitable compensation respectively. These remedies have expanded beyond their historical limitations and have mingled with legal doctrine. The jurisprudence supports a flexible remedial approach that rejects the strict confines of history.

It is concluded that a move beyond the divide between legal and equitable remedies must not be resisted. Remedies must be loosened from their historical anchors to shape a responsive remedial approach in Canadian law.
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Chapter 1: Introduction

A: Overview

The broad theme of my thesis concerns the confusion as to the extent of the divide between law and equity in modern Canadian jurisprudence. Much of the confusion results from a failure to interpret the historical stages in the evolution of the two jurisdictions.

Early History

There is evidence in legal writings of a failure to understand the early history of the two jurisdictions administered in the Common Law Courts and the Court of Chancery respectively. In particular misapprehension abounds in relation to the themes of equitable jurisdiction and the impact of the period of “legalization” of equity.

The Fusion of Common Law and Equity

Debate persists in relation to the scope and impact of the Judicature Acts of 1873 and 1875 which fused the administration of common law and equity under one court system.

Modern Jurisprudence

There has been insufficient academic review of the mingling of law and equity in the wake of administrative fusion.
The resulting failure to appreciate the points of divide and overlap between law and equity remains detrimental to the development of the legal system in Canada. In particular, a strict divide between law and equity is most detrimental in the remedial law sphere, which is the focus of this work. The time has come to loosen remedies from their historical origins and move towards a flexible system of remedies. This calls for a reassessment of the divide between legal and equitable jurisdictions.

B : A Divide between Law and Equity ?

1. Extent of the Divide

Several decades ago Maitland predicted that “a day will come when lawyers cease to inquire whether a given rule be a rule of equity or common law, suffice is it that it is a well-established rule of the High Court of Justice”\(^1\). That day has not arrived but this is not totally regrettable. The divide between law and equity continues to serve some purpose in our legal system. The difficulty lies in prescribing the scope of this division.

Although law and equity are now administered in one court, the separation of the jurisdictions is far from obsolete and continues to encapsulate distinctions in legal rules applied in Canadian courts\(^2\). The distinction between law and equity remains vital to distinguish between equitable rights and legal rights, although absolute definitions must


be avoided. Blackstone’s comments are instructive in this regard. He said that “every
definition or illustration which draws a line between law and equity by setting them in
opposition to each other will be totally erroneous or erroneous to a certain degree”\(^3\). In
particular no all-encompassing definition of equity exists to facilitate a dividing line
between it and common law.

Whilst appreciating the separation between legal and equitable rights it is submitted that a
divide between law and equity cannot pervade all aspects of law, it is argued that a strict
divide between law and equity is inappropriate in the sphere of remedial law.

2. Remedial Law

The future development of remedial law demands a move beyond a strict divide between
legal and equitable remedies. This issue is not merely a question of semantics or
terminology since the distinction between legal and equitable remedies serves to
prescribe the availability of remedies. Such an approach is outdated, inappropriate and
works injustice in a modern setting. It is asserted that the historical origins of remedies
should no longer dictate the availability of those remedies.

The retention of a strict division between the legal and equitable jurisdictions in remedial
damages the legal system as a whole. Remedies are central to the function of the system

\(^3\) Blackstone’s Commentaries Vol. III at 429 et seq.
since the majority of plaintiffs go to court seeking a particularly remedy. Therefore the framework of remedies is central to its effective operation of the law. The legal system through its remedies must aim to answer the demands for justice from its subjects. Most importantly, remedies must adapt and expand as the nature of those demands change with the evolution of society.

The division between common law and equitable remedies, seen as justified by historical forces, serves to restrict remedial flexibility in Canadian law. The future development of the law demands that the inappropriate division be bridged. A flexible framework of remedies, sensitive to the circumstances of the dispute is argued for.

Arguing in favor of a flexible framework of remedies does not require that the legal pillars of certainty or precedent be abandoned. As will be discussed below the distinction between legal and equitable rights means that certain remedies will remain rationally attached to certain rights. In this way precedent will be preserved and a degree of certainty will be ensured.

One argument in favor of retaining a distinction in between legal and equitable remedies turns on the perceived in rem/in personam divide. It has been argued by many "the fundamental difference between law and equity [is] namely that law acts in rem whilst equity acts in personam". However the concepts of in personam and in rem are historical

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terms that can be used in a number of different contexts. These latinisms mean different things in those contexts⁶ and failure to appreciate this has led to the terms becoming confusing and misleading.

In relation to equity it is reasoned that the fact that equity acts in personam has 2 major consequences;

(i) The Chancellor must have a party physically before him and capable of performing the Chancellor’s order.

(ii) Any new right created had to be a right in personam.⁷

In this way it is concluded that equity acts in personam, equitable rights are in personam and equitable remedies are in personam. In contrast it is asserted that the law acts in rem, legal rights are in rem and legal remedies are in rem. In fact, the scope of the terms in rem and in personam is unclear and the concepts do not provide a sound basis for distinguishing between legal and equitable remedies.

Whilst there is a distinction between legal and equitable rights, this does not demand a division in remedies. It must be appreciated that various causes of action, the means through which rights find legal expression, overlap with remedies to a certain degree

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only. The interdependence and independence of causes of action and remedies has implications for a remedial framework.

The acknowledged overlap between causes of action and remedies means that some remedies will be remain rationally attached to certain causes of action and vice versa. However, remedies are not solely defined in terms of causes of action. Remedies are limited in terms of practical considerations as well as society’s expectations of what is appropriate. As Cooper-Stephenson noted the law of remedies is moderated by “considerations of the pragmatic” and thus “the law of remedies embraces concepts separate from those used in the recognition of substantive rights” 8. Moreover many rights giving rise to causes of action are based in legislation nowadays and remedies are frequently external to such provisions 9. A distinction between legal and equitable rights, protected by various causes of action, does not in itself prescribe a similar division in remedial law.

Most important for present purposes, are the situations where a cause of action is established and there are a number of remedies available. One example is where a person wrongfully retains title in property and remedies such as damages or a constructive trust are available. The question then becomes what is the most appropriate remedy in the circumstances. Presently, the division between legal and equitable remedies and the

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9 Hammond, “Rethinking Remedies: The Changing Concept of the Relationship between Legal and Equitable Remedies” in Berryman, supra note 8, at 91.
separate rules relating to each body of remedies influences the answer as to the appropriate remedy. In certain cases the inadequacy of the legal remedy must be proven before a plaintiff can have recourse to equitable remedies. This is an unsatisfactory approach. It is time for the Courts to embrace a flexible remedial approach which responds in the most appropriate way, irrespective of historical origins of a particular remedy.

C: Outline

I intend to support the conclusion that a strict division between legal and equitable remedies is inappropriate by focusing on the history of and evaluating the development of equity's remedial jurisdiction. The emphasis on equity is justified for 2 reasons;

(i) It is the fundamental themes of equity's remedial jurisdiction that underlie the flexible remedial approach proposed. These themes are rooted in the origins of equity's remedial jurisdiction and survived the period of “legalization” of equity. They have emerged in a modern context to enable the courts to respond to an evolving society. The themes must continue to shape a flexible approach to remedial law in the future.

(ii) The evolution of specific equitable remedies provides evidence of a breakdown in the separation between legal and equitable remedies. In particular, the equitable remedies of
the constructive trust and equitable compensation have expanded beyond their historical origins and have mingled with legal doctrine in recent years.

By focusing on equity's remedial jurisdiction it is concluded that a strictly divided remedial jurisdiction no longer reflects the reality of the law administered in the courts. The mingling of legal and equitable remedial principles that has occurred must be recognized. Whilst the history of the divided jurisdictions cannot be abandoned, its role should be to inform as to the nature and consequences of remedies rather than to prescribe and so limit their availability.

In Chapter 2, I will focus on the evolution of equity's remedial jurisdiction. This brief outline touches on the themes that have influenced recent jurisprudence and which underlie the flexible remedial approach argued for. This outline also identifies the origins of individual equitable remedies which have assumed importance in recent decades and support a move beyond a divided remedial jurisdiction.

The historical outline in Chapter 2 traces developments leading to the fusion of law and equity under the Judicature Acts, including a discussion of the "legalization" of equity. The chapter concludes that despite the legislative intent, law and equity have mingled in the wake of administrative fusion.
In Chapter 3 the remedy of the constructive trust is examined. The constructive trust is an example of an equitable remedy which has expanded beyond its historical origins to meet the demands of an evolving society. This remedial device has remained influenced by equitable themes but has mingled with legal doctrine and provides support for a move beyond a strict divide between legal and equitable remedies.

In Chapter 4 the remedy of equitable compensation is discussed. In recent decisions equitable compensation has been shaped with reference to common law principles. The jurisprudence supports an amalgamation of legal and equitable principles to provide for a flexible remedy of compensation. Such an approach moves beyond a strict divide between legal and equitable remedies and allows for a remedial response that rejects artificial historical limitations.

Chapter 5 concludes that the historical justification for a strict divide between legal and equitable remedies is now grossly outdated and is no longer persuasive in a modern context. Furthermore the reality is that this divide is no longer strictly applied. The evolution of society has resulted in a blending of legal and equitable remedies.

Despite this some judges still adhere to a strict separation between legal and equitable remedies or mask more expansive decisions behind a restrictive, historically deferential façade. The final step of amalgamating legal and equitable remedies within a flexible framework of remedies must be taken. This will facilitate the coherent development of
remedial law in the continuing effort to better serve the demands of justice in an evolving society.
Chapter 2: A Brief History of Equity’s Remedial Jurisdiction

A: Introduction

As mentioned in Chapter 1, there has been a failure to appreciate the history of equity’s remedial jurisdiction. This has led to confusion in relation to the perceived division between legal and equitable remedies.

I intend to outline the history of equity’s remedial jurisdiction and to focus on the development of two equitable remedies, the constructive trust and equitable compensation, to support my conclusions. This emphasis on equitable jurisdiction is justified for two reasons;

(i) It is the broad themes of equity which underlie the flexible remedial framework proposed. This framework moves beyond the strict historical division between legal and equitable remedies.

(ii) Individual equitable remedies have assumed significance in recent jurisprudence. These remedies have expanded beyond their historical boundaries, have mingled with legal doctrine and provide support for a move beyond the strict separation of legal and equitable remedies.
(i) Themes of equity

Equity has always been remedial in focus, aiming to administer practical and contextual justice. Equity embraces a desirable conception of a 'remedy' namely; a resolution to satisfy a wronged party's needs, limited by pragmatic and policy considerations. In contrast the common law structure as it evolved, with its emphasis on certainty, formality and precedent limits the flexibility that a remedial framework in a legal system requires. Thus it is the broad themes of equity, rooted in history, which reveal a desirable approach to remedies and must shape remedial law in the modern context. These themes transcend the historical division between law and equity and should govern the remedial response by the Courts in contemporary Canada. In this way "equity remains as vital and fruitful a source of principle as it ever has been because the fundamental notions of equity are universal applications of principle to continually recurring problems; they may develop but cannot age or wither"\(^1\). A brief outline of the history of equity brings us in touch with these themes.

(ii) Recent Development of Equitable Remedies

The resurgence of equitable principles and remedies is evident in recent Canadian jurisprudence\(^2\). The courts have used equitable doctrines in a number of areas as "a means for injecting flexibility demanded by modern conditions and standards into our

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\(^2\) See *Soulos v. Korkontzilas* [1997] 2 S.C.R. 217 as an example of this.
system of legal redress for civil wrongs”. These developments represent “a period of legal transition in which we have been moving away from an era of strict law to one which gives greater emphasis to equity and natural law”.

McLachlin J. has identified two reasons for this “sea change”. First, as Canadian society has evolved, old forms of law have proven inadequate to deal with modern disputes and the courts have had recourse to equitable remedies. This will be illustrated in Chapter 3 with reference to the evolution of the constructive trust as a remedial device. Second the public perception of justice in general has altered, a development which has in turn been reflected in the courts. In Chapter 4, the remedy of equitable compensation in the context of fiduciary law, which serves to introduce a standard of morality in commercial dealings and adequately compensate wronged parties, will be discussed.

Although equity has absorbed new ideas to reflect the demands of an evolving society, it has maintained links with the basic equitable principles established in preceding centuries. In summary, a historical analysis is necessary not only to trace the broad themes of equity but also to fully understand the background to specific equitable remedies which have assumed importance in modern Canadian jurisprudence.

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4 Ibid. at 39.

5 Ibid.

6 Holdsworth, 51 L.Q.R. at 155.
B : The Origins of Equity

The point in time when equitable jurisdiction emerged is not as easy to pinpoint as one might imagine. In "The End of Law as Developed in Legal Rules and Doctrines" Pound divided the progress of legal systems into four stages;

Stage 1 : Primitive law.
Stage 2 : Strict law.
Stage 3 : Equity.
Stage 4 : Maturity of law.

It is however "exceedingly difficult to define the beginning of a new stage in the progress of the law" and so it is hard to say when equity actually began.8.

Studies in the late 19th and early 20th century have revealed that equity and the common law existed undifferentiated in the system of royal justice administered in 12th and 13th century England9. Holdsworth notes that the Curia Regis or King's Court in the 12th century was clearly marked by characteristics of a Court of Equity10.

This system of royal justice was eventually transformed into the common law system under the reign of Henry 2nd. Indeed as Snell states, the whole period from the Norman

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8 Smith, "The Stages of Equity" (1933) 11 L.Q.R. 308 at 309.
Conquest to the reign of Henry 3rd in the 13th century “witnessed the inception and rapid growth of the common law”\textsuperscript{11}.

The common law structure as it emerged at that time was based on a writ system. Under this system the Chancellor, the King’s representative, issued royal writs, which commenced actions in law. Each official writ had to be sealed by the Chancellor who was the keeper of the King’s seal. From the early days of the common law the Chancellor was “in close connection with the administration of justice”\textsuperscript{12}.

Originally the Chancellor retained power to issue new writs. This power was contained in a clause in the 2nd Statute of Westminster. The Chancellor only heard the plaintiffs application and the Courts were free to subsequently quash the writ as contrary to the law of the land\textsuperscript{13}. Gradually his role was restricted as the system of writs was formalized and the power of parliament expanded. Eventually the register of original writs became closed unless it was added to or altered by legislation.

Ultimately “the realization that the power to make new writs is the power to make new law forced writs into a closed cycle and put an end to the free development of the common law”\textsuperscript{14}. The common law system ceased to incorporate equitable characteristics

\textsuperscript{12} Maitland, \textit{Equity - A Course of Lectures} (Cambridge : University Press, 1936) at 5.
\textsuperscript{13} \textit{Ibid.} at 3.
\textsuperscript{14} Barbour, \textit{supra} note 9 at 834.
and became a rigid and technical structure. The Courts were no longer prepared to administer justice on the basis of fairness. By the middle of the 14th century equitable concepts such as ‘fairness’ and ‘good conscience’ had completely disappeared from the common law and all common law tribunals ceased to administer equity\textsuperscript{15}.

Despite the rigidity of the early common law, the Chancellor remained an important figure in the judicial system. He continued to be the keeper of the great seal, he was also a leading member of the King’s council and his office, the Chancery, was a well-organized and efficient department of state\textsuperscript{16}.

The Chancellor retained a common law jurisdiction in relation to matters directly affecting the King’s interests. The King could not be sued in the Common Law Courts so an individual wronged by the King had to plead for justice before the King himself. Such matters were referred to the Chancellor who resolved the particular dispute. He did so in accordance with the law of the land and dispensed a common law jurisdiction.

More important however was the development of the Chancellor’s equitable jurisdiction. As a result of the remedial defects of the early common law the practice developed whereby individuals petitioned the sovereign for a remedy against a fellow citizen. It was the Chancellor who exercised this “residual discretionary power of the King to do justice

\textsuperscript{15} Holdsworth, supra note 10 at 449.
\textsuperscript{16} Holdsworth, supra note 10 at 400.
among his subjects where justice could not be obtained in a common law court”17. The Chancellor assumed the primary role in the administration of the King’s discretionary power and gradually individuals petitioned him directly. In this way the Chancellor developed an equitable jurisdiction.

It seems that there was no distinction between the administration of the Chancellor’s equitable and common law jurisdiction until the 16th century. In dispensing his jurisdiction the Chancellor interacted with the King’s council and the Common Law Courts and throughout the 14th and early 15th century the relations between the Chancellor and common law judges were very close.

Due to the volume of petitions received the Chancery eventually acquired the characteristics of a court18. By the end of the 15th century it was clear that the Chancellor exercised independent jurisdiction as the head of the independent Court of Chancery. At this stage the Court of Chancery “awakened the jealously of the Common Law Courts” and the previous close relations between the two ceased19.


19 Holdsworth, supra note 10 at 451.
C: Emergence of an Independent Equitable Jurisdiction

The defects of the early common law writ system led to the emergence of an independent body of equitable principles administered in a separate court. Despite the fact that it now appears that the concept of 'equity' antedates the establishment of the Court of Chancery by more than two hundred years I am concerned with the later development of equity in the 15th century. Clearly "the lines upon which modern equity has developed were determined in this crucial period"20.

It is possible to classify the cases dealt with by the Court of Chancery as an equitable response to the substantive and procedural defects of the common law system. It is often said that "these three give place in Court of Conscience, fraud accident and breach of confidence"21. More specifically the nature of this early equitable jurisdiction can be divided along the lines proposed by Story22.

(i) Equity's exclusive jurisdiction: Equity developed an exclusive jurisdiction in areas that fell outside the scope of the early common law.

Under the early common law any claim by a plaintiff had to come within the scope of a writ. In practice, these writs simply could not cover all variations of dispute or protect all rights. Because the system was extremely rigid there was little potential for adapting as

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20 Barbour, supra note 9 at 835.
21 see Maitland, supra note 12 at 7.
different circumstances required\textsuperscript{23}. The dominant theme was a tendency to “sacrifice the particular to the general and sacrifice justice to certainty”\textsuperscript{24}.

Equity intervened to protect interests that fell outside the scope of the writs. This jurisdiction initially concerned the recognition, protection and development of uses. The use was a convenient means of transferring an interest in property and it facilitated the evasion of feudal dues and allowed individuals to escape the rigor of certain laws.

Since the common law refused to enforce uses the Court of Chancery intervened with a flexible and efficient procedure for their enforcement. This became a very fruitful area of substantive law as the popularity of the use grew throughout the 15th century\textsuperscript{25}. In 1535 the Statute of Uses\textsuperscript{26} was passed, which abolished the use. However, a clever construction of this statute meant that uses were rescued from destruction and a vital aspect of equitable jurisdiction was preserved.

The modern trust, which developed from the ancient use, has been hailed as the “greatest contribution to the substantive law which has ever been set down to the credit of Chancery”\textsuperscript{27}.

\textsuperscript{24} Smith, *supra* note 8 at 310.
\textsuperscript{25} Maitland, *supra* note 12 at 7.
\textsuperscript{26} *Statute of Uses* (1525) 27 Hen. V 111 c.10.
\textsuperscript{27} Holmes, “Early English Equity” (1885) 1 L.Q.R. 162 at 162.
(ii) Equity’s concurrent jurisdiction: Equity developed a concurrent jurisdiction in cases where the strict enforcement of the law was contrary to equity. Fraud, forgery and duress were the common grounds for interference by equity.

Equity also developed an expansive concurrent jurisdiction. This concerned cases where equity gave relief due to the inadequacy of common law remedies. Originally the common law had no remedy for enforcement of simple contracts and equity intervened on this basis. Subsequently a theory of contract was developed but the only remedy available at law was damages. Equity intervened to supplement the limited range of legal remedies so that a plaintiff who sought specific relief came to the Court of Chancery. Equity’s concurrent jurisdictions also flourished in the form of injunctive relief.

(iii) Equity’s auxiliary jurisdiction: Equity also intervened where remedies which existed at common law were not effectively administered.

A major difficulty with the early common law was the fact that plaintiffs were frequently denied justice in Courts due to the wealth, power and influence of certain defendants. Thus even if a plaintiff could bring a claim within the narrow scope of the writ he/she was frequently denied a remedy due to corruption of the system.

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28 Ashburner, Principles of Equity, 2nd ed. (London: Butterworths, 1933) at 29 Hanbury & Martin, supra note 17 at 5-6.
Individuals began to turn to the Court of Chancery and it was perceived by petitioners that the Chancellor "who possessed the confidence of the King was not easily influenced by threats or bribes". Barbour notes that studies of the petitions to the Court of Chancery reveal a belief amongst all classes that the Chancellor had the power to redress wrongs if the injured person could not protect himself through the common law.

In other cases equity intervened on a procedural level to facilitate administration of a remedy at law. For example, in an action at common law it was often necessary for a plaintiff to obtain discovery of facts resting in the knowledge of the defendant or documents in the possession of the defendant. The common law courts had no power to order such discovery so recourse was had to the Court of Chancery. The superior procedure in the Court of Chancery also rendered it more efficient for dealing with matters of account.

The administrative inefficiency of the early common law system, which forced individuals to resort to equity, has been well documented. Williams in discussing the 15th century lawsuit of Babington v. Venour states that the case illustrates "some of the deplorable effects of the formalism which characterized the pleading and procedure in the 15th century courts of the common law". He refers to the incredibly complex and futile

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30 Barbour, supra note 9 at 857.
31 Barbour, supra note 9 at 857.
32 Snell, supra note 11 at 26.
procedure and states that the case was resolved “with a settlement that might have been attained without the lengthy legal discussion recorded in the reports”\textsuperscript{34}. His concluding remarks assert that the development of equity in the later part of the century was “not only desirable but inevitable” since “the inefficiency of the common law during that period stands out as clearly as does the development of the equitable jurisdiction of chancery”\textsuperscript{35}.

The classification by Story discussed above has been criticized by many. It is acknowledged that Story was attempting to classify a series of disconnected doctrines\textsuperscript{36}. Equity has since expanded beyond the categories outlined by Story. Apart from this, equitable jurisdiction by its very nature defies any form of ordered categorization.

