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Equitable Damages in Nova Scotia

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I. Chancery Amendment Act 1858 (Lord Cairns' Act)

Section 2 of the *Chancery Amendment Act* 1858 *(Lord Cairns' Act)*[1] conferred jurisdiction upon the Court of Chancery to award damages, in certain instances, either in addition to or in substitution for an injunction or specific performance. *Lord Cairns' Act* was based upon the report of the Chancery Commissioners who recommended that courts of equity should be empowered to award damages in a suit for an injunction, or for the specific performance of a contract.[2] It may have been thought that the *raison d'être* of *Lord Cairns' Act* would have ceased upon the commencement of the *Judicature Act,* 1873.[3] However, *Lord Cairns' Act* did not merely enable the Court of Chancery to award those damages which could be awarded by a common law court. This issue was finally settled by the decision of the House of Lords in *Leeds Industrial Co-operative Society* v. *Slack.*[4]

In the *Leeds* case the ancient lights of the plaintiff would in time have been obstructed by buildings which were being erected by the defendant. The plaintiff was granted an injunction to restrain the construction of those buildings. The House of Lords held that *Lord Cairns' Act* conferred jurisdiction, in these circumstances, to award damages in lieu of this *quia timet* injunction. The decision of the House of Lords sanctioned the award of damages in equity to a plaintiff who had not sustained any injury. This jurisdiction to award equitable damages for prospective loss may be contrasted with the position at common law where damages may only be awarded in respect of an actual injury sustained by a plaintiff.[5] The decision also finally settled the question of whether the jurisdiction conferred by *Lord Cairns' Act* survived the repeal of the statute. The *Leeds* case, therefore, settled what Professor Heuston has referred to as a "vexed question".[6] The decision was controversial as the plaintiff had only sought injunctive relief to protect his proprietary rights.[7]

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1. 21 & 22 Vict. c.27 (Imp.). For the text of s.2 of the *Lord Cairns' Act, see* Appendix.
2. *See* "Third Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice and System of Pleading in the Court of Chancery" (Command 2064, 1856).
3. *Supreme Court of Judicature Act,* 1873 (36 & 37 Vict. c.66) (Imp.).
4. [1924] A.C. 851.
5. *See Backhouse* v. *Bonomi (1861), 9 H.L.C. 503.*
6. *See* R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940* (1964), at 349.
7. *See* (1925) 41 Law Quarterly Review 3. *See also* R.E. Megarry, *Miscellany-at-Law* (1969), at 71.

The relevance of equitable damages was recently exemplified in *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[8] In that case the defendants had excavated their land near its boundary with the plaintiffs' land. The excavation did not encroach on the plaintiffs' land, but would do so in the future. The plaintiffs recovered damages in respect of the cost of stabilising the bank. This award of damages was not justifiable at common law as the plaintiff had not sustained any actual damage. However, it was held that the plaintiffs were entitled to hold the judgment in their favour as equitable damages under *Lord Cairns' Act* could be awarded to the plaintiffs for the cost of stabilising the bank. The distinction between common law damages and equitable damages was emphasised in the judgments in this case. The fact that an award of equitable damages may include a component for prospective loss was recognised. McPherson J. remarked: "Damages for prospective losses arising out of an apprehended future withdrawal of support are recoverable only in equity and not at common law".[9] Thomas J. observed that *Lord Cairns' Act* "enabled assessments of damages to be made which were, for practical purposes, once and for all assessments".[10]

Jurisdiction to award equitable damages in England (and Wales) is now conferred by s.50 of the *Supreme Court Act* 1981.[11] Section 50 of the *Supreme Court Act* provides:

> Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

This provision appears to have been derived from s.92 of the *Judicature (Nothern Ireland) Act* 1978.[12] Section 50 of the English *Supreme Court Act* does not contain terms which are contained in *Lord Cairns' Act,* such as "injured" or "wrongful act", which may arguably impose jurisdictional constraints upon a court.[13] It might be mentioned that s.50 of the *Supreme Court Act* has been adopted in a number of jurisdictions, including Ontario[14], Victoria[15], Hong Kong,[16] and Manitoba.[17]

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8. [1986] 1 Qd.R. 245.
9. [1986] 1 Qd.R. 245, at 256.
10. [1986] 1 Qd.R. 245 , at 262.
11. 1981, c.54 (U.K.).
12. 1978, c. 23 (U.K.).
13. *See, e.g.: Attorney-General* v. *Birkenhead Borough,* [1968] N.Z.L.R. 383, at 393; *Neville Nitschke Caravans (Main North Road) Pty. Ltd.* v. *McEntree* (1976), 15 S.A.S.R. 330, at 351; *Talbot* v. *General Television Corp. Pty. Ltd,* [1980] V.R. 224, at 241, 243; [1981] R.P.C. 1, at 19, 21.
14. *See: Courts of Justice Act,* S.O. 1984, c.11, s. 112.
15. *See: Supreme Court Act,* 1986 (1986 No.110), s.38.
16. *See: Supreme Court Ordinance* cap.4, s.17 (rev. ed. 1987).
17. *See: The Court of Queen's Bench Act,* S.M. 1988, c.4, s.36.

