

# The “Fusion” of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non- Fusion of Legal and Equitable Matters

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*Equity, in its broad understanding, has long been a fundamental part of law. Its history may be traced through principles illustrated in the Old Testament and, in various formulations, through Ancient Greek and Roman legal constructs, as well as in Natural Law and Canon Law. While the historic presence of equity within various systems of law is unquestioned, the jurisdiction of equity within contemporary legal systems has been a matter of significant debate and confusion. Facilitating a better understanding of the contemporary role of equity requires knowledge of its meaning and the implications of the historic merger of legal and equitable jurisdictions. This paper establishes a framework for appreciating the contemporary challenges faced by equity by examining the Supreme Court of Canada’s analysis of the merger of legal and equitable jurisdictions in two major cases involving allegations of breaches of fiduciary duty: *Canson Enterprises Ltd v Boughton & Co* and *Hodgkinson v Simms*. The inconsistent application of equitable principles in these cases demonstrates the court’s confusion over the effects of the historic merger of law and equity and offers a valuable perspective for the administration of justice in contemporary law.*

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## I. Introduction

Equity<sup>1</sup> has long been a part of law, complementing its strength and ameliorating its deficiencies. Over its history, equity developed a number of key principles that advanced the law. One of these is the trust, which is often described as equity’s greatest invention.<sup>2</sup> Another

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1. The use of the term “equity” herein refers to the larger philosophical jurisdiction under which various equitable jurisdictions and principles (such as the equitable, as opposed to legal, interest in land) exist. Where specific instances of equity are referred to in the text, they will be distinguished accordingly, such as by the use of the phrase “English Equity” to designate that specific jurisdiction and its principles.
  2. See Frederick W Maitland, *Equity: A Course Of Lectures*, ed, by John Brunyate (Cambridge: Cambridge University Press, 1936)(“[o]f all the exploits of Equity the largest and the most important is the invention and development of the Trust” at 23); see also Harold G Hanbury, “The Field of Modern Equity” (1929) 45:2 Law Quarterly Review 196 (“[t]he trust, as developed through the use, is the mainspring of equity” at 199); Roderick Pitt Meagher, William Montague Charles Gummow & John Robert Felix Lehane, *Equity: Doctrines and Remedies*, 3d (Sydney: Butterworths, 1992)(“the recognition, protection and development of uses and trusts [is] equity’s greatest contribution to the law ... ” at 5).

is equity's single most representative creation, the fiduciary obligation.<sup>3</sup> Over hundreds of years, these and other developments helped to solidify equity's important place within the larger body of law it served to complement.<sup>4</sup>

Over time, the integration of equitable principles into the common law, including principles such as unconscionability and good faith in contract law and negligence in tort, has resulted in a narrowing of the historic gulf between law and equity. Adding this development to the merger of legal and equitable jurisdictions, or what has sometimes been described as the "fusion" of law and equity, has muddled the understanding of equity's traditional function as "the spiritual and reforming influence of the law".<sup>5</sup> This is a particular concern in Canada and the United States, where there is a lack of substantive discussion and explication of the purpose and function of equitable principles in mainstream jurisprudence and academic commentary.<sup>6</sup>

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3. Leonard I Rotman, *Fiduciary Law* (Toronto: Carswell, 2005) at 154 [Rotman, *Fiduciary Law*]; Gino Dal Pont & Don Chalmers, *Equity and Trusts in Australia and New Zealand*, 2d (Sydney: Law Book Co, 2000) (who describe the fiduciary concept as "arguably the premier equitable concept which illustrates equity's jurisdiction" at 71); John D McCamus, "The Evolving Role of Fiduciary Obligation" in *Meredith Lectures, The Continued Relevance of the Law of Obligations: Back to Basics* (Montreal: Les Editions Yvon Blais, 2000) ("fiduciary obligation seems now to have assumed the traditional mantle and role of equity jurisprudence as a device for correcting defects in the common law" at 205).
  4. As will be discussed further herein, equity was developed as a complementary jurisdiction to the common law that served to augment the latter and ameliorate its harshness and inflexibility.
  5. William F Walsh, "Is Equity Decadent?" (1937) 22:4 *Minnesota Law Review* 479 ("[t]he latent power of equity [is] to shape and develop new law on a higher plane of reason and conscience, and with an increased effectiveness to meet human needs" at 494).
  6. Certainly, substantive discussion of equity has been on the wane for much of the last century in North America, though some might argue that equity has faced significant challenges to its historic jurisdiction since the merging of legal and equitable jurisdictions in England through the *Judicature Act, 1873* (UK), 36 & 37 Vict, c 66; and *Judicature Act, 1875* (UK), 38 & 39 Vict, c 77.

Law's movement closer to equity in areas such as contract, tort, and unjust enrichment has combined with a greater emphasis towards achieving enhanced certainty in law to hasten equity's marginalization in contemporary jurisprudence.<sup>7</sup> These developments have had deleterious effects on the understanding of the substantive jurisdiction of law and equity. When this desire for certainty is combined with the decreased emphasis on substantive equity within Canadian and American law schools,<sup>8</sup> equitable doctrines such as fiduciary duty that emphasize abstract principles rather than more easily discernible and predictable rules have struggled to maintain their traditional roles.<sup>9</sup> What has generally been ignored in this restructuring of the legal landscape is that, despite its struggle towards achieving certainty, the law actually benefits

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7. Notwithstanding the general lack of knowledge of equity and equitable doctrine, the maxims of equity appear to retain a curious currency in contemporary jurisprudence: see *e.g.* Jeff Berryman, "Equity's Maxims as a Concept in Canadian Jurisprudence" (2012) 43:2 *Ottawa Law Review* 165.
  8. While it is difficult to pinpoint precisely when the abandonment of equity as a substantive part of the law school curriculum occurred, it would seem to have occurred within the last half century; see Louise Weinberg, "The New Meaning of Equity" (1977) 28:4 *Journal of Legal Education* 532 at 536 (the author indicates that while in 1949, eight of 108 law schools responding to a survey answered that they had eliminated separate courses in equity, in a 1967 survey of all 115 law schools then-accredited by the Association of American Law Schools ("AALS"), equity, in some form, was a required first-year course in only 11 schools, a required upper-year course in a further 19 schools, and available as an elective in only 32 schools); see also Louis F Del Duca, "Comment, Continuing Evaluation of Law School Curricula: An Initial Survey" (1968) 20:3 *Journal of Legal Education* 309; Lester B Orfield, "The Place of Equity in the Law School Curriculum" (1949) 2:1 *Journal of Legal Education* 26.
  9. For greater discussion, see Leonard I Rotman, "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91:3 *Boston University Law Review* 921.

from a certain amount of foginess.<sup>10</sup>

This paper emphasizes that equity ought to be understood to have a continuing and substantive role in contemporary law and legal education. Equity is not only a method by which the rigours of the common law are tempered and its gaps filled, nor is it merely a competing system to the positive law. Rather, equity is more appropriately understood as a process by which positive law is brought closer to the human condition.<sup>11</sup> It is a way of elevating the law and facilitating the achievement of justice in the

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10. This is becoming increasingly recognized in contemporary legal literature. See *e.g.* Seana Valentine Shiffrin, “Inducing Moral Deliberation: On the Occasional Virtues of Fog” (2010) 123:5 *Harvard Law Review* 1214 (where the author disputes the conventional wisdom that celebrating the clarity and certainty of legal *rules* must necessarily correspond to devaluing the flexibility and adaptability of legal *standards*. Instead, she argues that “[b]y framing the prima facie unclarity and uncertainty of legal standards as a defect, the traditional picture ignores the salutary impact that superficial opacity may have on citizens’ moral deliberation and on robust democratic engagement with law” at 1214); note also Yuval Feldman & Shahar Lifshitz, “Behind the Veil of Legal Uncertainty” (2011) 74:2 *Law and Contemporary Problems* 133 (which “challenges the conventional view [that uncertainty in law is bad] and proclaims the advantages of legal uncertainty” at 134; and “properly used, uncertainty can dramatically enhance efficiency and fairness” at 174).
11. Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009 ) (“[e]quity is not Utopian, it simply reaches beyond the routines of law towards the particularities of the human condition” at 243); see also Philip A Ryan, “Equity: System or Process?” (1956) 45:2 *Georgetown Law Journal* 213 (“[e]quity is a process, but it is a process of a far broader and more important kind than procedure, even when this is taken in its widest possible sense. Equity viewed as a process accomplished the conversion of morality into law; procedure is merely the means of recognizing the conversion in a particular case ... ” at 222).

broadest sense of the term<sup>12</sup> while providing sound parameters for the exercise of judicial discretion. However, this historic role is threatened by misunderstandings of the implications of merging legal and equitable jurisdictions that remain in the present day.