Although it is more accurate to view equity as a series of doctrines, Story’s classification assists in highlighting equitable themes which permeate all aspects of equity’s jurisdiction. It is not appropriate to reject Story entirely and view equity as purely random but rather it represents a diverse jurisdiction shaped by themes.

\textsuperscript{34} Ibid. at 363.
\textsuperscript{35} Ibid. at 363-364.
\textsuperscript{36} Maitland, supra note 12 at 20.
D: Themes of Equity

The first theme of equity's remedial jurisdiction is that it was contextual and pragmatic. The Chancellor was the trier of both fact and law, which meant that he made no sharp distinction between questions of law and those of fact. The Chancellors drew inferences and did not consider themselves bound by precedent when considering the appropriate remedy to resolve a dispute.\(^{37}\)

From this contextual approach the equitable theme of discretion blossomed. However the Chancellor's exercise of discretion was not utterly unprincipled. The Chancellors sought to rely on natural justice and more specifically the principle of conscience. This principle seems to have been an importation from canon law since almost all the medieval Chancellors were ecclesiastics.\(^{38}\)

Although in theory this principle of conscience was seen as based on universal natural justice, in practice the standards applied were criticized as varying with the size of each Chancellor's foot.\(^{39}\) Ultimately the Chancellors relied on their personal ideas about right

\(^{37}\) Ibid. at 8.


\(^{39}\) Snell, supra note 11 at 8.
and wrong\textsuperscript{40}. In the infamous words of Selden “equity is according to the conscience of him that is Chancellor and as that is longer or narrower so is equity. ‘Tis all one as if they should make his foot the standard, one Chancellor has a long foot, another a short foot, another an indifferent foot. ‘Tis the same thing in the Chancellors conscience”. As Maitland notes the Chancellors kept the law of nature in mind and borrowed jurisprudence from the common law, the canonists and civilians where necessary\textsuperscript{41}.

The fact that remedies lay within the discretion of the Chancellor meant that before awarding a remedy the Court of Chancery could take account of circumstances that would not be addressed at common law such as the conduct of plaintiff\textsuperscript{42}. In this way the Chancellor did not only administer equity and good conscience against the defendant. In many cases relief was denied to a plaintiff who himself had been guilty of some unconscionable conduct\textsuperscript{43}. Both remedies as part the exclusive jurisdiction of equity and those in aid of the common law lay within the Chancellor’s discretion.

The Chancellor’s exercised his discretion against the defendant in person and directed the remedy to the conscience of that person only\textsuperscript{44}. Thus another theme of equitable jurisdiction was that equity acted \textit{in personam}\textsuperscript{45}. The maxim that equity acts \textit{in personam}

\textsuperscript{40} Petitt, \textit{supra} note 18 at 3, see also Hanbury & Martin, \textit{supra} note 17 at 7, Barbour, \textit{supra} note 9 at 838.

\textsuperscript{41} Maitland, \textit{supra} note 12 at 8-9.

\textsuperscript{42} Snell, \textit{supra} note 11 at 588.

\textsuperscript{43} see Smith, \textit{supra} note 8 at 314.


\textsuperscript{45} Hanbury & Martin, \textit{supra} note 17 at 19, Petitt, \textit{supra} note 18 at 3.
is certainly now “of less significance than formerly” and is confusing in a modern context\textsuperscript{46}.

The maxim makes most sense in relation to remedies such as specific performance and injunctions which equity developed to supplement the limited range of legal remedies. To avoid conflict with legal rights, it was held that equity acted in personam and granted a remedy only where the legal remedy was inadequate.

Arguably this maxim has lost significance in a modern context and is now misleading. The mingling of doctrine has meant that legal and equitable remedies have been influenced by each other and have expanded beyond their historical origins where the \textit{in personam / in rem} divide developed. It is no longer appropriate to classify equitable remedies as strictly \textit{in personam} and operating against the conscience of the defendant only. Rather, some equitable remedies now appear more like what were traditionally classified as remedies \textit{in rem}.

Furthermore it is confusing to use the term \textit{in personam} to draw a distinction between legal and equitable remedies. We must move beyond the view that in rem legal remedies are the primary remedial response and in personam equitable remedies are imposed only where legal measures are inadequate.

\textsuperscript{46} Snell, \textit{supra} note 11 at 41.
Another perceived theme of equitable jurisdiction is that it equity is reactionary, supplementary and a “gloss” on the common law\(^{47}\). The theme springs from the argument that equitable remedial jurisdiction developed as a result of the gaps in the early common law system. This evolution of equity is viewed as an inevitable consequence of the evolution of a legal system and Aristotle stated “equitable justice is a rectification of law where the law falls short by reason of its universality”\(^{48}\).

Undue emphasis on the supplementary origins of equitable remedial jurisdiction however has resulted in misapprehensions as to its role in modern remedial law and its position alongside legal remedies. Just because equity presupposes the existence of the common law does not undermine its position alongside legal remedial jurisdiction. Equity may have originated as a supplement to the common law but it has become a separate jurisdiction. Its origins should not continue undermine its expansion as a separate jurisdiction and dictate its scope.

The themes of equity, discussed above, were overshadowed as equity experienced a period of “legalization” discussed below. These broad themes, namely the concept of contextual and pragmatic justice, have reemerged and must be nurtured in a modern remedial system. It must also be recognized that specific equitable remedies have expanded beyond their historical confines and have both been influenced by and

\(^{47}\) Petitt, \textit{supra} note 18 at 1.

influenced the evolution of legal remedies. A strict division between legal and equitable remedies is no longer appropriate.

E: The Path to Fusion

1. The “Legalization” of Equity

There were a number of steps that lead to the passing of the Judicature Acts in 1873 and 1875, which fused the administration of common law and equity. First, equity experienced a period of ‘legalization’ which lead to calls for the fusion of the administration of the two jurisdictions.

This ‘legalization’ of equity arose as a result of the conflict between equitable and common law jurisdictions. A direct conflict between the two separate and partially competing jurisdictions was inevitable. Common lawyers criticized the discretion of the Courts of Chancery and the fact that Chancellors did not adequately aquatint themselves with the common law\(^49\). There was also significant hostility towards the Court of Chancery amongst common lawyers because a plaintiff who obtained judgment in his favor in a court of law was sometimes prevented from enforcing it by means of a common injunction granted in equity.

\(^49\) Barbour, supra note 9 at 839.
The common lawyers were linked with activity on the political front so political pressure emerged from the democratic revolutionary forces in England seeking the reform of equitable jurisdiction\textsuperscript{50}. There was skepticism due to the Chancellors’ connections to the monarchy and a fear that his “unrestrained and arbitrary action may be used for purely political ends”\textsuperscript{51}. It was clear that the Court of Chancery could not remain “a fountain of unlimited dispensations”\textsuperscript{52}

In the 16th century these complaints became progressively more “loud voiced”\textsuperscript{53}. The conflict came to a head during the reign of James 1. The Chief Justice at that time, Chief Justice Coke, held that imprisonment for disobedience to injunctions issued by the Court of Chancery was unlawful. He also challenged the validity of decrees of specific performance issued by equity. The hostility between the two Courts culminated in \textit{The Earl of Oxford} case\textsuperscript{54}. Lord Ellesmere contended on behalf of the courts of Chancery that injunctions did not interfere unlawfully with the common law. On the advice of Bacon, the attorney general at the time, and other influential lawyers James 1 issued an order in favor of Chancery.

\textsuperscript{51} Barbour, \textit{supra} note 9 at 858.
\textsuperscript{52} Pollock “The Transformation of Equity” in Vinogradoff, ed., \textit{Essays in Jurisprudence} at 293.
\textsuperscript{53} Barbour, \textit{supra} note 9 at 858.
\textsuperscript{54} (1615) 1 Rep. Ch. 1 & App.
Despite this decision, the subsequent appointment of common law lawyers to the position of Chancellor influenced the transformation of the equitable system to one based on rules and precedents\textsuperscript{55}. In 1692 Lord Shaftesbury retired as Chancellor and he was the last non-lawyer to hold the office. Chancellors such as Lord Nottingham, Lord Harwicke and Lord Eldon vigorously pursued the systemization of equity\textsuperscript{56}. Lord Nottingham declared that the conscience of the Chancellor is not his natural or private conscience but a civil and official one.

Equitable principles became more fixed and cases were reported, cited and relied on in subsequent cases\textsuperscript{57}. Lord Eldon stated that “it is my duty to the authority of those who have gone before me”. The Courts of Chancery also became more concerned with property issues and the need for certain and settled principles of law became more apparent. There were reforms on an administrative level too, including increased appointments to the Courts of Chancery, which became organized and “operated as a regular system of courts”\textsuperscript{58}.

As Snell notes the systemization of equity had its price as equity was administered with increasing rigidity. In \textit{Re Diplock}\textsuperscript{59} the court held that a claim “must be shown to have an

\textsuperscript{55} Hanbury & Martin, \textit{supra} note 17 at 13, see also Berryman, \textit{supra} note 50 at 609.

\textsuperscript{56} Hanbury & Martin, \textit{ibid}. at 7.

\textsuperscript{57} Petitt, \textit{supra} note 18 at 3.

\textsuperscript{58} Snell, \textit{supra} note 11 at 10.

\textsuperscript{59} [1948] Ch 465.
ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction. It is not sufficient that because we may think that the justice of the present case requires it we should invent such a jurisdiction for the first time”60.

In many ways the legalization of equity resulted in “inflexibility that equity was designed to remedy”61. Indeed for many years the themes of equity remained lost as the Diplock approach to equitable jurisdiction flourished.

Despite this period of transformation of equity “the ecclesiastics of the 15th century had erected the groundwork upon which the structure of modern equity is reared”62. Although equity had become institutionalized in a formal court system, discretionary elements in equity did not totally disappear. The principles of conscience and fairness were not destroyed as a result of the legalization of equity63.

Although the “modern respect of equity for precedent may seem to have paralyzed its old ideals, the fine lines of distinction between similar cases...being so much in evidence in the field of equity come eventually to the rescue of those ideals”64. Thus in modern times

60 Ibid. at 481.
61 Berryman, supra note 50 at 609.
62 Barbour, supra note 9 at 859.
63 Hanbury, “The Field of Modern Equity” (1929) 45 L.Q.R. 196 at 205.
64 Maitland, supra note 12 at 206.
“the subtle distinctions to be drawn in cases render it ... possible for the idea of conscience to emerge”

The central themes of equity’s remedial jurisdiction have remained and facilitated a resurfacing of equitable remedies in recent times. Individual equitable remedies such as the constructive trust and equitable compensation have expanded in accordance with equitable themes to meet the demands of twentieth century society. The period of legalization was not fatal to the preservation of equity’s remedial themes but formed an important step on the path to the fusion of equity and the common law.

2. Procedural Difficulties

By the late 19th century the inefficient divided administration of legal and equitable jurisdiction led to calls for the fusion of the two court systems. There were widespread problems because each court administered a separate body of law with a separate procedure and a separate vocabulary of technical terms. The limitation on the jurisdiction of each court was uncertain. Thus a plaintiff could pursue a claim in one court only to find out that he should have pursued it in the other court.

Snell notes the frequency of concurrent proceedings to establish the right in common law and obtain the remedy in the Court of Chancery. Furthermore, parties in the course of

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65 Ibid.
67 Holdsworth, supra note 10 at 634.
litigation were often driven back and forth between the two systems as neither court had full power to grant complete relief in the case\textsuperscript{68}. The Common Law Courts had no power to order specific performance and limited power to grant injunctions and the Chancery Court could not award damages. Snell cites the cases of \textit{Marquis of Waterford v. Knight}\textsuperscript{69} and \textit{Moncton v. Attorney. General}\textsuperscript{70} as examples of this difficulty.

Some of these difficulties were mitigated by either the courts themselves or by statute. The Common Law Procedure Act 1854\textsuperscript{71} gave the Common Law Courts limited power to grant injunctions\textsuperscript{72}. The Chancery Amendment Act 1858 (commonly referred to as Lord Cairns Act)\textsuperscript{73} granted the Court of Chancery the power to award damages in certain circumstances namely instead or in addition to an injunction or an order for specific performance. However these Acts “did not go to the root of the problem” and were inadequate reforms\textsuperscript{74}.

Apart from difficulties caused where the jurisdiction of the two courts overlapped, each separate court was in desperate need of reform. The procedure in common law courts was

\textsuperscript{68} Snell, \textit{supra} note 11 at 11.
\textsuperscript{69} (1844) 11 Cl. & F. 653.
\textsuperscript{70} (1848) 2 Mac. & G. 402.
\textsuperscript{71} \textit{Common Law Procedure Act}, 1854 (U.K.), 17 & 18 Vict., c. 125.
\textsuperscript{72} s.79.
\textsuperscript{73} \textit{Chancery Amendment Act}, 1858 (Lord Cairn’s Act) (U.K.), 21 & 22 Vict. C. 27.
\textsuperscript{74} Snell, \textit{supra} note 11 at 12.
in disarray. The system of pleading was formal and complex often served to obscure the merits of the case. Corruption was also widespread.

There were even more widespread complaints as to the defective procedure in the court of Chancery. First the Court was understaffed which resulted in delays. These delays were aggravated by the system of rehearing and appeals that was put in place. In fact delays in the hearing of cases became synonymous with the Court of Chancery. This is referred to by Charles Dickens in Bleak House who wrote about a “suit before the house which commenced nearly twenty years ago ...and which is no nearer to its termination now than when it was begun”\textsuperscript{75}. The lamentable accuracy of Dickens work of fiction has been noted. Snell mentions the case of \textit{Godfrey v. Saunders}\textsuperscript{76} as an example, where the plaintiff waited 12 years for judgment in Chancery to obtain an accounting remedy and eventually brought an action in the common law courts.

There were further problems because the practice in the Court of Chancery was unsettled and many of the Chancellors “were not competent to settle it”. The Chancellors also failed to supervise the court officials so bribery and corruption became widespread.

Although there were similar problems in the Common Law Courts the complaints about the Courts of Chancery were more frequently voiced. This was because the common

\textsuperscript{75} Dickens, \textit{Bleak House} (England: WA Norton & Co. Inc.) at preface.

\textsuperscript{76} (1770) 3 Wils K.B. 73.
lawyers had influence in the House of Commons which prevented attacks on their own courts. Many common lawyers were also hostile towards the Court of Chancery and availed of any opportunity to publicly criticize it.

In any case the defects were more severe in the Court of Chancery and the early legislative attempts to reform the Court failed. There was also inaction in this respect on the part of the Chancellors. The abuses and defects worsened. Despite some reforms in the early 19th century, procedure in the Court of Chancery remained desperately in need of reform.

**F: The Judicature Acts**

1. **The Impact on Procedure**

Finally the procedural needs were met with the passing of the Judicature Acts of 1873\(^{77}\) and 1875\(^{78}\). These Acts established a Supreme Court of Judicature with a High Court and a Court of Appeal above it. The High Court was divided into the Queens bench division, Chancery division and Probate, Divorce and Admiralty division. Most significantly s.24 of the 1873 Act provided that each division exercised both legal and equitable jurisdiction.

\(^{77}\) *Judicature Act*, 1873 (U.K.), 36 & 37 Vict., c.66.

\(^{78}\) *Judicature Act*, 1875 (U.K.), 38 & 39 Vict., c.77.
S.25 of the 1873 Act provided certain rules as to how legal and equitable jurisdiction was to be administered. Subject to those specific rules subsection 11 provided that “generally in all matters not herein before particularly mentioned in which there is a conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail”.

The precise effect of the Judicature Acts has been a source of debate. There is a conflict between the orthodox view and a more expansive interpretation of the impact of these reforms. Despite this debate the significance of this legislation on a procedural level must not be undermined. Considering the state of the law prior to 1873 procedural reform was a very welcome development. The single court system removed some of the procedural nightmares which had hampered the effective administration of the law for some time. *Walsh v. Lonsdale*\(^79\) is a clear example of the beneficial effect of the Judicature Acts. In that case the plaintiff tenant brought an action for illegal distress against the defendant landlord. Whilst the defendants actions were illegal at law, the plaintiff’s claim failed in equity. Thus the rights of the respective parties under both common law and equity were decided at a single trial.

\(^79\) (1882) 21 Ch. D. 9.
2. The Impact on Substantive Law

As regards the effect on the substantive law the orthodox view is that the Judicature Acts provided for procedural and administrative fusion of the common law and equity and nothing more. They did not provide for any substantive merging of law and equity and did not in any way alter distinct legal and equitable principles. Pettitt argues that it is a complete misapprehension to think that the Judicature Acts aimed to do away with the dichotomy between law and equity. Similarly Evershed argues that to view the Judicature Acts as providing for anything other than procedural fusion is "a misconstruction of the act and of parliamentary intention".

There is significant support for this view. First the wording of the Acts themselves "clearly envisaged that equity and the common law would continued to have a separate existence". In particular s.25 of the 1873 Act, assumes a separate body of doctrine in law and in equity.

Second the jurisprudence of the time seems to affirm the orthodox view. In Joseph v. Lyons the plaintiff sought the return of goods, which the defendant claimed he held as security for a debt incurred by the plaintiff. The plaintiff argued that he had equitable

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81 Petitt, *ibid.* at 10.
82 Evershed, "Reflections on the Fusion of Law and Equity after 75 Years" 70 L.Q.R. 326 at 327.
84 15 Q.B.D. 280.
title to the goods and since the Judicature Acts had abolished the distinction between law and equity he also had legal title. Lindley JA in the Court of Appeal rejected this argument and held that the Acts had no effect on the distinction between equitable and legal title. In an action for wrongful dismissal in *Britain v. Rossiter* 85 it was affirmed that the Judicature Acts had not abolished the distinction between legal and equitable rights or remedies86.

As Maitland noted the wording of s.25 also supports the orthodox view as it assumes a separate body of doctrine in both law and equity. He also emphasized that the section only applied to specific conflicts between law and equity. It did not in any way provide that equity was to supersede the law but merely that where a conflict occurred in relation to a specific issue equity prevailed87. In practice very few disputes required the intervention of s.25 and indeed as Lord Evershed noted an appeal to s.25 was usually “the last hope when better arguments failed”88.

According to the orthodox view Ashburner's famous metaphor in relation to the post 1873 relationship between law and equity is wholly accurate namely; “the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters”89.

85 11 Q.B.D. 123.
86 Holdsworth, supra note 6 at 144.
87 Evershed, supra note 82 at 329.
88 Ibid.
89 Ashburner, supra note 28 at 18.
There is jurisprudence which supports an expansive interpretation of the effects of the Judicature Acts. In *United Scientific Holdings LTD v. Burnley Borough Council*[^90] Lord Diplock stated that "by the Supreme Court Judicature Act of 1873 the two systems of substantive and adjectival law formerly administered by the Courts of Law and Courts of Chancery...were fused"[^91].

The argument that the Judicature Acts "codified law and equity into one subject matter and severed the roots of the conceptual distinctions between them" has been labeled as the fusion fallacy by proponents of the orthodox view[^92]. Indeed in the wake of the *United Scientific* decision Lord Diplock was described as "the most forceful exponent of the fusion fallacy"[^93].

It is submitted that there is no fallacy in the argument that the waters of common law and equity have mingled as a result of procedural fusion. The fallacy is to trace this process as being one intended by the Judicature Acts. This brings us to a third interpretation of the effect of the Judicature Acts namely, that despite the strict intention behind the Acts some mingling of legal and equitable principles has inevitably occurred due to their co-existence in a unified court system.

[^91]: Lord Diplock at 925.
[^93]: Heydon, Gummow and Austin, ibid. at .27.
Support for this third interpretation of the effect of the Judicature Acts can be found in Diplock L.J.’s less extreme statements in *United Scientific*. In the course of his decision he stated that Ashburner’s metaphor “has become both michevious and deceptive”94 and that “the waters of the confluent streams of law and equity have surely mingled now”95.

Similar statements were made by Cooke P. *Aquaculture Corp. v. New Zealand Green Mussel Co. Ltd.* 96. The case concerned a breach of confidence claim against the defendant concerning the use of information about a possible remedy for arthritis made from freeze-dried mussels. In delivering judgment in the case Cooke P. held that “for all purposes now material equity and the common law are mingled or merged”.

Some mingling of doctrine in the wake of the Judicature Acts was inevitable since the provision of a new code of procedure for the superior court “put the relation of equity to law on a new basis” 97. After the passing of the Acts, Lord Justices and Lords of Appeal whose professional training had been in common law took part in the development of equity and vice versa98. This influenced the legal and equitable principles applied under one court system.

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97 Holdsworth, *supra* note 6 at 142.
Denning has noted some aspects of the decisions of the Chancery division and Queens Bench division after the passing of the Judicature Acts. In particular he notes that moral concepts, traditionally associated with equitable jurisdiction, began to play an influential role in the decisions handed down by the queen’s bench. He cites the case of Donaghue v. Stephenson as an example of this.

I intend to support the theory that law and equity have mingled in the wake of the Judicature Acts from a remedial perspective. In particular, individual equitable remedies such as the constructive trust and equitable compensation have mingled with legal doctrine and expanded beyond their historical boundaries. Furthermore, a resurgence of broad equitable themes has occurred which has influenced the move towards a unified system of remedies.

The proponents of the orthodox view, outlined above, assert that the traditional legal and equitable remedial jurisdictions remained in place after the passing of the Judicature Acts. They argue that the system of equity has evolved with definite and well-settled rules which are distinct from but exist side by side with the common law system and supplement it. On this view equitable remedies are capable of development only within these historical parameters.

99 Denning, “Need for a New Equity” (1952) 5 C.L.P. 1 at 8-9.
Recent Canadian jurisprudence refutes this argument and suggests that common law and equity have mingled and that the law is moving towards the creation of a number of unified remedies. This is evident in the case law concerning the constructive trust and equitable compensation.

We have reached the stage that since "neither law nor equity is now stifled by its origin and both are administered by one court, ..... each should borrow from the other in furthering the harmonious development of the law as a whole".

