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Promissory Estoppel, Proprietary Estoppel and Constructive Trust in Canada: "What's in a name?"

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This paper explores the similarities and differences between promissory estoppel, proprietary estoppel and the remedial constructive trust. Although the three are quite different at one level, as the first is a defence to an action, the second a cause of action as well as a defence, and the third simply a remedy to a cause of action, a closer examination reveals certain underlying similarities. The comparison highlights proprietary estoppel, an oft-overlooked concept in Canada, but which is comparable to promissory estoppel at the substantive level and the constructive trust at the remedial level.

Cet article compare la préclusion promissaire, la préclusion propriétale et la fiducie judiciaire à caractère réparatoire. Les trois concepts sont très différents en ce sens que le premier est une défense à une action, le deuxième une cause d'action aussi bien qu'une défense, et le troisième un simple remède à une cause d'action. Cela dit, un examen plus approfondi souligne des points de convergence intéressants. La comparaison met en valeur la préclusion propriétale, un concept souvent ignoré au Canada mais qui se compare à la préclusion promissaire sur le plan substantif et à la fiducie judiciaire sur le plan des remèdes.

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That which we call a rose
By any other name would smell as sweet.[1]

Introduction

The common law is like an English country garden, where a wide variety of plants of all shapes, sizes, colours, provenance and purpose thrive together in apparent disorder but with striking overall effect. Most of the plants are native species of ancient lineage, although judicious pruning and cross-fertilization have often changed their original aspect and adapted them to new uses; some of the plants have been transplanted from elsewhere, and their survival has depended on the suitability of soil and climate as well as the care and attention of gardeners.

England and other common law Commonwealth jurisdictions, except Canada, have concentrated much care and attention on cultivation of the doctrine of estoppel, so that there is now a profusion of estoppels, with promissory and proprietary estoppel having pride of place; none of these jurisdictions has shown particular interest in cultivating the remedial constructive trust. Common law Canada, on the other hand, has tended to ignore estoppel, being content to import English examples without more, and has concentrated its attention on cultivation of the constructive trust, particularly a vigorous American-style remedial constructive trust.

The range of plants in an English country garden makes them often difficult to classify – to determine whether they are plants of different genera, different species of the same genus, or simply different varieties of the same species. So it is with the common law. This paper looks at promissory estoppel, proprietary estoppel and the remedial constructive trust – more precisely, the unjust enrichment constructive trust – with a view to determining whether, like plants, they are fundamentally different, somewhat similar or basically the same.

In one sense, this is admittedly an unparallel comparison, as the two estoppels are either procedural or substantive concepts whereas the

1. William Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

constructive trust is simply a remedy to a substantive claim based, in our case, on unjust enrichment. In this sense, therefore, the appropriate comparison would appear to be between estoppel, on the one hand, and unjust enrichment, on the other. But both are broad concepts, so that a comparison between them would be correspondingly broad. In another sense, however, the chosen comparison is appropriate as it highlights proprietary estoppel, an oft-overlooked plant growing in the shadow of its showier neighbours. Proprietary estoppel is something of a hybrid, as we shall see, and an analysis of it calls for a comparison with promissory estoppel at the substantive level and with the constructive trust at the remedial level.[2]

The paper draws extensively, although not exclusively, for its analysis on appellate level cases decided in the last decade (1996-2006), using the database of the Canadian Legal Information Institute (CanLII).[3]

I. *Historical Development*

All three concepts – promissory and proprietary estoppel, and the constructive trust – were developed by the courts of equity to attenuate injustices resulting from application of strict legal rules, with these rules being basically contractual in the case of promissory estoppel and proprietary in the cases of proprietary estoppel and constructive trusts. All three trace their origins back to at least the eighteenth century, if not earlier, although these early roots are strongest in the case of constructive trusts. Both proprietary and promissory estoppel were rationalized by late nineteenth century court decisions. And all three concepts were further shaped by the influence of Lord Denning in the latter half of the twentieth century.

Promissory estoppel: The precursor of promissory estoppel, estoppel by representation, is ancient, although promissory estoppel itself did not emerge until the late nineteenth century, notably in the 1877 House of Lords' decision in *Hughes v. Metropolitan Railway Co.*[4] It then lay more or less dormant until it was taken up by Lord Denning in *Central London Property Trust Ltd. v. High Trees House Ltd.*, decided in 1946,[5] and was

2. On the possible misleading effect of metaphors on the classification of concepts, see Stephen Waddams, "The Relation of Unjust Enrichment to Other Legal Concepts" in Jason W. Neyers, Mitchell McInnes & Stephen G.A. Pitel, eds., *Understanding Unjust Enrichment* (Oxford: Hart, 2004) 405 at 407-08.

3. Online : <http://www.canlii.org/>.

4. [1877] 2 A.C.D. 439. See Hanbury & Martin, *Modern Equity*, 16th ed. by Jill E. Martin (London: Sweet & Maxwell, 2001) at 892; Cheshire & Burn, *Modern Law of Real Property*, 16th ed. by E.H. Burn (London: Butterworths, 2000) at 649.

5. [1947] 1 K.B. 130.

refined subsequently. *High Trees* is generally regarded as the English high-water mark of promissory estoppel, and the most interesting doctrinal developments in regard to it since then have come from Australia, with courts and scholars there advocating unification of the various types of estoppel – including promissory and proprietary estoppel – into one overarching concept.[6]

Proprietary estoppel: Proprietary estoppel owes its main impetus to an 1866 House of Lords' case, *Ramsden v. Dyson*. Lord Cranworth, speaking for the majority, there articulated the equitable principle in narrowly circumscribed terms based on mistake:

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own....
>
> But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner.[7]

The idea of mistake was emphasized in 1880 by Fry J. in *Willmott v. Barber*, in his oft-cited statement of the five "probanda" to be demonstrated by the person seeking to raise an estoppel: (1) that the plaintiff must have made a mistake as to his legal rights; (2) that he have expended some money or done some other act to his detriment on the faith of his mistaken belief; (3) that the defendant (the person sought to be estopped) know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) that the defendant know of the plaintiff's mistaken belief of his rights; and (5) that the defendant have encouraged the plaintiff in his expenditure of money or other acts, either directly or by abstaining from asserting his legal right.[8] This mistake-based approach is sometimes called "estoppel by acquiescence" and is clearly accepted in Canada today.[9]

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6. See *Waltons Stores (Interstate) Ltd. v. Maher* (1988), 164 C.L.R. 387 (H.C.A.) [*Waltons Stores*] and Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000).
7. (1866) L.R. 1 H.L. 129 at 140-41.
8. (1880) 15 Ch. D. 96 at 105-06 [*Wilmott*].
9. E.g., *The Queen v. Smith* (1980), 113 D.L.R. (3d) 522 (F.C.A.) at 580-84 (equitable doctrine of estoppel by acquiescence applied to Crown in claim for value of improvements to land in Indian reserve).

