Equity’s Maxims as a Concept in Canadian Jurisprudence

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In Pro Swing v Elta Golf Inc the Supreme Court of Canada made passing reference to the functions of equity’s maxims. Other courts have made similar references; indeed, judicial mention of equity’s maxims occurs quite frequently. This is surprising given the dearth of academic commentary on equity’s maxims, and that little mention of the maxims now takes place in Canadian law school curricula. In contrast, open any of the equity texts of the 1800s and significant attention is accorded to equitable maxims. This article seeks to explore whether the concept of equity’s maxims, as against the content of the individual maxims themselves, serves any real purpose today. It starts by providing an historical evolution of the notion of equity’s maxims, noting in particular that they are now largely ignored in the United States of America but still have topicality, to widely varying degrees, in Commonwealth jurisdictions. It then explores three divergent functions that have historically been served by equity’s maxims today. It concludes that equity’s maxims serve a minimal function today. They do, however, preserve the distinctness of equity’s methodology from the common law and do allow some explicit dialogue on morality and ethics in those areas of private law where equity still plays a significant, determinative role.

Dans l’arrêt Pro Swing c Elta Golf Inc, la Cour suprême du Canada a rappelé les fonctions des maximes de l’équité. D’autres tribunaux ont mentionné de la même manière ces fonctions ; en fait, il arrive assez souvent que les instances judiciaires abordent la question des maximes de l’équité. On peut s’en étonner étant donné la rareté des articles universitaires publiés sur le sujet et le peu d’attention accordé aux maximes de l’équité dans les programmes d’études des facultés de droit canadiennes de nos jours. En revanche, en compulsant n’importe quel texte sur l’équité publié dans les années 1800, on constatera l’importance accordée aux maximes et doctrines d’équité. Dans cet article, on examine dans quelle mesure le concept des maximes de l’équité, par rapport au contenu de ces maximes en soi, vise un objectif concret de nos jours. L’article débute par une revue de l’évolution historique de la notion des maximes de l’équité, en faisant notamment observer qu’elles sont de nos jours grandement négligées aux États-Unis bien qu’elles conservent leur actualité, à des degrés très divers, dans les pays du Commonwealth. L’auteur explore ensuite trois fonctions divergentes que, de tout temps, les maximes de l’équité ont remplies. Il aborde dans la foulée les trois rôles que les maximes de l’équité pourraient jouer à l’heure actuelle pour conclure qu’elles ne remplissent aujourd’hui qu’une fonction minimale. Elle permettent cependant de préserver le caractère distinctif de la méthodologie relative à l’équité par rapport à la common law et ouvrent la voie à un dialogue explicite au sujet de la moralité et de l’éthique dans les domaines de droit privé où l’équité continue de jouer un rôle significatif et déterminant.

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Table of Contents

167  I.  INTRODUCTION
169  II.  EVOLUTION OF THE CONCEPT OF EQUITY’S MAXIMS
174   A.  The Mnemonic
174   B.  The Substantive
177   C.  The Methodological
182  III.  WHAT ROLE DO EQUITY’S MAXIMS PLAY TODAY
182   A.  Moral Rectitude
183   B.  Scaffolding
183   C.  Old Coat
185  IV.  CONCLUSION
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I. INTRODUCTION

In Pro Swing Inc v Elta Golf Inc,¹ the Supreme Court of Canada had occasion to address the recognition and enforcement of a non-monetary foreign judgment. The judgment is important for practitioners of private international law.² However, another important aspect of the judgment of Justice Deschamps for the majority is her reference to the nature of equitable jurisdiction and the role played by equitable maxims. She states:

At common law, the typical remedy is an award for damages. However, a wide range of equitable remedies are available, and they take various forms. Their commonality is that they are awarded at the judge’s discretion. Judges do not apply strict rules, but follow general guidelines illustrated by such maxims as “Equity follows the law”, “Delay defeats equities”, “Where the equities are equal the law prevails”, “He who comes to equity must come with clean hands” and “Equity acts in personam” (Hanbury & Martin Modern Equity (17th ed. 2005), at paras. 1-024 to 1-036, and I. C.F. Spry, The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages (6th ed. 2001), at p. 6). The application of equitable principles is largely dependent on the social fabric. As Spry puts it:

…the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended

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¹ 2006 SCC 52, [2006] 2 SCR 612 [Pro Swing Inc].
not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise.3

As it turned out, none of equity’s maxims were called into play in deciding the case. However, this is not the first time the Supreme Court of Canada has made reference to equity’s maxims,4 and in senior provincial appellate courts, equity’s maxims have been relied upon in a much more definitive role. Recently, the Court of Appeal for Ontario in Grant Forest Products Inc (Re) had occasion to resort to the equitable maxim that “equity looks on that as done which ought to be done,”5 using it as the sole justification for retroactive enforcement of a tax refund agreement by the appellant ahead of other secured creditors of the respondent company, which had received protection under the Companies’ Creditors Arrangement Act.6

At first blush, the continued and frequent resort to equity’s maxims in Canada appears anachronistic. As early as 1881, Ontario’s courts were placed within one single Supreme Court of Judicature. This followed on the heels of the passing of the Judicature Act7 in England in 1873. In the other provinces of Canada, there was also little appetite for separate equity courts. Within Canadian legal education, no law school continues to offer, or has offered for some time, a course exclusively dedicated to equity. Rather, equity is discussed, usually briefly, in courses on contract law (equitable mistake, unconscionability, duress and undue influence); remedies (specific performance and injunctions); trust and fiduciary courses; restitution; and a smattering of other courses. Similarly, if one reviews the principal Canadian texts in these areas, the word “maxim” is rarely, if ever, uttered. Robert Sharpe, in Injunctions and Specific Performance, references a couple of maxims under a section on general principles and other discretionary defences to equitable remedies.8