G: Conclusion

The brief outline of equity's remedial jurisdiction before and after the passing of the Judicature Acts serves a number of purposes. First, in tracing the origins of equity the background to individual remedies which have assumed importance in recent years is identified. Second, the discussion above identifies the fundamental themes of equity's remedial jurisdiction.

These themes were abandoned during the period of "legalization" of equity but have re-emerged in the wake of fusion. These themes must remain prominent in this move towards a unified system of remedies. Godfrey comments that "the rules of equity are
founded on the jurisdiction it assumes to relieve you against the unconscionable behavior of your opponent in asserting his legal rights. This is a solid foundation on which to construct a system of unified remedies based on simple principle without any betrayal of equity’s historical antecedents”¹⁰¹.

¹⁰¹ Godfrey at 532.
Chapter 3: The Constructive Trust

A: Introduction

The constructive trust is an equitable remedy which has assumed significance in recent Canadian jurisprudence. What emerges from the relevant decisions is that the Canadian courts view the constructive trust as a flexible remedial device. This remedy has been loosened from its historical origins in equitable jurisdiction to meet the needs of an evolving society.

The approach of the Canadian courts can be contrasted with the approach in England, where the courts continue to view the constructive trust as a substantive institution, vindicating a pre-existing proprietary right.

This chapter begins with an analysis of the leading English decisions, which facilitates a comparison with developments in Canada. I will then briefly outline the position in America, since the jurisprudence from that jurisdiction has also been influential. The second half of this chapter contains a detailed analysis of the Canadian case law.

The analysis leads to the conclusion that the evolution of the constructive trust in Canada is indicative of the move towards a more flexible remedial jurisdiction. The courts have relied on the themes of equity's remedial jurisdiction and have used the constructive trust
to effect justice in various circumstances. Most importantly the development of this remedy by the Canadian courts illustrates that increased flexibility in a remedial approach does not mean that legal certainty is sacrificed.

_Soulos v. Korkontzilas_\(^1\) represents the most recent discussion of the remedy by the Supreme Court. That decision is indicative of the evolution of the remedial constructive trust and the resurgence of equitable theme of good conscience in a modern context. McLachlin J. held that the constructive trust remedy operates in two categories, namely to remedy both unjust enrichment and wrongful gains. The theme of good conscience underpins these categories which incorporate case sensitive tests to ensure the preservation of certainty of property rights.

The move towards a flexible remedial approach as illustrated in _Soulos_ relates to the breakdown of the separation between legal and equitable remedies. The constructive trust has expanded beyond its origins as an equitable remedy. Arguably the flexible remedial constructive trust now has a role in remedying breaches of legal obligations as well as equitable ones. The mere fact of the historical separation between law and equity is no longer sufficient justification of a remedial divide between the two jurisdictions in modern times.

B: A Brief History of the Constructive Trust in England

1. Early Jurisprudence

A discussion of the evolution of the constructive trust in Canadian law requires analysis of English precedents for two reasons. First, the influence of the English legal system on developments in Canadian law is firmly rooted in the history of this jurisdiction. Indeed as Bora Laskin asserted “a scanning of Canadian law reports, whether old or current, will amply demonstrate the continuing and pervasive influence of English decisions in Canadian Courts”\(^2\). The English precedents identify the historical origins and early approach to the constructive trust, as adopted by the Canadian courts.

In recent times however, the Canadian courts have not followed the English jurisprudence. Second, therefore we must outline the modern English approach to constructive trusts in order to compare and contrast developments in these two closely connected jurisdictions.

The early history of the constructive trust in English law is “deliberately vague”\(^3\). The key point however is that English law has regarded the constructive trust as a 'substantive


\(^3\) Per Lord Edmund Davies L.J. in Carl Zeiss Stiftung v. Herbert Smith & Co. (No.2), [1969] 2 Ch. 276 at 300 (C.A.).
institution’, affirming existing proprietary rights and thus limited in operation\(^4\). From the beginning the Chancery Courts compared the constructive to the express trust and so the former was seen as part of the general law of trusts. Indeed express, implied, resulting and constructive trusts were all viewed as “manifestations of the same trust concept”\(^5\).

There have been many criticisms of this approach. Waters asserts that a trust rests on the notion of intention and if the element of intention is removed the true basis of a trust disappears. Thus he argues that a constructive trust, which is imposed by law irrespective of intention, cannot be considered a trust in the traditional sense of the word. Waters also states that whilst both an express trustee and a constructive trustee are required to hold property for the benefit another, they may be subject to different duties. An express trustee must discharge a number of duties in his role of managing property on behalf of others and is subject to the standard of *exacta diligentia* in the performance of these duties\(^6\). The duties of a constructive trustee however have not been made clear and appear to vary with the circumstances\(^7\).

Despite this, the early English case law concerning constructive trusts relied on the simple analogy with the express trust. One direct consequence is that there has been no

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\(^{6}\) Hanbury & Martin, *supra* note 4 at 288.

\(^{7}\) *Ibid.*
analysis of the constructive trust as a distinct legal concept in English law. Rather, the constructive trust has been regarded as a residual category. The classic example of a constructive trust is the case of Keech v. Sandford which concerned a trustee of a lease who negotiated the renewal of the lease in his own favor. The principle that an express trustee may not use his position to make a personal profit was upheld, and a constructive trust was imposed. The courts have also held third parties liable as constructive trustees where they dishonestly assist a trustee in breach of duty or receive trust property transferred in breach of trust. These two categories have been referred to as 'knowing assistance' or 'knowing receipt' but it has been suggested that the terms 'accessory liability' and 'recipient liability' are now preferable. Constructive trusts have also been imposed to enforce secret trusts and mutual wills.

Proceeding from a comparison with the duties of express trustees, the courts have held that a person in a fiduciary relationship with another may not use the position to gain a personal benefit. Since the foundation of the position of express trustee and fiduciary is the same, namely the element of trust and confidence, it has been held that similar

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8 Ibid. at 293.
11 Hanbury, supra note 4 at 293.
principles of conduct should apply. Thus the Courts held that if a fiduciary abused his position, a constructive could be imposed in certain circumstances. One clear example is *Boardman v. Phipps*. Boardman acted as a solicitor to a trust and advised on the purchase of a company in which the trustees held shares. Due to the lack of trust money available he personally helped finance the purchase of the company and subsequently made a profit on his personal shareholding. The House of Lords held that Boardman's opportunity to make this profit arose out of his position as a fiduciary. They concluded that he held this profit on constructive trust for the beneficiaries.

Clearly the categories of fiduciaries are not fixed, and personal representatives, agents, solicitors, company directors, partners, mortgagors and mortgagees have been held liable as constructive trustees.

The emphasis on fiduciary relationships in the context of the constructive trust remedy led to the perceived need to establish the existence of such a relationship before a constructive trust could be imposed. A clear example of this is the case of *Reading v. The Attorney General* where an army sergeant used his position to assist smugglers. He was held to be a fiduciary and on this basis the Crown was entitled to the money. Such decisions have warped the concept of a fiduciary relationship by stretching the definition

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15 See *Hanbury & Martin*, *supra* note 4 at 298-299.
of a fiduciary to facilitate the imposition of a constructive trust. Simultaneously the constructive trust has been confined in application to the sphere of fiduciary law which has hampered its development along remedial lines. Furthermore, since “no comprehensive definition of the expression fiduciary has ever been attempted,” this has complicated any attempts to define the scope of constructive trusts. The traditional English approach to the imposition of a constructive trust, namely considering whether an abuse of a formulaic relationship has occurred as opposed to examining the nature of the act or event, is unsatisfactory.

The English Courts have also held vendors under a specifically enforceable contract for sale liable as constructive trustees. Where specific performance of a contract for sale is a remedy available to the purchaser, equity regards this purchaser as the owner of the land. On this basis a vendor, on conclusion of the contract, becomes a constructive trustee of the land in favor of the purchaser.

Constructive trusts have also imposed by English Courts against individuals who had obtained profit as a result of undue influence or crime since “equity has always been prepared to grant relief from fraudulent and unconscionable conduct.” Initially, equitable intervention was considered to be restricted to specific situations, such as where

18 Oakley, supra note 12 at 48.
20 Oakley, supra note 12 at 19.
a beneficiary kills the testator, but the notion of fraudulent conduct is diffuse and was a particularly broad term in the hands of equity lawyers\textsuperscript{21}. This enabled judges to expand the instances where constructive trusts were imposed under the rubric of remedying fraudulent conduct.

2. The New Model Constructive Trust in English Law

More recently constructive trusts have been imposed where conduct is judged to be "inequitable". As Hanbury & Martin note "this doctrine has been applied in cases where satisfactory solutions under established doctrines have proved particularly difficult to find"\textsuperscript{22}.

The 'constructive trust of a new model'\textsuperscript{23} originated in the resolution of matrimonial property disputes\textsuperscript{24}. Historically, the English Courts adhered to a policy of strict separation of property between married couples, which was enshrined in English legislation\textsuperscript{25}. This policy frequently operated unfairly against the female spouse, in the division of matrimonial property following a separation. It was blatantly unjust in most cases to resolve the dispute in accordance with legal title and enforce the separation of property doctrine, since the property was normally in the husband's name, irrespective of

\begin{footnotesize}
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\item \textsuperscript{21}Waters, \textit{supra} note 5 at 380, see also Oakley, "Has the Constructive Trust Become a General Equitable Remedy?" (1973) 26 Cur. Legal Prob. 17 at 20.
\item \textsuperscript{22}Hanbury, \textit{supra} note 4 at 318.
\item \textsuperscript{23}Eves v. Eves [1975] 1 W.L.R. 1338.
\item \textsuperscript{24}Oakley, \textit{supra} note 12 at 36.
\item \textsuperscript{25}MaCamus & Taman, "Rathwell v. Rathwell: Matrimonial Property, Resulting & Constructive Trusts" (1978) Osgoode Hall L. J. 741 at 744.
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the wife's contributions to the acquisition of the property. This injustice led to the development of the family assets doctrine, albeit that doctrine was finally rejected by the House of Lords in Pettitt v. Pettitt and Gissing v. Gissing.

In Pettitt and Gissing the House of Lords held that matrimonial property disputes had to be resolved in accordance with the intentions of the parties at the time of acquisition of the property. Essentially, the Court asserted that such disputes were to be decided in accordance with the rules of property law as opposed to what was considered 'reasonable and fair' in the circumstances. The Court employed a resulting trust analysis in these cases and found no evidence of a common intention that the interest in the property be divided. Thus the plaintiff in each case was denied relief.

In the wake of Pettitt and Gissing the law was thought by many to be in an unsatisfactory state. Cases had to be decided on a trust basis yet a resulting trust analysis proved problematic in the most relevant cases. In a case where a female spouse contributed financially to the purchase of property then a resulting trust could be imposed in her favor. The more typical scenario however, involved the female spouse making an indirect contribution to the acquisition or maintenance of property, beyond the scope of

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29 Supra note 27.
30 Supra note 28.
31 Dewar, supra note 17 at 292.
the resulting trust rationale. Ultimately the resulting trust doctrine was manipulated to fit the demands of such disputes. In *Falconer v. Falconer*, for example, Lord Denning had to resort to artificially inferring intentions in order to do justice between the parties.

This illustrates the flawed nature of the resulting trust analysis, for not only do the courts have to engage in searching for “the phantom intent” but in so doing the credibility of the judicial process is compromised.

Finally the English courts turned to the concept of a constructive trust and divided matrimonial property in accordance with the principles of equity rather than pursuing a possibly fabricated intent. In the search for an authoritative basis justifying this shift in focus, Lord Diplock’s statements in *Gissing* were taken out of context and cited as authority for the proposition that a constructive trust may be imposed to do justice *inter partes*. This principle of doing justice *inter partes* has also been applied in disputes involving unmarried couples.

Similarly the principle that a constructive trust may be imposed to reach a result required by equity, justice and good conscience has been applied in situations of joint enterprise

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32 See McCamus & Taman, *supra* note 25 at 746.
34 See Waters, *supra* note 5 at 370.
36 Waters, *supra* note 5 at 383.
like that in *Hussey v. Palmer*\(^\text{39}\). In *Hussey* the plaintiff went to live with her daughter and son-in-law and she paid for the construction of the additional bedroom required. After relations between the parties deteriorated the plaintiff moved out and subsequently sought the return of the amount she had spent on the extension to the house from her son-in-law. Lord Denning, in giving judgment, held that it would be against good conscience to permit the defendant to retain full beneficial interest in the house. The Court ordered him to hold an interest for the plaintiff on constructive trust, proportionate to the plaintiff’s contribution. Thus the constructive trust was recognized as a remedial device\(^\text{40}\).

This ‘new model’ constructive trust has also featured in the context of licenses\(^\text{41}\). In protecting licensees the Courts have used the constructive trust as a means of enforcing a contractual license against third parties to achieve a just result\(^\text{42}\). The origins of this approach can be traced to the case of *Binions v. Evans*\(^\text{43}\) where Lord Denning held that the plaintiff’s interest was a license, which bound the purchaser of the property under a constructive trust\(^\text{44}\). This approach was affirmed in *D.H.N. Foods Ltd v. Tower Hamlets London Borough Council*\(^\text{45}\).


\(^{41}\) Hanbury & Martin, supra note 4 at 326.

\(^{42}\) Ibid. at 327.


3. Restriction of the Constructive Trust Remedy in English Law

More recent English decisions seem to have rejected or restricted the use of the new model constructive trust. In *Lloyds Bank Plc. v. Rosset* the House of Lords restated the principles relating to the acquisition of an interest in the home. The notion that the court has a discretion to impose a constructive trust to achieve a fair result was rejected.

The Court of Appeal also discussed the undesirable consequences of imposing a constructive trust in license contexts in *Ashburn Anstalt v. Arnold*. On the facts the occupier was held to have a tenancy but the Court discussed *obiter* the situation where an individual is a licensee. Whilst it was held that the constructive trust may be an appropriate remedy in specific cases, any wide principle as to the availability of the constructive trust remedy for licensees was rejected.

Indeed the impact of the 'new model' constructive trust has declined in general since Lord Denning's retirement and recent cases have reaffirmed the ratio of the *Pettitt* and *Gissing* cases. There have been a number of factors that have contributed to this rejection of the remedial constructive trust.

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48[1989] Ch.1

There has been a failure in England to distinguish clearly between resulting and constructive trusts. The House of Lords has used the terms interchangeably on occasion, which leads to "conceptual chaos". More detrimental has been the absence of a theoretical framework to shape the concept of the constructive trust. Until recently English law did not accept the principle of unjust enrichment, a principle which has defined the scope of the constructive trust in America and, to a large extent, in Canada. Judicial concern over the broad nature of unjust enrichment has had an impact on the law of constructive trusts. The fear of palm tree justice led to the imposition of constructive trusts in very specific situations. With no solid foundation, the fluid and residual category of a constructive trust was abandoned by the English judiciary in the demand for legal certainty.

The principle of unjust enrichment has now been accepted as forming part of English law and in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* Lord Browne-Wilkinson suggested that the introduction of the remedial constructive trust may be an appropriate basis for developing proprietary restitutionary remedies. His statements were purely *obiter* however and decisions such as *Lloyds Bank v. Rosset* vehemently reject the constructive trust in favor of a return to the more orthodox

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50 McCamus & Taman, *supra* note 25 at 752.
principles of property law. In this respect Canadian courts have broken free from English precedent and have followed a divergent path, similar to that of the American courts.

**C : An Outline of The American Approach**

Whilst an in-depth analysis of the American case law and academic writings on the topic of constructive trusts is beyond the scope of this paper, a very brief discussion is necessary. The American jurisprudence in this area stands in stark contrast to the English approach yet it has been an influential force on Canadian developments.

In the United States the constructive trust is regarded as "the formula through which the conscience of equity finds expression". More specifically, in the wake of the publication of "Restatement of the Law of Restitution" the constructive trust has been regarded as an equitable remedy based on the principle of unjust enrichment. In contrast to the English approach, American law has recognized that the similarities between the constructive and express trusts are superficial. Rather, the differences between the two demands that the constructive trust be regarded as a distinct legal

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54 Hanbury & Martin, *supra* note 4 at 330.
57 Dewar, *supra* note 17 at 266.
entity\textsuperscript{58}. Thus the constructive trust is “an instrument for remedying unjust enrichment”\textsuperscript{59}.

Whilst the American approach recognizes the constructive trust as a remedial device largely unfettered by any historical bond to the express trust, the approach is still somewhat restrictive. Limiting the constructive trust remedy to cases of unjust enrichment exclusively is unsatisfactory. The constructive trust must be perceived as a flexible remedy, molded by the broad themes of equity. Furthermore it demands a move beyond the historical divide between legal and equitable jurisdictions. The Canadian courts have gone further towards this desirable end than their American counterparts.

D: The History of the Constructive Trust in Canada

1. Early History

The pattern of the English case law on constructive trusts was, up to 1980, mirrored in Canada\textsuperscript{60}. English precedents have, to a point, dictated the evolution of the Canadian constructive trust, so that express trustees, intermeddling third parties, fiduciaries and those guilty of fraudulent or unconscionable conduct have been held liable as constructive trustees by the Canadian courts\textsuperscript{61}. These decisions represent an affirmation of the view of

\textsuperscript{58} Ibid. at 276.
\textsuperscript{59} Oakley, supra note 12 at 10.
\textsuperscript{60} Waters, supra note 5 at 378.
\textsuperscript{61} For a discussion of the case law see Maddaugh & McCamus, “The Law of Restitution” (Canada Law Book Inc., 1990) at 83-87.
the constructive trust as institutional, limited in operation to a number of clearly defined categories.

As in England, Canadian matrimonial property disputes during the 1970’s demanded a reappraisal of the traditional remedies available and thus facilitated the growth of the remedial constructive trust. This process of growth has been a complex one since the English cases fostered the emergence of two conflicting approaches to the resolution of such disputes in Canada; the justice and equity school and the intent school respectively\(^{62}\). The former embraces the concept of the remedial constructive trust as necessary to do justice *inter partes*. The latter school focuses on the intention of the parties as determinative and favors the imposition of a resulting trust to divide property in accordance with intention.

In *Thompson v. Thompson\(^{63}\)* the court adhered to the intention based approach and held that there was no evidence of a direct financial contribution by the wife to the acquisition of the property. Furthermore, none of the other financial dealings between the parties indicated a proprietary interest on the part of the wife. In the absence of any evidence of a common intention that each party would have an interest, the court denied relief to the plaintiff.

\(^{62}\) See Waters, *supra* note 5 at 368 and McCamus & Taman, *supra* note 25 at 750.

The intention based approach was upheld by the Supreme Court in *Murdoch v.* *Murdoch*[^64]. It was held that, before imposing a trust, the court must look to proof, in the form of words or conduct, that the parties involved had a common intention that the property be shared between them. In delivering the judgment of the majority Martland J. held there was no evidence of such a common intention in the case. The majority refused a trust remedy but failed to distinguish between the various types of trusts. Instead the court adopted the confusing words of Lord Diplock who referred in *Gissing* to a “resulting, implied or constructive trust” and stated that it was “unnecessary for present purposes to distinguish between these three classes of trust”[^65].

Laskin J. dissented in *Murdoch* and pointed to the evidence of the plaintiff’s extraordinary contribution in terms of financial assistance and labor, which supported the imposition of a trust in her favor. He referred to the decision in *Deglman v. Guaranty Trust Co. of Canada and Constantineau*[^66] and held that the principle of unjust enrichment applied in that case was applicable to the case at bar[^67]. He held that Mr. Murdoch would be unjustly enriched at the plaintiff’s expense if he retained an absolute interest in the land and the assets. Laskin J. also cited the American jurisprudence supporting the imposition of a constructive trust to remedy an unjust enrichment.

[^65]: per Lord Diplock in *Gissing*, supra note 28 at 905 (A.C).
[^67]: per Laskin J. in *Murdoch*, supra note 64 at 451 (S.C.R.).
In discussing the constructive trust, Laskin J. stated that it is not based on intent, express or otherwise, and thus conceptually it is crucial to distinguish between it and other types of trusts. Whilst accepting that a resulting trust analysis may operate in certain cases, he alluded to the difficulties associated with such an approach in the domestic context. Thus he held the constructive trust to be the “appropriate mechanism” for awarding relief in the Murdoch case.

This dissenting judgment paved the way for the development of the remedial constructive trust and introduces the key point of divergence between the Canadian and English courts. Laskin J. drew on the principle of unjust enrichment as the basis of the remedial constructive trust, whereas the English courts have refused until very recently to accept this principle as forming part of the law. In the English jurisdiction, therefore, those like Lord Denning who advocated a justice and equity approach embracing the remedial constructive trust were “hopelessly limited in their assertions.”

Despite Laskin J.’s powerful dissent the majority decision in Murdoch remained and the difficulties with a resulting trust analysis in the matrimonial property sphere soon became apparent. These difficulties are numerous since the nature of the resulting trust and the nature of the disputes themselves combine to prevent coherent analysis. The resulting trust is based on intention, other than that which is recorded in writing or orally.

68 Ibid. at 454.
70 Waters, supra note 5 at 376.
communicated, and therefore practical difficulties in ascertaining such intention are likely. These difficulties are exacerbated in a domestic context where it is extremely difficult for parties to point to clear evidence of intent. It is also difficult for parties to establish a causal connection between the contribution and the property in question. As Professor McClean states a doctrine “beset with such factual difficulties is obviously a precarious basis on which to decide property disputes”.

These difficulties and the injustice that resulted where a strict resulting trust analysis was applied led to contrived intention analysis by the courts in the wake of Murdoch. The courts were forced to manipulate the intentions of the parties to achieve the desired result and essentially they employed a constructive trust approach “masquerading as a resulting trust one”.

