Foreword

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After last year's successful inaugural issue of the *Canadian Journal of Comparative and Contemporary Law* (CJCCL) dedicated to "Health Law and Human Rights", I am honoured to provide this brief foreword to the CJCCL's second issue, containing papers exploring the theme of "Equity in the 21st Century: Problems and Perspectives".

As a theme, "equity in the 21st century" is intriguing. At first glance, one might suppose that "equity" and "21st century" are as suitably juxtaposed as "Thomas Aquinas" and "emoji". While its origins are murky, we know that equity emerged long ago from the administrative power of the mediaeval Chancellor, to whom the King had delegated the task of hearing pleas from his subjects concerning injustices at the common law courts. As most law students also know, the Chancellor, as an ecclesiastic, was concerned with conscience (wherein lay the path to the immortal soul). It was therefore on the basis of "conscience" that he exercised this delegated remedial power by ordering respondents to act according to good conscience, notwithstanding their legal rights to do otherwise.

This account — while accurate — risks, however, descending into caricature in several respects. First, common law courts were not amoral wastelands. Still, their limited forms of action could work injustice. Clear rules were preferred over avoiding hardship. John H Baker's famous example of the paid debt that must be paid a second time (owing to the debtor's failure to ensure the debt was cancelled after it was paid the first time) illustrates the sort of problem that typically arose.[1] Secondly, while the Chancellor's jurisdiction ultimately widened from the "wide

1. John H Baker, *An Introduction to Legal History*, 3d (London: Butterworths, 1990) at 118.

but vague"[2] powers wielded during the Middle Ages, the Chancellor's conscience-based jurisdiction soon narrowed, as the stream of *ad hoc* decisions were inevitably reduced to rules or principles of equity which, by the late 18th century, were as inflexible and prone to working injustice as the common law itself. By the mid 20th century, the English Court of Appeal could unashamedly proclaim in *Re Diplock* that it lacked jurisdiction to do equity on the mere basis that "we may think that the 'justice' of the present case requires it".[3]

As the latter half of the 20th century showed, however, equity had not rolled over and died. As Leonard I Rotman argues in his article on the Supreme Court of Canada's understanding of the fusion of law and equity, in recent decades equity has brought the positive law "closer to the human condition". Longstanding devices such as resulting and constructive trusts, injunctions and estoppel were extended, and the action in unjust enrichment (assuming it can truly be understood as "equitable") was pulled from its post-*Moses v Macferlan*[4] obscurity. Courts have breathed new life into equity's concern for the conscientious exercise of legal rights in property and under terms of contracts. Concerns for "fairness" and "justice" have predominated.

A more muscular equitable doctrine to quell "unfairness" and "injustice", however, raises its own set of concerns, none of which are new. Is equity really nothing more than a body of sentimental goo to be haphazardly applied when the spirit of fairness and justice moves us? Or should the conditions calling for its intervention be stated (if they can be stated) precisely and exhaustively? The obvious criticism is that a purely "I-know-unconscionability-when-I-see-it" approach is nothing more than palm tree justice. Equity would lack intelligibility, clarity and predictability in application, thereby implicating basic norms of the rule of law.[5] Little wonder Professor Donovan Waters used to warn his trust law

2. Paul Vivian Baker & Peter St John Hevey Langan, *Snell's Equity*, 29d (London: Sweet & Maxwell,1982) at 8.
3. *Re Diplock*, [1948] Ch 465 at 481 (CA (Eng)), aff'd *sub nom Ministry of Health v Simpson*, [1951] AC 251 (HL).
4. (1760), 97 ER 676 (KB).
5. Tom Bingham, *The Rule of Law* (London: Penguin Group, 2010) at 37.

students against distorting the remedial constructive trust's conscience-based origins by taking it "too far". That seems fair. Nobody committed to equity's public repute wants to see a new maxim proclaiming equity (or the remedial constructive trust) to be the last refuge of a scoundrel. At the same time, there has been no expressed appetite for a return to the rigid systematization that made *Re Diplock* possible.