On the other hand, Lord Kingsdown, in dissent in *Ramsden v. Dyson*, favoured the application of a wider principle:

> The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord [the case concerned a dispute between landlord and tenant] for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.[10]

This wider approach is often described as "estoppel by encouragement." It came to the fore in the 1960s and 1970s, notably under the creative influence of Lord Denning,[11] and is the main way in which a proprietary estoppel arises today. However, as we shall see, the idea of mistake as the sole source of proprietary estoppel continues to hold some sway in Canada.

Constructive trust: Equity's long association with the trust, which dates back to at least the fifteenth century, means that the constructive trust as an institutional complement to the express trust developed continuously and incrementally, to encompass different categories of defendants; this took place largely between the seventeenth and nineteeth centuries,[12] without the periods of quiescence experienced with promissory and proprietary estoppel. Indeed, the 1726 touchstone case of *Keech v. Sandford* [13] continues to be taught and cited today. England flirted briefly with the idea of a remedial constructive trust in the 1960s and 1970s, again under the influence of Lord Denning,[14] but it was the Supreme Court of Canada that put the doctrine on a principled footing in its 1980 landmark decision in *Pettkus v. Becker*.[15]

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10. *Supra* note 7 at 170. Although this statement refers to the landlord-tenant relationship, it has been applied more widely. See, e.g., *Plimmer v. Mayor of Wellington* (1884), 9 A.C.D. 699 (P.C.). The 1862 case of *Dillwyn v. Llewelyn* (1862) 4 De G.F. & J. 517, 45 E.R. 1284 (Ch.) (son building on land owned by father on written assurance that property be given to son) is sometimes referred to as the origin of proprietary estoppel, but this is said to read too much into the case (Hanbury & Martin, *supra* note 4 at 897) as it was an incomplete gift case decided more on contractual grounds, with construction being treated as analogous to part performance, and seen as providing consideration.
11. E.g., *Inwards v. Baker*, [1965] 2 Q.B. 29 (C.A.).
12. Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) at 459 [Waters].
13. (1726) Sel. Ca. t. King 61, 25 E.R. 223 (Ch).
14. E.g., *Hussey v. Palmer* [1972] 3 All E.R. 744 (C.A.); Waters, *supra* note 12 at 461-3. See also *Bannister v. Bannister*, [1948] 2 All E.R. 133 (C.A.).
15. [1980] 2 S.C.R. 834.

II. *Principles*

Promissory estoppel, proprietary estoppel and constructive trust are creatures of equity, and equity is a court of conscience. Unconscionability, and the remedying of unconscionable conduct, is thus said to be the unifying principle for the two estoppels,[16] as each originates with a holding out by one party and has at its heart the detrimental reliance on this holding out by the other party. Similarly, good conscience is identified by the Supreme Court as the "common concept unifying the various instances in which a constructive trust may be found",[17] whether it be a remedial constructive trust imposed in situations of unjust enrichment of one party by another or an institutional constructive trust imposed in more disparate, category-based, situations.[18]

Promissory estoppel: Promissory estoppel is an equitable extension of the older "estoppel by representation." Both have three basic elements: a representation by one party to another; action by the other party in reliance on the representation; and resulting detriment to the party acting in reliance. The requirements concerning reliance and detriment are substantially similar in the two cases,[19] and the Supreme Court of Canada recently described them as follows:

> Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and detriment. The former requires a finding that the party seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his or her legal position. If the first step is met, the second

16. Margaret Halliwell, "Estoppel: Unconscionability as a Cause of Action" (1994) 14 L.S. 15; Cheshire & Burn, *supra* note 4 at 651.

17. *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at 236 (McLachlin J.) [*Soulos*].

18. McLachlin J. explained the institutional constructive trust as follows: "The history of the law of constructive trust ... suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in 'good conscience' they should not be permitted to retain. This served the end ... of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or 'institutional' trust." *Ibid.* at 228. Also Graham Virgo, "Review of D Wright, *The Remedial Constructive Trust* (Butterworths, Sydney 1998)" (1999) 58 Cambridge L. J. 645 at 645: "Although some judges have recently toyed with the introduction of the remedial constructive trust into English law, it has not been recognised here. For us the constructive trust is an institution, which is recognised by operation of law in certain identifiable circumstances ..."

19. Although there is some suggestion that the requirement of detriment is less stringent, perhaps even non-existent, for promissory estoppel than for estoppel by representation: see, e.g., Hanbury & Martin, *supra* note 4 at 893; Cooke, *supra* note 6 at 56, 62; S.M. Waddams, *The Law of Contracts*, 5th ed. (Aurora, ON: Canada Law Book, 2005) at paras. 198-99.

> requires a finding that, should the other party be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change from his or her assumed position.[20]

The principal difference between estoppel by representation and promissory estoppel is in the nature of the representation. Although both accept that the representation can be by words, conduct,[21] or silence,[22] estoppel by representation requires that the representation be of a present existing fact or law (hence it is sometimes referred to as "estoppel by representation of fact") whereas promissory estoppel calls for a representation, or promise, of future conduct.

> Where, by words or conduct, a person makes an unambiguous representation *as to his future conduct*, intending the representation to be relied on, and to affect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.[23]

The emphasis on representation, or holding out, thus gives promissory estoppel, as all other estoppels, a certain flavour of unilateralism: the representation, or holding out, is by one party and the action in reliance is by another and subsequent to the holding out. However, a certain element of mutuality is also required, as the statement or conduct must be known to the other party and acted upon. This is described as "crossing the line."

> All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense *all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. ...*

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20. *Ryan v. Moore*, [2005] 2 S.C.R. 53 at 85-86 (Bastarache J speaking for the Court, and citing a 1937 Australian High Court decision, *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641, in support).

21. This is sometimes called "estoppel by conduct." See, e.g., *Chan v. Lee (Estate)*, 2004 BCCA 644, 249 D.L.R. (4th) 38.

22. I.e., "estoppel by acquiescence." Silence can give rise to an estoppel only where the party is under an obligation to speak: *Ryan v. Moore*, *supra* note 20 at 88.

23. Hanbury & Martin, *supra* note 4 at 892, citing *Combe v. Combe*, [1951] 2 K.B. 215 (C.A.) at 220 [emphasis in original]. A recent, and oft-cited, definition of promissory estoppel by the Supreme Court of Canada (by Sopinka J. in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57) ignores this distinction: "The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position."