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3 Pro Swing Inc, supra note 1 at para 22.
5 2010 ONCA 355 at para 13, 101 OR (3d) 383 [Grant Forest].
6 RSC 1985, c C-36 [CCAA]. In Grant Forest, the court pointed out the utility of the maxim ahead of specific performance in that the former had retroactive effect and the latter prospective effect. The plaintiff had entered into an agreement to purchase the defendant’s tax refund credits for two years. The credits could only be transferred on a nominated date. On that date, the defendant company delayed the transfer largely at the request of other creditors, but prior to claiming protection under the CCAA. When that protection was obtained, the plaintiff sought a declaration that the transfer had taken place on the nominated date and that the assets represented by the tax refund were the plaintiff’s outright.
7 Supreme Court of Judicature Act, 1873 (UK), 36 & 37 Vict, c 66.
My text, *The Law of Equitable Remedies*, despite its title, gives short shrift; a matter that has been corrected in the second edition. This absence of Canadian treatment may explain why Justice Deschamps needed to reference an English and Australian text for support. What then are we to make of continued resort to the maxims of equity in Canadian law? Are they simply a throwback to some historical anachronism or do they still tell us something about the epistemology of equity?

This article seeks to explore the concept of equitable maxims, as opposed to critiquing individual maxims, and whether it has any resonance or relevancy today. Part II traces the history of the concept of equity’s maxims. Maxims were a way to communicate elaborate principles of equity doctrine with an economy of language. Later, maxims were envisaged as embodying a methodological approach guiding how equity operated. Part III explores whether there is still a conception of equity’s maxims that can be usefully applied to the exercise of judicial discretion, or whether, as has happened in the United States of America (US), this part of equity’s jurisprudence can also be safely discarded.

## II. EVOLUTION OF THE CONCEPT OF EQUITY’S MAXIMS

Open any of the principal equity texts of the nineteenth century and one will find an exposition of equitable maxims. The immediate forerunner of these was the work of Richard Francis, who produced a slim one-hundred-leaf folio called the *Maxims of Equity* in 1728. Francis was following a pattern set earlier by the likes of Francis Bacon, who had reduced English common law to a series of maxims; William Noy; and Christopher Saint Germain, who spoke referentially of the maxims of English Law in his *Doctor and Student* dialogues.

Francis detailed fourteen maxims of equity. He provided no particular exposition of the maxims, but simply grouped cases as examples of their application. However, the preface to his book is instructive of his attitude towards equity. Francis suggested that all judges should be guided by their conscience, and if they...
were their decisions would be just. Yet, due to the fact that “the depravity of human Nature is too apparent, and the Precepts of Conscience too often disregarded,” there must be restraint on judges so that they judge according to posited law. But here again, Francis tells us that because “human Providence is too meek, to make Laws, which shall prove just in all Cases; and human Nature is too corrupt to be left solely to the Guidance and Directions of Conscience,” then the “Excellency of our English Polity [is to avoid] both these Extreams.” Francis described the relationship between common law and equity: “… the Court of Law, rigidly adheres to its own established Rules, be the Injustice arising from thence, ever so apparent; whereas the Court of Equity will not adhere to its own most established Rules, if the least Injustice arises from thence.” But equity is not without its own rules, and the maxims of equity documented by Francis were an attempt to gather and catalogue them.

Jump to the nineteenth century and the great writers on equity of the time still made explicit reference to the maxims of equity. Edmund Snell published his first and only edition of *The Principles of Equity* in 1868. The second chapter is devoted to an exposition of eleven maxims, which are described as traceable to the great maxim or keystone that “Equity suffers no wrong without a remedy.” Across the Atlantic, Joseph Story published the first edition of *Commentaries on Equity Jurisprudence, as administered in England and America* in 1836, reducing his maxims to five. However, in contrast to Aristotelian and civilian conceptions of equity as embraced in the Latin aphorism *ex aequo et bono*, both Snell and Story conceived of a more formalist equity in keeping with the dominant legal philosophy of that era. Snell

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14 Francis, *supra* note 10 at 42.
15 *Ibid*.
16 *Ibid* at 4. See *ibid* at 3-4 where Francis tells us:
   
   The judges in our courts of law, are bound by their oaths to observe the strict rules of law; and therefore as upright judges, they must determine according to the known customs and statues of the realm, although they are sensible, that even in so judging, they do an act of manifest injustice. On the other hand, the judge in a court of equity is bound not to suffer an act of injustice to prevail, tho’ it be warranted by the forms and proceedings of law; and therefore he moderates the rigour of several penalties; relaxes the strict ties of unreasonable conditions; aids against unavoidable losses, clandestine frauds, and the like; and thence it is, that judgment shall be given in the same case against a man on one side of Westminster Hall, and quite contrary for him on the other; and yet both these agreeable to justice. See also *ibid* at 4 (where he adds the following metaphor: “This hath been judiciously compared to the mingling of two herbs, which of themselves are poison, but together make a wholesome medicine”).
18 *Snell*, *supra* note 17 at 12.
rejected the notion of judicial conscience and discretion, stating in his introductory chapter that “[a] court of equity is bound by settled rules as completely as a court of common law.”20 Story, after explaining the various conceptions of equity from antiquity, also rejected these notions and kept to a formalist doctrine whereby the principles of equity are as “certain, as the principles, on which the Courts of Common Law proceed [sic].”21