In the process of establishing a conceptual framework for understanding the merger of law and equity, this paper looks initially to equity’s historical and conceptual origins. Next, it examines the effect of the merging of legal and equitable jurisdictions, historically and by way of two contemporaneous cases decided by the Supreme Court of Canada: *Canson Enterprises Ltd v Boughton & Co*<sup>13</sup> (“*Canson*”) and *Hodgkinson v Simms*<sup>14</sup> (“*Hodgkinson*”). The paper then illustrates, by way of these cases, how similar fact patterns sharing a common feature<sup>15</sup> may be resolved differently, depending on whether one views equity as being “fused” with

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12. See Howard L Oleck, “Historical Nature of Equity Jurisprudence” (1951) 20:1 Fordham Law Review 23 (“[e]quity, certainly in its historical moral sense, and hopefully in its administrative sense, is the principal technique thus far developed to make certain that law always will be readily adaptable for, and directed toward, the achievement of justice” at 44); Watt, *ibid* (“[w]ithout equity, the law’s story becomes all rules and no justice” at 45; and “[e]quity does not set out to produce an ideally righteous system ... but it sets out to make the system of regular law more just” at 102-103); see also Ryan, *ibid* (“[w]hat is necessary is to have some adequate grasp of Equity as a built-in dynamism necessary for progress in any system which purports to administer justice” at 217); Robert H Rogers, “A Lesson in Equity” (1915) 49:4 American Law Review 510 (“[I]egal justice is the law’s attempt at approximate justice from the standpoint of social expediency ... But the justice of equity, as originally intended and administered, was man’s best attempt to arrive at real justice regardless of law or rule” at 535).
  13. (1991), 85 DLR (4th) 129 (SCC) [*Canson*].
  14. (1994), 117 DLR (4th) 161 (SCC) [*Hodgkinson*].
  15. In both of these cases, the damages claimed were not entirely related to the direct actions of the alleged wrongdoers, but were dependent upon the effects of secondary forces that were said to have flowed directly from the wrongdoers’ breach of duty. In both cases, the Supreme Court of Canada was also confronted with, *inter alia*, the application of common law *versus* equitable causation and the relevance of the principles of foreseeability, remoteness, and intervening act.

the common law (and thereby having its principles being fully integrated with or subsumed under the common law) or simply merged with it (whereby equitable principles retain their theoretical and substantive distinctiveness from those of the common law).

## II. The Historical and Conceptual Origins of Equity

Despite equity's historic role in developing greater justice for law, its continuation as the conscience of law has been potentially jeopardized by its uncertain application in contemporary jurisprudence.<sup>16</sup> Early in the history of various legal systems, it was recognized that for law to be just, it had to balance broadly-worded and rigidly applied positive laws of general application with more case-specific and flexible legal applications that could respond to new and unique circumstances. The challenge of appealing to the general and the specific, being rigid, yet flexible, and simultaneously precise and open-ended meant that complementary systems were required to bring together these antagonistic goals.

The idea of complementary legal jurisdictions helps to explain the historical purpose and function of equity. Equity works alongside the law, supporting it where it is deficient and enabling the law to adequately respond to the individual requirements of particular circumstances. It occupies a supplementary jurisdiction to the common law that props

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16. From a very early stage, conscience became one of the guiding principles of equity jurisdiction: see Carleton Kemp Allen, *Law in the Making*, 7d (Oxford: Clarendon Press, 1964) (“[i]f we look for one general principle which more than any other influenced equity as it was developed by the Chancery, we find it in a philosophical and theological conception of *conscience*” at 406); see also George Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol 1 (Philadelphia: Lea and Blanchard, 1846) (“... if any distinction was originally recognized as to the respective import of the terms Equity and Conscience, they soon became confounded, and a very considerable latitude was admitted in the application of the terms Equity and Conscience” at 412-413); Donovan WM Waters, “The Reception of Equity in the Supreme Court of Canada (1875-2000)” (2001) 80:1 Canadian Bar Review 620 (“[e]quity is ‘conscience’ – this is its whole *raison d’être*, doctrinal in character though it be ... ” at 630, and “[e]quity was and is the voice of conscience” at 625).

up and improves the latter without being inferior to it or lesser in importance.<sup>17</sup> The development and situation-specific application of equitable principles humanized and contextualized the law's otherwise antiseptic nature, which made the law more just.<sup>18</sup> In accomplishing these diverse tasks, equity did not replace the common law, but maintained a conceptual separation from it, all the while harmonizing law with the needs and requirements of evolving social structures and relationships.

As a supplemental jurisdiction to the common law, equity could not function independently of the former; as Maitland famously said, equity, without the common law, would have been "a castle in the air".<sup>19</sup> It is equally important, however, to understand that the common law, without equity, would have been "barbarous, unjust [and] absurd".<sup>20</sup> Today, equity is clearly "part of the warp and woof of our substantive law",<sup>21</sup> but the precise role it plays in contemporary law is often unclear.

Despite the symbiotic relationship between law and equity, common law practitioners were concerned about the competition that equity

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17. Acknowledging the supplementary jurisdiction of equity does not, however, entail, that equity is either inferior to or lesser in importance than the common law. Rather, equity is not needed where the law is suitable or sufficient to address the issue in question, but augments it or replaces it where it is silent or deficient; see the discussion of this issue below; see *Re Vandervell's Trusts (No 2)*(1974), 1 Ch 269 (Eng) at 322; Sidney E Smith, "The Stage of Equity" (1933) 11:5 Canadian Bar Review 308 ("[e]quitable rights were not to supplant common law rights, and, in most cases, equitable rights were predicated upon the very existence of common law rights" at 312, and "[e]quity, as understood in English law, was not a self-sufficient system; at every point, it presupposed the existence of the common law" at 313).
  18. See the references, *supra* note 12.
  19. Maitland, *supra* note 2 at 19.
  20. See also Watt, *supra* note 11 ("[t]he law provides just one among many stories of justice. If the law story is to convince us, it must include the character of equity. Without equity, the law's story becomes all rules and no justice" at 45); see also John Gardner, "The Virtue of Justice and the Character of Law" (2000) 53:1 Current Legal Problems 1 at 18.
  21. Douglas Laycock, "The Triumph of Equity" (1993) 56:3 Law and Contemporary Problems 53 at 71.

posed for the common law prior to the merging of legal and equitable jurisdictions. This provided them with incentive to denigrate equitable principles or to critique equity practice.<sup>22</sup> Part of the historic discontent with equity also arose from ideological conflicts and procedural issues that created a legacy of stalled jurisprudence in the Court of Chancery.<sup>23</sup>

During the time the common law and equity were administered in separate courts, with separate rules and bases of relief pertaining to each, there was little or no reciprocity between them. This created a situation whereby plaintiffs had to choose which forum to air their disputes.<sup>24</sup> This was not always a straightforward matter about what jurisdiction was appropriate for their claims. Indeed, even lawyers had a difficult time discerning the appropriate forum to entertain claims. Judges were not always helpful either; their desire to solidify claims to jurisdiction

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22. Frederick Pollock, “The Transformation of Equity” in Paul Vinogradoff, ed, *Essays in Legal History* (London: Oxford University Press, 1913) (“[c]omplaints ... were for the most part, if not altogether, made or instigated by practitioners of the common law who were aggrieved by the growing competition of the Chancery” at 293).
23. Walter Ashburner, *Principles of Equity* (London: Butterworth & Co, 1902) at 14-17 (Ashburner speaks of continual skirmishes between the jurisdictions during the reign of Elizabeth I. Attempts to introduce equitable concepts into common law – and thereby undermine the jurisdiction of English Equity); see also Spence, *supra* note 16 at 576; in a more contemporary American setting, see Lyman Johnson, “Delaware’s Non-Waivable Duties” (2011) 91:2 Boston University Law Review 701 (“[e]quity in the Western legal tradition has always coexisted somewhat uneasily with law, threatening as it does to ‘subvert’ and destabilize legal principles” at 709, citing Margaret Halliwell, *Equity and Good Conscience in a Contemporary Context* (London: Old Bailey Press, 1997), who states that “[f]undamental misconceptions of equity abound ... because of a persistent refusal to acknowledge that equity is, by its very nature, subversive of the law” at 6).
24. Laycock, *supra* note 21 (“[b]efore the merger, the choice between equity and law entailed an all-or-nothing choice between all the characteristics of each system: discretion or formalism, specific or substitutionary remedies, personal decrees or impersonal judgments, enforcement by the contempt power or by execution and garnishment, bench trial or jury trial, and the availability or unavailability of preliminary relief” at 78).

over a matter sometimes led to expansive interpretations that were not always consistent or logical. Inefficiency and delay often ensued, but these troubles were dispensed with by the merging, or fusion, of legal and equitable jurisdictions.<sup>25</sup>

### III. Equity and “Fusion”

Many of the difficulties posed by the separate existence of courts of law and equity were ultimately removed by the administrative merging of those jurisdictions. At that point, the separate jurisdiction of equity was abolished and every judge of the new, combined court of law and equity was bound to recognize and give effect to all legal and equitable rights, obligations, and defences. While the remnants of Chancery practice, along with the various abuses said to have occurred within its walls, were