> There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that – across the line between the parties – his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. [24]

The mutuality is strongest in "estoppel by convention," identified by the Supreme Court of Canada in *Ryan v. Moore* as a form of estoppel by representation of fact or promissory estoppel (the Court also included proprietary estoppel in the list) requiring not just a representation by one party to the other, but a common assumption shared by both parties: "[t]he crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of 'like mind.' ... Mutual assent is what distinguishes the estoppel by convention from other types of estoppel."[25]

Promissory and related estoppels (i.e., estoppels by representation or convention) are described as "true estoppels"[26] in the sense that they can be raised as a defence to an action but cannot themselves found a cause of action: they can be used as a shield, but not a sword. However, this does not mean that promissory estoppel cannot be invoked by a plaintiff, who may do so if he or she has an independent cause of action. In this case the plaintiff is using estoppel not as a sword but as a defence to a defence, as it were, a distinction which non-lawyers might regard as overly fine. Whether or not promissory estoppel should be overtly available as a sword, as well as a shield, is the subject of doctrinal controversy elsewhere in the common law Commonwealth, with Australian courts leading the way.[27]

Promissory and related estoppels have been applied in a number of recent Canadian appellate cases, with most involving its use as a defence to a defence. In *Maracle v. Travellers Indemnity Co of Canada*,[28] the issue was whether the plaintiff could claim under an insurance policy because the defendant was estopped from invoking a statutory limitation to the action; in *Hansen v. British Columbia*,[29] it involved a limitation on the

24. *Ryan v. Moore*, *supra* note 20 at 82-83 (Bastarache J. quoting *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28 (C.A.) at 34-35 with added emphasis).
25. *Ibid.* at 82 (Bastarache J.).
26. "Estoppe, cometh of the French word estoupe, from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth": Co. Litt. 352a, as cited in Halliwell, *supra* note 16 at 20.
27. E.g., *Waltons Stores*, *supra* note 6.
28. [1991] 2 S.C.R. 50; also *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61.
29. (2000), 186 D.L.R. (4th) 685 (B.C.C.A.).

time for claiming compensation under the *Expropriation Act*; in *Chan v. Lee (Estate)*,[30] it was a limitation period under the *Wills Variation Act*; and in *Ryan v. Moore*,[31] a limitation to an action under the *Survival of Actions Act*.

The issue of whether promissory estoppel can be used as a sword as well as a shield has been raised in Canadian courts on several occasions. A 2002 Nova Scotia Court of Appeal case suggested that "[t]he authorities are not clear whether promissory estoppel can create a cause of action,"[32] but most cases would agree with an Ontario Court of Appeal affirmation in 2004 that "[i]t is well established that promissory estoppel can be used only as a shield and not as a sword."[33] Promissory estoppel has therefore been held not to support a union grievance over the withdrawal of benefits that had been provided outside the context of a collective agreement,[34] an action against the then Premier of Ontario for damages for breach of assurances that a waste disposal site would not be permitted in an environmentally sensitive area,[35] an action to enforce a performance guarantee given by the defendant to a third party[36] or an action to claim priority over a prior registered encumbrance.[37] The most considered discussion is found in the waste disposal site case, *Reclamation Systems Inc. v. Rae*, in which the Court first recognized that some cases had "alluded to the argument that the sword/shield distinction may become extinct,"[38] and went on to say that, nevertheless,

> ...there have been no cases in Ontario in which estoppel has been utilized other than as a defence. The Ontario Court of Appeal has set out definitively in *Gilbert Steel* ... that estoppel can only be used as

30. *Supra* note 21.
31. *Supra* note 20.
32. *Ford v. Kennie* (2002), 210 N.S.R. (2d) 50 (N.S.C.A.) at 60.
33. *Doef's Iron Works Ltd. v. Mortgage Corp. Canada Inc.* (2004), 134 A.C.W.S. (3d) 64 (Ont. C.A.) at para. 2 (citing *Conwest Exploration Co. v. Letain*, [1964] S.C.R. 20 as authority). See, e.g., *Kahle v. Ritter*, 2002 BCSC 199 (citing *Canadian Superior Oil Ltd v. Hambly*, [1970] S.C.R. 932 as authority).
34. E.g., *Smoky River Coal Ltd. v. United Steelworkers of America, Local 7621* (1985), 60 A.R. 36 (C.A.); *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local D331 v. LaFarge Canada Inc.*, 1998 ABQB 802, 66 Alta. L.R. (3d) 396; *Nova Scotia Government Employees Union, Local 18 v. University College of Cape Breton* (1998), 172 N.S.R. (2d) 282 (S.C.); *Brandt Tractor Ltd. v. Pardee Equipment Employees Association*, 2006 ABQB 327, 399 A.R. 290.
35. *Reclamation Systems Inc. v. Rae* (1996), 27 O.R. (3d) 419 (Gen. Div.).
36. *Delta Western Fuel v. Byblow*, 2000 YTSC 544.
37. *Fraser Valley Credit Union v. Siba*, 2001 BCSC 744, 42 R.P.R. (3d) 135.
38. *Supra* note 35 at 456 (Cumming J. referring to *Tudale Explorations Ltd. v. Bruce* (1978), 88 D.L.R. (3d) 594 (Ont. Div. Ct.)); see also *Petridis v. Shabinsky* (1982), 132 D.L.R. (3d) 430 (Ont. H.Ct.J.); *ML Baxter Equipment Ltd. v. Geac Canada Ltd.* (1982), 133 D.L.R. (3d) 372 (Ont. H.Ct.J.); and *Edwards v. Harris-Intertype (Canada) Ltd.* (1984), 9 D.L.R. (4th) 319 (Ont. C.A.).