It was Roscoe Pound who expounded most on the role played by equitable maxims. In one article published in the Harvard Law Review, Pound traced the development of the concept behind maxims from antiquity through canon, Germanic and common law.22 For Pound, the development of legal philosophy could be expressed in an evolutionary way. In his article, Pound identified two roles served by maxims. Cases decided in an ad hoc fashion were catalogued into responsa; the answers of jurists to the questions placed before them in an action. In turn, these responsa were synthesized into rules, and maxims became the pithy expression, often expressed as proverbs, of these rules. Thus, one role of maxims is to provide a simplified expression of posited rules. The second role of maxims arises from the intersection of philosophy with law. For Pound, philosophy infused mechanical, arbitrary applications of posited rules with reason. Reason connoted reflection, and with reflection rules could be placed within a coherent order or philosophy. Descriptive maxims gave way to prescriptive maxims and eventually evolved into full-fledged legal principles. This second sense of maxims views them as an evolutionary step between rules and principles.23 Another important observation made by Pound is that maxims were most often included as part of legal education as a way for the teacher to summarize observations in “trenchant formulæ.”24

At the end of his article, Pound believed he had set the conditions to embark on a detailed exposition of equitable maxims. Although the article concluded with “To be continued,” a sequel was never published.25 Pound’s next writing on the subject, “On Certain Maxims of Equity,” was published in 1926.26 In this essay, Pound wrote on both Francis’ and Story’s maxims, noting the shallow foundation of English case law for all of them. Pound argued that maxims, specifically equitable maxims in this case, were largely matters of historical moment and simply recorded a transitory phase in legal thought with little relevance to modern-day American law. In fact, Pound was quite dismissive; he concluded, “To-day all occasion for

20 Snell, supra note 17 at 4.
21 Bond v Hopkins, 1 Sch & Lefr R 428-29, cited in Story, supra note 19 at 22-23.
23 Ibid. “Bridging the transition from the strict law to the philosophical jurisprudence of the classical natural law, maxims are an intermediate step between rules and principles” (ibid at 816).
24 Ibid at 817.
deceiving ourselves as to what these maxims are or how they arose has definitely passed.27

In England, Hanbury paid homage to Pound’s work but adopted a more sanguine approach.28 While acknowledging that many of the equitable maxims should be jettisoned, and others needed reworking, Hanbury saw value in the concept of maxims. He believed that they could hold the “worthy place of coadju
tors to the study of equity jurisprudence.”29

Following Pound’s writings, little has been written on equitable maxims as a concept. The 31st edition of Snell’s *Principles of Equity* still references the maxims, describing them as, “trends or principles which can be discerned in many of the detailed rules which equity has established.”30 Martin’s *Hanbury & Martin Modern Equity* gives similar treatment, describing the maxims as, “general guidelines illustrating the way in which equitable jurisdiction is exercised.”31 Alastair Hudson’s *Equity & Trusts* lists the maxims under the general heading of “Core Equitable Principles,” likening them to the Ten Commandments, and states that they “constitute moral prescriptions for the values according to which people should behave.”32 Simon Gardner has written dismissively of two particular equitable maxims, saying that they were misapplied by the House of Lords. As Gardner cautions, the vague transcendent expression utilized in maxims introduces “unarticulated value-judgments” and risks a high incidence of error.33

Australian writers have devoted greater attention to equity’s maxims. As previously noted, ICF Spry gives the most comprehensive treatment of the maxims and rationale concerning their contemporary relevance; that they describe an ethical quality used to determine “conscionability or justice of the behaviour of the parties according to recognised moral principles.”34 However, in the preceding paragraph

27 *Ibid* at 277. See *ibid* at 276-77 where Pound said:

Thus the maxims could serve both to preserve equity jurisdiction and to provide guides for its exercise, until equity could take root on this side of the water and an American system could be worked out by judicial decision and exposition by teachers. In England a system of equity was achieved, largely through the work of Lord Eldon, early in the nineteenth century. Thenceforth the maxims were less useful. Now they are rarely invoked as such. The doctrines are well understood and may be vouched without resorting to proverbial formula
tions. In the United States the maxims had work to do until our reception and adaptation of English equity was complete.


29 *Ibid* at 220.


31 Martin, *supra* note 9 at para 1-024.


33 Simon Gardner, “Two Maxims of Equity” (1995) 54:1 Cambridge LJ 60 at 60. See *ibid* at 61 (writing on the (mis)application of the maxims); *Attorney-General for Hong Kong v Reid* (1993), [1994] 1 AC 324, [1994] 1 All ER 1 PC (Eng) [*Reid* cited to AC] (stating “Equity regards as done what ought to have been done”); *ibid* at 63 (discussing the maxim “Equity supplements but does not contradict the common law.” Accord *Rhone v Stephens*, [1994] 2 AC 310, [1994] 2 WLR 429 HL (Eng)).

34 Spry, *supra* note 9 at 6.
Spry cautions that the application of maxims can be either misleading or can simply amount to *post facto* reasoning to bootstrap a decision that has already been reached on the application of other equitable principles. Similar to Spry’s position is that of Samantha Hepburn, who states that the utility of maxims “lies in their role as generalised edicts, illustrative of the ethical quality of equity but not functioning as fixed and immutable directives.” Patricia Loughlan, who describes the maxims as having the power to “explain some of the central ideas and themes and values of the equitable jurisdiction.” G E Dal Pont and DRC Chalmers describe the maxims as “fundamental ethical principles at the centre of equity jurisdiction.” RP Meagher, WMC Heydon and JRF Lehane devote a chapter in their work *Equity: Doctrines and Remedies* to eleven specific maxims, describing them as “of considerable importance for an understanding of equity.” They go on to cite the High Court of Australia, which described individual maxims as “a summary statement of a broad theme which underlies equitable concepts and principles.”