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25. *Ibid* (“[t]he merger of law and equity ought to mean that the choice between law and equity is no longer all-or-nothing” at 78); while the United Kingdom abolished the separate jurisdictions of law and equity through the *Judicature Acts* of 1873 and 1875, *supra* note 6, other countries maintained separations between the common law and equity for various lengths of time. In Canada, most provinces did not have separate jurisdictions for law and equity because the majority of them were formed after the UK *Judicature Acts* were promulgated. Quebec was an exception to this situation because of its use of civil law. The few provinces that did have separate jurisdictions for law and equity – Ontario, New Brunswick, Nova Scotia, and Prince Edward Island – adopted the idea of concurrent jurisdictions over time: New Brunswick in 1854, Nova Scotia in 1856, Prince Edward Island in 1873, and Ontario in 1881: see Waters, *supra* note 16 at 623. Ontario only had a Court of Chancery from 1837; however, as seen in Smith, *supra* note 17 even though “... [t]here was no Chancery Court there during that period ... there is no reason to believe that any great confusion resulted. What we do find, however, is that the judges of the common law Courts made a conscious effort to ameliorate the rigours of the common law and to do equity” at 313; in the United States, the procedural separation of law and equity was abolished under most state rules of civil procedure at various stages and, federally, through the Federal Rules of Civil Procedure of 1938: see Ralph A Newman, *Equity and Law: A Comparative Study* (New York: Oceana Publications, 1961) at 50-51. An obvious exception to this is the state of Delaware, which maintains a Court of Chancery to the present day.

abandoned, the doctrines of equity that were formulated and refined in Chancery did not lose their validity with the shuttering of that court. Watt expressly recognizes this important distinction:

[w]e do not mourn the passing of the old Court of Chancery with all the evils it perpetuated ... but we should not make the mistake of sealing its treasure in the tomb. The treasure of chancery is a living language; a vital repository of checks and balances that maintain the law's just operation in the zone between too much rigour and too much flexibility ... [A] legal language of equity is a thriving legacy of the Court of Chancery. Chancery language still has the capacity to inform the art of bending rules without breaking them and the capacity to reform the law without deforming it.<sup>26</sup>

Despite the merging of law and equity, the continuing role of equity post-merger remained contentious. Lionel Smith has described the distinction in views over the merger of law and equity as “equity pragmatism” and “equity purism”.<sup>27</sup> In his view, the equity pragmatist “sees the legacy of equity as an historical fact that merely complicates the correct understanding of the modern law”.<sup>28</sup> To the equity pragmatist, the common law and equity are not watertight compartments, but part of the “tapestry of law” and can be drawn upon freely or even in combination. The equity purist, on the other hand, “believes in the continuing distinctness of equitable reasoning, equitable doctrines, equitable traditions”.<sup>29</sup> To the equity purist, equity should never be infused with common law notions.<sup>30</sup> The fact of the jurisdictional merger of law and equity did not change the various reasons for creating equity in the first place nor make its doctrines and remedies

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26. Watt, *supra* note 11 at 131.

27. Lionel Smith, “Unravelling Proprietary Restitution” (2004) 40:3 Canadian Business Law Journal 317 [L Smith, “Unravelling”]; see also Lionel Smith, Book Reviews of *Equitable Damages* by Peter M McDermott; *Equity: Issues and Trends* by Malcom Cope, ed; *Commercial Equity: Fiduciary Relationships* by John Glover, (1996) 75:2 Canadian Bar Review 388.

28. L Smith, “Unravelling”, *supra* note 27 at 317.

29. *Ibid.*

30. See also Laycock, *supra* note 21 (in a similar vein, Laycock speaks about a “segregationist spirit” in his paper, in which equity is to be preserved as a separate and distinct body from the common law, with the preservation of the former’s own, separate traditions from those of law at 54).

any more broadly available than previously. It did, however, eliminate the uncertainty over which court to file a claim in and ended the wrongful duplication of claims in both courts.

Laycock is one prominent scholar who has argued in favour of the full and total integration of law and equity in a manner consistent with Smith’s “equity pragmatist”:

these debates are no longer about law and equity; they are simply debates about our law. We should not view every incremental expansion of a feature once associated with common law or equity as an incremental victory for common law or equity. The one thing we may be sure of is that the legal or equitable origin of the feature does not motivate the decision. Equity is fully accepted; legal and equitable features compete on a level playing field, largely commingled and sometimes indistinguishable. The argument about law and equity is over; now we just argue what the rules ought to be on grounds that are substantive, political, or jurisprudential, but not on the grounds of the subordinate status of equity.<sup>31</sup>

To Laycock, other than where references to equity have been codified, “law-equity arguments are always and exclusively a misleading distraction”.<sup>32</sup> This sentiment may also be observed in Justice Stevenson’s judgment in *Canson*, where he warned that “talk of fusing law and equity, only results in confusing and confounding the law”.<sup>33</sup>

Although this process of simplifying the law is a positive move, it does not require, nor should it require, the abandoning of principle. The fashioning of doctrine — and the corresponding rights and remedies flowing from it — is based in principle and should only be departed from on an equally principled basis rather than being rooted in mere practicality. Remedies are properly fashioned in relation to something; they ought not be developed for mere convenience or other equally inappropriate reasons. Remedies ought to always follow the law and be appropriate to the harm caused or loss suffered.

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31. *Ibid* at 81.

32. *Ibid* at 82.

33. *Canson*, *supra* note 13 at 165. See also Laycock, *supra* note 21 (“[t]o the extent that debate persists over discretion or other failures associated with equity, it is a general debate about the best way to run a legal system. The debate is not about the boundary between law and equity, and it distorts analysis to continue thinking in terms of law and equity” at 54).

In contrast to the equity pragmatist, who tends to focus only on outcomes, the equity purist focuses on doctrine and the applicability or appropriateness of any change or modification of principles or tenets of equity to assess changes to the application of equitable principles. These purists have stressed that the merging of legal and equitable jurisdictions is simply administrative and procedural in effect, bringing together historic law and equity jurisdictions in the same court, but maintaining the ideological distinctions between them. For example, Roscoe Pound has maintained that:

[a]lthough in all but five of our jurisdictions law and equity are administered by the same court, and often by the same judge, and in a majority of our jurisdictions they may be and are administered in the same proceeding, we still think and teach, and courts still judge, as if they were distinct jurisdictions.<sup>34</sup>

Similarly, as Master of the Rolls Sir George Jessel famously said in *Salt v Cooper*:

[i]t is stated very plainly that the main object of the [Judicature] Act was to assimilate the transaction of equity business and Common Law business by different Courts of Judicature. It has been sometimes inaccurately called “the fusion of Law and Equity”; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act.<sup>35</sup>

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34. Roscoe Pound, “Taught Law” (1912) 3:4 *American Law School Review* 164 at 168; see also Meagher, Gummow & Lehane, *supra* note 2 (“[t]here was nothing in the *Judicature Act* which attempted to codify law and equity as one subject matter or which severed the roots of the conceptual distinctions between law and equity. The term ‘fusion’ used frequently in discussion at that time referred to the establishment of the new court with, by virtue of s 26, the jurisdiction of the old courts ... It did not describe some new body of law which was neither law nor equity, and it was not susceptible of a construction that in any given case the new court had jurisdiction to produce a result which could never have been reached in any one or more of the old courts” at 45).
35. (1880), 16 Ch D 544 (Eng) at 549; see also *Di Guilo v Boland* (1958), 13 DLR (2d) 510 (Ont CA) (where Justice Morden states that “[t]he *Judicature Act* did not merge law and equity, but only the Courts of law and equity. A litigant cannot succeed in a purely common law claim relying upon equitable grounds” at 514).

There is no reason why the historical and necessary tenets of equity ought to have been altered or abandoned because of an administrative or procedural change or without significant and substantive reasons for doing so. Streamlining procedure or consolidating courts does not provide adequate reason or explanation for such a departure from long-standing practices. Although discussion about the fusion of law and equity has generated heated debate, to ignore that debate (as Laycock and Stevenson J suggest, above) because of, *inter alia*: (i) the commingling of legal and equitable principles, as, for example, with the doctrine of unconscionability in contract law;<sup>36</sup> (ii) the sense that equity “won” the battle, so there is no need to revisit it<sup>37</sup> or; (iii) that there is the potential to cause confusion by raising such arguments, ignores fundamental implications about the merging of the two jurisdictions.

While avoiding law-equity jurisdictional debates because of their potential to cause confusion may well be expeditious, such avoidance trades off a necessary element of judicial inquiry in order to simplify the process of arriving at a final determination of the matter in issue. In doing so, it also potentially ignores fundamental implications about the merging of the two jurisdictions in order to expedite a resolution that may well bring into question the authority and legitimacy of that resolution.

#### IV. “Fusion” and the Supreme Court of Canada

The Supreme Court of Canada has weighed in on the debate over “equity and fusion” in two significant cases: *Canson*<sup>38</sup> and *Hodgkinson*.<sup>39</sup> While these cases do not paint a wholly uniform picture of the Supreme Court’s position on the fusion debate, they indicate that court’s recognition of equitable doctrines as a significant, if not always consistently understood,

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36. As stated by Laycock, *supra* note 21 at 81.

37. *Ibid* (“[t]he distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won ... We should invoke equity just as we invoke law, without explanation or apology and without a preliminary showing that this is a case for equity” at 53-54).

38. *Canson*, *supra* note 13.

39. *Hodgkinson*, *supra* note 14.

component of Canadian law.