> a shield and this law has not yet been overturned. Furthermore, the Supreme Court of Canada, in *Canadian Superior Oil* ... has stated that promissory estoppel cannot be used as a cause of action. There is nothing in Canadian law to conclusively indicate that promissory estoppel can be used as a sword in addition to a shield.[39]

Most of the recent Canadian cases discussed the issue in the context of the definitional requirement for promissory estoppel that the representation "affect the legal relations between the parties."[40] They relied either on a line of Supreme Court of Canada cases, culminating in *Maracle v. Travellers Indemnity*,[41] in which the Court stated, somewhat neutrally, that the promise or assurance must have been "intended to affect their legal relationship"; or they relied on a leading Canadian contract textbook in which the author stressed, more explicitly, that there must be "an *existing* legal relationship between the parties *at the time the statement on which the estoppel is founded was made.*"[42] In other words, most Canadian courts are of the view that the requirement that promissory estoppel "affect legal relations" is limited to a downward modification of existing legal relations (which implies that it can be used only as a shield) rather than extending to a creation of new legal relations (which would permit its use as a sword).[43] As Smith J. put it in *Fraser Valley Credit Union v. Siba*:

> Thus, it appears that some legal relations between the parties must be extant at the time of the promise. . . A promise to *create* some kind of contractual relations, where none yet exist, is not captured under the language of promissory estoppel.[44]

This view was challenged before the British Columbia Court of Appeal in 2003, in *M. (N.) v. A. (A.T.)*.[45] The issue was whether the Court could

39. *Supra* note 35 at 456-57 (referring to *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 67 D.L.R. (3d) 606 (Ont. C.A.) and *Canadian Superior Oil v. Hambly*, *supra* note 33.

40. See text accompanying note 23.

41. *Supra* note 23. Earlier cases include *Conwest Exploration v. Letain*, *supra* note 33; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607; and *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641. See also *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 102 D.L.R. (3d) 685 (Ont. C.A.), leave to appeal refused, (1980) 31 N.R. 449n (S.C.C.).

42. G.H.L. Fridman, *The Law of Contract*, 5th ed. (Toronto: Thomson Carswell, 2006) at 127 [emphasis added].

43. The upward modification of a contract (in the sense of one party obtaining additional rights under the contract without providing anything in return) is not enforceable under estoppel, as this would entail using estoppel as a sword. See, e.g., the union grievance cases at *supra* note 34; but see *Williams v. Roffey Bros. Ltd.*, [1991] 1 Q.B. 1 (C.A.) (agreement to increase compensation under a construction contract held to be supported by consideration; possible application of promissory estoppel had it been properly argued).

44. *Supra* note 37 at para. 25 [emphasis in original].

45. 2003 BCCA 297, 13 B.C.L.R. (4th) 73.

enforce a promise by the male defendant to pay the balance of the mortgage outstanding on the female plaintiff's house if she would come and live with him, which promise she relied upon to her detriment. The trial judge followed the dominant line of authority and held that there had to be a legal relationship existing between the parties at the time the promise was made, which there was not. The Court of Appeal considered the appellant's argument that the Court should "extend the application of promissory estoppel to right a wrong that is otherwise being done," thereby following "the path already well trod by the courts of New Zealand, Australia, and the United States, and being opened in England to an equitable remedy for injurious reliance on a promise intended to bind its maker and to be acted upon by the promisee, and acted upon by the promisee to the knowledge of the promisor";[46] the appellant cited the American *Second Restatement of the Law of Contracts*[47] and the Australian case of *Waltons Stores*[48] in support. In the end, however, the Court avoided the need to decide, as it held that there was no intention to create legal relations at all in the circumstances of the case.

Proprietary estoppel: The constituent elements of proprietary estoppel are substantially the same as promissory estoppel: a holding out or representation (either by words, action or inaction) by one person to another, whether it be about an existing state of facts or a promise about future action; action in reliance on that holding out by the other; and resulting detriment to the party acting in reliance.[49] The essential differences between the two are, firstly, that proprietary estoppel requires that the representation be made by a property owner in relation to land and, secondly, that proprietary estoppel can be used as a sword as well as a shield (and is sometimes described as a "quasi-estoppel" for this reason). Indeed, the similarities between the two types of estoppel are so strong that proprietary estoppel is sometimes referred to as a simple subset of promissory estoppel: "Proprietary estoppel is a form of promissory estoppel. It is commonly supposed that estoppel cannot give rise to a cause of action, but proprietary estoppel appears to be

46. *Ibid.* at 76-77.
47. S. 90 (1) states: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."
48. *Waltons Stores*, *supra* note 6.
49. See R. Wells, "The Element of Detriment in Proprietary Estoppel" (2001) 65 Conv. 13.

an exception to that rule."[50] That proprietary estoppel can be used as a sword as well as a shield was clearly affirmed by the British Columbia Court of Appeal in *Zelmer v. Victor Projects Ltd*[51] in 1997, an affirmation relied on in other cases subsequently.

Proprietary estoppel has been applied at the appellate level in Canada recently, in at least eight cases. Two of the cases used estoppel as a shield,[52] and six of them invoked it as a sword.[53] Of the six, one – *Zelmer v. Victor Projects*[54] – expressly considered and clearly affirmed the principle that proprietary estoppel can be used as a sword, as mentioned above; and a concurring judge in another case – *Flello v. Baird*, involving a boundary dispute – finessed the distinction between a sword and a shield in a way that might apply equally to promissory estoppel:

> Although the [plaintiffs] raised estoppel in their petition, this is not truly a case of using that doctrine as a sword rather than a shield. Once the [defendants] took the position that the [plaintiffs] were trespassing and threatened action to enforce that position, it was incumbent on the [plaintiffs] to take steps to regularize the position of the boundary. They were vulnerable, not only to a possible action by the [defendants], but to the possibility of the [defendants] disposing of their property to an innocent purchaser for value. *Realistically, the [defendants'] reversal of position was the sword, the plea of estoppel was the shield.*[55]

Six of the cases, sword and shield alike,[56] relied on Lord Denning's judgment in *Crabb v. Arun District Council*, particularly on his statement that equity "will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties," which dealings he described on a sliding scale from contractual to non-contractual: firstly, if the person

50. *Eberts v. Carleton Condominium Corp. No 396* (2000), 136 O.A.C. 317 at 322-23 (Finlayson J.A.) [*Eberts*]. Stephen Smith speaks of courts having "hived off" proprietary estoppel from promissory estoppel: Stephen A. Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed. (Oxford: Clarendon Press, 2005) at 125.

51. (1997) 147 D.L.R. (4th) 216 (B.C.C.A.) [*Zelmer*].

52. *Depew v. Wilkes* (2002), 216 D.L.R. (4th) 487 (Ont. C.A.) and *Montreal Trust Co. v. Williston Wildcatters Co.*, 2002 SKCA 91, 10 W.W.R. 633 [*Williston Wildcatters*].

53. *Eberts*, *supra* note 50; *Zelmer*, *supra* note 51; *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69 [*Hill*]; *Flello v. Baird* (1999), 172 D.L.R. (4th) 741 (B.C.C.A.) [*Flello*]; *Maritime Telegraph and Telephone Co. v. Chateau Lafleur Development Corp.* (2001), 207 D.L.R. (4th) 443 (N.S.C.A.), leave to appeal refused, (2003) 294 N.R. 398n (S.C.C.) [*Maritime Telegraph*]; and *Tretheway-Edge Dyking District v. Coniagas Ranches Ltd.* (2003), 224 D.L.R. (4th) 611 (B.C.C.A.) [*Tretheway-Edge*].