II. Jurisdiction to Award Equitable Damages in Nova Scotia

In the colony of Nova Scotia the Governor was originally also the Chancellor of the colony. It was a common practice for the Governor of a British colony to exercise the jurisdiction of the Lord Chancellor within that colony.[18] For instance, the Governor of Prince Edward Island also exercised jurisdiction as the Chancellor of that colony.[19] With the development of Nova Scotia provision was later made in 1833 for the Master of the Rolls to exercise primary jurisdiction in Chancery; however, all decrees that were to be enrolled still had to be signed by the Chancellor.[20] The Nova Scotia "Court of Chancery" was abolished under the 1859 revision of the Nova Scotia statutes which vested the Supreme Court with Chancery jurisdiction.[21]

In 1864 the Supreme Court of Nova Scotia was also later vested with Chancery jurisdiction under "An Act in Respect of Courts and Judicial Officers, and Proceedings in Special Cases".[22] Section 1 of this statute provided: "The Supreme Court shall have within this province the same powers as are exercised by the courts of queen's bench, common pleas, chancery and exchequer in England". It is not entirely apparent that this provision also vested the statutory jurisdiction of the Court of Chancery, as well as the original jurisdiction of that court. An 1873 consolidated statute relating to "Procedure in Equity"[23] made it clear that the equity jurisdiction of the court was to be confined to the "Court of the Equity Judge" (s. 1). That this equity jurisdiction was to be separately exercised was evident from s.22 of this consolidating statute which provided: "No cause of action heretofore denominated legal shall be contained in a writ or declaration which seeks equitable relief". An exception was, however, provided in s.53 of this statute which was expressed to apply where a plaintiff sought "a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right". Section 53 enabled a plaintiff "in the same action" to "include a claim for damages or other redress". Section 53 appears to have originated in the 1859 revision of the Nova

18. *See* A. Stokes, *Constitution of the British Colonies* (1788), at 185. *See also* J. Chitty, *Prerogatives of the Crown* (1820), at 36.

19. *See* F. MacKinnon, *The Government of Prince Edward Island,* (1951), at 36.

20. *See, e.g., Chancery Act* 1833 ("An Act for amending the Practice of the Court of Chancery and diminishing the Expences thereof") 3 Will. IV, c. 52 (Nova Scotia), s.6 The revised statutes of 1851 continued the requirement for the Chancellor to sign all decrees to be enrolled: *see* R.S.N.S. 1851, c.127, s.5.

21. *See* R.S.N.S. 1859, c.127.

22. *See* R.S.N.S. 1864, c.123.

23. *See* C.S.N.S. 1873, c.95.

Scotia statutes.[24] The provision merely enabled common law damages, a "legal" remedy, to be awarded in injunction proceedings. Section 53 did not confer jurisdiction to award equitable damages as it did not, unlike *Lord Cairns' Act,* enable damages to be awarded "in substitution" for an injunction. No statutory provision which corresponds to s.2 of *Lord Cairns' Act* ever appears to have been enacted in Nova Scotia.

The Supreme Court of Nova Scotia was later constituted under *The Nova Scotia Judicature Act,* 1884.[25] Section 8(1) of the *Judicature Act* provided:

> The Supreme Court shall have within this Province the same powers as were formerly exercised by the Courts of Queen's Bench, Common Pleas, Chancery and Exchequer, in England; and also such and the same powers as were on the nineteenth day of April, A.D. 1884, exercised in England by the Supreme Court of Judicature, save in respect of Probate and Surrogate Courts.

This provision would be the present source of jurisdiction of the court to award equitable damages under *Lord Cairns' Act.* The provision, by including a reference to the 19th April, 1884, would presumably be construed as including any statutory jurisdiction possessed by the English High Court on that date. Successive revisions of the *Judicature Act* have provided for the continuation of the court as originally constituted.[26] The continuation of the court in this manner would have the consequence that the jurisdiction of the court under *Lord Cairns' Act* would have been preserved.[27]

III. Award of Equitable Damages in Nova Scotia

It is apparent from the terms of s.2 of the *Lord Cairns' Act* that the jurisdiction conferred by this section may be exercised where the court has "jurisdiction to entertain" an application for:

(a) an injunction, or

(b) specific performance.