Despite this, the intention-based approach was again upheld in Rathwell and the Supreme Court imposed a resulting trust in favor of the plaintiff. Martland J., speaking for the majority, rejected the constructive trust approach stating that the concept had not yet been extended “to enable a court to allocate property between a husband and wife on the basis of a broad discretion as to what the court considers would be just and 

72 Ibid. at 165.
73 Dewar, supra note 17 at 300.
74 Waters, supra note 5 at 368.
equitable”76. He went on to state that such an extension of the scope of the constructive trust would be a matter for the legislature.

Dickson J. spoke for the minority in Rathwell and was joined by Laskin and Spence JJ. Indeed the majority and minority positions in this case illustrate the divide between the two conflicting schools of thought77. Dickson J. explained that the charge against the justice and equity approach is that it amounts to “palm tree justice” whereas the charge against the intent doctrine is that it demands a search for phantom intent78. He went on to assert that the American justice and equity approach is both “flexible and satisfactory” in comparison to the English intention-based approach. He concluded that “accepting unjust enrichment has opened the way to recognition of the constructive trust as an available and useful remedial tool in resolving matrimonial property disputes”79.

Dickson J. also attempted to untangle what he referred to as the “muddle” which “has arisen due to the failure to distinguish between resulting and constructive trust”80. He pointed out that the distinction is of “practical importance” and clearly lies in terms of intent81. The resulting trust is grounded in intent, inferred or presumed, whereas the constructive trust is imposed irrespective of intent.

76 Ibid. at 474 (S.C.R.).
78 McCamus & Taman, supra note 25 at 750.
79 Per Dickson J in Rathwell, supra note 75 at 444 (S.C.R.).
80 Ibid.
81 Ibid. at 450.
The minority concluded that the plaintiff’s financial contribution led to a presumption of a common intention to split the interest in the property, which entitled her to a resulting trust. They also held that the defendant’s unjust enrichment, which would result if he retained absolute title, meant that she succeeded in constructive trust\textsuperscript{82}. Thus the minority found both a resulting and constructive trust in favor of the plaintiff but Dickson J. asserted that the constructive trust was to be preferred over the resulting trust in such circumstances.

Finally, in \textit{Pettkus v. Becker}\textsuperscript{83}, the majority of the court expressly favored the constructive trust remedy and thus the Canadian courts finally “rejected the approach of searching for the phantom intent”\textsuperscript{84}. The majority held that a strict resulting trust was not applicable on the facts and that the remedy of a constructive trust had to be considered. Dickson J. speaking for the majority accepted the constructive trust as a remedial device “founded squarely on the principle of unjust enrichment”\textsuperscript{85}.

So a process that began with a powerful dissenting judgment in \textit{Murdoch} culminated in the decision of the court in \textit{Pettkus}. The notion of the remedial constructive trust was

\begin{itemize}
  \item \textsuperscript{82} \textit{Ibid.} at 476.
  \item \textsuperscript{83} [1980] 2 S.C.R. 834, 117 D.L.R. (3d.) 257 [hereinafter \textit{Pettkus}].
  \item \textsuperscript{84} Scane, \textit{supra} note 35 at 270.
  \item \textsuperscript{85} Maddaugh & McCamus, \textit{supra} note 61 at 79.
\end{itemize}
embraced by the court but was defined in terms of the principle of unjust enrichment.
The precise implications of this now have to be considered.

2. The Recent History of the Constructive Trust

The *Pettkus* decision was clearly the major turning point in the evolution of the remedial constructive trust in Canada. In that case a constructive trust was imposed to prevent Mr. Pettkus' unjust enrichment at Miss Becker's expense. Thus the remedial nature of the constructive trust was recognized within the framework of the principle of unjust enrichment. Indeed as Dickson J. stated that "the principle of unjust enrichment lies at the heart of the constructive trust"\(^86\). The precise implications of this statement, and thus the scope of the decision in *Pettkus*, has been a fertile source of debate. Judges and academics alike have been concerned with the points of intersection between unjust enrichment and the constructive trust. A critical analysis of the case law reveals how the area of overlap between the principle and the remedy has developed.

The obvious starting point is the *Pettkus* decision itself where the Supreme Court held that a resulting trust did not apply on the facts, as the trial judge in the case found no evidence of a common intention between the parties to share the property. Thus the remedy of a constructive trust was considered.

\(^{86}\) Per Dickson J in *Pettkus*, supra note 83 at 847 (S.C.R.).
After having stated that the principle of unjust enrichment lies at the heart of the constructive trust, Dickson J. examined the substance of the principle itself. In affirming his decision in Rathwell87 he outlined the elements necessary to establish unjust enrichment, namely: proof of an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment88.

Since it was held that “Mr. Pettkus had the benefit of nineteen years of unpaid labor, while Miss Becker had received little or nothing in return”89 the requirement of proof of an enrichment and a corresponding deprivation was satisfied. In focusing on “the absence of a juristic reason” element of the test, Dickson J. said that essentially the enrichment must be shown to be unjust. He held that this requirement was satisfied on the facts because “where one person in a relationship tantamount to spousal, prejudices herself in the reasonable expectation of receiving an interest in the property, and the other person in the relationship freely accepts the benefits conferred by the first person, in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it”90. Thus Miss Becker’s reasonable expectation of acquiring an interest and Mr. Pettkus’ implicit acceptance of this expectation supplied the “unjust” factor.

87 Supra note 75.
88 Per Dickson J in Pettkus, supra note 83 at 848 (S.C.R.).
89 Ibid. at 849.
90 Ibid.
After having concluded that unjust enrichment had been shown, Dickson J. stated that the case warranted the application of the constructive trust remedy, and that he was imposing one “in the interests of justice”\textsuperscript{91}. This vague and open-ended reasoning did little to clarify the precise connection between the principle of unjust enrichment and the constructive trust. The vital question as to the exact circumstances in which the imposition of a constructive trust is justified remained unanswered. Furthermore to refer to the interests of justice as a criterion subjects the determination of proprietary rights to “the formless void of individual moral opinion”\textsuperscript{92}. Indeed in a subsequent decision in \textit{Lac Minerals v. International Corona Resources Ltd.}\textsuperscript{93} La Forest J. expressly criticized the view “that a proprietary remedy can be imposed whenever it is just to do so”\textsuperscript{94}. Scane notes the traditional “fear of disturbing property rights in response to a sense of unconscionability not elaborated by a body of rules”\textsuperscript{95} which is justified and must be avoided.

The decision in \textit{Pettkus} is also flawed because of confusing usage of the terms unjust enrichment and constructive trust. In his judgment Dickson J. states that the purpose of the constructive trust is to “prevent unjust enrichment in whatever circumstances it occurs”\textsuperscript{96}. This is however only one purpose of the constructive trust. The unjust

\textsuperscript{91} \textit{Ibid} at 850.

\textsuperscript{92} See per Deane J in \textit{Muschinski v. Dodds} (1985), 160 C.L.R. 583 at 616.

\textsuperscript{93} [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter \textit{Lac}].

\textsuperscript{94} \textit{Ibid}. at 677 (S.C.R.).

\textsuperscript{95} Scane, \textit{supra} note 35 at 261. See also Dewar, \textit{supra} note 17 at 299.

\textsuperscript{96} Per Dickson J in \textit{Pettkus}, \textit{supra} note 83 at 851 (S.C.R.).
enrichment principle is simply not wide enough to cover all instances of the constructive trust[^7]. There have been numerous cases where a constructive trust has been imposed yet the fact pattern simply cannot be viewed in terms of one party having been enriched and the other deprived[^8]. Thus the recognition of the remedial nature of the constructive trust in *Pettkus* did not distinguish the existing precedents on constructive trusts which previously affirmed the English institutional approach as part of Canadian law. Careless use of the terms constructive trust and unjust enrichment misrepresents history and causes confusion.

In considering the application of the constructive trust remedy Dickson J. alluded to the causal connection required between the acquisition of the property in question and the plaintiff's contributions. Here again, however, a conflation of the terms unjust enrichment and constructive trust is evident. Dickson J. held that "for the unjust enrichment principle to apply...some connection must be shown between the acquisition of the property and the corresponding deprivation"[^9]. This statement is inaccurate since such a connection to property must only be shown for a constructive trust remedy to apply after unjust enrichment has been proven. Clearly a connection between the plaintiff's contribution and some piece of property need not be shown in all cases of

[^7]: McClean, *supra* note 71 at 168. See also Waters, *supra* note 5 at 396.


unjust enrichment, since to prove unjust enrichment it is enrichment *per se*, and not necessarily proprietary enrichment, that needs to be established\(^{100}\).

Thus despite the importance of the *Pettkus* decision there was confusion in its wake as to the interplay between the unjust enrichment principle and the constructive trust. Some of the confusion emanating from *Pettkus* was dispelled in the subsequent *Sorochan v. Sorochan*\(^1\) decision. The reasoning in the latter case was well structured with a dividing line drawn between the consideration of the elements necessary to establish unjust enrichment and those necessary to impose a constructive trust to remedy that enrichment. The court held that “to ascertain whether a constructive trust should be imposed in this case, we must begin by examining the doctrine of unjust enrichment”\(^{102}\).

The court affirmed *Pettkus* in relation to the three components of an unjust enrichment claim, and held that there must be proof of a clear enrichment and a corresponding deprivation and that the enrichment must be unjust\(^{103}\). It was held that these requirements were satisfied on the facts and, as in *Pettkus*, found the enrichment to be unjust because Mary Sorochan had “a reasonable expectation of receiving some benefit in return for her 42 years of domestic and farm labor”\(^{104}\).

\(^{100}\) Litman, *supra* note 51 at 429.


\(^{103}\) *Ibid*.

\(^{104}\) *Ibid.* at 46.
The court then stated that there were a number of remedies available in cases of unjust enrichment and the question of when is it appropriate to impose a constructive trust in favor of the plaintiff had to be confronted\(^{105}\). First the causal connection requirement justifying the imposition of a constructive trust was considered. In *Sorochan*, in contrast to *Pettkus*, the respondent had acquired the property before the relationship between him and the appellant began. Thus he sought to argue that a connection had to be shown between the deprivation and the actual acquisition in order for a trust to be imposed in her favor. The court however, referred to the more general term of a "clear link" mentioned in *Pettkus* and agreed that the issue is one of fact\(^{106}\). After reviewing the relevant case law Dickson J. noted the comment by Cory J. in the Court of Appeal that it may be necessary to distinguish between commercial and domestic cases \(^{107}\). Ultimately the court stressed the need "to retain flexibility in applying the constructive trust"\(^{108}\) and it was held that a contribution relating to the preservation, maintenance or improvement of the property would satisfy the causal connection test. The overarching reasoning was that the issue is a question of fact as to whether the services have rendered a "clear proprietary relationship"\(^{109}\).

\(^{105}\) *Ibid.* at 47.


\(^{107}\) *Ibid.* at 49.

\(^{108}\) *Ibid.* at 50.

The court also referred to the expectation of the appellant of acquiring an actual interest in the property as relevant to the imposition of the *in rem* remedy of a constructive trust. Thus the question of the appellant’s reasonable expectations was relevant at two stages of the reasoning. First, as discussed above, the reasonable expectation of a plaintiff goes to proving unjust enrichment. Secondly the reasonable expectation of a plaintiff of acquiring an actual interest in the property is a relevant consideration in imposing a constructive trust. The court held that a constructive trust remedy was justified on the facts since the appellant had a reasonable expectation of acquiring an interest in the property, which the respondent was aware of. Finally the court considered the longevity of the relationship as a consideration in awarding an *in rem* remedy but as Prof. Farquhar notes the precise significance of this dicta concerning the length of the relationship is not clear.

Indeed, the precise interplay between these considerations, relevant to the imposition of a constructive trust namely: the causal connection, the reasonable expectations of the parties and the length of the relationship, is not clear from the *Sorochan* decision. Prof. Farquhar argues that the statements of Dickson J. suggest that “even if there is no causal connection between the plaintiffs contributions and the property in question, a

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constructive trust may be imposed on the property if the plaintiff entertained reasonable expectations in that regard". The argument is that where a court has found a defendant to be unjustly enriched the plaintiff must establish either a causal connection to the property or a reasonable expectation of acquiring an interest in the property in order to have a constructive trust awarded. Whilst such an assertion may be stretching Dickson J’s statements which seem to suggest that both causal connection and reasonable expectation are equally relevant ‘considerations’ in imposing a constructive trust the argument itself is appealing. Indeed Prof. McClean also argues that proof of a reasonable expectation of acquiring an interest may be sufficient to impose a constructive trust.

He asserts that if there is no proof of a reasonable expectation then a causal connection must be established.

The Sorochan case also raises questions in relation to proving such a reasonable expectation of acquiring an interest in the property and when that expectation may be inferred. Clearly however where causal connection can be established it will not be necessary for a claimant to rely on reasonable expectation. Most importantly, in domestic cases this causal link requirement will generally be easy to satisfy since any

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113 Farquhar, “Causal Connection in Constructive Trusts” (1986) 8 Est. and Tr. Q. 161 at 180.
114 Farquhar, supra note 112 at 349.
116 McClean, supra note 71 at 171.
117 Farquhar, supra note 113 at 184.
118 Ibid. at 185.
contribution which liberates the defendant’s assets will ensure a causal link. This ‘link’ may be more difficult to establish in non-matrimonial cases but this may be viewed as an effective way to distinguish between contexts and limit the operation of the constructive trust\textsuperscript{119}.

Thus it appears on the basis of \textit{Sorochan}, that a two-tiered test may be in place in considering the application of the constructive trust remedy. This would require that in a case of unjust enrichment the plaintiff must either establish a causal connection to the property or alternatively, where necessary, must prove a reasonable expectation of acquiring an interest.

Ultimately \textit{“Sorochan solved a number of points of doctrinal confusion emerging out of Pettkus v. Becker”}\textsuperscript{120}. First the decision clarifies the dividing line between the unjust enrichment principle and the constructive trust remedy since the court held that a case of unjust enrichment must be made out and then in certain circumstances a constructive trust may be considered as one of the available remedies for effecting restitution. The decision also modifies the causal connection requirement to include contributions relating to the preservation, maintenance or improvement of property acquired before the relationship between the parties began. Interestingly, a review of subsequent case law reveals that in reality this modification is minimal and that the case “has not brought about any

\textsuperscript{119} Litman, \textit{supra} note 51 at 430. See also McClean, \textit{supra} note 71 at 172.

\textsuperscript{120} Farquhar, \textit{supra} note 113 at 186.
discernible trends or shifts in emphasis in the law concerning constructive trust and
causal connection”\textsuperscript{121}.

Despite the developments in \textit{Sorochan} the decision “is not without difficulties of its
own”\textsuperscript{122}. There is a lack of clarity in relation to the issues of causal connection and
reasonable expectations of the parties and the question of distinguishing commercial and
domestic cases is raised.

The decisions in \textit{Sorochan} and \textit{Pettkus} were obviously shaped by the domestic nature of
the disputes but the issue of the application of the constructive trust in a commercial
context was raised in \textit{Hunter Engineering Co Inc. v. Syncrude Canada Ltd.}\textsuperscript{123}

Ultimately, the majority held that the claim of unjust enrichment was not made out and
therefore no question of a restitutionary remedy arose. Wilson J. however, in dissent,
asserted that an unjust enrichment analysis giving rise to a constructive trust was by no
means limited to the family context.

In the case of \textit{Lac Minerals v. International Corona Resources Ltd.}\textsuperscript{124} the application of
a constructive trust remedy in a commercial context was directly considered. The issues

\textsuperscript{121} Farquhar, supra note 112 at 349.
\textsuperscript{122} Farquhar, supra note 113 at 181.
\textsuperscript{124} Supra note 93.
presented to the Supreme Court on appeal concerned whether there was a breach of a fiduciary duty and a breach of confidence by the mining company, Lac Minerals, and what the appropriate remedy might be.\footnote{125} A majority rejected the existence of a fiduciary relationship between the parties but upheld the breach of confidence claim. The Court imposed a constructive trust in favor of the plaintiffs, International Corona Resources Ltd., but the decision is unclear as to the basis on which the remedy was imposed. One reading is that the trust was not imposed to remedy an unjust enrichment claim as in previous cases but rather to remedy the claim of breach of confidence as a legal wrong. This is supported by statements of La Forest J. that "breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate."\footnote{126} Thus the breach of confidence can be viewed as the cause of action and the constructive trust as the restitutionary remedy imposed to right that wrong. This interpretation represents an expansion of the remedial constructive trust beyond the unjust enrichment context discussed in both Pettkus and Sorochan.

The judgment however is confusing as La Forest J. also states that "the restitutionary claim has been made out"\footnote{127} which suggests that he imposed a constructive trust on the basis of unjust enrichment. Ultimately it appears that La Forest J. confuses the notions of restitutionary relief in the form of a constructive trust and an unjust enrichment claim. He

\footnote{125} For a detailed discussion of the case see Waters, Case Comment (1990) 69 Can. Bar Rev. 455. 
\footnote{126} Per La Forest J. in Lac, supra note 93 at 670 (S.C.R.). 
\footnote{127} Ibid. at 671.
appears to hold that since the plaintiff has established a breach of confidence, restitutionary relief in the form of a constructive trust may remedy that wrong. He also holds however, that before a constructive trust can be imposed an unjust enrichment ‘claim’ must be made out. La Forest J. refers to *Hunter* and the two-tiered approach affirmed in that case whereby “first the Court determines whether a claim for unjust enrichment is established and then secondly examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment”\(^\text{128}\).

Clearly, this approach is applicable where unjust enrichment is the cause of action and the court then considers the appropriate remedy. Where however, as in *Lac*, a breach of confidence is the cause of action the unjust enrichment analysis is not relevant in considering whether a constructive trust is the appropriate form of remedy. A constructive trust is not exclusively tied to unjust enrichment claims but, as an expansion of its institutional function, can be imposed to remedy a wrong.

La Forest J. despite concluding that a breach of confidence had been established, proceeded with an unjust enrichment analysis. He held that Lac was unjustly enriched at Corona’s expense and that a constructive trust could be imposed in relation to the property that Corona would have acquired but for the breach of confidence by Lac\(^\text{129}\).


\(^{129}\) *Ibid.* at 673.
Aside from the confusing reasoning the key point is that a constructive trust was imposed in a situation where the plaintiffs had no previous interest in the property. but La Forest J. asserts that the rationale of the law of restitution ensures that “the fact that Corona never owned the property should not preclude it from pursuing a restitutionary claim”\textsuperscript{130}.

Sopinka J. in dissent pointed to the fact that the constructive trust remedy is “ordinarily reserved for situations where a right of property is recognized”\textsuperscript{131}. He went on to state that precedent supports a remedy of damages as adequate in cases of breach of confidence and asserts that there is no justification for breaking with such precedent on the facts of Lac\textsuperscript{132}.

In the course of his expansive reasoning La Forest J., echoing the words of Dickson J. in Pettkus, stressed that the constructive trust does not lie at the heart of the law of restitution. He held that “it is but one remedy and will only be imposed in appropriate circumstances” and referred to the availability of other legal and equitable remedies\textsuperscript{133}.

Traditionally, under the adequacy doctrine, a plaintiff had to exhaust the legal remedies available before turning to equitable remedies but La Forest J. appears to reject the rigidity of this doctrine and states that “to award only a monetary remedy in such

\textsuperscript{130} \textit{Ibid.} at 669.
\textsuperscript{131} \textit{Ibid.} at 615.
\textsuperscript{132} See Waters, \textit{supra} note 125 at 463.
\textsuperscript{133} Per La Forest J. in Lac, \textit{supra} note 93 at 674 (S.C.R.).
circumstances where an alternative remedy is both available and appropriate would in my view be unfair and unjust.\(^{134}\) He stresses however, that the courts should not automatically overlook the legal remedies available as alternatives to the constructive trust and furthermore that the Court must carefully consider the consequences of a constructive trust. In referring to the *Hunter*\(^{135}\) case he held that “had the restitutionary claim been made out there would have been no reason to award a constructive trust as the plaintiff’s claim could have been satisfied simply by a personal monetary award”. Thus “a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right to property”\(^{136}\). This appears to be a rational approach which both accommodates concerns over the far-reaching nature of the constructive trust yet facilitates the freedom to move beyond the confines of legal remedies where the circumstances so demand.

In recognizing the remedial nature of the constructive trust La Forest J. also asserted the flexibility of the remedy. He rejected both the notion of a requirement of a special relationship between the parties, or that the plaintiff has a previous recognizable right to the property and concluded that the truly remedial nature of the constructive trust meant it could be imposed both to recognize and to create a right of property\(^{137}\). Thus it has been said that this case cemented the remedial nature of the constructive trust.

\(^{134}\) *Ibid.* at 675.

\(^{135}\) *Supra* note 123.

\(^{136}\) *Per* La Forest J. in *Lac,* *supra* note 93 at 678 (S.C.R.).

\(^{137}\) *Ibid.* at 676.
The *Lac* decision not only represents the express recognition of the constructive trust remedy in a commercial context, but the scope of the remedy is redefined. The redefinition means that the issues of causal connection and reasonable expectation of the parties were not raised as relevant issues. The progressive element of the reasoning of La Forest J. is, however, tainted by the confused analysis of the concepts of unjust enrichment, restitutionary relief and the constructive trust respectively. Since *Lac* is not an unjust enrichment case the most favorable interpretation of the decision is that a constructive trust was imposed to remedy a wrong.

The subsequent *Rawluk v. Rawluk*\(^\text{138}\) case concerned the remedial constructive trust and the Family Law Act 1986 and specifically whether a constructive trust could be imposed where the Act provided a remedy for the unjust enrichment complained of. Cory J., in delivering judgment for the majority, reviewed the evolution of the remedial constructive trust, citing the leading Canadian cases as well as the relevant American jurisprudence. He held that “at the time that the Family Law Act 1986 was enacted the constructive trust was widely recognized as the pre-eminent common law remedy for ensuring the equitable division of matrimonial property”\(^\text{139}\). He stated that “the legislators must have been aware of the existence and effect of the constructive trust remedy in matrimonial cases when the Act was proposed”\(^\text{140}\). In concluding he asserted that “the Family Law


\(^{140}\) *Ibid.*
Act 1986 incorporates the constructive trust remedy as an integral part of the process of ownership determination and equalization established by that Act’’141.