54. *Supra* note 51.

55. *Supra* note 53 at 756-57 (Esson J.A.) [emphasis added].

56. *Eberts*, *supra* note 50; *Zelmer*, *supra* note 51; *Williston Wildcatters*, *supra* note 52; *Hill*, *supra* note 53; *Flello*, *supra* note 53; *Maritime Telegraph*, *supra* note 53.

makes a binding contract that he will not insist on his strict legal position; secondly, if he makes a binding promise short of a contract (i.e., a contract unenforceable for want of consideration or writing); and thirdly, if "[s]hort of an actual promise ... he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act...."[57]

Two of the cases, *Zelmer v. Victor Projects*[58] and *Tretheway-Edge Dyking District v. Coniagas Ranches Ltd*,[59] applied the mistake-based "five probanda" set out by Fry J. in *Willmott v. Barber*.[60] They did so even though both cases were cases of estoppel by encouragement, rather than the mistake-driven estoppel by acquiescence. In the first case, *Zelmer*, the court simply quoted the five probanda and then appeared to equate them to subsequent fraud rather than initial mistake by quoting Scarman LJ. in *Crabb*, who said:

> It is to be observed from the passage that I have quoted from the judgment of Fry J. [in *Willmott*], that the fraud or injustice alleged does not take place during the course of negotiation, but only when the defendant decides to refuse to allow the plaintiff to set up his claim against the defendants' undoubted right. The fraud, if it be such, arises after the event, when the defendant seeks by relying on his right to defeat the expectation which he by his conduct encouraged the plaintiff to have.[61]

In the second case, *Tretheway-Edge*, Newbury J. is much more direct: "I note that the five elements or 'probanda' famously cited by Fry J. in *Willmott* v. *Barber*, including in particular the making of a 'mistake' by a party as to his or her legal rights, have now been overtaken by a broader and less literal approach to proprietary estoppel."[62]

None of the recent Canadian proprietary estoppel cases is an example of what has been described diversely as the "paradigm" case[63] or the "most extreme" case[64] of one person spending money on the property of another in reliance upon a representation or holding out of obtaining a proprietary

57. [1976] 1 Ch. 179 (C.A.) at 187-88 [*Crabb*].
58. *Supra* note 51.
59. *Supra* note 53.
60. *Supra* note 8; see accompanying text. The two cases identified the probanda as having being applied by the Supreme Court of Canada in *Canadian Superior Oil v. Hambly*, *supra* note 33.
61. *Supra* note 57 at 195 as quoted in *Zelmer*, *supra* note 51 at 228. Fry J. in *Willmott*, *supra* note 8 at 105 introduced his list of probanda as follows: "A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description?"
62. *Supra* note 53 at 627.
63. Cheshire & Burn, *supra* note 4 at 655.
64. Hanbury & Martin, *supra* note 4 at 896.

interest. The closest Canadian example is probably the oft-cited trial-level decision in *Stiles v. Tod Mountain Development Ltd.*,[65] in which a would-be purchaser who had, with the encouragement of the developer, built a house in a subdivision that eventually did not receive planning approval was awarded an irrevocable right to remain in occupation of the house until he was given clear title to another acceptable lot. Another possible example is the more recent appellate-level case of *Deloitte & Touche LLP v. Marino*,[66] in which the defendants claimed that they had spent money paying down the mortgage and making improvements to their home, the title to which had vested in the plaintiffs under the *Bankruptcy Act*, on the strength of the plaintiff's ongoing assurances that it did not intend to realize on the property; however, the case was argued and decided (in favour of the defendants) on the basis of promissory estoppel.

The reason for the paucity of such cases in Canada, when compared with England, Australia and other Commonwealth jurisdictions, is that they would usually be decided here on the basis of a remedial constructive trust. As Fridman put it:

> Canadian developments, in effect, have married the original constructive trust idea to the proprietary or equitable estoppel idea to produce something that is now quite distinct from both... Canadian decisions regard those who have provided money, work or services, leading to or assisting in the acquisition, creation or expansion of wealth or property, as the beneficiaries of a constructive trust imposed on the one who was legal owner of the resulting wealth or property. Where an English court might have resolved the issue by invoking the doctrine of estoppel, Canadian courts have dealt with the question of 'compensation' by utilising the constructive trust.[67]

Constructive trust: Canada, like England, has long recognized the existence of a constructive trust as an institutional complement to the express trust in a variety of situations. These situations include unauthorized gains by a fiduciary, intermeddling in trust property by third parties, breaches of confidence, profiting from corporate and other opportunities, obtaining secret commissions and bribes, contracts for the sale of land, and so on.[68] Many but not all of these situations involve a pre-existing fiduciary relationship. The Supreme Court of Canada, by a slim majority, recently

65. (1992) 64 B.C.L.R. (2d) 366 (S.C.).
66. (2004) 72 O.R. (3d) 274 (C.A.).
67. G.H.L. Fridman, "The Reach of Restitution" (1991) 11 L.S. 304 at 308.
68. See, e.g., A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 5th ed. (Toronto: Carswell, 1998) at 433-593; Mark R. Gillen & Faye Woodman, eds., *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery, 2000) at 441-98; and Waters, *supra* note 12 at 489-531.

reaffirmed the continued recognition of the "institutional" constructive trust in Canada, and rationalized its application.[69]

But it is not the institutional constructive trust that is of interest as a comparator to promissory and proprietary estoppel, but rather the "remedial" constructive trust. The constructive trust as a remedy for unjust enrichment was developed slowly by the Supreme Court of Canada through a number of decisions, and was accepted for the first time by a majority of the Court in 1980 in *Pettkus v. Becker*. There Dickson J., speaking for six of the nine judges, identified unjust enrichment as lying "at the heart of the constructive trust," and set out the requirements for finding one:

> [T]here are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries ...[70]

Enrichment and deprivation are relatively easy to identify and apply, and the Supreme Court takes a "straightforward economic approach" to them.[71] The former was described by McLachlin J. in *Regional Municipality of Peel v. Canada* as consisting of a tangible benefit conferred by the plaintiff on the defendant; it can be either a positive benefit, such as the payment of money, in which case the enrichment is presumed, or a negative benefit, such as relieving the defendant from an expense which must otherwise be paid (e.g., paying all household expenses, renovating or maintaining the property, assuming the burden of caring for young children or elderly parents, etc.), in which case the benefit must be proved.[72] Detriment comprises lost opportunity, and is assumed in the case of financial contribution but must be proved in the case of the contribution of care and services.[73]

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69. *Soulos*, *supra* note 17. In this case, the majority of four of seven judges distinguished between the institutional and remedial constructive trust, holding that unjust enrichment (i.e., a benefit) was necessary for the latter but not the former. The distinction between the two types of constructive trust is less clearly drawn in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 [*Peel*].