This tension is never far from the surface in this splendid collection of essays. For example, Alastair Hudson maintains that we err by treating the organizing principle of "conscience" as an entirely subjective phenomenon, as opposed to the product of objectively constituted sources of normative behaviours. And, although not directly addressed to the subjective-vs.-objective dichotomy, Sarah Worthington's paper seeks, by way of analysis of the proscriptive rules which equity imposes upon fiduciaries, to bring principle to determining who is a fiduciary (fellow Canadians, please pay attention![6]), the obligations they owe, and the remedies which flow from a breach. In contrast, Hila Keren, in lamenting "the fall of equity", strikes a more subjective note by celebrating (or, more accurately from her standpoint, commemorating) equity's "non-economic" priorities of "morality, fairness, justice or equality". The other papers implicitly presume that conscience is either an objective reference point, or that — if it has a subjective dimension — such subjectivity need not defeat clear thinking and rational rule-making in equity. Richard C Nolan's article demonstrating the importance of inherent jurisdiction to the administration of trusts celebrates the innovative judicial extension of that jurisdiction, for example, to give directions where the trustee is caught between competing groups of holders of notes issued under the terms of a trust deed. At the same time, though, he calls for greater attention to identifying a theoretical basis for deciding when a court can or cannot exercise inherent jurisdiction in this fashion. Mark Gillen espouses more radical reform of trust law by providing for enforcement of certain non-charitable purposes trusts — not, however, by way of a subjective act of judicial discretion, but by way of legislative intervention.

Nolan and Gillen's papers are also representative of a distinctly

6. *CA v Critchley* (1998), 60 BCLR (3d) 92 (CA) at para 75.

pioneering flavour to the collection — not inappropriately, given the 21th century theme. They are joined in this respect by Irit Samet's consideration of whether the law should abandon *caveat emptor* to permit rescission for unilateral mistakes in contract formation, and of whether equity is the appropriate vehicle to effect such a reform; Matthew Harding's deep reflection about discriminatory public trusts, whether judges should prefer the threshold of "public benefit" over "public interest", and the place of the value of freedom of disposition under each threshold; Kathryn Chan's argument for reinvigorating the Federal Court of Appeal's equitable jurisdiction over registered charities by invoking certain curative principles oriented towards effectuating imperfect charitable gifts; Paul Davies' consideration of whether the rules of equitable compensation should follow those available for breach of contract, for negligence, or for other torts; and David Wiseman's account for the possibility that equity might prefer a beneficiary-protection power over a beneficiary-direction rule in the context of joint bank account resulting trusts. And, appropriately enough (given this Journal's dedication to comparative law), Graham Virgo seeks to harmonize the Australian and Canadian remedial constructive trust with the institutional (substantive) constructive trust in England, while Margaret Hall considers the applicability to Canadian law of a recent English judicial innovation, rooted in the equitable doctrine of undue influence, for disrupting relationships that exploit children and mentally incapable adults. At a more general level, Justice Mark Leeming shows why equity is especially suited to comparative analysis, comprising themes which are familiar to jurists throughout the common law world.

Breaking new ground can, however, be difficult work, and the results are not always universally embraced. Robert Chambers shows how, over several decades of debate about liability for knowing receipt of assets transferred in breach of trust or fiduciary duty, various accounts for such liability have been advanced — from unjust enrichment, to failure to perform a duty to restore the misapplied trust property, to Chambers' admirably plain-spoken and persuasive argument that knowing receipt is itself a breach of trust. Any resort to "waiver of tort", once hoped to be equity's elixir for overcoming indeterminate causation in mass tort

claims,[7] must now account for Craig Jones' account of its limits. Stephen Watterson explores the residual uncertainties in the wake of the House of Lords' decision in *Banque Financière de la Cité v Park (Battersea) Ltd*,[8] following which English law has had to sort out what it means to say that subrogation to extinguished rights (usually held by a disappointed unsecured creditor or by a lender whose funds were misappropriated to discharge another's liabilities) is not only a remedy, but one that is also equitable and restitutionary. And as Mitchell McInnes' essay on beneficial services in respect of land shows, the implications of expanding the scope for equitable relief — in that particular case for relief under proprietary estoppel — are often insufficiently examined, both before and after the fact.

Our legal community, howsoever one chooses to define it (Western Canadian, Canadian, Anglo-American, common law), owes a debt of appreciation to Thompson Rivers University's Faculty of Law on this initiative — the CJCCL, with its worthwhile themes and its first-rate content. The essays contained in its second issue deserve wide circulation among practicing and academic lawyers and, of course, among judges charged with doing equity. As one who has profited from reading them, I offer my thanks and congratulations to all concerned and, in particular, to the authors and to the CJCCL's editorial team.

7. *Serhan (Estate Trustee) v Johnson & Johnson* (2004), 132 ACWS (3d) 221 (Ont Sup Ct).
8. [1999] 1 AC 221 (HL).