### ***A. Canson Enterprises Ltd v Boughton & Co***

In *Canson*, the appellants Canson Enterprises Ltd (“Canson”) and Fealty Enterprises Ltd (“Fealty”) and the respondent Peregrine Ventures Inc (“Peregrine”) concluded an agreement to purchase and develop a property as a joint venture on the recommendation of the respondent, Treit. However, Treit had surreptitiously arranged a flip of the property in question, resulting in the developers paying \$115,000 more for the property than necessary. Treit then split that “secret profit” with a third party. Peregrine knew about the flip, but did not disclose its existence to Canson and Fealty. The same lawyer, Wollen, acted as solicitor on all these transactions, including the final purchase by Canson, Fealty, and Peregrine. To further conceal the flip and secret profit from Canson and Fealty, the transaction in question was documented as a transfer from the original vendor directly to the purchasers.

Following the conclusion of the sale of the land, the appellants proceeded with their development, but the warehouse they built sank as a result of negligence by the soil engineers they had hired to analyze the property. The appellants initiated proceedings and subsequently won judgments against the soil engineers and pile-driving company for the damage caused to the warehouse. However, neither the soil engineers nor the pile-driving company had sufficient assets to satisfy the full amount owed. Ultimately, the mortgage company that had financed the sale and development of the property foreclosed, resulting in a shortfall of more than \$1 million to the appellants.

The appellants subsequently commenced an action against Peregrine, Wollen, and his law firm Boughton & Co. The agreed-upon statement of facts indicated that “but for” the respondents’ failure to disclose the land flip and the secret profit it generated, the appellants would not have purchased the property and, therefore, would not have been in a position to suffer the losses from its development caused by the negligence of the soil engineers and pile-driving company. The claim thus attempted to foist ultimate liability upon the respondents for initiating the chain of events that caused the warehouse to sink, notwithstanding that they

neither hired nor had authority over the soil engineers and pile-driving company. The claim’s attempt to circumvent principles of, *inter alia*, causation, remoteness, and foreseeability required that it be founded in an equitable cause of action rather than on a common law basis. This choice of law issue became a particular focus upon the case’s appeal to the Supreme Court of Canada.

In his majority judgment in *Canson*, Justice La Forest appropriately describes the appellants’ claim as one which would have resulted in no recovery had it been founded in a common law cause of action:

[i]f the action was one founded on breach of contract, it would be necessary to consider whether the damages suffered were within the reasonable contemplation of the parties. If the action was founded in negligence, it would be proper to apply principles of remoteness, foreseeability and intervening cause. And if the action was one for deceit or fraud, not only foreseeable but unforeseeable damages flowing from the deceit would be awarded, stopping, however, where the chain of causation was broken ... If the action were brought on any of these bases, then, the appellants could not recover for the very substantial damages that arose from the actions of the engineering firm and the pile-driving company.<sup>40</sup>

Despite the existence of precedent holding that these considerations did not apply to claims of breach of fiduciary duty,<sup>41</sup> the ability to circumvent these matters did not sit well with La Forest J. As he states, “barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress”.<sup>42</sup>

While La Forest J accepts that the appellants were entitled to

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40. *Canson*, *supra* note 13 at 137.

41. *Guerin v The Queen* (1984), 13 DLR (4th) 321 (SCC).

42. *Canson*, *supra* note 13 at 148; see also Michael Tilbury, “Fallacy or Furphy?: Fusion in a Judicature World” (2003) 26:2 University of New South Wales Law Journal 357 at 370 (where he states that those who favour the substantive fusion of common law and equity or who believe that the *Judicature Acts* already created such an effect – whom he describes as “fusionists” – believe that a strong argument in favour of substantive fusion exists precisely so that like cases will be treated alike).

“choose the remedy most advantageous to them”<sup>43</sup> and that the respondents breached fiduciary duties owed to the appellants, his judgment indicates that he remains unconvinced that sufficiently different policy considerations existed to warrant granting equitable relief without accounting for foreseeability, intervening act, or remoteness. Consequently, his judgment limits the appellants’ claim to losses directly attributable to Wollen’s failure to disclose the property flip and not from the sunken warehouse development. The latter, he insists, were too far removed from the breach of fiduciary duty resulting from Wollen’s failure to disclose the property flip and thus not appropriately attributable to the respondents.

In her minority judgment in *Canson*, Justice McLachlin, as she then was, correctly recognizes that different policy considerations apply to equitable compensation versus common law damages. Although she finds, in accordance with *Caffrey v Darby*<sup>44</sup>, that a fiduciary in breach of duty may be liable for the actions of third parties that are linked to the breach, she determines that the appellants’ loss was not the result of Wollen’s breach of duty, but of decisions made by the appellants and the individuals they hired. As she explains, “[i]t is fairer that losses arising from construction on the property after the purchase be borne by those who assume responsibility for the construction rather than by the solicitor who acted in the purchase transaction”.<sup>45</sup>

Stevenson J’s judgment substantially agrees with La Forest J’s reasoning in *Canson*, but differs on the issues of equitable compensation and the “fusion” of law and equity. Regarding the former, Stevenson J states that:

... a court of equity, applying principles of fairness, would and should draw the line at calling upon the fiduciary to compensate for losses arising as a result of the unanticipated neglect of the engineers and pile-driving contractor. The fiduciary had nothing to do with their selection, their control, their contractual or bonding obligations. ... [T]hese losses are too remote, not in the sense of failing the “but for” test, but in being so unrelated and independent that they

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43. *Canson*, *supra* note 13 at 140.

44. (1801), 31 ER 1159 (Ch) [*Caffrey*].

45. *Canson*, *supra* note 13 at 164.

should not, in fairness, be attributed to the defendant’s breach of duty.<sup>46</sup>

Stevenson J also concludes that the merger of law and equity has nothing to do with the determination of liability in *Canson*.<sup>47</sup>

La Forest J’s assertion that a common law or equitable claim ought to give rise to the same level of redress “barring different policy considerations underlying one action or the other” fails to recognize, as McLachlin J does in her judgment, that there *are* different policy considerations underlying equitable actions like breach of fiduciary duty than those corresponding to common law claims. While “but for”, “cause-in-fact”, or “*sine qua non*” causation generally satisfies the requirements of equity, the common law requires a finding of materiality or substantial cause to link the impugned activity with the harm to the plaintiff.<sup>48</sup> To conflate the various requirements existing in common law and equity or to equate equitable compensation and common law damages ignores those jurisdictions<sup>49</sup> separate and distinct historical and doctrinal development. Like La Forest J, McLachlin J does not hold the respondents liable for the full amount of the loss suffered; her conclusion, like his, stems from an unwillingness to find that Wollen’s liability would have extended to the appellants’ development of the property if rooted in fiduciary duty, but not if it was rooted in contract or tort. However, in arriving at the same conclusion, she remains faithful to the historic and doctrinal distinctions of the common law and equity.

The distinctions in common law and equitable approaches to causation that proved to be so prominent in the result in *Canson*, as well as in distinguishing the judgments of La Forest and McLachlin JJ, are never reconciled in that case. Interestingly, they arise again in the

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46. *Ibid* at 165.

47. *Ibid* (“[a] court of equity might not find some losses to be caused by a plaintiff rather than a defendant, and to be too remote in that sense, but it would not do so because of the fusion of law and equity” at 166).

48. See *e.g.* Andrew Tipping, “Causation at Law and in Equity: Do We Have Fusion?” (2000) 7:3 *Canterbury Law Review* 443 at 445.

49. For greater clarity, the use of the word “jurisdiction” here is not intended to indicate anything other than the separate conceptual and doctrinal bases of the common law and equity.

Supreme Court of Canada's subsequent judgment in *Hodgkinson*. In *Hodgkinson*, however, the implications of those distinctions are not seen to be problematic as they were held to be in *Canson*. Additionally, they are less clearly visible in the judgments in that latter case, notwithstanding that they figure equally prominently in the disposition in *Hodgkinson*.

### B. *Hodgkinson v Simms*

In the *Hodgkinson* case, Hodgkinson, a stockbroker seeking advice on tax sheltering, hired Simms, an accountant who specialized in providing such advice. Hodgkinson advised Simms that he wanted to defer tax through the acquisition of stable, long-term investments. Simms suggested investing in multi-unit residential buildings ("MURBs"), which were conservative real estate investments according to conventional wisdom at the time. Hodgkinson then purchased four MURBs recommended by Simms. However, when the real estate market later experienced a sharp decline, Hodgkinson lost virtually all of his investments in the MURBs. Hodgkinson subsequently discovered that Simms and his firm had received fees and payments regarding three of the MURB developments he had invested in. At no time had Simms disclosed these payments or that he had provided advice to the MURB developers to make their projects more desirable tax sheltering investments.<sup>50</sup> Hodgkinson then commenced legal action against Simms for negligence and breach of fiduciary duty. As a stockbroker who was wary of the high risk world of promoters, Hodgkinson trusted Simms' advice and stressed in his pleadings that had he known of Simms' relationship with the MURB developer, he would never have invested in the MURBs in question.<sup>51</sup>

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50. During the time period in question, Simms billed the developers an amount representing one-sixth of his firm's total billable hours.

51. For the purposes of the *Hodgkinson* judgment and fiduciary law generally, whether or not Hodgkinson would have invested in some other MURBs and still lost his money as a result of the decline in the real estate market is an irrelevant consideration based on the principle espoused in *Brickenden v London Loan & Savings Co* (1934), 3 DLR 465 (SCC) [*Brickenden*]; see the discussion of *Brickenden's* implications in Rotman, *Fiduciary Law*, *supra* note 3 at 659-70.