McLachlin J., in dissent, agreed that the concept of the constructive trust as a general remedy for unjust enrichment has been accepted in Canada142. She stressed the essential features of the constructive trust namely, that it is a discretionary remedy and dependent on the inadequacy of other remedies in the circumstances143. Therefore she held that “the availability of other remedies for the unjust enrichment must be considered before declaring a constructive trust”144. After outlining the consequences of the constructive trust remedy she asserted that “it may be wise to insist that a plaintiff has exhausted his or her personal remedies before imposing the remedy of constructive trust”145. Thus she held that a constructive trust should not be imposed in the case at bar “because the Family Law Act 1986 provides a remedy for the unjust enrichment of the husband to the detriment of his wife”146 which rendered it “unnecessary to resort to the doctrine of constructive trust”147.

141 Ibid. at 89-90.
142 Ibid. at 184.
143 Ibid. at 185.
144 Ibid. at 100 (S.C.R.).
145 Ibid. at 188.
146 Ibid.
147 Ibid at 189.
The Supreme Court once again confronted the issue of the constructive trust remedy in a domestic context in *Peter v. Beblow*\(^ {148}\). McLachlin J., echoing *Sorochan*\(^ {149}\), stated that once the right to claim relief has been made out the second doctrinal concern is the nature of the remedy.\(^ {150}\) Where unjust enrichment is proved it was held that “the remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed”\(^ {151}\). In following the structure of the *Sorochan* decision by considering the unjust enrichment claim and then the applicable remedy the *Peter* case reopened the causal connection question and raised the issue of the adequacy of legal remedies doctrine.

McLachlin J. also discussed the issue of distinguishing between domestic and commercial cases. After having concluded that unjust enrichment was made out she rejected the notion of distinguishing between domestic and commercial cases in relation to either the unjust enrichment principle or the remedial constructive trust. As regards the constructive trust she held that the requirements of proof of the inadequacy of monetary compensation and the link to the property requirement, means no distinction is necessary since these factors operate to distinguish between contexts. She held however, that the


\(^{149}\) *Supra* note 101.

\(^{150}\) Per McLachlin J in *Peter*, *supra* note 115 at 987 (S.C.R.).

\(^{151}\) *Ibid.* at 988.
court should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.\textsuperscript{152}

Cory J. in dissent, asserted that there is a need to limit the use of the constructive trust in the commercial context\textsuperscript{153}. He said that the different expectations justified the distinction between domestic and commercial contexts.

It is submitted that apart from the need for legal certainty that favors the application of the same general principles in all contexts, a distinction between commercial and domestic contexts is not warranted. The elements of the constructive trust such as the causal connection requirement are sensitive enough to adapt to the particular context of the dispute. Thus because a causal connection will be harder to establish in a commercial context the “healthy tendency for courts to be skeptical of efforts to employ equity to secure priority over creditors in commercial situations”\textsuperscript{154} will be preserved.

In any case it is further submitted that not all family and commercial contexts can be automatically distinguished along the same lines. Situations concerning a short term, domestic relationship of convenience for the partner claiming an interest may present

\begin{itemize}
\item \textsuperscript{152} \textit{Ibid.} at 997.
\item \textsuperscript{153} \textit{Ibid.} at 1022.
\end{itemize}
themselves and it would be inappropriate to impose a constructive trust in such circumstances. Similarly there may be disputes between life-long business partners whose have developed a relationship trust and confidence in their commercial transactions and a persuasive argument for the imposition of a constructive trust may be put forward. The lines cannot be clearly drawn in order to justify a black and white distinction. Indeed any distinction between domestic and commercial disputes is arbitrary, unwarranted and robs the constructive trust remedy of its flexible rationale.

Arguably it is more important that the far-reaching consequences of the constructive trust be appreciated in all contexts. It is submitted that rather than distinguishing between contexts the over-arching test suggested by La Forest J. in Lac of imposing a constructive trust only where the consequences are justified should be applied. This approach accords with the flexibility fundamental to the application of this remedy.

After expressing the view that a distinction between commercial and domestic contexts was unnecessary McLachlin J. went on in Peter to state that "where a monetary award is sufficient there is no need for a constructive trust". Although this issue was never addressed in either Pettkus or Sorochan, the adequacy doctrine was discussed in Lac and Rawluk and the existence of this doctrine in Canada has been affirmed Ruff v. Stroebel.

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155 Supra note 93.
156 Per McLachlin J. in Peter, supra note 115 at 997 (S.C.R.).
Because equity was perceived as a system of remedies which evolved to redress the wrongs not adequately righted by the common law, a rule emerged that a plaintiff had to prove the inadequacies of legal remedies before he was entitled to turn to equity\textsuperscript{158}. This rule that equitable remedies were dependent on the inadequacy of legal remedies, was seen as consistent with equity’s role as a gloss on the common law and prevented continual conflicts between legal and equitable remedies. Thus the adequacy doctrine relates to the historical division of the administration of legal and equitable remedies. However, the historical division between the jurisdictions is no longer sufficient justification to retain this doctrine in a modern context. Arguably no independent justification exists and the doctrine is not only outdated but undesirable.

The adequacy doctrine represents a “hierarchy of remedies: legal remedies being primary and equitable remedies secondary”\textsuperscript{159}. But hierarchy “does not accord with common sense in a post judicature world”\textsuperscript{160}. Indeed it may be said that remedial hierarchy is “still the greatest constraint on a more responsive system of judicial remedies”\textsuperscript{161}. It sets up an artificial primacy and both Pound and Story have criticized the favoring of money based remedies, associated with legal jurisdiction, over performance based ones, associated with equitable jurisdiction, which was advocated by Holmes\textsuperscript{162}. The objective must be to

\textsuperscript{158} (1951) St John’s L. Rev 283 at 293.
\textsuperscript{159} Tilbury, \textit{Civil Remedies}, Vol. 1 (Australia: Butterworths) at 13.
\textsuperscript{160} Ibid.
\textsuperscript{162} Ibid.
determine what is most appropriate remedy in the circumstances as opposed to establishing the adequacy of the available legal remedies, based of the perceived primacy of remedies at law. Tilbury states that the hierarchy of remedies is "no more than a conclusion of history"163 that should be abandoned.

Whilst Scott supports the requirement that legal damages be shown to be inadequate before a constructive trust can be imposed164, a body of opinion to the contrary also exists. Bogert expressly rejects the adequacy doctrine165. Paciocco argues that equitable principles are molded by fiduciary obligations and the concept of the trust, but that since the constructive trust lies beyond these boundaries "sound policy may require these principles to be compromised"166. McClean states that the inadequacy doctrine is outdated167. He asserts that since the doctrine arose out of the political relationship between the Courts of Chancery and the Courts of Common Law the fusion of the systems allows plaintiffs to choose the jurisdiction168. Paciocco agrees that the adequacy doctrine should be rejected as it produces "curious and unsatisfactory results"169.

163 Tilbury, supra note 159 at 15.
166 Paciocco, supra note 154 at 328.
167 McClean, supra note 71 at 173.
168 Ibid.
169 Paciocco, supra note 154 at 339.
Despite the above, support for the adequacy doctrine re-emerged in the context of specific performance in the recent *Semelhago v. Paramadevan* case\(^{170}\). The appeal to the Supreme Court in that case related to the calculation of damages in lieu of the remedy of specific performance. Sopinka J. held that the remedy of specific performance should “not be granted as a matter of course absent evidence that the property is unique…”\(^{171}\). Thus where the property is not unique in nature a plaintiff must prove the inadequacy of the remedy of compensatory damages before relying on the remedy of specific performance.

Sopinka J. traced the history of the remedy of specific performance. Traditionally every piece of real estate was considered unique under the common law. Therefore a remedy of damages was inadequate and an innocent purchaser was generally entitled to specific performance of a purchase contract\(^{172}\). Sopinka J. went on to hold that nowadays not all property is unique due to mass production in the property sphere and so damages cannot no longer be assumed an inadequate remedy.

In certain circumstances such as where a vendor is party to a specifically enforceable contract for sale the remedies of specific performance and constructive trust are so interlined that the constructive trust may be viewed as a form of specific performance. In


\(^{171}\) Per Sopinka J. in *Semelhago*, supra note 170 at 429 (S.C.R.).

\(^{172}\) *Ibid.* at 425.
this way Semelhago may be authority for the proposition that legal remedies must be inadequate before a constructive trust is imposed.

Ultimately however in Semelhago Sopinka J. acknowledged that the appeal had to be disposed of on the basis that specific performance was an appropriate remedy in the circumstances. Thus his comments relating to restricting the specific performance remedy and his support of the adequacy doctrine are clearly obiter. Indeed La Forest J. whilst concurring with Sopinka J. expressly stated that he preferred not to deal with the circumstances giving rise to the remedy of specific performance.

Furthermore, on the facts of that case the calculation of damages in lieu of specific performance resulted in a windfall for the plaintiff who had suffered little or no damage. As Siebrasse notes therefore Sopinka J’s comments are not only obiter but appear to be motivated by a desire to “minimize the future opportunity for windfalls gains such as that which was upheld in Semelhago itself”. Ultimately this support for the adequacy doctrine is not binding and is context specific.

Whilst accepting the desirability of avoiding windfall awards it is not desirable that the courts use the historical hierarchy of remedies to justify conclusions. Rules such as the adequacy doctrine were conceived in a very different time and are no longer appropriate.

173 Ibid. at 423.
174 Ibid. per La Forrest J at 418.
175 Siebrasse, supra note 170 at 551.
Not only has the separation between legal and equitable remedies been broken down, as discussed above, but effective remedial law demands that courts focus on the appropriateness of certain remedies in the circumstances as opposed to relying on outdated historical practices. Tilbury asserts that there is no justification for maintaining a hierarchical system of remedial law\textsuperscript{176}.

Arguably the body of academic opinion rejecting the adequacy doctrine in relation to the constructive trust remains very persuasive and supports the rejection of the first element of test outlined by McLachlin J. in \textit{Peter}\textsuperscript{177}. It is more appropriate for the Courts to take a flexible approach as put forward by La Forest J. in \textit{Lac}. This means that the court will have regard to the legal remedies available in any case, the far reaching consequences of the constructive trust but where the remedies are equally adequate the defendant must show why the imposition of the constructive trust should be refused. This plaintiff centered approach to remedies, in particular to protect property rights, is appropriate.

As well as discussing the adequacy of legal remedies in the \textit{Peter} case Mc Lachlin J. relied on her statements in \textit{Rawluk}\textsuperscript{178}, and held that “for a constructive trust to arise the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff’s contribution”\textsuperscript{179}. Essentially the court must ascertain “whether

\textsuperscript{176} Tilbury, supra note 159 at 13-14.

\textsuperscript{177} Supra note 115.

\textsuperscript{178} Supra note 138.

\textsuperscript{179} Per Mc Lachlin J. in \textit{Peter}, supra note 115 at 995 (S.C.R.).
the nexus between the contribution and the property described in Pettkus v. Becker has been made out. McLachlin J. agreed with the findings by the trial judge that there was a sufficient connection between the services rendered and the property to support the imposition of a constructive trust.

Her judgment contains no detailed analysis of the causal connection requirement and the precise nature and extent of the contributions made. Similarly the simple upholding of the findings at trial means there is no discussion of the reasonable expectations of the parties or when this is a factor to be considered in imposing a constructive trust.

Most recently the constructive trust remedy was considered in the Soulos case, which concerned a breach of a fiduciary duty by a real estate broker and the question of the appropriate remedy in the circumstances. The plaintiff sought to have the property, which formed the subject of the dispute, conveyed to him by way of a constructive trust. At trial it was held that the defendant, Mr. Korkontzilas, had breached a duty owed to the plaintiff, Mr. Soulos, but it was held that a constructive trust was not an appropriate remedy because the defendant had not been unjustly enriched at the plaintiff's expense. The Court of Appeal reversed this decision and imposed a constructive trust in the plaintiff's favor. The defendant appealed to the Supreme Court.

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180 Ibid. at 999.
181 Ibid. at 1000.
182 Supra note 1.
McLachlin J., speaking for the majority, stated that the appeal raised the issue of whether a constructive trust could be imposed in the absence of the enrichment of the defendant. In concluding at the outset that “the doctrine of constructive trust applies and requires that Mr. Korkontzilas conveys the property he wrongly acquired to Mr. Soulos”¹⁸³ she had “to formulate a theory of constructive trust that is wider than unjust enrichment”¹⁸⁴.

First she agreed with the finding that Mr. Korkontzilas was acting as Mr. Soulos’ agent and breached the duty of loyalty owed in his position as a fiduciary. Then she considered the issue of the appropriate remedy.

McLachlin J. noted that the appeal presented two different views of “the function and ambit of the constructive trust”¹⁸⁵; one of which sees the constructive trust as a remedy for unjust enrichment and the other which “does not confine it to that role”¹⁸⁶. She asserted that the latter broad approach to the remedy “best accords with the history of the doctrine of constructive trust, the theory underlying the constructive trust and the purpose which the constructive trust serves in our legal system”¹⁸⁷.

¹⁸³ Per McLachlin J in Soulos, supra note 1 at 224 (S.C.R.).
¹⁸⁴ Farquhar, supra note 98 at 345.
¹⁸⁵ Per McLachlin J. in Soulos, supra note 1 at 227 (S.C.R.).
¹⁸⁶ Ibid.
¹⁸⁷ Ibid.
McLachlin J. framed her analysis by stating that history suggests that “the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain”\textsuperscript{188}.

In tracing the history of the constructive trust she referred to the English jurisprudence and the Canadian modifications to this traditional institutional approach. Most importantly, she stressed that unjust enrichment cases “should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized”\textsuperscript{189}. Instead “the law of the constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence”\textsuperscript{190}.

It was this point that formed the basis of Sopinka J’s dissenting judgment. He argued that “a constructive trust remedy is not available where there has been no unjust enrichment”\textsuperscript{191}. Indeed he stated that “recent case law is very clear that a constructive trust may only be imposed where there has been an unjust enrichment”\textsuperscript{192}. He also

\begin{footnotes}
\item \textsuperscript{188} Ibid. at 228.
\item \textsuperscript{189} Ibid. at 230.
\item \textsuperscript{190} Ibid. at 232.
\item \textsuperscript{191} Ibid. at 244.
\item \textsuperscript{192} Ibid. at 247.
\end{footnotes}
concluded that “the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust’s remedial role since there should be no remedy “unless a loss has been suffered” 193. Due to the fact that the defendant in *Soulos* was not enriched Sopinka J. held that the constructive trust remedy was inapplicable.

Prof. Farquhar argues that “there is less difference between his view and that of McLachlin J. than would at first appear” because Sopinka J. “takes a much broader view of what amounts to unjust enrichment”194. However, limiting the constructive trust to albeit a broad definition of unjust enrichment is confusing. A number of cases remain where a constructive trust has been imposed yet the facts do not fit within an unjust enrichment framework. Broadening the definition of unjust enrichment in an effort to embrace these decisions is not the path to theoretical tidiness. Rather it simultaneously muddies the waters of both the unjust enrichment principle and the constructive trust remedy.

It is submitted that McLachlin J.’s approach in *Soulos* is preferable in its recognition that the constructive trust remedy is not exclusively limited to unjust enrichment cases but can be imposed on the basis of justice and good conscience.


194 Farquhar, *supra* note 98 at 346.
In _Soulos_ McLachlin J. addressed the nature of 'good conscience' as the unifying concept underlying the constructive trust. Once again however, the error of using the terms unjust enrichment and constructive trust interchangeably is evident. McLachlin J. refers to Prof. McClean's article, in which he argued that the concept of good conscience may be a better foundation for restitution than the notion of unjust enrichment\(^{195}\). McLachlin J. cites this as supporting the proposition that good conscience may underlie the unjust enrichment principle but appears to mean the constructive trust. Indeed she goes on to discuss good conscience as underpinning the constructive trust\(^{196}\). But Prof. McClean merely argued that good conscience was a satisfactory foundation of restitution and was not referring to it as the underlying concept of the constructive trust or the basis of the unjust enrichment principle\(^{197}\).

McLachlin J. went on to state that the good conscience principle straddles the concern for fairness between the parties and the greater public concern to “maintain the integrity of institutions like fiduciary relationships”\(^{198}\). She attempted to meet the criticisms of it as excessively broad and open-ended principle by stating that the concept is informed by situations where constructive trusts have been imposed in the past, the reasons for which a constructive trust has traditionally been imposed and finally the absence of indication

\(^{195}\) McClean, *supra* note 71 at 169.

\(^{196}\) Per McLachlin J. in _Soulos, supra_ note 1 at 232-33 (S.C.R.).

\(^{197}\) McClean, *supra* note 71 at 169.

\(^{198}\) Per McLachlin J. in _Soulos, supra_ note 1 at 235 (S.C.R.).
that a constructive trust would have an unfair or unjust effect on the defendant or third parties\textsuperscript{199}.

She defended the admittedly general nature of the concept by asserting "any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must of necessity be general"\textsuperscript{200}. Finally McLachlin J. asserted that in relation to the good conscience concept "the goal is a reasoned, incremental development of the law on a case by case basis"\textsuperscript{201}.

In addressing the substance of good conscience McLachlin J. stated that there are two general categories where the imposition of a constructive trust in accordance with good conscience may be considered. The first category is where property is acquired by means of a wrongful act and the second category is where the defendants would be unjustly enriched at the plaintiff's expense if they were to retain an absolute interest in the property\textsuperscript{202}. Thus under "the broad umbrella of good conscience constructive trusts are recognized both for wrongful acts...as well as to remedy unjust enrichment and corresponding deprivation"\textsuperscript{203}.

\textsuperscript{199} Ibid. at 236.
\textsuperscript{200} Ibid.
\textsuperscript{201} Ibid at 237.
\textsuperscript{202} Ibid. at 237.
\textsuperscript{203} Ibid. at 240.
Whilst the *Pettkus*\(^{204}\) decision examined the prerequisites for a constructive trust based on unjust enrichment, in *Soulos* McLachlin J. focused on the prerequisites for a constructive trust based on wrongful conduct. Referring to an article by Goode\(^{205}\) she identified four conditions that must be satisfied:

1) The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands.

2) The assets must have resulted from the defendant’s activities in breach of an obligation owed.

3) The plaintiff must show a legitimate reason for seeking a proprietary remedy.

4) There must no factors which would render the imposition of a constructive trust unjust in the circumstances\(^{206}\).

On the facts McLachlin J. found that Mr. Korkontzilas was under an equitable obligation in relation to the property and wrongfully acquired in breach of his equitable duty of loyalty\(^{207}\). Second the assets the defendant acquired resulted from his activities in breach of his obligation to the plaintiff\(^{208}\). Third the plaintiff sought a constructive trust to return the parties to the position they would have been in had the breach not occurred.

McLachlin J. further held that “a constructive trust is required in cases such as this to

\(^{204}\) *Supra* note 83.


\(^{206}\) *Supra* note 1 at 241 (S.C.R.).

\(^{207}\) *Ibid*.

\(^{208}\) *Ibid*. at 242.
ensure that agents and others in positions of trust remain faithful to their duty of loyalty”. Finally McLachlin J. held that there were no factors which would make the imposition of a constructive trust unjust in the case. She dismissed the appeal and imposed a constructive trust in the plaintiff’s favor. Despite some lack of clarity what does emerge from the *Soulos* decision is the conditions that must be met before a constructive trust will be imposed over property wrongfully acquired.

As Smith notes the specification of an equitable obligation as part of the first requirement for the imposition of a constructive trust to remedy a wrong, raises a question as to whether the constructive trust must be confined to remedying equitable wrongs. Although the constructive trust originated as an equitable remedy it is arguable that the historical division between legal and equitable remedies should not prevent this remedy being used in the context of legal wrongs. It seems logical that common law duties could also support a constructive trust.

The third condition proposed by McLachlin J.; that the plaintiff must show a legitimate reason for seeking a proprietary remedy, appears to echo the somewhat dubious adequacy doctrine. It seems that the plaintiff must adduce evidence as to why other remedies are inadequate before a constructive trust can be imposed. In this respect *Soulos* follows on from the recent *Semelhago* decision discussed above. It is submitted that the strict

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211 *Ibid.* at 545.
adequacy doctrine has no place in modern jurisprudence. Furthermore, in light of the fourth condition proposed by McLachlin J.; namely a consideration of the circumstances to ensure that a constructive trust is a justified measure, the third condition is unnecessary as well as undesirable.

Finally Smith notes that Soulos raises the issue of proprietary relief for wrongdoing where the plaintiff has no previous interest the property\textsuperscript{212}. The debate surrounding this question was conveniently ignored by the court but may be confronted at a later date.

And so Soulos marks another turning point in the evolution of the constructive trust. The Soulos decision takes the remedial constructive trust beyond the confines of unjust enrichment claims, which is where its remedial status has developed in Canadian law during the last 16 years. The facts of the case also demanded a move beyond the domestic context, yet there is a return to the historical origins of the constructive trust in the law of fiduciary relationships. In many ways “the wheel is come full circle” but a new remedial constructive trust has emerged.

Since the groundbreaking Pettkus decision the evolution of the constructive trust has been familiar in pattern as in each successive case questions are answered and others are posed.

\footnote{\textit{Ibid.} at 544.}
Like Pettkus, Soulos is a turning point in relation to the constructive trust remedy which leaves questions unanswered and touches on issues that demand clarification. We await another series of decisions that began with Sorochan in the wake of Pettkus, to continue the cyclical process of development and clarification.

E: Conclusion

The primary criticism of the remedial constructive trust is that it is represents a judicial discretion to vary property rights. Traditionally, there has been resistance to the imposition of constructive trusts in accordance with the doctrine of unjust enrichment because of “a fear of disturbing property rights in response to a sense of unconscionability not elaborated by a body of rules”\textsuperscript{213}. There are however already situations where the courts will alter title without legislative guidance\textsuperscript{214}. In fact the courts have exercised a wide discretion by adopting artificial reasoning in matrimonial property disputes to impose resulting trusts. In real terms the scope of the constructive trust in such instances is not much greater than this expanded resulting trust\textsuperscript{215}. However the remedial constructive trust analysis offers a more satisfactory basis of relief\textsuperscript{216}.