In the US, Pound’s comments have proved prophetic. Modern remedies texts barely mention, if at all, any notion of equity’s maxims. Dan B Dobbs recognized the equitable maxims in his first edition but jettisoned them from the second edition. Dobbs argues that the values and ideas engaged in the maxims are now integrated into the substantive law on any subject. To the extent that maxims are still relevant for Dobbs, they are confined to “Delay,” “Equality” and “One who seeks equity must do equity.” James Fischer mentions equity’s maxims as a historical curiosity, and Robert S. Thompson et al omit any mention of them at all. There are two articles written specifically on equitable maxims in the US. In one, Howard L. Oleck describes the function of equitable maxims as to “provide general principles as points of departure” and to “provide a broad, general view of equity as

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35 Ibid.
38 GE Dal Pont & DRC Chalmers, *Equity and Trusts in Australia*, 4th ed (Prymont, NSW: Lawbook, 2007) at 15. See Corin v Patton, [1990] HCA 12, 169 CLR 540 at 557, Mason C] and McHugh J [Corin] (where the High Court of Australia has also remarked on the status of equitable maxims as constituting something less than a rule or principle).
40 Corin, supra note 37 at 557.
41 See Dan B Dobbs, *Handbook on the Law of Remedies: Damages – Equity – Restitution* (St Paul, Minn: West Publishing, 1973) at 34-45; Dan B Dobbs, *Law of Remedies*, 2d ed (St Paul, Minn: West, 1993) at 63-64. See also ibid at 2.3(4) (where Dobbs makes a slightly more detailed reference to equity’s maxims in the Practitioner edition, noting a number in a footnote and asserting that “they can hardly be called law, much less rules, but, as would be expected, they reflect the ethical ideals and claims of the equity courts”).
44 Howard L Oleck, “Maxims of Equity Reappraised” (1952) 6:3 Rutgers L Rev 528 at 528.
a working system of jurisprudence.”\textsuperscript{45} In the other, Howard W. Brill suggests, “If nothing else, the maxims… offer an insight into equitable discretion and provide the opportunity for creative lawyering.”\textsuperscript{46}

At least three divergent approaches emerge from the historical development of the role of equity’s maxims. These divergent approaches are what this article term’s the mnemonic, the substantive and the methodological.

A. The Mnemonic

Equitable maxims used to be a way to communicate substantive rules with an economy of language. In structure, they were likened to proverbs. These maxims were part of inculcating the student of law into the law practiced before the courts of equity. In this sense, they can be likened to a mnemonic; a way to aid the memory. We now take for granted the readily available computer databases and search functions to find law, as well as the vast monograph library on most aspects of legal doctrine. However, in an era of limited publishing and against a backdrop that saw the law being increasingly catalogued and systematized, creating pithy statements of rules and principles is understandable. The impetus behind equity’s maxims was the same force that made Blackstone’s \textit{Commentaries on the Laws of England}\textsuperscript{47} such a raging success in both the United Kingdom (UK) and the US.

In today’s academy, one would be subject to derision to suggest that vast areas of law could be reduced to a few simple proverbs. Law’s complexity mirrors society’s complexity. Nor is there a need to memorize law; memory work has been displaced with a host of analytical skills. In any case, it would now seem strange to single out one area of law for this treatment when there are so many other areas that presumably could also benefit.

B. The Substantive

For those authors who continue to include an exposition of equity’s maxims in their texts, a practice most common in Australia and the UK, the maxims retain some substantive content and can be determinative of rights. The treatment of maxims by these authors follows a similar pattern: the maxim is stated, followed by a general explanation of its content. Illustrations are drawn from cases. Caution is expressed as to over extending the maxim’s application, and then exceptions to the maxim are

\textsuperscript{45} Ibid.

\textsuperscript{46} Howard W Brill, “The Maxims of Equity” [1993] Ark L Notes 29 at 29. See also Kevin C Kennedy, “Equitable Remedies and Principled Discretion: The Michigan Experience” (1997) 74:4 U Det Mercy L Rev 609 at 617 (which describes the maxims as “useful shorthand devices for jogging one’s memory, and not a substitute for principled and thoughtful decision making”).

given as examples. One is then left with some doubt as to what veracity should be accorded the original maxim as stated.

Not all maxims are equal. Some authors describe the maxim that, “[e]quity will not suffer a wrong without a remedy” as the principal maxim that underlies equity’s entire jurisdiction.\(^48\) The maxim itself finds parallel expression in common law’s *ubi jus ibi remedium* (there is no right without a remedy). Some maxims have metamorphosed into more complete and complex doctrines; “Equity will not assist a volunteer” and “Delay defeats equity” being examples.

Clearly, some equitable maxims still retain much substantive bite. Rightly or wrongly, the application of the equitable maxim “Equity considers as done that which ought to have been done” was the single principle determinative of rights in *Reid*.\(^49\) The defendant, while serving as a public prosecutor in Hong Kong, had accepted bribes to frustrate certain criminal proceedings. The defendant was eventually arrested and convicted. Part of the order against the defendant required him to pay any funds received as bribes to the Crown. However, prior to his conviction, he had transferred the funds obtained from the bribes and purchased real estate in New Zealand. The plaintiff, the Crown in Hong Kong, brought civil proceedings in New Zealand to recover the real estate. The Privy Council eventually gave the plaintiff a remedy of constructive trust over the New Zealand property,\(^50\) the effect of which would remove the real estate assets from any other creditors of the defendant. The basis of the propriety relief granted to the Crown is that a false fiduciary has no right to retain a bribe.\(^51\) The payer of the bribe has no right to recovery because he or she has committed a criminal offence.\(^52\) The false fiduciary owes a duty to the Crown, his employer at the time, and thus the bribe money must be owed to the Crown.\(^53\) Because equity considers “as done that which ought to be done,” the duty to pay the Crown arose the moment the bribe was paid and accepted.\(^54\) In failing to turn over the bribe, the false fiduciary immediately held the funds in the capacity of constructive trustee for the Crown.\(^55\) The decision is controversial because imposing a constructive trust—a proprietary remedy—at the point when the false fiduciary is in receipt of the bribe(s) could have an impact upon other unsecured creditors of the false fiduciary, who cannot then share in the assets subject to the constructive trust.