La Forest J’s majority judgment in *Hodgkinson* places significant emphasis upon the integrity of the relationship in *Hodgkinson*, not simply upon Hodgkinson’s personal vulnerability created by his individual interaction with Simms. La Forest J’s judgment focuses more upon the broader purpose of protecting important social and economic relations of dependency and vulnerability than in addressing the particular circumstances that existed between Hodgkinson and Simms. It is in the context of the former that La Forest J speaks of the “social importance of the fiduciary principle”<sup>52</sup> and emphasizes that “the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules”.<sup>53</sup>

La Forest J also pays particular attention to the policy considerations that inform fiduciary law. This is indicated by his statement that “[t]he desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law”.<sup>54</sup> La Forest J emphasizes that “[b]y enforcing a duty of honesty and good faith, the courts are able to regulate an activity that is of great value to commerce and society generally”.<sup>55</sup> This broader focus, which is characteristic of equity, is conspicuously absent in *Canson*.<sup>56</sup> However, La Forest J’s judgment in *Hodgkinson* maintains the position he put forward in *Canson* that a plaintiff ought not be entitled to greater relief by choosing an equitable as opposed to common law cause of action.

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52. *Hodgkinson*, *supra* note 14 at 185.

53. *Ibid* at 186.

54. *Ibid*.

55. *Ibid* at 184.

56. While some might argue that it is the result of the commercial interaction in *Canson* as opposed to the advisory relationship in *Hodgkinson*, recall that the key issue in *Canson* is the duty owed by the solicitor, Wollen, to the appellants as a result of his failure to act in their best interests as their fiduciary by not disclosing the existence of the real estate flip. Thus *Canson*, like *Hodgkinson*, also involves the duties owed by professionals to their clients, so there is, in fact, no such distinction in the nature of the duties contemplated in both cases.

Justices Sopinka and McLachlin J's dissenting judgment in *Hodgkinson* disagrees with La Forest J's finding that a fiduciary relationship existed between Hodgkinson and Simms. They also state that literal "but for" causation had been rejected in British, Canadian, and United States case law for both common law and equitable claims;<sup>57</sup> more specifically, they rely on the fact that the *Canson* judgment had found that "the results of supervening events beyond the control of the defendant are not justly visited upon him/her in assessing damages, even in the context of the breach of an equitable duty".<sup>58</sup> For this reason, they disagree with the result found by La Forest J, concluding instead that Simms ought not be held liable for Hodgkinson's losses.

### C. Analysis

In *Canson*, both the majority and minority judgments insist that the respondents' breach of duty — failing to disclose the property flip — is insufficiently material and too remote from the damages emanating from the sunken warehouse development — which was directly caused by the negligence of the soil engineers and pile-driving company — to result in the respondents' liability for the latter. Curiously, no similar causal problem was found to exist in the majority judgment in *Hodgkinson*, where Simms' failure to disclose his conflict of interest in the MURBs he recommended to Hodgkinson founded his liability for the loss in value of the MURBs directly caused by the real estate market downturn.

Despite emphasizing the importance of the distinction between *Canson* and *Hodgkinson*, La Forest J does not truly explain why a distinction exists between the two similar situations arising in those cases. In both cases, a failure to disclose a conflict of interest results in a finding of breach of fiduciary duty. Equally, in both cases a conflict of interest established the scenario for a second, causally unrelated, event that resulted in greater losses suffered than those emanating from the conflicts of interest. Where the distinction between the judgments in the two cases lies is in how far liability for a breach of fiduciary duty extends

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57. *Hodgkinson*, *supra* note 14 at 223.

58. *Ibid* at 224.

*vis-à-vis* the totality of losses suffered. In *Canson*, liability does not extend beyond the breach itself, which limits it to the increase in the purchase price of the property emanating from the flip and excludes losses from the warehouse development. Yet, in *Hodgkinson*, liability extends to the loss in value of the MURBs stemming from the market downturn, notwithstanding the lack of direct correlation between Simms’ breach of duty and the market collapse.

La Forest J fails to indicate why the actions of the soil engineers and pile-driving company in *Canson* constitute an intervening act sufficient to break the chain of causation initiated by Wollen’s lack of disclosure, whereas the results of the downturn in the real estate market, which was equally beyond Simms’ control in *Hodgkinson*, remained causally tied to Simms’ conflict of interest notwithstanding that that conflict neither caused nor otherwise influenced the real estate market crash. La Forest J insists in *Hodgkinson* that “[f]rom a policy perspective it is simply unjust to place the risk of market fluctuations on a plaintiff who would not have entered into a given transaction but for the defendant’s wrongful conduct”.<sup>59</sup> Regarded in isolation, that conclusion may be deemed plausible, if not valid. What goes unexplained is why it is not equally unjust to place the risk of market fluctuations on Simms, since he had no greater control over the effects of the market than Hodgkinson did? La Forest J does not address this point.

Meanwhile, in *Canson*, both La Forest and McLachlin JJ deem it improper to hold the respondents liable for damages caused by the negligence of the soil engineers and pile-driving company when they neither hired those companies nor had any connection to or authority over them. However, La Forest J does not indicate why, in *Canson*, it is not unjust to place the risk of unforeseen subsequent events tied to the development of the property on Canson and Fealty when they testified that they would not have closed the purchase of the property — and thus would not have been in a position to have pursued the warehouse development and suffered the losses associated with that situation — had the increased purchase price caused by the real estate flip been disclosed.

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59. *Ibid* at 207.

Indeed, if one attempts to be consistent in the disposition of the *Canson* and *Hodgkinson* cases, then either of two scenarios ought to have occurred. To be consistent with the determination in *Canson* and the limitation of liability for breach of fiduciary duty, the result in *Hodgkinson* ought not have held Simms responsible for the decreased value of the MURBs, insofar as the fall in the real estate market was not causally linked to Simms failure to disclose his conflict of interest. In that situation, Hodgkinson's recovery should have been limited to the amount of the commissions paid to Simms from his purchase of the MURBs in question. If, however, the appropriate determination was that from the majority's judgment in *Hodgkinson*, then the result in *Canson* ought to have entitled Canson and Fealty to recover the entirety of their losses suffered from the warehouse development, insofar as they would not have suffered those losses had Wollen either: (a) not breached his fiduciary duty, or; (b) disclosed the existence of his breach. Just as the majority found in *Hodgkinson* that Mr. Hodgkinson would not have purchased the MURBs and thus suffered the losses emanating from the downturn in the real estate market had he known of Simms' dishonesty, Canson and Fealty claimed they would not have purchased the land in question — and resultantly not be: (i) in a position to develop the land; (ii) hire the negligent soil engineers and pile-driving company, and; (iii) have the warehouse sink, resulting in loss — had they known of the real estate flip.

La Forest J correctly asserts that Simms' breach of duty in *Hodgkinson* "goes to the heart of the duty of loyalty that lies at the core of the fiduciary principle".<sup>60</sup> Yet, could the same not be said of the breach of duty by the solicitor, Wollen, to his clients, the purchasers/developers in *Canson*? The distinction is made more curious by the fact that Simms' problematic action was his failure to disclose his conflict of interest, not that he failed to adequately perform his professional advisory function, whereas in *Canson*, Wollen neither adequately discharged his professional duties nor disclosed his conflict of interest in concealing the flip and pocketing fees from the appellants from transactions that were actually detrimental to

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60. *Ibid* at 208.

their interests.

Holding Simms responsible for the market’s effects on the MURBs appears to be based on equity’s jurisdiction over conscience. If this is so, one may legitimately ask why the same rationale does not also justify placing the risk of misfortune resulting from the warehouse development in *Canson* on the respondents, who also acted against conscience by orchestrating and failing to disclose the real estate flip? By acting in breach of duty, the respondents in *Canson*, like Simms in *Hodgkinson*, ought to incur liability on the basis of the precedent in *Caffrey v Darby*, which McLachlin J relies upon in her judgment in *Canson*. There the court states:

... if they have been already guilty of negligence, they must be responsible for any loss in any way to that property: for whatever may be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence. If they had taken possession of the property, it would not have been in his possession. If the loss had happened by fire, lightning, or any other accident, that would not be an excuse for them, if guilty of [the] previous negligence. That was their fault.<sup>61</sup>

This principle in *Caffrey v Darby* explains Simms’ liability for Hodgkinson’s losses, notwithstanding that the direct cause of the loss was the bottom falling out of the real estate market rather than from any direct result of action taken by Simms. A wrong-acting fiduciary takes the world as he or she finds it.<sup>62</sup> Thus, the fiduciary in breach of duty becomes liable for all tangibly related occurrences arising subsequent to the wrongful action, including the actions of third parties or the effects of catastrophic events

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61. *Caffrey*, *supra* note 44 at 1162.