This article will discuss the exercise of jurisdiction under *Lord Cairns' Act* in Nova Scotia in these classes of case. It should be mentioned, as a preliminary matter, that the words "jurisdiction to entertain" in *Lord Cairns' Act* have been interpreted to mean that a court possesses the

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24. *See* R.S.N.S. 1859, c.127, s.25.

25. *See* R.S.N.S. (5th ser.) 1884, c. 104.

26. *See, e.g. Judicature Act,* R.S.N.S. 1900, c.155, s.3; *Judicature Act,* S.N.S. 1919, c.32, s.3; *Judicature Act,* S.N.S. 1950, s.3; *Judicature Act,* S.N.S. 1972, c.2, s.2. *See also: Deruelle* v. *Children's Aid Society of Cape Breton* (1978), 26 N.S.R. (2d.) 125, at 128.

27. *Cf., St. Anne-Nakawic Pulp & Paper Co. Ltd.* v. *Canadian Paper Workers' Union, Local 219,* [1986] 1 S.C.R. 704, at 727 where the Supreme Court of Canada considered similar legislation which constitutes the Supreme Court of New Brunswick.

requisite jurisdiction to award equitable damages despite the absence of a plea for such relief, and notwithstanding that there is a discretionary bar to the grant of an injunction or specific performance.[28]

1. Injunction

The Supreme Court of Nova Scotia has in a number of injunction cases recognised the existence of the jurisdiction to award equitable damages. In most of these cases the courts have not expressly acknowledged *Lord Cairns' Act* as the source of this jurisdiction. However, there have been references in some of the cases to the "working rule" enunciated by A.L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.*[29] In that case an injunction was issued to restrain a nuisance caused by vibrations from the operations of machinery of an electric lighting company. A.L. Smith L.J., in considering the availability of the jurisdiction under *Lord Cairns' Act* to award damages in substitution for an injunction, made the following observations:

> In my opinion, it may be stated as a good working rule that —
> (1) If the injury to the plaintiff's legal rights is small,
> (2) And is one which is capable of being estimated in money,
> (3) And the case is one in which it would be oppressive to the defendant to grant an injunction: — then damages in substitution for an injunction may be given.[30]

It is clear that A.L. Smith L.J. was not formulating an inflexible rule. The Lord Justice later remarked that the determination of each matter in the "working rule" "must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication".[31] This was recognised in *Duchman* v. *Dairy Co. Ltd.*[32] where Master J.A. remarked that "the rule in the *Shelfer* case does not purport to be exhaustive".[33]

Most of the Nova Scotia cases in which the "working rule" has been cited concern building encroachments. In these cases the courts have recognised the existence of a discretionary power vested in the court whereby the court may either grant a mandatory injunction to restrain a continuing trespass or award damages in lieu of an injunction.[34] It will be

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28. *See, e.g., Barbagallo* v. *J. & F. Catelan Pty. Ltd.*, [1986] 1 Qd.R. 245, at 251.
29. [1895] 1 Ch. 287.
30. [1895] 1 Ch. 287, at 322-323.
31. [1985] 1 Ch. 287, at 323.
32. (1928), 63 O.L.R. 111, [1929] 1 D.L.R. 9.
33. (1928) 63 O.L.R. 111, at 120, [1929] 1 D.L.R. 9, at 24. *See also, Denison* v. *Carro Suel Farms Ltd.* (1981), 129 D.L.R. (3d) 334, 342.
34. *See: Gallant* v. *MacDonald* (1970), 3 N.S.R. (2d) 137, at 146, 160; *Andrews* v. *R.A. Douglas Ltd.* (1975), 17 N.S.R. (2d) 209, at 216 (no trespass found); *Dempsey* v. *J.E.S. Developments Ltd.* (1976), 15 N.S.R. (2d) 448, at 453; *MacDonald* v. *Lawrence* (1980), 38

recalled that the *Shelfer* case concerned a nuisance, and the courts have, by analogy, applied the "working rule" to cases of trespass. In some building encroachment cases the "working rule" would be inappropriate. One example is where a building, which constitutes a minor encroachment, is erected by a defendant who has notice of a plaintiff's objection.[35] In building encroachment cases the courts have to balance various competing interests. An evaluation has to be made as to the consequences of the removal of a building as against the vindication of the proprietary rights of an individual. The decision whether to grant injunctive relief, or award equitable damages must, of course, ultimately depend upon a case-by-case analysis.