As mentioned earlier, the same equitable maxim was applied by the Court of Appeal for Ontario in *Grant Forest Products Inc (Re)*.\(^56\) The appellant, Grant Forest

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48 Snell, supra note 17 at 5-02; Hudson, supra note 31 at 26.
49 Reid, supra note 33.
50 Ibid at 339.
51 Ibid at 331
52 Ibid.
53 Ibid.
54 Ibid.
55 Ibid at 331.
56 Grant Forest, supra note 5.
Products Inc (GFPI), was in the lumber business. The company’s economic fortunes declined and its CEO, the respondent Peter Grant, began funding the company. One of the ways Grant did this was by purchasing a tax refund owed to GFPI. Under the applicable Tax Refund Agreement, the respondent paid US$20 million to GFPI in return for US$10 million tax refunds due to GFPI in each of 2008 and 2009. Under the agreement’s terms, the respondent paid the money immediately to GFPI, but only received rights, title or interest in the tax refunds once they were transferred upon the nominated closing dates. The agreement also provided that GFPI would hold the refunds in trust for the respondent when it received them after the nominated closing date. GFPI was in receipt of the funds, but declined to deliver them to the respondent on the nominated closing date. GFPI maintained this position for some months and then claimed protection under the *CCAA*. The respondent sought an order that he was entitled under the purchase agreement to the transfer of the refund funds. The appellants, a syndicate of banks who constituted secured lenders to GFPI, objected to the respondent’s motion claiming that the imposition of a trust would defeat the terms of the *CCAA*, in that it would constitute an unfair preference. In effect, the respondent would get a one hundred percent return of his money on an unsecured loan, ahead of the secured creditors who would receive substantially less. The Court of Appeal for Ontario upheld the motion judge’s conclusion that, based on the equitable maxim “Equity looks on that as done which ought to be done,” the appellants could not complain if the court simply enforced the terms of the agreement, which created the obligation to transfer and which had been breached. The appellants had been quite involved in the creation of the Tax Refund Agreement and had influenced GFPI to enter into it. It would be inequitable for them to avoid an agreement that they had helped create.

The extent to which other of equity’s maxims have had such definitive appeal as in the aforementioned cases has not been investigated in this article, though it is suspected that there are not many such cases. The maxim that “Equity does not assist a volunteer” may be one such candidate, although even here there are exceptions. Even Spry, who perhaps gives the most spirited defence of equity’s maxims, only accords two of the maxims detailed treatment: “Clean hands” and “He who seeks equity must do equity.”

58 *CCAA*, supra note 6.
59 *Grant Forest*, supra note 5 at para 9.
60 *Ibid* at para 12.
61 *Ibid*.
65 See Spry, supra note 9.
C. The Methodological

For those writers who do include coverage of equity’s maxims, there is a uniform rationale: that the maxims assist in understanding equity’s methodology, particularly where it comes to the exercise of discretion or conscience. In this guise, the maxims are torchbearers of transcendent moral values and principles that infuse both the substantive and the procedural arms of equity’s jurisdiction. Whether this is an accurate picture of equity today, and if so whether the maxims provide any substantive guidance, are two questions to which will now be turned to.

On the first question, the answer offered by Douglas Laycock is a resounding no.66 For Laycock, there is but one corpus juris in which equity won over the common law.67 Laycock’s thesis is built upon his extensive research on the irreparable injury rule.68 The rule acts as a threshold to access equitable remedies and requires plaintiffs to prove that they will suffer irreparable harm if confined to common law damages.69 Laycock asserts that the rule is dead because every time a court grants an equitable remedy the rule is always satisfied, such that it never acts as a gatekeeper to equitable relief.70 Even in areas where equity asserts a substantive jurisdiction and which “butt up” against common law rights, for example the creation of equitable interests over property including trusts, Laycock claims that equity has displaced common law rules. Laycock sees the continued desire to retain equity as a discrete jurisdiction as a claim about creating the right balance between formalism and discretion:

We can argue about the right balance between discretion and formalism, but it makes no sense to argue about the right balance between law and equity. If discretion pervades the system, then discretion is no longer equitable in any meaningful sense. If we have too much discretion in the system, we have too much discretion in equitable contexts as well as in legal contexts.71

Spry’s critique of equity represents the opposing view to Laycock’s. For Spry, equity has a distinct methodology.72 Whereas the common law is formalist in its orientation and its development works from analogy, equity is concerned with the prevention of unethical and unconscionable conduct and works from direct

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67 Ibid at 53.
69 Laycock, “Equity,” supra note 66 at 54.
70 Ibid.
71 Ibid at 75.
72 Spry, supra note 9 at 1.
application. With this orientation, Spry describes the ability of equity to adapt to new situations by developing, for example, fiduciary, company, intellectual property and confidentiality law. Within equity’s auxiliary jurisdiction, the principal concern of Spry, it has a distinctive methodological approach that entails a multivariate balancing act, often engaging different levels of proof.

The difficulty with Laycock’s position—at least for Commonwealth jurisdictions—is that it in effect calls for the abandonment of the term “equity” as being nothing more than a redundant historical anachronism. This seems to fly in the face of the argument that the repeated use of the term serves some function as an organizing principle of reported case law. Steve Hedley has written on how the common law has generally eschewed attempts at reaching a consensus on a single systematic structure of law. Hedley notes that law was historically structured according to the writs that were available to commence an action, and thus had a remedial focus.

Despite the wave of theorizing around structuring common law according to rights (i.e. property), duties (i.e. obligations) or source (i.e. statute) performed in the academy, and for which the concept of equity as a methodological approach finds no home, the repetitiveness of the term’s usage in our case law suggests that it has significance for both lawyers and judges. Hedley comments on this particular phenomenon, making reference to “the survival and growth of a distinct category of ‘equity,’ long after the original reason for its existence…has gone.”