70. *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848.

71. *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 990 (McLachlin J.).

72. *Peel*, *supra* note 69 at 790. See also *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 at paras. 31, 36 [*Garland*].

73. E.g., *Clarkson v. McCrossen Estate* (1995), 3 B.C.L.R. (3d) 80 (C.A.); *Wilcox v. Wilcox* (2000), 190 D.L.R. (4th) 324 (B.C.C.A.) at para 45: "There is no evidence that she lost or limited employment to provide the service, or that her opportunities were limited in any way by the care and service she provided."

The third requirement – absence of juristic reason for the enrichment – is the most difficult to assess. Dickson J. described it in *Pettkus v. Becker* in terms akin to proprietary estoppel (estoppel by acquiescence):

> As for the third requirement, I hold that where one person in a relationship ... prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[74]

McLachlin J. expanded upon this in *Peter v. Beblow*: "It is in connection with the third element – absence of juristic reason for the enrichment – that ... the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust.'"[75] And most recently, Iacobucci J. suggested a two-step approach in *Garland v. Consumers' Gas Co.*: firstly, that the plaintiff make out a *prima facie* case by proving the absence of an "established category" of juristic reasons (which include "a contract ... a disposition of law ... a donative intent ... and other valid common law, equitable or statutory obligations"); and secondly, that the *de facto* burden of proof would then shift to the defendant to rebut the presumption of unjustness thus raised by pointing to other circumstances which might constitute a valid juristic reason for the enrichment. The court would assess the circumstances raised in rebuttal by looking to two factors, "the reasonable expectations of the parties" and "public policy considerations."[76]

Unjust enrichment, for its part, can be used only as a sword, not a shield. This flows from its role as a cause of action and is not discussed in the cases.

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74. *Supra* note 70 at 849. And in *Wilcox v. Wilcox*, *ibid.* at para. 46, the British Columbia Court of Appeal applied the third element in a manner akin to estoppel by encouragement: "Further, [the daughter's contributions] doubtless were made in expectation of the right of survivorship passing the full title to her, an expectation expressed by [the mother] to third parties in the presence of [the daughter]. I conclude, therefore, that there is no juristic reason for the financial enrichment of [the mother]."

75. *Supra* note 71 at 990.

76. *Supra* note 72 at paras. 44-46. The Court felt that this two-step procedure, and particularly the "closed-list" aspect of the first step, responded to the criticism of Lionel Smith (in "The Mystery of 'Juristic Reason'" (2000) 12 Sup. Ct. L. Rev. (2d) 211 at 212-13, 228) that the Canadian requirement that there be "an absence of juristic reason" (in contrast to the English formulation "that the enrichment be unjust") imposed on the plaintiff the difficult burden of proving a negative. At para. 46 Iacobucci J. stressed, however, that the first-step list was not definitely closed: "It may be that when these factors are considered, the court will find that a new category of juristic reason is established. ... The point here is that this area is an evolving one and that further cases will add additional refinements and developments." For a critique of this approach see Mitchell McInnes, "Making Sense of Juristic Reasons: Unjust Enrichment after *Garland v. Consumers' Gas*" (2004) 42 Alta. L. Rev. 399.

The remedial constructive trust is now firmly established in Canada. It has been applied and further developed by the Supreme Court in a number of cases since *Pettkus v. Becker*, not just in decisions concerned with family property[77] but also in commercial and other disputes.[78] English courts, on the other hand, have eschewed the remedial constructive trust since the retirement of Lord Denning,[79] in favour of either a "common intention" constructive trust when the plaintiff can prove direct financial contribution[80] or proprietary estoppel otherwise.

III. *Remedies*

Promissory estoppel: Because Canadian courts limit promissory estoppel to the role of defence to a main action, it does not give rise to any particular remedial issues. The defence is either successful, or not; the person making the representation is either estopped from going back on it, or not; and the main action proceeds apace and gives rise to the remedies appropriate to it. Canadian courts thus do not have to deal with the issue of principle of whether the appropriate estoppel remedy should reflect expectation of gain or simply compensate for loss flowing from the reliance. The general approach of Australian and American courts, where this issue does arise,

77. E.g., *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; and *Peter v. Beblow*, *supra* note 71.

78. E.g., *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 [*Lac Minerals*]; *Peel*, *supra* note 69; and *Garland*, *supra* note 72. Applying the three requirements in a commercial relationship is harder than in a domestic one as "the essence of the [commercial] relationship is the enrichment of the participants, perhaps at the expense of each other"; the standard of fairness in a domestic setting is thus "equality of the parties" whereas in a business setting it is "honest dealing not equal dealing": *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161 (B.C.C.A.) at 171 (Lambert J.A.). This can cause difficulties in cases involving family farm corporations (a common mode of farm ownership in Canada), which fall somewhere in between commercial and family relationships: *Devick v. Devick* (2005), 255 D.L.R. (4th) 604 (B.C.C.A.).

79. Although the House of Lords recognized unjust enrichment as a distinct cause of action in *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.). For subsequent developments, see Andrew Burrows, "The English Law of Restitution: A Ten-Year Review" in Neyers, McInnes & Pitel, *supra* note 2, 11.