\textsuperscript{213} Scane, supra note 36 at 261. See also Dewar, supra note 18 at 299
\textsuperscript{214} Dewar, supra note 18 at 299
\textsuperscript{215} Ibid.
\textsuperscript{216} Waters, supra note 3 at 424
The Canadian decisions since *Pettkus* have established that this remedial device can be flexible enough to move beyond its historical limitations whilst encompassing measures to protect legal certainty of property rights.

On the basis of *Soulos* it appears that the constructive trust operates in two broad categories;

(i) Unjust enrichment

(ii) Wrongful gains contrary to good conscience.

As Prof. Farquhar states that "the reality is that most constructive trust precedents do involve unjust enrichment" so the role of the concept of good conscience in this sphere is limited\textsuperscript{217}. He points to the manner in which the unjust enrichment concept has evolved in the courts on a rational and measured basis and asserts that there is no reason to presume any different treatment of the good conscience concept\textsuperscript{218}. In this way the constructive trust can continue develop as a powerful remedial device.

What is clear is that the constructive trust has moved beyond its historical origins in developing as a remedial device in Canadian law. It has drawn on the themes of equity discussed in Chapter One to effect justice where traditional remedies have proved inadequate and to respond to the expansion of restitution. The remedy has evolved

\textsuperscript{217} Farquhar, *supra* note 94 at 348.

\textsuperscript{218} Ibid.
beyond historical limitations and so arguments rooted in history alone should not restrict its future development.

The evolution of the constructive trust is a powerful example, supporting a move beyond the divide between legal and equitable remedies. History alone is no longer sufficient justification to confine the operation of this equitable remedy to equitable wrongs. The courts must move beyond the traditional sphere of equity into that of legal obligations in finding breaches of good conscience resulting in the imposition of a constructive trust.

The history of this remedy serves to tell us the nature of the constructive trust and its far reaching consequences. This history must be appreciated and not determinative as the Courts move beyond the strict separation between legal and equitable remedies and towards a flexible responsive remedial approach
Chapter 4: Equitable Compensation

A: Introduction

The remedy of equitable compensation has been somewhat neglected. Arguably this remedy is most useful in the context of fiduciary law, yet compensation for breaches of fiduciary obligations causing financial loss is often overlooked, particularly by English Courts. This is regrettable as equitable compensation enables beneficiaries to recover where other remedies are inappropriate or inapplicable.

Despite a previous lack of attention, this remedy has been discussed in recent Canadian jurisprudence. This chapter aims to discuss that jurisprudence and evaluate the developments. The analysis begins with an outline of the origins of the remedy. A discussion of recent relevant case law follows.

The conclusion is that equitable compensation is a flexible remedy used to effect justice inter partes. As with the constructive trust, its evolution in Canadian law is indicative of a move beyond historical restrictions towards a flexible remedial jurisdiction.

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The resurgence of equitable themes, noted in previous chapters, is evident as equitable compensation principles are molded to suit the circumstances of particular disputes. Most significantly, in recent Canadian cases these principles have been limited by reference to common law doctrine. This development is evidence of the breakdown of the separation between legal and equitable remedies which has occurred in the wake of the Judicature Acts, a process which must be brought to fruition.

An examination of the remedy of equitable compensation lends support to the argument that the strict division between legal and equitable remedies is no longer appropriate. Furthermore, the historical divide between legal and equitable remedial jurisdiction is insufficient justification for the retention of such a distinction. Rather the analysis below supports an amalgamation of compensation principles. This allows for a flexible approach to compensation which focuses on the nature of the breach of duty, as opposed to the historical source of that duty.

B: Origins of Equitable Compensation

1. Lord Cairns Act 18582

There is much debate as to the origins of equity’s jurisdiction to award monetary compensation. One relevant point in history is Lord Cairns Act 1858 which provided in s.2 that

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2 21 & 22 Vict. c.27.
"in all cases where the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such manner as the court shall direct".

As a result of this Act, the Court of Chancery was free to award damages in lieu of an injunction to protect a legal right and in lieu of specific performance. In summary the effect of Lord Cairn's Act was to extend equity's jurisdiction to award damages for breach of a legal right. There has been some argument that the term 'wrongful acts' in s.2 of Lord Cairns Act relates to breaches of equitable obligations also and thus refers to aspects of equity's exclusive jurisdiction. The more persuasive view however is that the term applies to legal wrongs only and does not relate to compensation for breaches of fiduciary duty and other equitable obligations. The provisions of Lord Cairns Act are not therefore the focus of this chapter. Rather the question of equity's exclusive jurisdiction to award compensation for breaches of equitable obligations is discussed.

2. Compensation and Trusts

There appears to be a misconception that the Court of Chancery did not award any form of monetary compensation prior to the passing of Lord Cairns Act in 1858.
However, monetary compensation was not completely unknown to the Court of Chancery prior to that date. Equity always had an inherent jurisdiction to compensate where breach of an equitable obligation causes the wronged party financial loss.

Pursuant to this jurisdiction the Court of Chancery applied the principle that where a breach of a trust occurred, the trustee had to effect restitution to the estate. Since restitution in specie was not always possible the Court awarded compensation to the wronged beneficiaries where necessary. The nature of this remedy was outlined in Ex Parte Adamson; "the Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of a debt. It was a suit for the restitution of the actual money or thing, or the value of the thing, of which the party had been cheated."4

Whilst the focus of this chapter is the development of equitable compensation to remedy breaches of fiduciary duty, a brief discussion of equity's jurisdiction to compensate outside the realm of fiduciary law is warranted.

3. Equitable Compensation Outside Fiduciary Law

Davidson notes that compensation was awarded in the Court of Chancery outside the strict realm of trust law in a number of situations. He cites Colt v. Woolaston5 as an early

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3 (1878), 8 Ch. D. 807.

4 Ibid. per James & Bagallay LJJ at 819

example of equitable compensation awarded for a representation dishonestly made\textsuperscript{6}.

There was no relief for such causes of action at common law until the decision in \textit{Pasley v. Freeman} in 1789\textsuperscript{7}. Indeed even after 1789 the Court of Chancery continued to exercise its jurisdiction on occasion to award compensatory relief to plaintiffs who suffered loss due to the false representations by defendants. However since \textit{Derry v. Peek}\textsuperscript{8} the adequacy of the remedy of damages at common law for deceit has been established and equity's role in this area ceased\textsuperscript{9}.

It should be noted that prior to \textit{Derry v. Peek} the Court of Chancery also awarded compensation where representations were made by defendants without knowledge of their falseness. The earliest examples of this equitable jurisdiction are \textit{Burrowes v. Lock}\textsuperscript{10} and \textit{Slim v. Croucher}\textsuperscript{11} These decisions appear to be based on policy considerations in situations where the defendants had information which should have enabled them to know the representations were false.

Clearly since \textit{Derry} there is no action at law for deceit in circumstances where a defendant merely ought to have known of the falsity of his representations. What is unclear is interplay between legal and equitable relief in the wake of the \textit{Derry} decision.

\textsuperscript{7}(1789), 3 T.R. 51, 100 E.R. 450.
\textsuperscript{8}(1889) 14 App Cas [hereinafter \textit{Derry}].
\textsuperscript{9} Davies, \textit{supra} note 1 at 357.
\textsuperscript{10}(1805) 10 Ves 470, 32 E.R. 927 [hereinafter \textit{Burrowes}].
\textsuperscript{11}(1860) 1 De GF & J 518, 45 E.R. 462 [hereinafter \textit{Slim}].
Arguably *Derry* did not overrule *Burrowes* and *Slip* but those decisions are confined to their facts and no general jurisdiction to compensate against honest misrepresentations in equity survives.

This point is academic to a large extent due to the development of obligations in the tort of negligence. As Davies comments "the twentieth century developments in negligence provide a satisfactory framework within which courts can evolve principles to establish in which ‘special circumstances’ an obligation of care in making statements should be imposed"\(^\text{12}\).

Since developments in the tort of negligence have taken over in this area\(^\text{13}\), remedies for negligent misstatement are now awarded in accordance with the principles laid down in *Hedley Byrne & Co. v. Heller & Partners Ltd*\(^\text{14}\). The remedy of damages is awarded in accordance with legal principles and equitable jurisdiction in this area has disappeared.

The next aspect of equity jurisdiction is that of compensation for breaches of fiduciary obligations which is the focus of this chapter. This represents an element of equity's exclusive jurisdiction and so is not affected by the decision in *Derry v. Peek*.

\(^\text{12}\)Davies, *supra* note 1 at 371.

\(^\text{13}\)Davidson, *supra* note 6 at 371.

C : Equitable Compensation and Fiduciary Law

1. Origins of Equitable Compensation for Breach Of Fiduciary Duty

The origins of equity’s jurisdiction to award compensation were comprehensively reviewed by the House of Lords in Nocton v. Lord Ashburton15. Viscount Haldane noted that the Court of Chancery not only awarded compensation in cases of fraudulent misstatements, as outlined above, but also awarded compensation where there was a misrepresentation by a fiduciary, which did not amount to actual fraud. In Nocton the court went on to affirm the inherent jurisdiction of equity to enforce compensation for breach of fiduciary duty.

The facts in Nocton were that a mortgagee sued his solicitor for breach of fiduciary duty. He sought compensation for loss suffered as a result of the advice his solicitor gave him to release a part of a mortgage security. A majority of their Lordships in the House of Lords granted equitable compensation to remedy the breach of fiduciary duty by the defendant solicitor. Viscount Haldane referred to "the old bill in Chancery to enforce compensation for breach of a fiduciary obligations"16 and stated that Derry v. Peek did not affect these cases within the exclusive jurisdiction of equity17.

16 Ibid. per Viscount Haldane at 946.
17 Ibid. at 952.
In *Day v. Mead*\(^\text{18}\) equity’s inherent jurisdiction to award monetary compensation for breach of fiduciary duty was also discussed. As in *Nocton*, the case concerned an action by the plaintiff against his long-standing solicitor. On the basis of advice given to him by his solicitor the plaintiff invested in a company which subsequently went into receivership and the plaintiff lost his money. He sued for breach of fiduciary duty and sought compensation.

Equity’s jurisdiction to award compensation was affirmed in *Day* but the court noted that equity was not frequently called upon to compensate by way of money because the common law courts were better equipped to assess loss\(^\text{19}\). Furthermore the Court stressed that most cases in this area concerned the breach of a legal obligation as opposed to an equitable one\(^\text{20}\).

The remedy of equitable compensation for breach of fiduciary duty has been established in recent Canadian jurisprudence, discussed below. Most notably in *Canson Enterprises Ltd. v. Boughton & Co*\(^\text{21}\) La Forest J., speaking for the majority, cited *Nocton* and stated that “the inherent jurisdiction of equity to compensate for a breach of a fiduciary duty cannot be denied”\(^\text{22}\). He noted that this jurisdiction has been exercised both where the

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\(^{19}\) VenNell, *supra* note 18.

\(^{20}\) *Ibid*.


\(^{22}\) Per La Forest J. at 574.
exercise of another equitable remedy has become impossible\textsuperscript{23}, as well as in cases of misstatement as explained in \textit{Nocton}\textsuperscript{24}.

Once equity's jurisdiction to award monetary compensation for breach of fiduciary duty is recognized questions as to the principles underlying this jurisdiction are raised.

\textbf{2. Nature of Equitable Compensation for Breach of Fiduciary Duty}

Equity seeks by way of compensation to put the plaintiff in as good a position as he or she would have had the wrong not occurred\textsuperscript{25}. This is clearly illustrated in the context of a breach of fiduciary duty as occurred in \textit{Nocton}. In that case Viscount Haldane held that the Court of Chancery could order the defendant "to make restitution or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury"\textsuperscript{26}. The restitutionary basis of equitable compensation was also referred to recently in both \textit{Canson}\textsuperscript{27} and \textit{Hodgkinson v. Simms}\textsuperscript{28}.

The view that the basis of equitable compensation is restitutionary has a number of consequences. First the concepts of remoteness, intervening cause, forseeability,

\textsuperscript{23} \textit{McKenzie v. McDonald}, [1927] V.L.R. 134.

\textsuperscript{24} Per La Forest J. in \textit{Nocton}, supra note 15 at 574-75.

\textsuperscript{25} Per La Forest J. in \textit{Canson}, supra note 21 at 565-66.

\textsuperscript{26} Per Viscount Haldane in \textit{Nocton}, supra note 15 at 952.

\textsuperscript{27} Per La Forest J. in \textit{Canson}, supra note 21 at 565-66.

mitigation and contributory negligence which apply to common law damages have no relevance in the calculation of equitable compensation\textsuperscript{29}.

Second since equitable compensation involves the restoration of the actual value of the thing lost, loss is calculated at time of trial with the full benefit of hindsight rather than time of breach. Any increase in market value between the time of the breach and the date of restitution must be borne by the fiduciary in breach. The clearest example of this is Re \textit{Dawson}\textsuperscript{30}. In that case a trustee wrongfully disposed of a trust asset held in a foreign currency and was ordered to restore the value not on the date of the breach but as on the day on which restitution had to be carried out.

Equitable compensation is an appealing remedy for plaintiffs in some other respects. Because the compensation is within the jurisdiction of equity the benefit of certain equitable presumptions comes into play\textsuperscript{31}. If a defendant who has breached a fiduciary duty is unwilling or unable to explain what has happened to assets that have disappeared or to produce accounts, much is presumed against him\textsuperscript{32}.

\textsuperscript{29} Per La Forest J. in \textit{Canson}, \textit{supra} note 21 at 565.


\textsuperscript{31} Jill Martin, ed., "\textit{Hanbury & Martin’s Modern Equity}" 14th ed. (London: Sweet & Maxwell, 1993) at 299, see also Davies, \textit{supra} note 1 at 302.

\textsuperscript{32} \textit{Gray v. Haig} (1855), 20 Beavan 219, 52 E.R. 587 (Rolls Court) and \textit{Wallersteiner v. Moir} (No. 2), [1975] Q.B. 373 (C.A.).
Similarly certain presumptions in favor of the plaintiff are made. In *Huff v. Price*\(^33\) held that "once....breach of fiduciary duty is shown, the Court assessing damages will not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiffs to establish the amount of the loss and the cause of the loss"\(^34\).

The presumption that an asset would have been invested to earn a good profit or that the sale of an asset would have taken place when it was at or near its highest value within a certain period may also operate\(^35\).

Equitable compensation also incorporates the doctrine that a fiduciary must disgorge profits gained through a breach of duty even though such profits are not made at the expense of the person to whom the duty is owed.

The fact that equitable compensation has been perceived as restitutionary forms the basis of the distinction between it and common law damages. Different rules are used at law and in equity to achieve the similar goal of compensating the plaintiff for the loss suffered\(^36\).

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\(^33\) (1990), 76 D.L.R. (4th) 138 (B.C.C.A.) [hereinafter *Huff*].

\(^34\) *Ibid.* at 149.


\(^36\) Davidson, *supra* note 6 at 352.
It has been acknowledged that in terms of the practical result the difference between compensation in equity and damages at law is by no means clear. In *Nocton* Viscount Haldane did nothing more than acknowledge that there may be a difference between the equitable compensation and damages but did not expand on this. In *Day* Cooke P. concluded that in many cases it is "a difference without distinction", a view which La Forest agreed with in *Canson*.

Due to the mingling of legal and equitable doctrine in the wake of the Judicature Acts the differences between equitable compensation and common law damages are becoming increasingly blurred. Greater flexibility of damages at common law means that this result is often the same as would be achieved by means of compensation in equity. In particular, there is an increased willingness by the Courts not to strictly apply the rule of assessing legal damages at the date of the breach.

Most significantly with expansion of the fiduciary concept to new situations, equitable compensation has been limited with reference to the common law principles. Once again the resurgence of equitable themes in the area of equitable compensation is evident and identifies a desirable approach by the Courts. As Davies notes against the background of

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37 Per La Forest J in *Canson*, supra note 21 at 577.
38 Per Cooke P. in *Day*, supra note 18 at 451.
39 Per La Forest J in *Canson*, supra note 21 at 578.
equitable jurisdiction and the general framework of restitutionary compensation the Courts seem to arrive at the result they think is most suited to each case.\textsuperscript{41}

The question now is whether, despite significant mingling of principle, a clear distinction between equitable compensation and common law damages can still be drawn. It is submitted that it cannot. Rather the remedy of compensation, undistinguished as legal or equitable, to remedy both legal and equitable wrongs and limited as the circumstances of the wrong require, should be recognized. This is consistent with a move towards a flexible remedial jurisdiction which moves beyond the artificial division between legal and equitable remedies.

This above argument is supported by recent case law concerning equitable compensation for breach of fiduciary duty. Before analyzing this case law a background understanding of recent developments in fiduciary law is required.

### 3. Recent Developments in Fiduciary Law

In Canada the law on the subject of fiduciaries has been “expanding at an almost incredible rate within recent years”\textsuperscript{42}. This expansion has turned on “the extension of the fiduciary relationship to new situations”\textsuperscript{43}. Such developments may be seen as illustrative

\textsuperscript{41} Davies, \textit{supra} note 1 at 313.


of the resurgence of equitable principles in a modern context as the courts have attempted to impose a standard of morality in commercial dealings\textsuperscript{44}. Whilst an in-depth analysis of this jurisprudence is beyond the scope of this chapter some preliminary comments must be made.

At the outset it must be stated that the area of fiduciary law remains in a state of flux. Gautreau asserted in his article in 1989 that "the mystique of fiduciary law is beginning to melt"\textsuperscript{45}. However fiduciary principles were discussed at length recently in Hodgkinson and "more uncertainty rather than less is the result of the discussion"\textsuperscript{46}. Thus "we are still at a point where the fiduciary principle remains imprecisely defined and its application unpredictable"\textsuperscript{47}.

The origin of the fiduciary concept lies in equity. The original fiduciary was the trustee and since trusts were creatures of the Court of Chancery, fiduciary law fell under equitable jurisdiction. The clearest example of this is Keech v. Sandford\textsuperscript{48} where a trustee renewed a lease in his own favor and was held in breach of his duty.

\textsuperscript{44} See Hodgkinson, supra note 28 which is discussed in detail below.
\textsuperscript{47} Ibid. at 390.
\textsuperscript{48} (1726) Sel Cas T King 61, 25 E.R. 223.
Gradually the courts recognized that other relationships such as partnerships and agency involved elements similar to those in an express trust. Similar standards of conduct were imposed in these situations and the parties were deemed to be in a fiduciary relationship. In Canada fiduciary principles have been applied to solicitor-client relationships, crown-native band relationships, relationships in real estate and insurance counseling and various kinds of financial service relationships.

More recently it has been recognized that fiduciary obligations may arise out of the specific circumstances of a particular relationship. Thus the courts have discussed fiduciary obligations in a wide variety of contexts including parent/child relationships, doctor/patient relationships and commercial parties negotiating at arms length. In these cases the Courts have applied fiduciary principles on an ad hoc basis. Thus a distinction may be drawn between institutional fiduciary relationships and fact based fiduciary relationships.

The courts have repeatedly shown a reluctance to define the concept of a fiduciary or the underlying principles. Any attempts at definition have been qualified since the decision

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52 See Ellis, Fiduciary Duties in Canada (1988).
in *Lloyd Bank Ltd v. Bundy*\(^{56}\) where Sir Eric Sachs in the Court of Appeal stated that it was neither feasible nor desirable to attempt to define the nature of fiduciary relationships \(^{57}.\)

In the course of his judgment however he referred to the elements of reliance and confidentiality in the relationship\(^{58}.\) In recent jurisprudence further attempts to formulate principles have been made. In *Frame v. Smith*\(^{59}\) Wilson J. stated that fiduciary obligations have three characteristics;

(i) The fiduciary has some discretion or power

(ii) That discretion or power can be exercised unilaterally to affect the beneficiary’s legal or practical interests

(iii) The beneficiary is peculiarly vulnerable to the exercise of the discretion or power.

In *Guerin* Dickson CJC summarized this approach stating that where "one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary"\(^{60}\). Even after a lengthy discussion of fiduciary law in *Hodgkinson* however any definitions that have been provided by the court are “so vague as to be practically useless”\(^{61}\) and the majority

\(^{56}\) [1975] Q.B. 326.

\(^{57}\) Per Sir Sachs at 341.

\(^{58}\) Ibid.


\(^{60}\) Guerin, supra note 50 at 384.

\(^{61}\) Farquhar, supra note 46 at 389.
judgment in that case “reveals a bewildering variety of theoretical bases for the imposition of fiduciary duties”\textsuperscript{62}.

Further confusion has resulted due to the fact that the fiduciary concept has frequently been strained to facilitate the operation of certain remedies. In \textit{Goodbody v. Bank of Montreal} \textsuperscript{63} for example, a thief was classified as a fiduciary to enable his victim to trace the stolen property.

All that can be asserted is that “the existence and extent of a fiduciary relationship will depend on the facts and the circumstances involved”\textsuperscript{64}. This was made clear by the court in \textit{Guerin}. In \textit{Lac} it was also held that “whether or not fiduciary obligation arises depends on the course of the dealings between the parties and the proof of the facts which give rise to such obligations”\textsuperscript{65}. In \textit{M}, La Forest J. stressed the varying nature of fiduciary relationships and held that the duty “is not determined by analogy with the established heads of fiduciary duty....the nature of the obligation will vary depending on the factual context of the relationship in which it arises”\textsuperscript{66}.