62. See Joshua Getzler, “Equitable Compensation and the Regulation of Fiduciary Relationship” in Peter Birks & Francis Rose, eds, *Restitution and Equity, Volume 1: Resulting Trusts and Equitable Compensation* (London: Mansfield Press, 2000) (“[t]he negligent trustee must take the world as he finds it, such that unforeseeable real-world events in the chain of causation initiated by the breach cannot establish remoteness as a defence” at 240). While Getzler questions the need for such a strict standard in contemporary jurisprudence, his statement that “[t]he severe test is instituted primarily to put maximum pressure on trustees to uphold their trust, and is not really an attempt to fix causation rules precisely” indicates a valid reason, and continued need, for its existence at 240).

that are linked to the breach.<sup>63</sup> Simms caused Hodgkinson to purchase MURBs in which the former had a conflict of interest. In doing so, Simms set a scenario into motion that left Hodgkinson susceptible to the ebbs and flows of the real estate market. From that point, he became responsible for whatever transpired; the implication of *Caffrey v Darby* is clear.

Playing out that same principle from *Caffrey v Darby* in the *Canson* case, then, ought to have held the respondents liable for the full amount of the losses suffered by Canson and Fealty, including the losses from the botched warehouse development. The explanation for such a result, as drawn from the precedent in *Caffrey v Darby*, is that Wollen would be assumed to undertake financial responsibility for any losses reasonably, logically, or sequentially tied to events set into motion by his breach of duty. That would include anything tied to the development of the land, including the ill-fated warehouse project, because Wollen's breach was an intimate, albeit secret, part of the transaction by which Canson and Fealty acquired the land upon which they constructed the warehouse. Without that transaction, they would not have been in a position to develop the warehouse or to suffer the losses from that development,

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63. Note McLachlin J's (as she then was) reliance on *Canson*, *supra* note 13, in *Doyle v Olby (Ironmongers) Ltd* (1969), 2 QB 158 (CA (Eng)) (in *Doyle*, Lord Denning MR states "[t]he defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say; 'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages'" at 167. McLachlin J added in *Canson*, *supra* note 13 (that "it does not lie in the mouth of a fiduciary who has assumed the special responsibility of trust to say the loss could not reasonably have been foreseen" at 161).

notwithstanding that the losses were directly caused by third parties.<sup>64</sup>

When viewed this way, the situation in *Hodgkinson* is, effectively, no different than that in *Canson*, save for the fact that the direct responsibility for the loss to the appellants in the latter was not an intangible phenomenon like the market, but, rather, the actions of people.<sup>65</sup> While La Forest J correctly states that “[i]n *Canson* the defendant solicitor did not advise on, choose, or exercise any control over the plaintiff’s decision to invest in the impugned real estate”,<sup>66</sup> the solicitor facilitated a scenario in which losses occurred that would not have transpired but for his actions.<sup>67</sup> Consequently, his actions ought to be seen as being as directly related to the loss in *Canson* as Simms’ failure to disclose his conflict of interest is to the loss in *Hodgkinson*.

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64. While it is plausible to suggest that, had the events subsequent to the real estate transaction occurred at a different time, an alternate soil engineer and pile-driving company may have been hired by Canson and Fealty who would not have been negligent and the warehouse would have been constructed without sinking or causing loss, such speculation is wholly irrelevant. Using the same logic, it could equally be said that had the situation in *Hodgkinson* arisen at a different time, there may not have been a real estate market downturn subsequent to Hodgkinson’s purchase of the MURBs, with the result that he would not have lost the value of his MURBs, or perhaps may not have lost as much as he did.
65. See *Hodgkinson*, *supra* note 14 (where Sopinka, McLachlin and Major JJ determined that “[t]he loss in value was caused by an economic downturn which did not reflect any inadequacy in the advice provided by the respondent. We would reject application of the ‘but for’ approach to causation in circumstances where the loss resulted from forces beyond the control of the respondent who, the trial judge determined, had provided otherwise sound investment advice” at 226).
66. *Hodgkinson*, *supra* note 14 at 203.
67. Assuming, of course, that we believe Canson and Fealty were telling the truth when they stated they would not have closed the purchase of the land in question had they known of the flip and increase in purchase price, which would then have precluded them from taking any actions to develop the land in question because it would not have been theirs.

## D. Summary

In light of the disparate judgments in *Canson* and *Hodgkinson*, how may one summarize the present position of the Supreme Court of Canada on the merger of law and equity? *Canson* clearly endorses their substantive fusion, as indicated most readily in La Forest J's judgment:

[i]n time the common law outstripped equity and the remedy of compensation became [somewhat] atrophied. Under these circumstances, why should it not borrow from the experience of the common law? Whether the courts refine the equitable tools such as the remedy of compensation, or follow the common law on its own terms, seems not particularly important where the same policy objective is sought.<sup>68</sup>

However, La Forest J's majority judgment in the *Hodgkinson* case, while not directly addressing the issue of fusion, is wholly inconsistent with the conclusion that legal and equitable jurisdictions in Canada have been substantively merged.

*Canson's* endorsement of fusion eliminates the potential benefits associated with choosing an equitable versus common law cause of action. This determination is certainly at odds with the principle established in *Nocton v Lord Ashburton*,<sup>69</sup> the case which famously resurrected equitable compensation. In that case, Lord Chancellor Viscount Haldane states that a court of equity will not refuse jurisdiction to hear a matter simply because the plaintiff may have available remedies at common law:

[i]t did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be

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68. *Canson*, *supra* note 13 at 153. Curiously, this statement appears to contradict La Forest J's earlier statement in *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 [*Lac Minerals*] (where La Forest J stated that "I do not countenance the view that a proprietary remedy can be imposed whenever it is 'just' to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to 'some mix of judicial discretion' ... subjective views about which party 'ought to win' ... and 'the formless void of individual moral opinion' per Deane J in *Muschinski v. Dodds* (1985), 160 C.L.R. 583, at p.616" at para 196).

69. (1914), AC 932 (HL).

taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.<sup>70</sup>

Curiously, La Forest J acknowledges this same principle in *M(K) v M(H)*,<sup>71</sup> where he expressly indicates that “a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims”.<sup>72</sup>

Even in *Hodgkinson*, La Forest J recognizes that “the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties ...”.<sup>73</sup> Yet, La Forest J also refers positively to his finding of the substantive fusion of law and equity in *Canson* in his judgment in *Hodgkinson*.<sup>74</sup> This internal inconsistency plagues his judgment in *Hodgkinson*, where his recognition of the purpose of

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70. *Ibid* at 956-57; see also *Roe, McNeill & Co v McNeill* (1998), 45 BCLR (3d) 35 (CA) (“[i]t would be anomalous indeed that the parties should have stipulated in the contract for one to owe a duty of good faith to the other, and for him to have been found in breach of that contractual duty, but that the law would deprive the other of a remedy for breach of fiduciary duty because he already had a remedy in contract” at para 38).

71. (1992), 96 DLR (4th) 289 (SCC).

72. *Ibid* at 323; refer also back to La Forest J’s statement in *LAC Minerals*, *supra* note 68.

73. *Hodgkinson*, *supra* note 14 at 174.

74. *Ibid* (“[a]s I noted in *Canson*, at pp. 152-3, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old Judicature Acts ... Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded” at 202).

fiduciary relief belies his endorsement of fusion in *Canson*.<sup>75</sup> It also creates difficulty for those seeking a clear vision of the Supreme Court of Canada's perspective on fusion. The result is a rather muddled Canadian jurisprudence on the matter of fusion that lacks consistency and guidance for future applications.<sup>76</sup>

In characterizing the fusion of law and equity as including substantive matters, important distinctions between legal and equitable concepts and remedies have been inappropriately blurred. These distinctions are both historical and substantive; further, their implications reflect the separate historical rationale for and genesis behind the development of English

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75. It is implicit in La Forest J's judgment in *Hodgkinson* that there are no comparable policy considerations at common law that would supersede the use of fiduciary principles. Thus, the policy underlying the fiduciary concept which La Forest J expressly recognizes in *Hodgkinson* provides an unequivocal example of the "different policy considerations" that he suggests in *Canson* "should give rise to different levels of redress" for claims of breach of fiduciary duty versus breach of common law obligations: *Canson*, *supra* note 13 at 148.
76. It should be recognized, though, that *Canson* is not the only contemporary judgment in the common law world that has characterized the fusion of law and equity as including substantive matters; see *e.g. United Scientific Holdings Ltd v Burnley Council* (1978), AC 904 (HL) (where it was stated that "[m]y Lords ... this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery ... were fused. ... If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now" at 924-25); see also *LeMesurier v Andrus* (1986), 54 OR (2d) 1 (CA) (where the Ontario Court of Appeal states that "[w]hatever the original intention of the Legislature, the fusion of law and equity is now real and total" at 9); whereas, in *Aquaculture Corp v New Zealand Green Mussel Co Ltd* (1990), 3 NZLR 299 (CA) it is said that "[f]or all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that ... a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute" at 301.