80. See, e.g., Simone Wong, "Constructive Trusts over the Family Home: Lessons to be Learned from Other Commonwealth Jurisdictions?" (1998) 18 L.S. 369, and, by the same author, "When Trust(s) is Not Enough: An Argument for the Use of Unjust Enrichment for Home-Sharers" (1999) 7 Fem. Legal Stud. 47.

has been to treat expectation as the upper limit but to award less where necessary to do justice between the parties.[81]

Proprietary estoppel: The English cases show that the remedies available to the injured party under the doctrine of proprietary estoppel are varied and effective. They can be either personal or proprietary in nature, and the proprietary remedies can range from awarding an equitable charge or lien on the land, to recognizing an easement over property or a leasehold or life estate in it, through to awarding a share in the freehold title to the property, or the title itself – with or even without compensation to the landowner.[82] As Battersby cautioned:

> If the court decides in favour of a proprietary interest, it must choose from the available menu provided by the general law; the court has no general jurisdiction (and no need) to invent new proprietary interests for this purpose, and certainly no jurisdiction to declare that a right created by estoppel (such as a licence) has proprietary effect when a similar right created expressly by the parties has only personal effect.[83]

Because Canadian courts tend to turn to the constructive trust to remedy cases of unjust enrichment arising from improvements made to the property of another, most of the recent Canadian appellate-level proprietary estoppel cases have awarded only limited interests in land, most often easements[84] requiring payment of compensation in one instance.[85]

A difficult remedial issue in proprietary estoppel relates to timing, that is, to the effect of the proprietary remedy on third parties. The proprietary remedy, once awarded, of course binds third parties in the normal course of

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81. See the discussion in, e.g., C.J. Davis, "Estoppel – Reliance and Remedy" [1995] 59 Conv. 409; Cooke, *supra* note 6 at 150ff; Mark Pawlowski, "Satisfying the Equity in Estoppel" (2002) 118 Law Q. Rev. 519; and Susan Bright & Ben McFarlane, "Proprietary Estoppel and Property Rights" (2005) 64 Cambridge L.J. 449. See also Simon Gardner, "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 Law Q. Rev. 492 (arguing for clearer parameters around the exercise of judicial discretion).

82. For a principled consideration of when courts should, and do, award proprietary remedies, see Bright & McFarlane, *ibid.*

83. Graham Battersby, "Contractual and Estoppel Licences as Proprietary Interests in Land" [1991] 55 Conv. 36 at 46-47. A number of English cases, under the influence of Lord Denning, had awarded an irrevocable licence in land (e.g., *Inwards v. Baker*, *supra* note 11), but the Court of Appeal decided in *Ashburn Anstalt v. Arnold*, [1989] Ch. 1 (C.A.) that contractual licences are not interests in land binding on purchasers, even those who take with notice. Battersby would have the same rule apply to licences arising on an estoppel (diversely called "equitable licences," "licences by estoppel" or "licences coupled with an equity"); see to the same effect Megarry & Wade, *The Law of Real Property*, 6th ed. by Charles Harpum (London: Sweet & Maxwell, 2000) at 750-51.

84. *Hill*, *supra* note 53; *Zelmer*, *supra* note 51; *Flello*, *supra* note 53; *Eberts*, *supra* note 50; *Maritime Telegraph*, *supra* note 53; *Depew v. Wilkes*, *supra* note 52; and *Tretheway-Edge*, *supra* note 53.

85. *Depew v. Wilkes*, *supra* note 52.

events; but what is the situation until it is granted, in the interval between the raising of the estoppel and the exercise of the court's discretion to award a proprietary remedy? This issue has not arisen in recent Canadian cases, and only rarely in English cases. The general consensus among English academics is to recognize the estoppel claimant as having an "equity" in the property prior to judgment, which binds third parties who take with notice of it.[86]

Constructive trust: The constructive trust raises remedial questions similar to those raised by proprietary estoppel.[87] In fact, imposing a trust is just one of a panoply of measures to remedy an unjust enrichment, some of which are personal (e.g., compensation for labour performed or goods provided, accounting for profits) and some of which are proprietary (e.g., a lien or a trust). As La Forest J. expressed it in *Lac Minerals*: "While ...'[t]he principle of unjust enrichment lies at the heart of the constructive trust' ... the converse is not true. The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances."[88] The court is thus free to choose the most appropriate remedy, with a proprietary remedy (the trust) being imposed where a monetary remedy would be inadequate and the nexus between the detriment and the property in question is sufficient.[89] Generally speaking, a proprietary remedy is quantified using the "value survived" approach, while a monetary remedy calls for the "value received" approach unless this would be unfair in the circumstances (particularly in a rising market in a family context).[90] These two approaches, which correspond loosely to the difference between equity and debt, echo the estoppel distinction between remedies based on expectation of gain or compensation for loss.[91]

As the choice of remedy is discretionary, this poses the same issue of timing and possible effect on third party interests as with proprietary

86. See, e.g., Cooke, *supra* note 6 at 130-135.

87. For a thoughtful consideration of the remedial aspects of the constructive trust see Lionel Smith, "Unravelling Proprietary Restitution" (2004) 40 Can. Bus. L.J. 317 and Andrew Burrows, "Unravelling Proprietary Restitution: A response to Professor Lionel Smith" (2005) 41 Can. Bus. L.J. 424.

88. *Supra* note 78 at 674, quoting Dickson C.J. in *Pettkus v. Becker*, *supra* note 70 at 847.

89. *Sorochan v. Sorochan*, *supra* note 77; *Peter v. Beblow*, *supra* note 71; *Michelin Tires (Canada) Ltd. v. Canada (CA)*, 2001 FCA 145, 3 F.C. 552.

90. E.g., *Peter v. Beblow*, *supra* note 71; *Hubar v. Jobling*, 2000 BCCA 661 195 D.L.R. (4th) 123; *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108; *Snow v. Marsh*, 2004 NSCA 155, 229 N.S.R. (2d) 203; *Panara v. Di Ascenzo*, 2005 ABCA 47, 250 D.L.R. (4th) 620.

91. See text accompanying note 80.

estoppel. When does the constructive trust arise: at the time of the unjust enrichment or at the time of the court order? The question is still unresolved in Canada. In *Rawluk v. Rawluk*,[92] a majority of four judges of the Supreme Court of Canada held that a remedial constructive trust exists from the time the unjust enrichment arises, whereas the other three judges were of the view that the discretionary nature of the remedy means that a remedial constructive trust cannot come into existence until the court orders it; however, even the minority admitted that the property interest so created might be "extended back" to the time of the enrichment in appropriate circumstances. What might be considered as appropriate circumstances under this view is a matter of conjecture.