\textsuperscript{62} Smith, \textit{supra} note 43 at 721.
\textsuperscript{63} (1974) D.L.R. (3d) 335, 4 O.R. (2d) 147 (Ont HC.).
\textsuperscript{64} Gautreau, \textit{supra} note 45 at 7.
\textsuperscript{65} \textit{Lac}, \textit{supra} note 55 at 637.
\textsuperscript{66} Per La Forest J. in \textit{M}, \textit{supra} note 53 at 65-66.
Ultimately “the term fiduciary does not connote a single class of relationship to which a fixed set of rules and principles apply”67. The wide variety of fiduciary relationships is significant in shaping the remedial responses in this area. Behind the phrase fiduciary relationship, is a range of obligations and a range of ways these obligations may be broken. At one end of the fiduciary spectrum the fiduciary relationship is little more than a description of a particular obligation that has arisen68. This is illustrated by the case of Huff v. Price69 where no fiduciary obligation had originally existed between the parties but one arose as a result of the dealings between the parties70. In that case the defendant broker knew of the dubious activities of the plaintiff’s accountant, Mr. Price. The court analyzed the facts step by step and concluded that the defendant broker acquired a fiduciary obligation towards the plaintiffs. It was held that he was under an obligation to at least warn them of the dangers in letting Mr. Price continue to manage their affairs. The defendant was found liable for breach of that obligation.

At the other end of the spectrum are cases like Keech where the existence of a fiduciary relationship between the parties is clear and has existed from the outset. Finally it is important to appreciate that “not every breach of duty by a fiduciary is a breach of fiduciary duty”71. A flexible remedial approach which moves beyond a strict divide

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67 Gautreau, supra note 45 at 10.
68 Davies, supra note 1 at 300.
69 Supra note 33.
70 Ibid. at 171.
between legal and equitable remedial jurisdiction is required to deal with the demands of fiduciary law.

One remedy for breach of fiduciary duty, which has been the subject of recent jurisprudence, is equitable compensation. The expansion of the fiduciary concept and the recognition that fiduciary obligations may vary have provoked argument as to whether equitable compensation must be limited in some cases to reflect the nature of the particular breach of duty.

In previous cases involving a loss resulting from a breach of fiduciary duty the courts have moved from an analysis of the breach to a conclusion that the plaintiff must be restored to the position he was in before the breach. This approach to the remedy of equitable compensation has been used to good effect in cases where fiduciary liability occurred in specific contexts and full restitution was justifiable. Problems have arisen now that fiduciary liability has extended beyond specific contexts\(^7\). Due to this expansion of fiduciary law, elements of legal damages doctrine such as remoteness may have to be incorporated\(^8\). The history of a strict separation between legal and equitable remedies should not prevent this desirable mingling of doctrine. An analysis of recent jurisprudence in this area is required.

\(^7\) Davies, *supra* note 1 at 297.

\(^8\) *Ibid.*
4: Recent Jurisprudence on Compensation

In recent decades, as the concept of fiduciary obligations has been extended to new situations, the appropriate measure of equitable compensation in such circumstances has been discussed.

This issue was raised in Guerin v. The Queen\(^\text{74}\). The plaintiff in Guerin was a member of an Indian band whose lands were administered by the Crown. A dispute arose because the Crown entered into a long term lease on the band’s behalf, without consulting the band. The terms of the lease were less advantageous than those that had been authorized by the band. The plaintiff sued for breach of fiduciary duty and sought compensation.

The trial judge held that the Crown had breached its fiduciary duty. He took an equitable approach to compensation and calculated the measure of damages at the date of the trial.

On appeal the Supreme Court held that the principles of equitable compensation applicable to a breach of fiduciary duty by trustees were also applicable to non-trustees. Even though the case did not involve an abuse of trust property in the classic sense Dickson J. held the compensation was to be calculated by analogy with principles of trust law. He held that “the Crown will be liable to the Indians in the same way and to the same extent as if a trust were in effect”\(^\text{75}\). The court held that tort law principles were not relevant by way of analogy in calculating the measure of equitable compensation.

\(\text{74 [1984] 2 S.C.R. 335.}\)
\(\text{75 Ibid. at 376.}\)
The result in Guerin was certainly influenced by the unusual nature of the relationship between the parties involved. Nonetheless it formed a precedent as to the principles underlying equitable compensation for breach of fiduciary duty. In the wake of Guerin some commentators stated that “it is unsafe to treat principles governing breaches of express trusts as applicable to breaches of fiduciary duty” and argued that the role of contract and tort principles in assessing equitable compensation must be considered.\textsuperscript{76}

The basis of compensation for a breach of fiduciary duty was discussed in detail in Canson Enterprises Ltd. v. Boughton & Co.\textsuperscript{77}. The case concerned a solicitor’s liability for failure to disclose the secret profit a third party was making in the course of the plaintiff’s purchase of property. The plaintiff alleged deceit and breach of fiduciary duty. Canson concerned a more traditional category of fiduciary relationship as compared to Guerin.

The trial judge held that the defendant was guilty of a breach of fiduciary duty but was not liable for deceit. In considering the fiduciary question he distinguished the holding in Guerin. He stated that in Guerin the Crown was holding property for the benefit of the band and was more like a trustee which was different from the position of the defendant in the instant case. The judge rejected the argument that compensation in the case under

\textsuperscript{76} Gummow, “Compensation for Breach of Fiduciary Duty” in Youdan, \textit{Equity, Fiduciaries and Trusts} (Toronto: Carswell, 1989) at 63.

\textsuperscript{77} \textit{Supra}, note 21.
consideration was to be calculated by way of analogy to trust law. On the facts it was held that damages were not limited to the amount of the secret profits and that the plaintiff was entitled to consequential damages. The measure of these damages however was limited by reference to intervening factors which were unconnected to the breach of duty.

In the Court of Appeal Hutcheon JA agreed that Guerin was distinguishable and that the ratio of the case, namely that damages for breach of fiduciary duty be calculated by analogy to trust law, was limited to trust-like situations. He held that the consideration of remoteness of the loss applied in the case at bar and upheld the calculation of damages at trial.

Lambert J.A agreed with this conclusion but gave additional reasons for his decision. He asserted that the rubric of fiduciary duty has expanded to such an extent that it no longer appropriate to determine the remedy merely on the basis of a breach of fiduciary duty. Rather it was necessary to consider the true nature of the wrong and to move from there to the determination of the remedy.

He went on to state that the effect of the fusion of law and equity was that “common law remedies may be awarded for what were purely equitable wrongs and vice versa, and in addition remedies which have aspects of both systems may be awarded for wrongs that

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78 (1989) 39 BCLR (2d) 177 (C.A.) at 182.
79 Ibid.
have aspects of both systems.” He concluded that the award of damages at trial in *Canson* rested not on legal or equitable principles but on “the fused amalgam of those principles.”

Whilst Lambert JA’s decision may contain traces of the fusion fallacy it remains appealing for a number of reasons. First Lambert JA recognized the expansive spectrum of fiduciary relationships and obligations pursuant to those relationships. This demands that the remedial response be sensitive to the particular circumstances of the breach. Second he alluded to the breakdown in the historical division between legal and equitable remedies. Although Lambert JA may be mistaken in identifying this development as an intended effect of fusion under the Judicature Acts, such a breakdown has nonetheless occurred. It is no longer appropriate to enforce a strict division between legal damages and equitable compensation.

There was an appeal to the Supreme Court in *Canson* on the question of the calculation of compensation. The Court had to decide whether the solicitor was liable only for losses flowing from the breach of duty itself or whether he was also liable for loss caused by an intervening act unrelated to that breach. As noted above La Forest J, speaking for the majority, invoked the inherent jurisdiction of equity to compensate for breach of fiduciary duty.

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In distinguishing *Guerin* La Forest held that “there is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation”\(^{82}\). In the former trust like situation the concern of equity is that the object be returned to the beneficiary or compensation afforded. In the latter case equity’s concern is “simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on”. Thus the measure of compensation in each case raises different issues\(^{83}\). La Forest J rejected the appellants argument that the same remedy applies against a faithless fiduciary as would apply against a trustee.

This distinction drawn by La Forest J appears logical and is supported by authority\(^{84}\). Not all fiduciary obligations are the same and equitable compensation must be sensitive to the nature of the particular breach and loss. On the facts La Forest J held that an analogy with trust law was inappropriate. The case was not one where the fiduciary was holding property for the benefit of another and generous equitable compensation, calculated by analogy with trust law was inappropriate. In this way *Canson* represents an attempt by

\(^{82}\) Per La Forest J. in *Canson*, *supra* note 21 at 578.

\(^{83}\) *Ibid.*

\(^{84}\) Sealy “Some Principles of Fiduciary Obligations” [1963] Cam Law J. 119 at 119ff who draws a distinction between fiduciary obligations along the lines proposed by La Forest J.
the court to “escape the rigorous application of the equitable remedy of restitution by
taking into account the nature of the breach”85.

La Forest J. stated that the measure of compensation should be limited by analogy with
common law principles. In drawing support for this approach La Forest J affirmed the
reasoning of Lord Diplock in United Scientific Holdings Ltd. v. Burnley Borough
Council86. He agreed that and the two systems of common law and equity have now
mingled. Therefore it was appropriate that in certain circumstances equitable principles
should evolve in the direction of the common law.

La Forest J also referred to the case of Day v. Mead87 and the manner in which the New
Zealand Court of Appeal in that case dealt with compensation. In Day the Court held that
law and equity had merged and so common law principles should apply to the measure of
equitable compensation. Cooke P. in Day affirmed United Scientific and held that there
was no reason not to follow the “obviously just course, especially now that law and
equity have mingled or are interacting”88.

In concluding La Forest J in Canson held that “only when there are different policy
objectives should equity engage in its well known flexibility to achieve a different and

85 Huband, “Remedies and Restitution for Breach of Fiduciary Duty” in 1993 Issac Pitblado Lectures,
87 Day, supra note 18.
88 Ibid. at 451.
fairer result”90. This provided for “a general but flexible approach that allows for direct application of the experience of and best features of both law and equity”91.

On the facts La Forest J. held that the recovery was limited by reference to remoteness of the loss to the breach. The case established that the common law methods and equitable standards were not irreconcilable and so the majority decision in Canson is “radical in bridging the divide between law and equity so far as remedies are concerned”91.

Mc Lachlin J dissented in Canson92. She agreed with La Forest J’s decision that the calculation of damages at trial should be upheld. However she held that the remedy was based in equity and rejected the argument that equitable compensation can be measured by analogy with damages in tort and contract93.

McLachlin J. argued that an analogy with tort law would “overlook the unique foundations of the goals of equity” which is concerned not only to compensate the plaintiff but “enforce the trust at the heart of the fiduciary relationship”94. McLachlin J. rejected the distinction drawn by la Forest J. between “true trust” situations where the

89 Per La Forest J. in Canson, supra note 21 at 586-587.
90 Ibid.
91 Davies, supra note 1 at 302.
92 Supra note 21.
93 Per McLachlin J. in Canson, supra note at 543.
94 Ibid.
trustee holds property as an agent for the beneficiary and other fiduciary obligations. She acknowledged that differences between types of fiduciary relationships may dictate different approaches to damages but held that the differences related to the concept of trust.

It should be noted that McLachlin J. agreed that it was wise to accept such insights offered by the law of tort as may prove useful but did not believe tort principles were useful in the case at hand.

Ultimately the Court in Canson was “unanimous in its decision that there should be a rule in fiduciary law limiting recovery of losses stemming from a breach of fiduciary obligation by reference to their remoteness from the breach”. Unfortunately neither the majority nor minority judgment outline a clear remoteness test but the discussion of this issue by the members of the Court is relevant. The division in opinion turns on the fact that the majority discussed remoteness by analogy with common law principles whereas the minority emphasized the influence of the law of trusts.

The approach by the majority is indicative of a mingling of legal and equitable remedial doctrine and is preferable. The minority approach is unhelpful and “little can be gained

95 Ibid. at 546.
96 Ibid.
97 Ibid.
98 Davies, supra note 1 at 299.
by appealing to trust law for clear guidance on remoteness in fiduciary law”\(^{99}\) since the law governing compensation for losses for fiduciary breach has expanded beyond its origin in the law of trusts. Developments in fiduciary law mean that the spectrum of fiduciary obligations and the range of potential breaches of those obligations is vast. Ultimately the “greater range of fiduciary obligations today and the varied forms of their breach require a greater freedom of remedy than the analogy to trust law can provide”\(^{100}\).

In assessing compensation for breach of fiduciary duty the manner in which the obligation has been breached is key. Thus “guidance on when it is appropriate to limit recovery should be sought in the scope and ambit of fiduciary obligations and the character of his breaches of them”\(^{101}\). This remedial response demands a comprehensive approach to equitable compensation, molded by analogy with common law doctrine “irrespective of the historic divide between law and equity”\(^{102}\). The majority decision in *Canson* establishes that common law techniques can be used to integrate remoteness into the general framework of fiduciary law\(^{103}\). The fears of the minority in this regard are not justified and arguments rooted in history should not preclude an appropriate mingling of doctrine.

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\(^{100}\) *Ibid.* 320.

\(^{101}\) *Ibid.* at 310.

\(^{102}\) *Ibid.* at 323.

\(^{103}\) *Ibid.* at 303.
The issue of equitable compensation for breach of fiduciary duty was discussed once again in *M v. M*[^104^]. That case concerned an action by a 28 year old, suing her father for damages arising from incest and for breach of fiduciary duty. The jury in the case awarded tort damages of $50,000 but the trial judge held the action was barred by the Ontario Limitations Act. The Court of Appeal dismissed the appeal and there was an appeal to the Supreme Court.

A majority of the Supreme Court held that incest is a tortious assault and that the Ontario limitation legislation did not apply until the plaintiff is capable of discovering the wrongful nature of the acts. On the facts the limitation period did not begin to run against the plaintiff until she had received therapy and the action was commenced before the period expired.

More relevant for present purposes is the discussion of the claim in equity and the appropriate remedies on the facts. La Forest J held that although the courts below did not consider the claim in equity the issue should be addressed. He held that a breach of fiduciary duty cannot be automatically be overlooked in favor of concurrent common law claims[^105^].


[^105^]: Per La Forest J. in *M*, supra note 104 at 61.
As referred to above La Forest J. recognized that the nature of fiduciary obligations will vary depending on the context\textsuperscript{106}. He held that the plaintiff’s delay did not bar her claim in equity and went on to consider “whether some additional remedy in equity is necessary to compensate the appellant fully and properly”\textsuperscript{107}.

He held that the underlying objectives in breach of fiduciary duty and tortious assault were the same as both seek to compensate the victim and punish the wrongdoer\textsuperscript{108}. It was concluded that the jury award of $50,000 was appropriate to satisfy both the equitable and common law claims.

La Forest J. referred back to his judgment in \textit{Canson} and stated that in some cases it may be difficult to distinguish between common law damages and equitable compensation. He asserted that in such cases the measure of compensation should be the same unless a different policy at law or in equity is involved. The \textit{M} case is an example of where the perceived difference between the legal and equitable remedial jurisdictions is one without distinction.

Mc Lachlin J agreed with La Forest J’s decision but added comments on a number of points. She held that that since the appellant only asked that the jury’s award be reinstated

\textsuperscript{106} \textit{Ibid.} at 66.
\textsuperscript{107} \textit{Ibid.} at 80.
\textsuperscript{108} \textit{Ibid.} at 81.
the question of whether the award was appropriate did not arise on appeal\textsuperscript{109}. However she highlighted the difference between the two causes of action at issue in the case and concluded that compensation was not necessarily the same in cases of breach of fiduciary duty and those of tortious assault\textsuperscript{110}.

Admittedly her reasoning was confined to the facts of the case and she did go on to say that the essential question is whether the wrong encompassed by the cause of action is the same at law and in equity. She agreed that where the same policy objectives underlie two different causes of action similar measures of compensation may be appropriate. McLachlin J. accepted that by focusing on the nature of the wrong it may occur that equitable principles are not distinguishable from those at common law and the measure of compensation is identical.

Most significantly both the decisions of La Forest and McLachlin JJ. in $M$ suggest that “any difference between damages and equitable compensation may have little to do with the juridical origin of the remedy”\textsuperscript{111}

In Hodgkinson v. Simms\textsuperscript{112} the plaintiff brought an action against his accountant who advised him in relation to investing in a particular project. It transpired that the defendant

\textsuperscript{109} Per McLachlin J. in $M$, supra note 104 at 85.
\textsuperscript{110} Ibid. at 86.
\textsuperscript{111} Capper, "Damages for the Breach of the Equitable Duty of Confidence" 14 Legal Stud. at 316 at 325.
\textsuperscript{112} Supra note 28 .
accountant was acting for the developers of the project during this period. The plaintiff alleged breach of fiduciary duty, breach of contract and negligence. The trial judge dismissed the negligence claim but awarded damages for breach of fiduciary duty and breach of contract. The Court of Appeal upheld the breach of contract finding but reversed the finding on the breach of fiduciary duty and also varied the damages awarded at trial.

La Forest J. speaking for the majority in the Supreme Court held that “the trial judge did not err in finding that a fiduciary obligation existed between the parties, and that this duty was breached by the respondent’s decision not to disclose pecuniary interest with the developers”\textsuperscript{113}.

In discussing his earlier decision in \textit{Canson} La Forest J. stated that the decision “recognizes the fact that a breach of a fiduciary duty can take a variety of forms and as such a variety of remedial considerations may be appropriate”\textsuperscript{114}. Equitable compensation for breach of fiduciary duty may be limited with reference to common law principles because “where the common law has developed a measured and just principle in response to a particular kind of wrong equity is flexible enough to borrow from the common

\textsuperscript{113} \textit{Ibid.} per La Forest J. at 439.

\textsuperscript{114} \textit{Ibid.}
law”¹¹⁵. He stated that this was in accordance with the fusion of law and equity that occurred “under the auspices of the old Judicature Acts”¹¹⁶.

However La Forest J. referred to the differences between the wrongs committed in *Canson* and in *Hodgkinson*. On this basis he upheld the trial judge’s calculation of damages unlimited by common law principles.

It is clear that in *Canson* the fiduciary duty arose by operation of the law and the loss was caused by the wrongful act of a third party. In *Hodgkinson* however the duty arose on the facts and the breach of duty by the defendant caused the loss directly. Despite this, the basis of the distinction drawn by La Forest J. is highly questionable.

In *Hodgkinson* La Forest J. also referred to the broader justification for upholding calculation of damages namely “to put special pressure on those in positions of trust and power over others in situations of vulnerability”¹¹⁷. He asserted that the law of fiduciary duties “has always contained within it an element of deterrence”¹¹⁸. Thus he suggests that a wider recovery in cases where moral culpability of defendant in breach in greater may be justified as a deterrent. Again it is hard to see how this forms a rational basis of distinction between *Canson* and *Hodgkinson*.

Sopinka and Mc Lachlin JJ. delivered judgment for the minority in Hodgkinson and were joined in dissent by Major J. The minority stressed "the desirability of confining fiduciary law narrowly"\(^{119}\) and held that no fiduciary obligation arose on the facts. The minority upheld the Court of Appeal's calculation of damages for breach of contract.

In the wake of recent decisions there are still many questions surrounding the nature of equitable compensation for breach of fiduciary duty. Canson is significant in asserting that Courts must consider the nature of the breach in each case to determine the extent of compensation. The majority decision also relies on a mingling of legal and equitable doctrine to shape an appropriate remedial response. Hodgkinson affirms this approach, although the decision is a questionable one on the facts.

The issue of the conflicting decisions by La Forest J. and Mc Lachlin J. in Canson, M and Hodgkinson must be addressed. La Forest J. clearly asserts that the best approach to assessing compensation is to apply the experience and best features of both equity and common law, irrespective of the origins of the measure. Mc Lachlin J. also states that equity may borrow from the experiences of the common law but she differs from La Forest J. in relation to the circumstances that call for such mingling of doctrine.

\(^{119}\) Farquhar, supra note 46 at 388.
Whilst there may be little doctrinal difference between these majority and minority opinions in the jurisprudence the approach of the majority remains preferable. When one considers the manner in which fiduciary law has expanded the approach by La Forest J. in limiting equitable compensation in appropriate circumstances by reference to damages doctrine appears desirable. The remedial response in fiduciary law requires the “integration of common law techniques with equity’s techniques”\textsuperscript{120}, irrespective of history.

The need for a flexible remedial approach in this area has been affirmed by the New Zealand Court of Appeal in the recent \textit{Bank of New Zealand v. New Zealand Guardian Trust Co. Ltd.} case\textsuperscript{121}. The defendant, Guardian Trust, was a trustee under a debenture deed. The case concerned a breach of duty by Guardian in failing to use reasonable diligence to detect breaches of the deed by another party. It was held that there was no loss to the trust property on the facts.

On appeal Gault J. stated that “not every breach of duty by a fiduciary is a breach of fiduciary duty”\textsuperscript{122} and so not every breach by a fiduciary attracts liability based on broad equitable compensation principles. Rather the measure of compensation must be limited with reference to the nature of the breach, irrespective of the historical source of the duty. The compensation must draw on equitable and legal doctrine as appropriate so that

\begin{footnotesize}
\textsuperscript{120} Davies, \textit{supra} note 1.
\textsuperscript{121} \textit{[1999]} 1 N.Z.L.R. 664.
\textsuperscript{122} \textit{Ibid.} at 680.
\end{footnotesize}
“where a person, though under some fiduciary obligation, merely fails to exercise reasonable skill and care, there is no reason in principle for the law to treat that person any differently than those who breach duties of care imposed by contract or tort”\(^\text{123}\).

It was held that the proper approach to compensation is to focus “on the scope of the duty in the circumstances”\(^\text{124}\). Gault J’s conclusion accords with the central argument of this work namely that “surely the stage has been reached in the development of the law where something more substantial than historical origin is needed to justify disparate treatment in the law”\(^\text{125}\). The Court held that the common law principles of causation and remoteness applied and the defendant was held not to be liable for the loss suffered.