One Nova Scotia decision, concerning a building encroachment, in which the *Shelfer* case was cited, is *Gallant* v. *MacDonald*.[36] In that case the defendant's residence was partially constructed upon the plaintiffs' residential building lot. The plaintiffs were unable to acquire a building permit to build a house on this lot because of the encroachment. Cowan C.J.T.D. made a general observation that "where the encroachment is slight and the cost of removal would be great, the corresponding benefit to the adjoining owners small, or where compensation by way of damages can be determined and can be had, a court will ordinarily decline to compel removal and will leave the party complaining to his remedy at law in damages".[37] The court assessed the diminution in value of the plaintiffs' lands caused by the continuing trespass but regarded such a remedy as clearly inadequate. Cowan C.J.T.D. remarked: "If I decide that the plaintiffs should receive only damages, they will be left with a lot of land which, at the present time, is incapable of being put to the only use for which it is suited, namely, the construction of a dwellinghouse".[38] It was, therefore, held that the plaintiff would be granted a mandatory injunction for the removal of the encroachment, as well as damages for the trespass already committed. The Chief Justice observed that factors that may induce a court to award damages in lieu of injunctive relief would be where the plaintiff was guilty of laches, or was guilty of conduct inducing the defendant to proceed with the construction of a building when, to the knowledge of the plaintiff, the building was on land owned

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N.S.R. (2d) 319, at 326-327, 40 N.S.R. (2d) 626; *Brean* v. *Thorne* (1982), 52 N.S.R. (2d) 241, at 245-246.

35. *Cf., Krehl* v. *Burrell* (1877), 7 Ch.D. 551; (1879), 11 Ch.D. 146.

36. (1970), 3 N.S.R. (2d) 137.

37. (1970), 3 N.S.R. (2d) 137, at 142. An award of equitable damages for prospective loss that is made in substitution for an injunction is not a remedy which is available at law. The remedy originated in the jurisdiction which was vested in the Court of Chancery by *Lord Cairns' Act.*

38. (1970), 3 N.S.R. (2d) 137, at 142.

by the plaintiff.[39] Cowan C.J.T.D. also acknowledged the relevance of *Lord Cairns' Act* when, in discussing the *Shelfer* case, he remarked: "The Court of Appeal found that *Lord Cairns' Act* (21 & 22 Vict. c. 27) in conferring upon Courts of Equity a jurisdiction to award damages instead of an injunction, did not alter the settled principles upon which those Courts interfered by way of injunction".[40]

In *Brean* v. *Thorne*[41] the parties were adjacent landowners. The defendants had built a house on the plaintiffs' property mistakenly believing it to be their own. In these circumstances the court did not consider that this was a case in which the *Shelfer* case could properly be applied. Rogers J. commented:

> The facts in this case are far more serious than in the *Gallant* case. The encroachment amounts to a complete usurpation, an expropriation if you will, of the plaintiffs' rights to their property. Quite clearly, when the tests set out in the *Shelfer* case are applied, it is not difficult to reach the conclusion, and I do so, that the injury to the plaintiffs of their rights is not small, it is one that is not capable of being adequately estimated in money, and cannot be adequately compensated by a small money payment.[42]

In *Brean* v. *Thorne*[43] the court granted the plaintiffs a mandatory injunction to compel the removal of the house from their property. The fact that the plaintiffs made relatively little use of their property, which was not entirely unique, was regarded as not to the point. Rogers J. remarked: "But it is going too far to say that in those circumstances damages in exchange for a deed or a court-compelled exchange of deeds to Lots A-1 and A-2 is the appropriate remedy".[44] The defendants

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39. (1970), 3 N.S.R. (2d) 137, at 160.
40. (1970), 3 N.S.R. (2d) 137, at 145. The decision in *Gallant* v. *MacDonald* also decided an interesting point concerning veterans' finance. The Director under the *Veterans' Land Act* (R.S.C. 1952, c. 280, now the *Veterans' Land Act,* R.S.C. 1970, CV-4) was added as a defendant after the issue of the writ. The Director submitted that although the fee simple of the land was vested in the Director, the Director was in the position of being a mere mortgagee, and should not be liable in any way for the encroachment and continuing trespass. The *Veterans' Land Act* provided that a veteran holding or occupying land sold by the Director shall, until the Director grants or conveys the land to him, be deemed a tenant at will (s.12). Also, the Act provided that the title, ownership, and right of possession of all property sold to a veteran shall generally remain in the Director until the sale price and other charges are fully paid. However, the Director could transfer the title to property without prejudicing the entitlement of the Director to payment of relevant moneys (s.13). This legislation was obviously intended to ensure that the home of a veteran should not be taken in execution under proceedings issued by a creditor of a veteran. Cowan C.J.T.D. held that "the Director is responsible for the continuing trespass constituted by the encroachment of the MacDonald house and its associated works" (at 142).
41. (1982), 52 N.S.R. (2d) 241.
42. (1982), 52 N.S.R. (2d) 241, at 246.
43. (1982), 52 N.S.R. (2d) 241.
44. (1982), 52 N.S.R. (2d) 241, at 246.