Equity. As Justice of Appeal Keane explains:

[t]he ethical values of individual restraint, mutuality and social responsibility at play within the framework bequeathed by Chancery differ from the individualism and the universalism of the common law. To regard equitable doctrines as modular, so that they may be mixed and matched with common law rules so as to expand the scope of the judicial branch of government's regulation of self-interested action is to fail to appreciate these differences.<sup>77</sup>

Notably, most judgments supporting the substantive fusion of law and equity are rather far removed from the time when those jurisdictions were merged. Further, they ignore significant and straightforward commentary by judges and noted scholars that were contemporaneous with or much closer in time to that occurrence and which find only an

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77. Patrick Keane, "The 2009 WA Lee Lecture in Equity: The Conscience of Equity" 10:1 *Queensland University of Technology and Law Justice Journal* 106 at 131.

administrative merging to have occurred rather than a substantive one.<sup>78</sup> Perhaps most tellingly, they rarely provide substantive commentary or

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78. *Hansard*, 3d Series, vol 214 (see in particular statements made by Lord Selborne, LC, who introduced the legislation merging common law and equity in Britain (the *Judicature Acts*), and Attorney-General Sir John Coleridge, who promoted it. Lord Selborne said “[i]t may be asked ... why not abolish at once all distinction between law and equity? I can best answer that by asking another question – Do you wish to abolish trusts? If trusts are to continue, there must be a distinction between what we call a legal [estate] and an equitable estate ... The distinction, within certain limits, between law and equity, is real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded” at 339); see also *Hansard*, 3d Series, vol 216 (where Coleridge expressed essentially similar sentiments: “[t]o talk of the fusion of Law and Equity was to talk ignorantly. Law and Equity were two things inherently distinct ... All they could do was to secure that the suitor who went to one Court for his remedy should not be sent about his business without the relief [which] he could have got in another Court” at 1601); see further *Hansard*, 3d Series, vol 216 (where Coleridge makes the purpose of the legislation unequivocal: “[t]he defect of our legal system was, not that Law and Equity existed, but that if a man went for relief to a Court of Law, and an equitable claim or an equitable defence arose, he must go to some other Court and begin afresh. Law and Equity, therefore, would remain if the Bill passed, but they would be administered concurrently, and no one would be sent to get in one Court the relief which another Court had refused to give ... It was more philosophical to admit the innate distinction between Law and Equity, which you could not get rid of by Act of Parliament, and to say, *not that the distinction should not exist, but that the Courts should administer relief according to legal principles when these applied, or else according to equitable principles. That was what the Bill proposed*, with the addition that, whenever the principles of Law and Equity conflicted, equitable principles should prevail” at 644-45 [emphasis added]); see also *Ind Coope & Co v Emerson* (1887), 12 App Cas 300 at 308 (HL) and the discussion in Rotman, *Fiduciary Law*, *supra* note 3 ch 4.

rationales to support their contentions.<sup>79</sup>

While the boundary between the common law and equity is becoming increasingly blurred, it is important to recall, as Keeton explains, that "the distinction between common law and equity is not only one of history, but also one of attitude".<sup>80</sup> To substantively "fuse" legal and equitable jurisdictions would have required something more explicit than what may be seen in the legislation blending those jurisdictions in the various countries where such action was taken. What may be taken from this finding is to further affirm that the administrative fusion of common law and equitable jurisdictions altered procedure, but did not affect the distinct nature of legal and equitable doctrines.<sup>81</sup> In explaining the distinctiveness of legal and equitable principles, Loughlan states:

[s]ince equitable principles such as those applicable to fiduciaries fulfil a different social purpose from the law of contract and of tort, imposing, as they do, a strong duty to act only in the interests of the other, it is by no means clear that principles developed in respect to common law obligations should be utilised in the equitable jurisdiction.<sup>82</sup>

The important distinction that remained after the merger of law and

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79. Meagher, Gummow, & Lehane, *supra* note 2 ("[t]hose who assert that law and equity are fused rarely (if ever) explain what they mean, how it happened and what follows from it" at 66); see also the essentially similar comments in JRF Lehane, Book Review of *Specific Performance* by Gareth Jones & William Goodhart, (1987) 46:1 Cambridge Law Journal 163 ("[t]hose who assert that law and equity are fused should explain what they mean, how it happened and what follows from it" at 165).

80. George W Keeton, *An Introduction to Equity*, 6d (London: Pitman, 1956) at 43-44; see also Allen, *supra* note 16 ("[t]here is still a frontier between the Common Law and the Chancery. The training is different, the habit of thought is different, the subjects of jurisdiction are different" at 413).

81. See Edmund HT Snell, *The Principles of Equity*, 11d by Archibald Brown (London: Stevens & Haynes, 1894) ("[t]he distinction between Law and Equity ... will be found to be a distinction not so much of substance as of form, a distinction not of principle but of history ... and yet the distinction ... has not, as we shall presently see, been materially affected even by the recent so-called fusion of Law and Equity" at 2).

82. Patricia Loughlan, "The Historical Role of the Equitable Jurisdiction" in Patrick A Parkinson, ed, *The Principles of Equity* (Sydney: Law Book Co of Australasia, 1996) at 23-24.

equity is, indeed, one of history and attitude, but also one of profoundly distinct ideas and approaches to law, leading to different results. Thus, “the measure of relief under the common law and Equity ought not be similar where the nature of common law and equitable duties — and their underlying policy rationales — are dissimilar”.<sup>83</sup>

## V. The Status of the “Fusion” Argument in Canada Today

In the Supreme Court of Canada’s landmark judgment in *Pettkus v Becker*,<sup>84</sup> which entrenched the remedial constructive trust in Canadian jurisprudence, Justice Dickson, as he then was, explained that “[t]he great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice”.<sup>85</sup> Although equity emphasizes the spirit and intent of law over more formal compliance with established rules or procedures and equitable principles may be shaped to fit the changing needs and mores of society, there are limits to their application. Equitable principles are not appropriately used in any situation in which there may be a need or desire for a novel application of law. Rather, they are properly limited by the parameters established via the maxims and principles of equity.

Maintaining a jurisprudential system that appropriately balances the certainty of law with the malleability of equity requires a delicate equilibrium that neither tilts too far toward taxonomy or arbitrariness.

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83. Rotman, *Fiduciary Law*, *supra* note 3 at 703; see also Justice of Appeal Heydon’s judgment in *Harris v Digital Pulse Pty Ltd* (2003), 56 NSWLR 298 (CA (Austl)) (“[i]t is not irrational to maintain the existence of different remedies for different causes of action having different threshold requirements and different purposes. The resulting differences are not necessarily ‘anomalous’” at 404).

84. (1980), 117 DLR (3d) 257 (SCC).

85. *Ibid* at 273; see also La Forest J in *Canson*, *supra* note 13 (where La Forest J emphasizes that “the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice” at 151).

Part of the challenge of such a system is to stay true to the historical and doctrinal roots of common law and equitable doctrines, notwithstanding the administrative merging of law and equity and the resultant blurring of lines between legal and equitable doctrines over time. This challenge exists not only in Canadian law, but in every jurisdiction where the creation of some form of equity designed to ameliorate the rigour of the common law has played an important role in the shaping of modern legal discourse.

Writing in the early stages of the 20th century, American legal scholar Roscoe Pound postulated that traditional equity had been transformed over time into a decadent system of rules that destroyed its existence as a process of facilitating justice premised upon the measured use of judicial discretion.<sup>86</sup> Pound referenced a number of judgments that he believed reinforced his conclusion. What he failed to consider, however, was that the cases he referenced did not signify the decadence of equity, but instead were, as Walsh appropriately characterizes them, “illustrations of mistaken law applied by courts in apparent ignorance of the law involved, in no way indicating any decadence of equity”.<sup>87</sup> More specifically, those cases evidence the courts’ misunderstanding of the merger of legal and equitable jurisdictions much like the Supreme Court of Canada incorrectly characterizes the fusion of law and equity in the *Canson* case.<sup>88</sup>

In the aftermath of *Hodgkinson*, one may see how the Supreme Court of Canada’s problematic holding in *Canson* could have been resolved differently had the court properly understood the implications of the merging of legal and equitable jurisdictions. Dean Pound did not have that same benefit. What Pound saw as the “decadence of equity” was, instead, multiple occasions of courts making mistakes based upon their common misunderstanding of what merging law and equity meant for the practice of law. Had those courts possessed a sounder appreciation of this merger, Pound would then likely have been extolling the virtues of the

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86. Roscoe Pound, “The Decadence of Equity” (1905) 5:1 Columbia Law Review 20 [Pound, “Decadence”].

87. Walsh, *supra* note 5 at 480.

88. *Canson*, *supra* note 13.

continuation of equitable principles without the chaos and inefficiency caused by maintaining separate jurisdictions for law and equity rather than bemoaning the decadence of equity and the crystallization of its principles into a rigid system of rules and precedent.

Better education about the implications of the statutorily mandated merger of law and equity would not only have prevented the types of erroneous judgments cited by Pound, but also those in *Canson*. Such a development would have also assisted in fulfilling Dean Pound's recommendation to be vigilant and fight for the survival of a strong and principled equity — an understanding of equity that facilitated justice by tempering law, where appropriate, with more benevolent and situationally-apposite equitable principles.<sup>89</sup> However, it would also have been a complete reversal of the trend that witnessed law schools in Canada and the United States move away from the teaching of substantive equity more than two generations ago.<sup>90</sup>

To the contemporary law student, “equity” is far more likely to be associated with a form of investment in corporate finance courses, a form of interest in land, or principles of fairness in administrative, constitutional, or employment law than as a complementary system to the common law. However, the traditional understanding of equity as complementing the common law still plays an important role in contemporary jurisprudence and needs to be appropriately recognized for its vital function. The function of equity is not fully comprehended when it is regarded solely as a method by which the rigours of the common law are tempered and its gaps filled, nor when it is seen as a competing, though complementary, system to the positive law. Equity is more appropriately and accurately understood when it is recognized as a

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89. Pound, “Decadence”, *supra* note 86 (“[w]e must be vigilant ... we must fight for our law. No less must we fight for equity. Law must be tempered with equity, even as justice with mercy. And if, as some assert, mercy is part of justice, we may say equally that equity is part of law, in the sense that it is necessary to the working of any legal system” at 35).