Laycock espouses an extreme form of the fusion of equity and common law. A more modest position has been articulated by Andrew Burrows. Burrows provides three categories of interaction between equity and common law. The first

73. Ibid. See also Re Hallet’s Estate (1880), 13 Ch D 696 at 710, 49 LJ Ch 415 (CA), Jessel MR. Historically, this difference was also recognized in that the common law worked from a principle of a declaratory point of view, where each judgment was simply declaratory of what the law had always been. In contrast, equity worked from a point of view of rules being established by the respective chancellor from time to time.

74. See Spry, supra note 9.


76. Ibid at 307.

77. “Equity” still finds a home in its substantive jurisdictional capacity. Nothing turns, for example, on saying that the law of trusts has derived from equity because the law of trusts has, within either a rights, property or source classification, attained its own doctrinal autonomy. This is to assert the primacy of the Laycock thesis of doctrinal development.

78. For example, searching the term “equity” in LexisNexis for all Canadian cases in the last six months (September 5, 2011 to March 5, 2012) generates 646 hits.

79. Hedley, supra note 74 at 317.

80. See United Scientific v Burnley Council (1977), [1978] AC 904 at 924-25, [1977] 2 WLR 806 HL (Eng) (where Lord Diplock commented upon Ashburner’s (in)famous fluvial metaphor that the two jurisdictions of law and equity “though they run in the same channel, run side by side and do not mingle their waters”). See also ibid at 925 (where the retort of Lord Diplock that “[i]f 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,” set off the last flurry of fusion debates. See generally Paul M Perell, The Fusion of Law and Equity (Markham, Ont: Butterworths, 1990).

describes a mutual co-existence and coherence. The second category describes areas where there is coherence but where nothing is served by retaining the separate labels of equity and common law. Burrows suggests the law of mistake as an example of this category. Since his article was written, the law in the UK has developed according to this suggestion. Burrows’ final category contains those areas of law in which there is no coherent co-existence between law and equity. He gives limitation of actions, award of compound interest, tracing and illegal contracts as examples. Most of the remainder of his article seeks to effect fusion (coherence) in the award of monetary remedies for civil wrongs. This article does not seek to disagree with Burrows other than to suggest that his first category, at least in Canada, may be larger and less coherent than he envisions. For Canada, the extension of remedial constructive trusts and fiduciary duties into areas which overlap with common law duties of care may suggest that subjects placed within category one would be more accurately placed in category three. However, if the price of coherence in the third category is to generate some new principle drawn from equity and common law, it may come through the sacrifice of equity’s methodology; the reason for the extension of the fiduciary duty in the first place.

The independent existence of equity is clearly recognized by the Supreme Court of Canada in *Soulos v Korkontzilas*. In that case, it is the majority’s reliance upon equity and good conscience which fuels its decision to recognize at least two foundations for a constructive trust: first, as a remedial device to restore an unjust enrichment and second, when in equity and good conscience it is otherwise necessary to effect justice between parties. The majority judgment written by Chief Justice McLachlin reflects her long held views about the place of equity in the law.

In an illuminating article, Dennis Klinck examined what is to be made of the references to conscience so often made in Canadian and other Commonwealth

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82 Ibid at 5.
83 Ibid.
84 Ibid.
85 Ibid.
87 Burrows, supra note 81 at 6.
88 Ibid at 7.
90 Ibid at paras 34, 36.
courts, particularly in the coupling of equity and (good) conscience. Klinck suggests that attraction to equity and conscience may be partially explained as an act of “reflex repetition”; a bootstrapping exercise to avoid more detailed analysis, thus inflating the phrase’s importance—a form of self-fulfilling prophecy. But Klinck also makes the following two suggestions: first, that conscience is appealing as a way to infuse moral criteria into the law; and second, that when conscience is collocated with equity, it often harkens back to an Aristotelian notion in which equity is advanced to ameliorate the rigours of a formal application of posited law.

Nevertheless, despite the centrality of equity to the decision in *Soulos*, one could equally find support for the Laycock position in the jurisprudence of the Supreme Court of Canada—in particular, the decision in *Cadbury Schweppes Inc v FBI Foods Ltd*, which dealt with a breach of confidential commercial information. Justice Binnie, writing for the Court, acknowledged the historical basis of protection of confidences as originating in equity, but noted that this doctrine overlapped with actions lying in contract, tort and property law. To the Court, this development culminated in the right to protection of confidence being a *sui generis* right. The Court then outlined a continuum of remedies and suggested that an appropriate remedy must be linked to an underlying policy objective warranting the particular level of protection.

Another attack on the place of equity and conscience originates from some restitution scholars. They see appeals to equity and conscience as embracing discretionary remedialism, which in turn is viewed as resorting to idiosyncratic justice. They argue the areas that have attracted discretionary remedialism can be better explained within the rubric of unjust enrichment, and the organizing discipline entailed within the criteria used to justify restoring enrichment. Ironic and somewhat disconcerting for these scholars are the assertions by the Supreme Court of

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92 Dennis R Klinck, “The Unexamined ‘Conscience’ of Contemporary Canadian Equity” (2001) 46:3 McGill LJ 571. Klinck points out that the terms “equity” and “conscience” can, and do, carry separate meanings in law. For example, “conscience” as applied to the doctrine of unconscionability is a distinct application, as is the term “equity” when used in a statute to describe employment equity. When the terms are coupled, they are a description of a particular methodology. Klinck seeks to explore the change in meaning over time to these terms, whether they are largely synonymous, and whether it is the defendant’s or the court’s conscience that is engaged.

93 Ibid at 611.

94 Ibid at para 79.

95 Ibid at para 32.

96 [1999] 1 SCR 142, 167 DLR (4th) 577 [Cadbury cited to SCR].