obtained partial indemnification from a real estate agency and its employees who showed the defendants the wrong property at the time of purchase. However, the court did not give any indemnification for the cost of construction of the house beyond the footings. This was because municipal regulations provided that any construction should not proceed beyond the footage stage without obtaining the required building permit based on a surveyor's certificate. Rogers J. observed that "that is a complicated and expensive remedial regimen".[45]

The courts in Nova Scotia have shown a general reluctance in building encroachment cases to award equitable damages in substitution for injunctive relief. This is because the award of equitable damages in lieu of an injunction is an interference with the proprietary rights of a plaintiff. This attitude was evident in *MacDonald* v. *Lawrence*[46] were Glube J. remarked:

> When dealing with land, wherever possible, the court should not interject itself as an expropriating authority requiring a party to give up any portion of their land unless they are mutually willing to reach that accommodation.[47]

In that case the court ordered the removal of a wall which encroached on the plaintiff's land. It has been seen from cases such as *Gallant* v. *MacDonald*[48] and *Brean* v. *Thorn*[49] that the courts will, in appropriate instances, compel the removal of a house. Earlier in this century, in *Gilpinville Ltd.* v. *Dumaresq,*[50] the court ordered the removal of a garage that was erected in breach of a restrictive covenant not to erect a building that would interfere with a view.

One Nova Scotia building encroachment case where the jurisdiction to award equitable damages in lieu of an injunction was exercised is *Dempsey* v. *J.E.S. Developments Ltd.*[51] In that case the defendant constructed a warehouse that encroached onto the plaintiff's land by 35 square feet. The damages were assessed on the basis of the rent that the defendant would receive. MacIntosh J. held that an award of damages was appropriate in the circumstances for to grant a mandatory injunction ordering the removal of the building from the plaintiff's lands would involve great costs to the defendant. The award of damages also included a component for exemplary damages as the conduct of the representative

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45. (1982), 52 N.S.R. (2d) 241, at 258.
46. (1980), 40 N.S.R. (2d) 137, at 160.
47. (1980), 40 N.S.R. (2d) 626, at 627.
48. (1970), 3 N.S.R. (2d) 137.
49. (1980), 40 N.S.R. (2d) 626.
50. [1927] 1 D.L.R. 730 (N.S.S.C.).
51. (1979) 15 N.S.R. (2d) 448.

of the defendant company was abusive and contemptuous of the plaintiff's rights. Upon payment of these damages the plaintiff was required to execute a release of her interest in the encroached land. It might be mentioned that in some jurisdictions the courts have been empowered to grant relief upon terms where a building is mistakenly erected.[52]

The approach of the courts in Nova Scotia may be contrasted with the decision of Graham J. in *Bracewell* v. *Appleby*[53], which is illustrative of the consequences of laches on the part of a plaintiff. In that case the defendant erected a house over a right of way of the plaintiff. The plaintiffs had delayed in enforcing their legal rights until the house was built. The plaintiffs were aware that the house would be built, and the defendant wrongly asserted his entitlement to build the house. Graham J. remarked:

> The plaintiffs kept on threatening to bring proceedings, but in fact stood by until the house was erected, and the defendant, whilst insisting that he had a right of way by virtue of the grant, in fact never took any proceedings, for example, to obtain a declaration to that effect and pushed ahead until the house was a *fait accompli*.[54]

In these circumstances the plaintiffs were awarded equitable damages in lieu of an injunction. Graham J. later remarked that "the plaintiffs have established their legal right, and by reason of the *Chancery Amendment Act* 1858 *(Lord Cairns' Act)* they can ask for, and the court can grant, damages in lieu of an injunction".[55]

The jurisdiction under *Lord Cairns' Act* is also of relevance where a plaintiff seeks injunctive relief to enforce riparian rights. In *Lockwood* v. *Brentwood Park Investments Ltd.*[56] the Appeal Division of the Nova Scotia Supreme Court dissolved an injunction to prevent the restriction of the flow of a brook, and instead awarded damages for loss of amenities to the riparian owner. In this case the court cited the "working rule" in the *Shelfer* case. Although the plaintiff claimed general damages there was no evidence before the trial judge of any actual pecuniary loss. Dubinsky J. awarded the plaintiff damages of $2,400 for "the loss of the

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52. *See Conveyancing and Law of Property Act,* R.S.O. 1980, c.90. s.37. This reform has been adopted in Queensland where there were a number of instances of homes being built on the wrong allotment, in some cases, on canal estates consisting of reclaimed land which did not have any obvious landmarks. *See; Property Law Act,* 1974 (No. 76 of 1974) (Qld.), ss. 195-198. *See also* Report of the Law Reform Commission of Queensland, *Property Law Reform* (Q.L.R.C. 16, 1973), at 86-87.
53. [1975] Ch. 408.
54. [1975] Ch. 408, at 415.
55. [1975] Ch. 408, at 419.
56. (1970), 1 N.S.R. (2d) 669.