Tipping J. agreed with the conclusions of Gault J. and summarized the arguments stating that “what matters is not so much the historical source, be it equity or the common law, fiduciary duty or tort, but rather the nature and content of the obligation which has not been fulfilled”\(^\text{126}\). Thus “it will not usually be appropriate if the nature and content of the duty are the same, to have different approaches to causation and remoteness, according to its historical source”\(^\text{127}\). He noted the various forms that breaches by fiduciaries may take which demand a flexible remedial approach that moves beyond the strict historical divide between legal and equitable compensation principles.

\(^{123}\text{Ibid. at 681.}\)
\(^{124}\text{Ibid. at 681.}\)
\(^{125}\text{Ibid. at 681.}\)
\(^{126}\text{Ibid. at 686.}\)
\(^{127}\text{Ibid. at 687.}\)
D : Equitable Compensation and Breach of Confidence

There is further support for the move towards remedial flexibility and a mingling of legal and equitable compensation principles in cases concerning breach of confidence. The Supreme Court has held that the availability of equitable remedies in breach of confidence actions does not turn on the presence of a fiduciary relationship or the provisions of Lord Cairns Act. These decisions support view that the courts must focus on the nature of the wrong to determine compensation with reference to the appropriate remedial principles, whether legal or equitable.

One recent decision in this area is *Lac Minerals v. International Corona Resources Ltd.*\(^{128}\). The facts of the case were that Corona, a junior mining company entered into negotiations with Lac, a senior mining company concerning the development of a property, the Williams Property. In the course of negotiations Corona disclosed confidential geological information about the site. After these negotiations broke down Lac representatives gathered more information about the site and subsequently succeeded in acquired the property. Corona sued for breach of contract, breach of confidence, and breach of fiduciary duty.

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At trial it was held that Lac was liable for breach of confidence and breach of fiduciary duty and the appropriate remedy was the return of the Williams property to Corona. Lac was also ordered to pay the amount of profits it made from the property with interest to Corona. This order was subject to a lien for the cost of improvements to the property expended by Lac. The Court of Appeal upheld the finding and added that a constructive trust was an appropriate remedy for breach of confidence and breach of fiduciary duty.

In the Supreme Court the majority upheld the finding of a breach of confidence by Lac but rejected the claim for breach of fiduciary duty. This decision by the Supreme Court represents a resistance to the imposition of a fiduciary relationship on the basis that parties are not of equivalent bargaining power\textsuperscript{129}.

La Forest J. speaking for the majority on the remedy question, emphasized that in considering the appropriate remedy the court must consider the nature of the breach and held that there was a range of remedies available for breach of confidence. He stated \textit{obiter} that common law concepts like causation, foreseeability and remoteness could limit the remedy of equitable compensation.

La Forest J. stressed that Lac’s conduct had to be deterred and imposed a constructive trust in favor of the plaintiffs. It was held that it is important to focus on the reasons for

\textsuperscript{129} Waters, \textit{ibid.} at 469-470.
awarding a right to property in the plaintiff's favor as opposed to focusing on reasons for depriving defendant of right.\textsuperscript{130}

Sopinka J. in dissent on the remedy question held that the appropriate remedy for breach of confidence was damages. He held that the aim of a remedy for breach of confidence was to restore the plaintiff in monetary terms to the position he was in before the breach and that this was achieved with an award of damages.

What is most significant is that both the majority and minority judgments on the remedy question "exhibit little sympathy for jurisprudence based on a distinction between law and equity."\textsuperscript{131} Rather the decision emphasizes that the common law and equitable compensation principles often produce the same result.

Most Recently, the Supreme Court discussed equitable compensation for breach of confidence in \textit{Cadbury Schweppes Inc. v. FBI Foods Ltd}.\textsuperscript{132} The case concerned the misappropriation of confidential information obtained under a licensing agreement about the recipe and manufacturing procedures of Clamato juice. At trial it was held that the defendants has wrongfully misused the confidential information but that the plaintiffs had not established any financial loss. The trial judge awarded "headstart damages" on the

\textsuperscript{130} \textit{Ibid.} at 462.

\textsuperscript{131} Hammond, \textit{supra} note 128 at 209.

\textsuperscript{132} 42 B.C.L.R. (2d) 159 [hereinafter \textit{Cadbury Schweppes}].
basis that the breach of confidence had given the defendants a springboard into the juice market.

The Court of Appeal upheld the finding of a breach of confidence and granted the respondents a permanent injunction against the continued use of the confidential information. The court also awarded damages based on the amount the plaintiffs would have earned if they had sold the volume of product sold by the defendants in the period following the breach.

One of the grounds of appeal to the Supreme Court was the principles on which financial compensation for breach of confidence was to be calculated. The Court referred to Sopinka's J's decision in Lac stating that breach of confidence should be characterized as a hybrid action that springs from roots in equity and common law\textsuperscript{133}. It was held that this explains the flexibility shown by the courts in crafting remedies for the protection of confidential information.

The Court went on to hold that the majority approach to the remedy question in Lac confirms that the courts have a jurisdiction in a breach of confidence case to grant a remedy "dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations". Binnie J., speaking for the court, held that "there is much to be said for the majority view in Lac that if a ground of liability is established, then the remedy that

\textsuperscript{133} Per Sopinka J., dissenting in Lac, supra note 55 at 615.
follows should be one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" 134. This decision supports a flexible remedial approach which moves beyond a strict divide between legal and equitable remedies.

Binnie J. cited M and held that where same policy objectives underlie two different causes of action similar measures of compensation may be appropriate. He stated that it is "anachronistic to draw distinctions.... between various sources of liability , dictated as they are by the same consideration of policy" 135. The court held that in the instant case common law principles and equitable principles would produce the same result.

It should be noted briefly that there is some support for a flexible approach to compensation in breach of confidence cases in English jurisprudence. In Seager v. Copydex Ltd (No.2) 136 the sole issue before the court was the assessment of damages for the breach of confidence by the defendant. In delivering judgment the Court of Appeal was "moving in uncharted territory in attempting to outline principles upon which compensation for breach of this purely equitable duty were to be assessed"137. It was held that the measure of compensation should vary according to the nature of the confidential information. Denning J. drew an analogy with common law damages for conversion in

134 Cadbury Schweppes, supra note 132 at para 24.
135 Ibid. at para 50.
137 Per Stuckey J. in Seager, supra note 136 at 421.
order to develop the principles for the assessment of compensation in equity. This accords with a flexible remedial approach although it should be noted that Denning J’s decision has been criticized and in *Cadbury Schwepps* Binnie J. stated that the decision presented some “theoretical difficulties” 138

**F: Damages for Breach of Legal Duty**

Amalgamating legal and equitable compensation principles constitutes a desirable move beyond historical limitations and towards remedial flexibility. Under such a flexible approach equitable compensation can be limited by reference to the legal doctrine in order to remedy breaches of equitable obligations, as discussed above.

There is further support for the argument that the nature of the wrong must determine compensation principles, as opposed to principles based on the historical divide between law and equity, in relation to breaches of legal duty. Amalgamating legal and equitable compensation principles allows for a more generous approach to compensation for breaches of legal duties. This recognizes that certain breaches of legal duty exist, outside the scope of fiduciary law, where a more generous approach to compensation than that traditionally associated with damages, is justified.

138 *Cadbury Schwepps*, *supra* note 132.
Not only does this allow for an appropriate measure of compensation for breaches of legal duty but it avoids the unnecessary creation of an artificial fiduciary relationship to facilitate an equitable approach. Such a remedy-orientated distortion of the concept of a fiduciary has occurred in the past. In Reading v. The Attorney General an army sergeant was classified as a fiduciary in order to require him to return profits made from abuse of his positions as such to the British government. This expansion of the fiduciary principle was necessary because there was no acceptance of the doctrine of unjust enrichment until Lipkin Gorman v. Karpnale. Similarly, in Goodbody v. Montreal a thief was classified as a fiduciary to his victim to enable tracing because it was thought that the remedy of tracing could only be granted where a fiduciary relationship existed. The courts were forced to expand the concept of a fiduciary relationship in order to facilitate a suitable remedial approach.

The most recent expansion of the fiduciary principle, motivated by remedial concerns is suggested in the Norberg v. Weinrib case. That case concerned an action against a doctor who provided drugs to an addicted patient in exchange for sexual contact. The plaintiff sued the defendant doctor for damages on the grounds of sexual assault, negligence, breach of fiduciary duty and breach of contract. The action was dismissed at trial.

141 Supra, note 63.
142 see Waters, supra note at 456.
Although the majority in the Supreme Court dealt with the case on the basis of the tort of assault Mc Lachlin J in dissent dealt with the case on the basis of fiduciary law. Her analysis was clearly motivated by equity’s generous approach to compensation in cases of breach of fiduciary duty.

Mc Lachlin J. held that the doctrines of tort or contract failed to capture the nature of the wrong done to the plaintiff\(^\text{144}\). She held that only the principles applicable to fiduciary relationships encompassed the nature of the relationship between the parties and the wrong done. The fact that equity is more generous in its approach to remedies in this area was clearly of primary concern and the motivating factor for dealing with the case as a breach of fiduciary duty as Mc Lachlin J argued that unless the defendants duty was characterized as fiduciary “the wrong done to the plaintiff can neither be fully comprehended in law nor adequately compensated in damages”.

The dangers involved in characterizing the relationship in Norberg as fiduciary are obvious. First is the fear that such a decision would open the floodgates to unfounded claims based on the abuse of real or perceived inequality of power. Concern about expanding the fiduciary concept has also already been expressed in Lac and by the minority in Hodgkinson.

\(^{144}\) Ibid. per McLachlin J. at 269.
In attempting to answer these fears Mc Lachlin J claimed the ambit of the fiduciary obligation must be defined “in a way that encompasses meritorious claims while excluding those without merit”\(^{145}\). This is a vague and inadequate reply. In recent decades the courts have struggled to define and contain the fiduciary principle and so the suggestion of excluding cases without merit is redundant in the effort to define a fiduciary.

Despite the objectionable approach by Mc Lachlin J her concerns in *Norberg* that the wrong in the case be adequately remedied are well founded. *Norberg* is a case which calls for a more generous approach to damages than is traditional. This can be achieved by focusing on the nature of the breach and the circumstances of the case and assessing the measure of compensation on this basis with reference to appropriate principles, whether legal or equitable.

**F: Conclusion**

The trend in judicial reasoning has moved “away from attempts to formulate principles of general application and towards the resolution of particular disputes on a case by case basis”\(^{146}\). In particular, due to recent developments, the existence of a fiduciary

\(^{145}\) *Ibid* at 291.

\(^{146}\) Smith, *supra* note 43 at 728.
relationship may be decided on a case by case basis and in accordance with the circumstances presented. The remedial response by the courts must be similarly sensitive to circumstances and the recent evolution of the remedy of equitable compensation is illustrative of this approach.

The recent jurisprudence concerning compensation for breach of fiduciary duty supports an approach to compensation which incorporates aspects of both legal and equitable remedial doctrine. In a number of cases the courts have limited equitable compensation by reference to common law principles. This represents a breakdown in the historical separation between equitable and legal remedies.

The key point is that the courts must refer to the nature of the breach of fiduciary duty and adjust the remedial response accordingly. A number of decisions concerning breach of confidence also support a flexible approach to equitable compensation.

The case law provides support for “the assimilation of equitable compensation with damages and the availability of a full range of legal and equitable remedies for breach of duty originating in equity”147. The decisions also reveal a “concern that the policy objectives of the law should be paramount over the origins of a cause of action” which is “a potent sign of extensive mingling of law and equity”148

147 Capper, supra note 111 at 327.
148 Ibid.
This flexible approach to compensation which moves beyond historical divide between legal and equitable remedies has an impact in areas other than the breach of equitable obligations. Clearly there are legal wrongs which call for more generous measure of compensation than that traditionally awarded at law. A flexible approach to compensation in such cases allows for a proportionate measure and avoids the distortion of the fiduciary concept.

Admittedly there are some issues which remain outstanding. It is unclear what limiting principles apply to equitable compensation. Whilst the need for a causal link before equitable compensation is awarded was established in Canson, the role the issue of foreseeability was not adequately discussed. It remains unclear how far common law analysis is to be taken and it must also be recognized that some equitable presumptions must retain significance in assessing compensation\textsuperscript{149}.

The issues have yet to be addressed so at this stage it is “unclear whether equitable compensation for breach of fiduciary duty and other equitable wrongs will evolve into a powerful new remedial weapon or indeed runs the risk of becoming a doctrinal loose canon”\textsuperscript{150}.

\textsuperscript{149} Davies, \textit{supra} note at 320.
\textsuperscript{150} McCamus, \textit{supra} note 63 at 340.
The foundation for a flexible approach to compensation has been put in place and the Courts must not be reluctant to build upon it.
Chapter 5: Conclusion

A: Remedial Law

The legacy of the divided jurisdictions of common law and equity continues to influence modern Canadian law. Whilst some divisions between the jurisdictions retains significance, a strict separation between law and equity is detrimental to legal development in many respects. This is particularly evident in the remedial law sphere. The analysis in the preceding chapters springs from a broad concern with the remedial system as it stands at present.

This work is also motivated by the fact that although remedial law relates to the basic functioning of the judicial system, there is a lack of academic focus on this area. At its most fundamental level, a judicial system must strive to serve its subjects and to effect justice. One aspect of this jurisdiction is the power to award wronged persons a legal remedy. It is vital that remedial law is sensitive and responsive to the evolution of society and the fact that novel legal problems arise all the time.

The various objectives underpinning remedial law are easy to express but difficult to achieve. First it is difficulty to translate remedial aims into functional legal terms. How is it possible to mold ideals into rules of law? How does the system quantify various losses and fashion an appropriate remedial response?
This brings us to a second difficulty concerning remedial law which is the existence of pragmatic limitations. A system which awards those wronged what they desire and deserve is an unattainable ideal. It ignores the realities of the operation of society and the limitations on a court's remedial jurisdiction. It also ignores the competing interests which operate in the legal sphere, such as the rights of the wrongdoer, the victim and society at large.

Whilst acknowledging the complexity of remedial law the strive towards a more responsive system of remedies in Canada is a necessary and legitimate aim. A greater degree of remedial flexibility is vital in order to realize the objective of a more responsive remedial system.

**B: Legal and Equitable Remedies**

The move towards greater remedial flexibility in Canada continues to be hindered by history. In particular, the strict separation of legal and equitable remedies operates to prescribe the availability and so limit the operation of specific remedies in Canadian law. This separation springs from the historical division between equitable and legal jurisdictions, a history which continues to mold remedial responses in Canada. In the face of an evolving society however, history alone does not justify a strict division which limits remedial flexibility. The time has come to reassess the role of history in the
remedial law sphere. It is time to move beyond the strict separation of legal and equitable remedies and towards a flexible framework of remedies.

It has been argued that "in principle and policy it is desirable that the jurisdictional origins of the rules of law become less important and those rules are adapted to changing social realities by courts in fused jurisdictions, where the relationship of those rules inter se and their overall purpose in the legal system as a whole can be better appreciated".  

Whilst this argument has much merit this work does not advocate a abandonment of history and precedent. Clearly, the history of the legal system continues to serve a purpose but it is the scope of that purpose must be understood. A move towards a unified system of remedies must be 'based on principle and supported by precedent' as 'only in this way can the law afford its customers that reasonable degree of consistency which is essential to the function of a civilized system of jurisdiction'.

The retention of some aspects of the divide between law and equity is vital. The division between legal and equitable rights must be preserved. These separate bodies of rights embrace fundamental legal concepts. The distinction between legal and equitable interests is central to the vast law of property and trusts.

1 Tilbury, Civil Remedies, Vol. 1 (Australia: Butterworths) at 11.
2 Godfrey at 29.
3 Ibid.
4 Capper, "Damages for the Breach of the Equitable Duty of Confidence" 14 Legal Stud. at 316.
However, the division between law and equity is not an all pervasive one. More specifically, a distinction between legal and equitable rights does not necessitate a strict division between legal and equitable remedies. The Courts must move beyond the position where for example “remedies flowing from a breach of some equitable duties may be limited because of their origin in equity and for no other reason”.

Unfortunately the burden of history still weighs heavily on the shoulders of remedial law in contemporary Canada. The rules concerning remedies must now be adapted to reflect changes in society. Ultimately “a distinction which is based entirely on the nature or history of the remedy sought does not seem a very satisfactory basis for a material difference in the resulting positions”.

**C: Summary**

This work focuses on the evolution of equity’s remedial jurisdiction in advocating a flexible remedial approach. The brief study of the history of equity’s remedial jurisdiction in Chapter 2 brings us in touch with the themes of this jurisdiction. From the outset, equity aimed to administer practical and contextual justice based on fairness and justice.

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In recent years there has been a resurgence of equitable themes in the remedial context which is to be welcomed.

The equitable themes of contextual justice stand in contrast to the rigid common law approach that developed in the 14th century. Indeed as a result of the rigidity of the common law, equity flourished as an independent jurisdiction.

To avoid conflict with the common law equity was viewed as a supplementary jurisdiction. In turn equitable remedies were viewed as supplementary and legal remedies remained primary. Such a perception, rooted in the divided administration of the two jurisdictions has continued to mold the modern progression of equity. It is time to abandon any artificial hierarchy of remedies and mold a response to fit the circumstances presented.

Historical fact should not be used to restrict the impact of equity's remedial jurisdiction. Rather it should be used to identify remedial themes which remain constant and must shape a flexible and modern remedial response.

Chapter 2 traces the history of equity to the period where the scope of equitable discretion was restricted and the jurisdiction became formalized. Despite this “legalization” of equity the themes forged by the Chancellors in the 15th century were not lost.
In the wake of the "legalization" conflict between the common law and equity persisted. The existing difficulties were further aggravated by the procedural chaos in the Common Law Courts and the Courts of Chancery respectively. Eventually, the administration of law and equity was fused under the Judicature Acts. As stated in Chapter 2 the precise effect of these Acts is debated but it is submitted that a mingling of legal and equitable principles has occurred in the wake of administrative fusion. Whilst to assert that this mingling of principle was intended under the Acts is to partake in the fusion fallacy, to ignore this development is similarly erroneous.

The Judicature Acts cannot be used to prohibit a mingling of legal and equitable remedial doctrine. Just because the legislation does not authorize remedial fusion does not mean that such fusion is prohibited. The breakdown of the separation between legal and equitable remedies "ought not be rejected out of hand on the basis of a backward looking argument that such a development would not have been possible before 1875".

This conclusion that mingling of remedial principles has occurred is supported by an analysis of individual equitable remedies which have been influenced by legal doctrine and shaped by the themes of fairness and contextual justice.

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7 Tilbury, supra note 1 at 11.
8 Ibid.
Chapter 3 discusses the evolution of the constructive trust in Canadian law. The chapter begins with an outline of the English approach which has influenced Canadian developments and serves as a contrast to more recent Canadian jurisprudence. In Canada, the constructive trust has become a remedial device and has evolved beyond its historical roots. Its evolution is illustrative of the resurgence of equitable themes to respond to the demands of an evolving society.

The constructive trust operates to remedy unjust enrichment and wrongful gains as outlined in the recent *Soulos* case. The development of this remedy illustrates that remedial flexibility does not mean that legal certainty is sacrificed. In relation to the constructive trust "there are still pre requisites for its imposition but these are functional considerations based on the appropriateness of the result not historical considerations required to ground the jurisdiction to make the order". The scope of this remedy should no longer be restricted as a result of arguments rooted in history.

In Chapter 4 the remedy of equitable compensation is examined. This discussion provides further evidence of the breakdown of the divide between legal and equitable remedies in recent Canadian jurisprudence. Equitable compensation has mingled with legal doctrine and this has proved a fruitful development.

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Most of the recent case law concerning equitable compensation has occurred in the context of fiduciary law, an area which has been the subject of much attention in Canada. The concept of fiduciary obligations has expanded considerably and it is important to acknowledge the spectrum of fiduciary obligations as well as the potential range of breaches of these obligations.

The remedy of equitable compensation has been developed to accommodate the developments in fiduciary law. To this end this remedy has limited by reference to common law doctrine. The law must allow for such beneficial mingling of legal and equitable doctrine to occur where appropriate, irrespective of the ancient historical divide between the two jurisdictions. What results is a flexible approach to compensation which allows for a legal response shaped by the particular circumstances of the case.

There is also evidence of a mingling of legal and equitable doctrine in cases concerning compensation for a breach of confidence. The jurisprudence supports a flexible remedial approach. Most recently in Cadbury Schweppes the Court held that the remedy imposed in each case "should be the one that is the most appropriate on the facts of the case rather than one derived from history or over categorization"\textsuperscript{10}.

\textsuperscript{10} 42 B.C.L.R. (2d) 159 at para 24.
Finally, in Chapter 4 it is noted that a flexible approach to the concept of compensation is desirable as it avoids the necessity to artificially infer a fiduciary obligation in order to adequately compensate a plaintiff.

The evolution of the constructive trust and equitable compensation is illustrative of a move towards a unified system of remedies in Canada. The developments mark a pattern of the breakdown of the traditional separation of legal and equitable remedies as well as the decline in the primacy of legal remedies and the subordinate nature of equitable remedies in modern jurisprudence.\textsuperscript{11}

However, a more orthodox approach still maintains force in the courts and historical argument is still employed to justify the continued separation between legal and equitable remedies. Thus whilst a number steps towards blending legal and equitable remedies have been taken the final step is resisted. There is concern about relationship between new forms of equitable relief and traditional legal remedies under tort, contract and statute.\textsuperscript{12} The issue of legal certainty is also raised to counter arguments for increased remedial flexibility.

In response, the legal system must strive to achieve a balance between certainty and justice. Increased flexibility does not mean all certainty is sacrificed. The jurisprudence

\textsuperscript{11}Tilbury, \textit{supra} note 1 at 7.

concerning the evolution of the constructive trust and equitable compensation is indicative of this. Certain legal rules will continue to dictate the availability of remedies. However a strict separation distinction between legal and equitable remedies should no longer be a determinative factor.

In all cases "a full range of remedies should be available as appropriate no matter whether they originated in common law or equity".\(^\text{13}\)