90. Refer back to the discussion, *supra* note 8.

process by which positive law is brought closer to the human condition.<sup>91</sup> Equity is a way of facilitating justice in the broadest sense of the term<sup>92</sup> while providing sound parameters for the exercise of judicial discretion.

Equity works alongside law, supporting the latter where it is deficient and enabling it to better respond to the individual requirements of particular circumstances that the operation of its taxonomic tendencies hold in check. It occupies a complementary jurisdiction to law that supports and enhances it without being either inferior to the law or lesser in importance.<sup>93</sup> The development and situation-specific application of equitable principles provides law with a sense of humanity and context, which makes law more just.<sup>94</sup> In accomplishing these diverse tasks, equity does not replace law, but maintains a conceptual separation from it, all

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91. Watt, *supra* note 11 (“[e]quity is not Utopian, it simply reaches beyond the routines of law towards the particularities of the human condition” at 243); see also Ryan, *supra* note 11 (“[e]quity is a process, but it is a process of a far broader and more important kind than procedure, even when this is taken in its widest possible sense. Equity viewed as a process accomplished the conversion of morality into law; procedure is merely the means of recognizing the conversion in a particular case ...” at 222).
92. *Burke v Lfot Pty Ltd* (2002), 209 CLR 282 (HCA)(Kirby J states that the “business” of equity is “the attainment of justice” at 324); see also Oleck, *supra* note 12 (“[e]quity, certainly in its historical moral sense, and hopefully in its administrative sense, is the principal technique thus far developed to make certain that law always will be readily adaptable for, and directed toward, the achievement of justice” at 44); Watt, *supra* note 11 (“[w]ithout equity, the law’s story becomes all rules and no justice” at 45; and “[e]quity does not set out to produce an ideally righteous system ... but it sets out to make the system of regular law more just” at 102-103); see also Ryan, *supra* note 11 (“[w]hat is necessary is to have some adequate grasp of Equity as a built-in dynamism necessary for progress in any system which purports to administer justice” at 217); Robert H Rogers, “A Lesson in Equity” (1915) 49:4 *American Law Review* 510 (“[I]egal justice is the law’s attempt at approximate justice from the standpoint of social expediency ... But the justice of equity, as originally intended and administered, was man’s best attempt to arrive at real justice regardless of law or rule” at 535).
93. See *supra* note 17.
94. See the references, *supra* note 12.

the while harmonizing law with the needs and requirements of evolving social structures and relationships.

These effects did not disappear, nor were they meant to disappear, with the merger of legal and equitable jurisdictions. Rather, quite the opposite intent was facilitated. Once equitable principles were operational within common law courts, the inevitable bleeding of equity into the common law occurred<sup>95</sup> and, with it, the facilitation of more situationally-specific and appropriate methods of resolving conflict. New causes of action like unconscionability and breach of confidence were created specifically as a result of the jurisdictional merger of legal and equitable jurisdictions that allowed for their development. Meanwhile, the Supreme Court of Canada's recent judgment in *Bhasin v Hrynew*<sup>96</sup> and its articulation of a general, good faith standard in contract law indicates the continuation and expansion of this practice.

In *Bhasin*, the Supreme Court holds that the principle of good faith is a fundamental element of contract law. The court clearly and unequivocally articulates that “good faith contractual performance is a general organizing principle of the common law of contract”.<sup>97</sup> Although the court recognizes that “Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts”,<sup>98</sup> it nonetheless holds that the concept of good faith “underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance”.<sup>99</sup> The court further recognizes that one “manifestation of this organizing principle of good faith, [is] that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations”.<sup>100</sup> Consequently, it would

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95. See Zechariah Chafee Jr, “Does Equity Follow the Law of Torts?” (1926) 75:1 University of Pennsylvania Law Review and American Law Register 1 at 5, 20.

96. 2014 SCC 71 at para 33 [*Bhasin*].

97. *Ibid.*

98. *Ibid* at para 32.

99. *Ibid* at para 33.

100. *Ibid.*

appear that, in the aftermath of *Bhasin*, parties to contractual dealings are implicitly understood to have duties of good faith towards each other in the execution of their contractual obligations. This development is an example of what can be described as “equitable bleed” — where concepts of equity are allowed to bleed into the common law and themselves become a part of the latter.

In determining that good faith ought to be recognized as foundational to Canadian contract law, the Supreme Court in *Bhasin* sought to “develop the common law to keep in step with the ‘dynamic and evolving fabric of our society’”.<sup>101</sup> This is precisely the function that equity plays in keeping the common law current, relevant, and situationally-appropriate. Part of ensuring the Canadian law of contracts remains consistent with the evolving fabric of Canadian society is to ensure that contract law reflects not only the reasonable expectations of the parties, but also the moral underpinnings of dealings between individuals in a manner consistent with the expectations and mores of Canadian society as a whole. Expressly incorporating good faith into all contractual dealings entails the Supreme Court’s recognition that contemporary Canadian society is disinclined to accept sharp dealing or attempts to evade responsibility as acceptable in contractual relationships. Parties are expected to live up to the obligations they expressly agreed to when they sign contracts.

Post-*Bhasin*, then, the principled foundation of Canadian contract law more closely resembles the law applicable to unjust enrichment or even breaches of fiduciary duty than it did previously. This is not to say that contract law is now to be understood as either giving rise to remedial constructive trusts, seen as analogous to fiduciary law, or indicating the substantive fusion of historic legal and equitable jurisdictions. Rather, it signifies that Canadian tolerance for breaching contracts has lessened. With this reduction in tolerance comes the recognition that it is appropriate for law to enlarge the range of relief to remedy breaches of contract in a manner akin to what was historically done in equity so long as doing so does not result in doctrinal impropriety or an improper blurring of the conceptual distinctions between historic legal and

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101. *Bhasin*, *supra* note 96 at para 40.

equitable jurisdictions.

Following the administration fusion of legal and equitable jurisdictions, the concepts of equity continued to complement and supplement the law just as they had when the common law and equity maintained their historically separate existence, but also to inform and modify the law where necessary while retaining their important conceptual separation from law. When both common law and equitable causes of action become available within a court with jurisdiction over both, procedural dilemmas and difficulties subsided, confusion abated, and the requirements of justice were better served.

Today, with the concurrent administration of the common law and equity in a unified court, the contemporary judge has a wider range of tools available to mete out situationally and doctrinally appropriate justice. This is to be celebrated, not sabotaged, even unintentionally, by the subordination of equitable doctrines to those of the common law as under a substantive merging of legal and equitable jurisdictions. As Chafee wrote almost 100 years ago:

[o]ur single court of law and equity is like a workman with numerous tools lying before him. For some tasks he may want to use either the hard blows of the action for damages or the flexible injunction, according to circumstances. For other jobs, like the suppression of battery, the injunction is [wholly unjustified, and] only damages [or prosecution will serve]. There remains, however, delicate work where damages are of no use and bound to do harm, and yet an injunction would produce admirable results. Under such circumstances, no sound argument exists for a refusal to employ the appropriate tool, merely because he can not use another tool which does not meet the need at all. So long as judges are not expressly prohibited from using such a legitimate remedy as the injunction for a purpose which it will effectually obtain, the non-existence of an action for damages should be immaterial. As it is the function of a factory to produce goods, so it is the function of courts to produce justice, and they should feel free to use for that object all or any of the means which long custom and legislation have placed at their disposal.<sup>102</sup>

## VI. Conclusion

Although the *Bhasin* judgment appears to provide a clear indication of the continued presence and prominence of equitable principles in

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102. Chafee, *supra* note 95 at 35.

Canadian law, the inconsistency between the *Canson* and *Hodgkinson* decisions has not been revisited and thereby remains an impediment to characterizing the current understanding and application of fusion in Canadian law. While *Canson* seems to evidence the Supreme Court of Canada's acceptance of the substantive merging of legal and equitable jurisdictions, the majority judgment in *Hodgkinson* retreats from *Canson's* subordination of equitable constructs to their common law counterparts. Instead, it founds liability in a manner that is consistent with equity's emphasis on conscience and adopts equity's interpretation of causation by abandoning reliance on considerations such as foreseeability, remoteness, and intervening act that played a significant role in *Canson*. This unaddressed inconsistency between these important judgments is a troubling source of confusion and uncertainty for the contemporary understanding of fusion in Canadian law. However, in light of what the Supreme Court has subsequently articulated in *Bhasin*, it would appear that the Supreme Court has gravitated away from the idea of substantive fusion that it articulated in *Canson*. That would be a significant advance for the evolving law in Canada.

While it appears that Canada continues to embrace the foundational principles of equity in its jurisprudence, there remain some nagging considerations revolving around the treatment of causation and the ability of litigants to select equitable versus common law causes of action without interference from the courts. One wonders whether the Canadian experience is a bellwether for other jurisdictions. Whether it is or is not, it nonetheless offers an important perspective on the merging of law and equity that is relevant to the administration of justice in contemporary law.