pleasure which the plaintiff had formerly enjoyed when the brook flowed in greater volume past his land".[57]

2. Specific Performance

It has already been mentioned that the jurisdiction to award equitable damages under *Lord Cairns' Act* may also be invoked where specific performance is sought. The jurisdiction has relevance in cases of part performance. It has been settled since the decision of Pollock C.B. in *Massey* v. *Johnson*[58] that the doctrine of part performance does not enable a plaintiff to recover damages in an action upon a parole contract which is required to be in writing. However, it is accepted that a plaintiff may be awarded equitable damages where the entitlement of a plaintiff to relief is dependent upon the operation of the doctrine.[59] This was recognised in *Lavery* v. *Pursell*[60] by Chitty J. who remarked: "It was suggested that after *Lord Cairns' Act* the Court of Equity could give damages in lieu of specific performance, yes, but it must be in a case where specific performance could have been given".[61] This case was explained in *Price* v. *Strange*[62] by Goff L.J. who commented: "In my view, that case decides nothing more than this, that the court cannot grant damages in lieu of specific performance when it is impossible to effect specific performance".[63]

This jurisdiction to award equitable damages in cases of part performance has been considered in a number of Nova Scotia cases. In *Dominion Supply and Construction Co.* v. *Foley Brothers*[64] an action was brought for the breach of a verbal contract for the purchase of sand and gravel. The sand and gravel were to be supplied in accordance with the specification of government engineers and were subject to their approval. A portion of the material, which was approved, was accepted and paid for, the balance being obtained from another source. The appeal court affirmed the decision of the trial judge that there was no liability on the

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57. (1970), 1 N.S.R. (2d) 669, at 705.
58. (1847), 1 Ex. 241 (154 E.R. 102).
59. *See* J.M. MacIntyre, "Equity — Damages in Place of Specific Performance" (1969), 47 Canadian Bar Review 644; M.G. Bridge, "The Statute of Frauds and Sale of Land Contracts" (1986), 64 Canadian Bar Review 57. *See also* R.A. Brewer, "A Comparison of *Lavery* v. *Pursell,* and *McIntyre* v. *Stockdale*" (1947), 1 (1) University of New Brunswick Law School Journal 25.
60. (1888), 39 Ch.D. 508.
61. (1888), 39 Ch.D. 508, at 518.
62. [1978] Ch. 337.
63. [1978] Ch. 337, at 359.
64. (1919), 53 N.S.R. 333.

part of the defendants to pay for the material which was rejected by the Government engineers.

The court in the *Dominion Supply* case considered the relevance of the doctrine of part performance in an action for damages. Ritchie E.J. remarked:

> Part performance is relied on to take the case out of the statute. The answer to this point is that part performance is an equitable doctrine, and only to be applied where specific performance could on that ground be decreed. In this case it was admitted that specific performance had become impossible. In *Lavery* v. *Pursell,* 39 Ch. D. page 518, Mr. Justice Chitty said:
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> > Now this question of part performance resolves itself into this. Part performance was an equitable doctrine, and, putting it shortly, where there was performance under the contract it took the case out of the statute, but it was an equitable doctrine applied by the courts of equity, and it was applied in those cases where the court would grant specific performance, for instance the case of a sale of land, but if before the *Judicature Act* the court dismissed the bill because it was not a case for specific performance, a court of law, when asked to give damages, the contract not being within the fourth section, had no alternative but to refuse and to give judgment for the defendant in the action. But since the various amendments which have taken place in the law with regard to equitable doctrines, it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law.
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> The result is that I feel myself driven to give effect to the *Statute of Frauds.*[65]

The judgment of Ritchie E.J. in the *Dominion Supply* case correctly reflects the position where common law damages are sought in a case of part performance. However, the judgment does not contain any consideration of the jurisdiction to award equitable damages under *Lord Cairns' Act.* The quotation which was taken from the judgment of Chitty J. in *Lavery* v. *Pursell*[66] did not include that later part of the judgment that acknowledges the existence of the jurisdiction to award equitable damages where a plaintiff possesses an equity to a decree of specific performance. The fact that the jurisdiction under *Lord Cairns' Act* was not explained in the *Dominion Supply* case may have affected the course of future authority. However, it is acknowledged that the actual decision in that case was quite unexceptionable.