97 Ibid at para 20.

98 Ibid at para 61.

99 Ibid at paras 26, 30, 33, 46, 48.


Equity’s Maxims as a Concept in Canadian Jurisprudence

Canada—which has been more active than most in advancing unjust enrichment—that much of unjust enrichment is itself the product of equity. Laycock may be correct that talk of equity is really a discussion about striking the right balance between formalism and discretion, but the jurisprudence of the Court would tend to confirm that references to equity in Canada are more than rhetorical flourishes; equity together with conscience connotes a distinct form of reasoning—though only over part of the common law of obligations. In the areas where equity is most active—property, trusts and fiduciaries, procedural rights and remedies—Canadian law still sees an advantage in being able to say that we do that at law but this in equity. Thus, a legal system that asserts, “this is the rule and that is an exception,” is differently crafted from one that says, “all rules are discretionary” (i.e. Laycock’s thesis that the exceptions have subsumed the rules). Anglo-Canadian law provides many examples of this proposition. The law of part-performance would never have gotten off the ground if it had not recognized the rule and exception; however in applying it, we still see merit in insisting upon formal documentation concerning dispositions of real property. In Canadian law, a plaintiff must demonstrate some fair, real and substantial justification to gain specific performance of a contract concerning real property; a stance that has strengthened the inadequacy of damages criteria and reinforces the dominance of damages as a presumptive contractual remedy. The phenomenon of granting, yet suspending, injunctive relief is a way to recognize that land is protected by property rules and thus can only be obtained through consensual exchange, but that special circumstances may dictate a different result to accommodate the public interest or a defendant’s particular circumstances. The rule that one cannot have judgment before trial becomes subject to the exceptional circumstances that generate a Mareva injunction. The imposition of remedial constructive trusts as an exception favouring women after common law cohabitation arrangements have dissolved seems particularly just, while still preserving the sanctity of property as a rule.

My point here is not to discuss the current metes and bounds of the fusion debate, other than to say that in Commonwealth jurisdictions there is still recognition of a separate place for equity, and recognition that within this sphere there are methodological differences in how equity’s doctrines are applied to any particular factual pleading. I now turn to the question of whether equity’s maxims continue to perform any useful role. I identify these roles as “moral rectitude,” “scaffolding” and “old coat.”

103 See Pacific National Investments Ltd v Victoria (City), 2004 SCC 75 at 576, [2004] 3 SCR 575 (where Justice Binnie stated, “…unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to the principles rooted in fairness and good conscience”). See also Roxborough v Rothmans of Pall Mall Australia Ltd, [2001] HCA 68, 208 CLR 516 at paras 72-74, Gummow J.
III. WHAT ROLE DO EQUITY’S MAXIMS PLAY TODAY?

Perhaps surprisingly, given the paucity of academic commentary and the fact that, by and large, equity’s maxims do not have a place in Canadian law school curricula, there is still a large amount of maxim speak in reported cases. LexisNexis records over 500 hits when using the search terms “equity” and “maxim” in close proximity to each other, and many of these are contemporary cases. A cursory inspection suggests that the maxims: “Equality is equity,” “Clean hands” and “Equity treats as done what ought to have been done,” figure most prominently. An equally cursory inspection of these cases suggests that references to any particular maxim are of the reflexive repetition kind alluded to by Klinck with respect to equity and good conscience, and contain little in the way of analysis. For the judiciary, equity’s maxims still perform a supportive function to the application of legal doctrine in judicial reason, or serve as convenient shorthand abridging a more complex legal analysis.

A. Moral Rectitude

Taken together, equity’s maxims do present a certain picture of moral rectitude. This rectitude is strongest in Richard Francis’ fourteen maxims and weakest in Story’s six maxims. The prevailing undertone of morality has been captured, somewhat facetiously, by Roger Young and Stephen Spitz in their article, “SUEM – Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose.”104 In this article, Young and Spitz illustrate, through cases drawn exclusively from South Carolina, that the application and result of the traditionally drafted equitable maxims conform to Spitz’s ultimate equitable maxim. Where there are exceptions, it is usually because it remains unclear whether one can clearly identify either a “good guy” or a “bad guy.” Young and Spitz suggest their ultimate maxim as a quick and easily applied check whenever legal counsel are arguing an equitable case and wish to identify who will win.

Hudson’s analogy between equity’s maxims and the Old Testament’s Ten Commandments captures the argument of moral rectitude.105 The Commandments express the essence of Judaeo-Christian obligatory conduct in language that is stark, yet still leaves room for interpretation.106 The maxims describe the essence of a personified equity in equally sententious language. At least in Francis’ version of the maxims there is no doubt left that the world can be divided between the good

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104 Roger Young & Stephen Spitz, “SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose” (2003) 55:1 SCL Rev 175. Roger Young is a Circuit Court Judge for the Ninth Circuit of South Carolina and Stephen Spitz is a professor at the University of South Carolina, School of Law.

105 Hudson, supra note 32.

106 Exodus 31:18. The Commandments were written with the “finger of God”.
and the bad, the innocent and the guilty, the wronged and the wrongdoer, and that equity should favour the former over the latter. The maxims operate to guide judgment on the particular dispute, but no doubt is left that judgment will be made, and that the righteous will prevail, in equity.

B. Scaffolding

Dennis Klinck’s article on conscience in equity gives varying accounts for the continued reliance on equity in Canadian decisions. He suggests that it could simply be a case of inertia. Alternatively, he identifies the transformation that conscience has undergone from the Tudor era when casuistical moral reasoning allowed a differentiated and atomistic conscience, to a formalist time, in which an objective conscience of either judge, court or law was engaged to curb moral relativism. Klinck concludes that throughout equity’s history into the present day, this discourse has highlighted the “continuing attractiveness of including moral criteria in the law.”107 The dilemma has always been how to accommodate the particular case, framed by appeals to conscience within a framework of rules and principles that make law what it is. Klinck leaves us this challenge with a better understanding of it, but no particular insight on how it is to be accomplished. It may not be much, but equity’s maxims may provide the scaffolding upon which arguments about the content of “in equity and good conscience” can be assembled—the torchbearer can be made to illuminate a bit more brightly.