This issue has been considered in two recent appellate court decisions from British Columbia. In *Leclair v. Leclair Estate*,[93] a wills variation case, the Court accepted the majority position in *Rawluk* that the trust arose at the time of the unjust enrichment; however, it cautioned that the plaintiff's proprietary interest did not arise automatically at that time but required a subsequent court determination of the dual issues of the existence of an unjust enrichment and of the appropriateness of a trust as the remedy – a position that arguably is closer to the minority than the majority approach in *Rawluk*, albeit with an automatic rather than a discretionary extending back. In *Ellingsen (Trustee in Bankruptcy of) v. Hallmark Ford Sales Ltd.*,[94] the issue was considered by the two majority judges. One quoted both the majority and minority decisions in *Rawluk* without distinguishing between them; and the second judge acknowledged the difference between the two approaches but did not think it necessary to chose between them as he (like the Court in *Leclair*) regarded a trust arising when declared by the court as extending back automatically – as having "true retroactive effect" – to the date when the unjust enrichment arose: "In this case, as in most cases, the result [between the two approaches] would be the same, which is probably why the point, as far as I know, must still be regarded as unsettled."[95]

Conclusions

What can we conclude about these three concepts, and the interrelationship between them? Are they, like plants, fundamentally different, somewhat similar or basically the same? At the most general level, the three are admittedly fundamentally different, as was mentioned in the introduction, as one (promissory estoppel) is a defence to an action, another (proprietary

92. *Supra* note 77.
93. (1998), 159 D.L.R. (4th) 638 (B.C.C.A.).
94. 2000 BCCA 458, 190 D.L.R. (4th) 47.
95. *Ibid.* at para. 70 (Lambert J.A.).

estoppel) a cause of action as well as a defence,[96] and the third (constructive trust) simply a remedy to a cause of action. But closer examination reveals certain underlying similarities among them.

A first-blush look at language and definitional elements suggests that the closest pairing is between the two estoppels, with the remedial – or unjust enrichment – constructive trust being only somewhat similar to them. The estoppels are defined from the point of view of estoppel claimants, and focus on the detriment suffered by them: in this sense, they are framed in terms of unjust impoverishment.[97] In contrast, the remedial constructive trust is a response to unjust enrichment, and thus focuses on the benefit received by defendants. But this difference between estoppel and constructive trust is more apparent than real because unjust impoverishment and unjust enrichment are here two sides of the same coin. The definition of unjust enrichment is explicit about this, and includes the need for a counterbalancing detriment (or deprivation) as part of the formula; and a counterbalancing benefit to the reneging party would seem implicitly part of estoppel, as the main reason for going back on one's word would be to obtain a benefit. The definitions of all three – promissory estoppel, proprietary estoppel and the unjust enrichment which is behind a constructive trust – are thus more similar than initially appears. Their similarity is further supported by the fact that their underlying principles, and especially the grounding of all three in matters of conscience, are basically the same.

However, a more detailed look at remedies and especially procedure – the sword / shield distinction – suggests that the closest pairing is between proprietary estoppel and the constructive trust, with promissory estoppel being the odd concept out.

As for remedies, both proprietary estoppel and unjust enrichment can give rise to proprietary remedies in appropriate circumstances, and timing is an issue for both. Most attention has focused on the time prior to judgment, and on the effect an eventual proprietary remedy can have on third party dealings taking place in this period. But a closer analysis suggests that there are three phases to consider – pre-judgment, post-judgment but pre-

96. The multi-faceted nature of estoppel was stressed by the Privy Council in *Canada and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Ltd.*, [1947] A.C. 46 (P.C.) and by Lord Denning, who declared that estoppel "is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity": *Moorgate Mercantile Co. Ltd. v. Twitchings*, [1975] 3 All E.R. 314 at 323d. See Kenny D. Anthony, "Which Estoppel in the Law of Saint Lucia?" (1992) 2 Caribbean L. Rev. 154 at 160.

97. L.L. Fuller & William R. Perdue, Jr., "The Reliance Interest in Contract Damages: 1" (1936) 46 Yale L.J. 52 at 56.

execution, and post-execution – with the claimant having different property interests at each stage. These are a mere equity in the first phase (as the English proprietary estoppel analysis suggests), an equitable interest in the second phase (as the Canadian remedial constructive trust stresses), and a legal interest in the third phase (as is implicit in both jurisdictions). The hierarchy between these three types of interests – mere equities, equitable interests and legal interests – is well established in general property law, and this helps to clarify the rights between the parties, including third parties, at each phase of the procedure.

As for procedure, it is generally accepted in Canada that although both proprietary estoppel and unjust enrichment can be used to found an action, promissory estoppel can be invoked only as a defence to an action. In the final analysis, therefore, whether all three concepts are basically the same and not just somewhat similar – whether, in botanical terms, they are different varieties of the same species and not different species of the same genus – depends on how fundamental the sword / shield distinction is.

Whether or not promissory estoppel should be available as a sword and not just as a shield raises large issues relating to the integrity of the law of contracts, and the role of the doctrine of consideration in it. These issues are obviously too large to attempt to resolve here,[98] but several general suggestions can be made in light of the preceding comparative discussion, by someone admittedly more at home in the field of property law than contract law. A first suggestion is that the operation of promissory estoppel has enough of a contractual flavour to blur a bright-line distinction between contract and estoppel. A good example of this contractual flavour is the notion of "crossing the line,"[99] and another is Lord Denning's sliding scale, or spectrum, in *Crabb v. Arun District Council*.[100] Where is the appropriate tipping point between enforceable and unenforceable along this spectrum?

A second suggestion is that the definitional requirement that a promissory estoppel affect existing legal relations,[101] which prevents (perhaps designedly so) too great an incursion of the doctrine of estoppel into the law of contract, need not be regarded as immutable. This recalls the debate surrounding the recognition of the remedial constructive trust in Canada, where it was objected that a constructive trust was available only where there was a pre-existing fiduciary relationship. The Supreme Court

98. See especially Smith, *supra* note 50 at 106-30 and, by the same author, *Contract Theory* (Oxford: Oxford University Press, 2004) at 233-44.
99. See text accompanying note 24.
100. See text following note 56.
101. See text following note 40.

set aside this requirement when it recognized the remedial constructive trust in *Pettkus v. Becker*.

A third suggestion is that barring all use of promissory estoppel as a sword to preserve the integrity of contract law is over-inclusive. Not all promissory estoppel cases are contract-based, as the number of recent Canadian statute-based promissory estoppel cases attest. Moreover, estoppel was raised in these cases by the plaintiff, to counter the defence's argument that the action was statute-barred. This comes very close to using estoppel as a sword, as the distinction between using estoppel as an offence and using it as a defence to a defence seems fine at best, particularly when the action would be inadmissible but for the estoppel.[102]

A final, and more general, suggestion is that it seems odd, even unprincipled, to make a fundamental difference in the doctrine of estoppel between promises relating to land and other promises, and to give more weight to the former than the latter, in the context of a legal system that places more formal requirements on dealings with property, especially land, than on other dealings. Why should the law of contract insist on a peppercorn when the law of property can overlook the need for seals, writings, registration, properly attested wills, and so on? Is it because equity has made greater substantive incursions into property law than into contract law, and the shield / sword distinction between promissory and proprietary estoppel is simply a reflection of the difference between law's formalism and equity's flexibility? Should fusion of the two courts now attenuate this distinction?

102. See text following note 26.