In *Carter* v. *Irving Oil Co.*[67] an action was brought for damages for the breach of an oral agreement for a lease of a service station. A written

65. (1919), 53 N.S.R. 333, at 348.
66. (1888), 39 Ch.D. 508.
67. [1952] 4 D.L.R. 128.

memorandum in relation to the lease had been signed by a person who had no authority to bind the defendant. There were various acts of part performance on the part of the plaintiff, and any entitlement of the plaintiff to damages could only be derived from *Lord Cairns' Act*. MacDonald J. remarked:

> Part performance can only enable an action of damages to succeed (where s. 7 of the *Statute of Frauds* is not satisfied) if the case in hand is one in which specific performance would otherwise have been granted by the Court of Chancery; and neither *Lord Cairns' Act of 1858* [c.27] nor the fusion of law and equity declared by the *Judicature Act* affects this result.[68]

This analysis again does not acknowledge that the jurisdiction to award equitable damages in cases of part performance is derived from *Lord Cairns' Act*. MacDonald J. did not award damages as the contract was not susceptible to specific performance because there was a requirement of constant supervision of continuing acts of personal service. *McCallum* v. *MacKenzie*[69] is a similar Nova Scotia decision in which it was held that damages could not be awarded as the doctrine of part performance did not apply to a contract for personal services. In that case the contract concerned an agreement to buy an accounting practice.

The courts have traditionally declined to decree specific performance because of the difficulties of supervision of any decree.[70] It has been suggested that it is for this reason that equitable damages could not be awarded for breaches of a contract for personal services.[71] It is, however, submitted that courts of equity have adopted changing attitudes in considering whether to decree specific performance of personal services. There are recent English cases which show that a court will now more readily exercise jurisdiction to make an order for the specific performance of a contract for personal services.[72] From early times it is clear that the remedy of specific performance has always been available to compel performance of such contracts.[73] It has long been recognised that the fact that a contract requires personal supervision does not prevent a court from decreeing specific performance to ensure that an injustice is redressed.[74]

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68. [1952] 4 D.L.R. 128 at 133.
69. (1979), 37 N.S.R. (2d) 328, at 246-347.
70. *See, e.g., Ryan* v. *Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116.
71. *See* T. Ingman & J. Wakefield, "Equitable Damages under *Lord Cairns' Act*", [1981] Conveyancer & Property Lawyer 286, at 292. *See also, Elliott* v. *Roberts* (1912), 28 T.L.R. 436.
72. *See, e.g., C.H. Giles & Co. Ltd.* v. *Morris,* [1972] 1 W.L.R. 307, at 318; *Shiloh Spinners Ltd.* v. *Harding,* [1973] A.C. 691, at 724; *Tito* v. *Waddell (No.2),* [1977] Ch. 106, at 321-322.
73. *See* J. Berryman, "The Specific Performance Damages Continuum: An Historical Perspective" (1985), 17 Ottawa Law Review 295.
74. *See Wilson* v. *Furness Railway Co.* (1869), L.R. 9 Eq. 28, at 33.

There are still, however, modern indications of a reluctance to decree specific performance of contracts for personal services. Recently, in *Scandinavian Trading Tanker Co. A.B.* v. *Flota Petrolera Ecuatoriana*[75] Lord Diplock stated that "this is a remedy that English Courts have always disclaimed any jurisdiction to grant".[76] In Canada, in *Emerald Resources Ltd.* v. *Sterling Oil Properties Management Ltd.*[77] Allen J.A. stated "that it would be improper to make one man serve another against his will".[78] Such statements of principle pay no regard to any necessity to give a party to a contract relief where no remedy at law is available. It is submitted that the modern view is that a court possesses jurisdiction to decree specific performance of a contract of personal services. In such circumstances a court would not necessarily make an order for the specific performance of a contract. Nevertheless, a court would notionally exercise the jurisdiction to adjudge that a plaintiff possesses an equity for an order for the specific performance of a contract, and thereby award equitable damages. Such an award would be made "in substitution" for an order for specific performance. Consequently, there would be no order requiring any supervision by a court, nor would such an award be objectionable on policy grounds.

IV. Assessment of Equitable Damages

In a number of Canadian contract cases concerning the sale of land equitable damages have been assessed on a different basis from common law damages.[79] This approach can be seen to have originated in the judgment of Megarry J. in *Wroth* v. *Tyler*[80] where damages for the breach of a contract of sale of land were assessed as at the date of judgment to take account of the realities of inflation. The value of the land had escalated in value since the date of the breach of the contract which was the usual date for the assessment of damages. The assessment of damages in this manner was innovative at the time, although there were earlier precedents for this course of action.[81]

In England the decision of the House of Lords in *Johnson* v. *Agnew*[82] has recently emphasised the compensatory function of damages. Lord

75. [1983] 2 A.C. 694.
76. *Id.*, at 701.
77. (1969), 3 D.L.R. (3d) 630.
78. *Id.*, at 647.
79. *See, e.g.*, B.J. Reiter & R.J. Sharpe, *"Wroth* v. *Tyler:* Must Equity Remedy Contract Damages?" (1979), 3 Canadian Business Law Journal 146; E. Veitch, "An Equitable Export — *Lord Cairns' Act* in Canada" (1980), 12 Ottawa Law Review 227.
80. [1974] Ch. 30.
81. *See, e.g.: Horsnail* v. *Shute,* [1921] 2 W.W.R. 270, 62 D.L.R. 199; *Bosaid* v. *Andry,* [1963] V.R. 465.
82. [1980] A.C. 367.