The role of equity’s maxims envisaged under this heading is that they capture certain normative preferences based on some limited open-textured moral and procedural imperatives, but operate in a type of pre-law function. The maxims are descriptive of the ways in which equity should be engaged, but they lack specificity and sanction to act prescriptively to determine any particular substantive outcome. The maxims operate in a more procedural way by funnelling the parties towards a smaller range of acceptable outcomes. Snell’s expression of the maxims best captures these sentiments.

C. Old Coat

Without exaggerating the role of equity’s maxims, there are examples in equity where trolling through the past has been used to found a modern action and, thus, fill a void in the law.108 Harkening back to the past lends legitimacy to the modern action and may provide guidance on how to frame the result. Because the common

107 Klinck, supra note 91 at 614.
108 See Jeff Berryman, “Anton Piller Orders: A Canadian Common Law Approach” (1984) 34:1 UTLJ 1 for an example, the creation of the Anton Piller order, and a brief history of its historical roots. Its genesis can be traced to work by Hugh Laddie, who was a chancery barrister, and in 1974, happened to come across some old chancery cases that had given ex parte orders for the inspection of property.
law moves incrementally and by analogy, there is some reason to keep a reservoir of concepts on which to draw, much as one keeps an old and familiar coat in the hall closet to brave inclement weather. The resort to particular maxims of equity in *Grant Forest Products Inc (Re)*\(^{109}\) and *Reid*,\(^{110}\) discussed above, may be examples of this phenomenon. The role envisaged here for equity’s maxims is, as a last resort, to shore up and add legitimacy to a judgment where other contemporary legal classifications are barren. Equity acts as progenitor, the maxims as midwives.

Identifying roles that either are or could be fulfilled by equity’s maxims does not prove that they actually make a difference, or are in fact necessary. Indeed, as evident in the US, a common law jurisdiction can function perfectly well without explicit acknowledgement given to the maxims as maxims. Nevertheless, at least in Canada, some account has to be given that accommodates the prodigious extent of maxim speak in reported decisions, including in our most senior appellate courts.

Writing ex-curia, Justice Robert Sharpe has alluded to a role played by equity’s maxims.\(^{111}\) Justice Sharpe argues that in the area of commercial litigation, the tendency in modern day has been to accord the judge discretion. He points out that exercising discretion carries with it a number of meanings. Traditionally in law, particularly as it relates to issues of administrative law or civil procedure, discretion is seen as exercising a decision-making function within a range of equally permissible alternatives. But a second definition of discretion is to exercise judgment, prudence and discernment. Justice Sharpe, drawing from Ronald Dworkin,\(^{112}\) suggests that between these two definitions, the role of a judge is to exercise discretion consistent with legal policies and principles and to give reasons that can withstand scrutiny. Sharpe specifically identifies some equitable maxims (“Clean hands” and “Laches”) as having reached the status of principles, in which discretion, adopting the second meaning, is used when they are exercised:

> A principle of this kind plainly forms part of our law and points to a resolution, but not in a categoric manner of rules. A principle is only one factor to be taken into account. It may conflict with another policy or principle on any given question and may have to be weighed by the decision-maker with a view to determining which should prevail. But it does have operative force in that it represents an identifiable value, capable of supporting rational discussion with a view to arriving at an objectively just resolution of disputes.\(^{113}\)

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109 *Grant Forest*, supra note 5.
110 *Reid*, supra note 32.
113 Sharpe, supra note 111 at 9.
Perhaps then, this marks the point of divergence between Commonwealth and US approaches to equity’s maxims. Laycock’s view towards equity conforms to Pound’s view that equity’s maxims marked a transition stage between rules and principles, which was complete well before the turn of the twentieth century, making continued resort to the maxims obsolete. In contrast, in Commonwealth jurisdictions, equity’s maxims have only recently emerged from a period of stasis on the inevitable evolution toward becoming principles. Nevertheless, in all jurisdictions the central issue is, as Laycock suggests, guiding the exercise of judicial discretion (used in the sense of its second meaning; to exercise judgment, prudence and discernment). As with so many jurisprudential debates between the two great progenitors of our common law, there may be a tad too much legal realism in Laycock’s vision of how discretion should, or is in fact, exercised. Preserving equity’s maxims reinforces the notion that Canadian law still retains jurisprudence on equity that is distinctive from common law in methodological approach. It may be that in time we will truly dispense with the maxims as envisaged by Pound, but that time is yet to come. The maxims also act as explicit signifiers that a debate about principles, and indirectly moral values, is being engaged in by a court. The need for great doctrinal stability in areas where equity principally operates—property and private obligations—justifies this signifier role. It is the reason why the common law can still comfortably assert that we do that in law but this in equity; an approach legitimated by the opening lines of Justice Deschamps J in Pro Swing Inc.\textsuperscript{114}

IV. CONCLUSION

This article has sought to argue that some account must be given for the persistent reference to equity’s maxims in the Supreme Court of Canada’s recent judgments and in other Canadian courts. Equity’s maxims have a strong instinct for survival given the paucity of academic commentary and their apparent absence in law school curricula in Canada. At the same time, it cannot be said that retention of equity’s maxims is vital or dramatically improves our legal system; others certainly get by without them. Perhaps the most defining role played by equity’s maxims is to differentiate equity’s distinctive methodology from other forms of exercising discretion. The maxims do allow a historically legitimate opening to explicitly infuse parts of law amenable to equity’s jurisdiction with moral and ethical values.

\textsuperscript{114} \textit{Pro Swing Inc}, supra note 1 at para 22.