Wilberforce considered that *Lord Cairns' Act* provided no warrant for the assessment of damages on a different basis from common law damages in a case where both remedies are available. His Lordship also observed that there was no invariable principle that damages should be assessed as at the date of breach as the court could find some other date that might be appropriate in the circumstances.[83] Dr. Spry has remarked: "The observations of Lord Wilberforce can hardly have been intended to exclude equitable considerations in cases where equitable damages are sought".[84] Professor Gareth Jones, in his review of Dr Spry's work, has stated that he is in agreement with this observation.[85]

The judgment of Lord Wilberforce in *Johnson* v. *Agnew*[86] did not contain any discussion of the fact that an award of damages under *Lord Cairns' Act* is an equitable remedy which is exercised according to equitable considerations. Therefore, any claim for equitable damages is subject to equitable defences, *e.g.,* delay, acquiesence. This was earlier recognised by the Supreme Court of Canada in *Elsley* v. *J.G. Collins Insurance Agencies Ltd.*[87] The judgment of the court in this case was delivered by Dickson J. who remarked:

> The award is still governed, however, by special equitable considerations which would not apply if the plaintiff were seeking damages at law rather than in equity. These considerations might serve, for example, to reduce the amount, due to such factors as delay or acquiesence. In addition, if the parties have agreed on a set amount of damages at law, or a maximum amount, it would be unconscionable, in my opinion, to allow recovery of a greater amount of damages in equity.[88]

It remains to see how the courts in Canada continue to assess equitable damages. It has even been suggested in British Columbia that there is no difference between equitable damages and common law damages. In *Ansdell* v. *Crowther*[89] Anderson J.A. remarked that "the judgements of the House of Lords in *Johnson* v. *Agnew*[90] make it clear that there is no distinction between damages at common law and so-called 'equitable damages', there is no fixed rule as to the date when damages ought be assessed and, in order to do justice, the courts are empowered to fix damages as of the date found to be appropriate in the circumstances".[91]

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83. *Id.,* at 400-401.
84. *See* I.C.F. Spry, *Equitable Remedies* (3rd ed., 1984), at 610.
85. *See* G. Jones, (1982), 45 Modern Law Review 240.
86. [1980] A.C. 367.
87. [1978] 2 S.C.R. 916, 83 D.L.R. (3d) 1.
88. [1978] 2 S.C.R. 916, at 935; 83 D.L.R. (3d) 1, at 13.
89. (1984), 55 B.C.L.R. 216, 11 D.L.R. (4th) 614.
90. [1980] A.C. 367.
91. (1984), 5 B.C.L.R. 216, at 221; 11 D.L.R. (4th) 614, at 619.

This approach is contrary to the binding decision of the Supreme Court of Canada in *Elsley* v. *J.G. Collins Insurance Agencies Ltd.*[92]

V. Conclusion

Some Canadian commentators have commented upon or recognised the absence of a statutory provision in Nova Scotia which corresponds to s.2 of *Lord Cairns' Act.*[93] Any future revision of the Nova Scotia *Judicature Act* should include a provision derived from s.50 of the *Supreme Court Act* 1981 (Eng.) This provision has been adopted in Ontario and other jurisdictions. The enactment of such a provision would make the jurisdiction to award equitable damages evident to practitioners, and also avoid jurisdictional arguments which may arise under *Lord Cairns' Act.*

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92. *Supra,* note 87.
93. *See* S.M. Waddams, *The Law of Damages* (1983), at 52; G.H.L. Fridman, *The Law of Contract in Canada* (2nd ed., 1986), at 652.

Appendix
Chancery Amendment Act 1858 (Lord Cairns' Act)
(21 & 22 Vict. c. 27)
Section 2

In all cases in which the Court of Chancery has Jurisdiction to entertain an Application for an Injunction against a Breach of any Covenant, Contract, or Agreement, or against the Commission or Continuance of any wrongful act, or for the Specific Performance of any Covenant, Contract or Ageement, it shall be lawful for the same Court, if it shall think fit, to award damages to the Party injured either in addition to or in substitution for such Injunction or Specific Performance, and such damages may be assessed in such manner as the Court shall direct.