
The Unexamined "Conscience" of Contemporary Canadian Equity

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Reference to "conscience" is increasingly commonplace in Canadian courts exercising equitable jurisdiction. Yet it is a problematic concept because there is a lack of judicial exposition of what is meant by the term. Although "conscience" has existed as a legal concept for well over five hundred years, the continuity of the underlying concept cannot be assumed; "conscience" as a concept may be variable or even arbitrary. As the author argues, however, a clearer definition of "conscience" is critical because of its use by judges exercising equitable jurisdiction as a normative standard for evaluating conduct.

The first part of the article examines the development of equity from the fifteenth to the nineteenth centuries as juxtaposed with conscience's meaning. Next, current invocations of conscience by Canadian courts exercising equitable jurisdiction are considered. It is determined that these invocations, while frequent, are perfunctory, and neither acknowledge the problematics of the term, nor display historical consciousness. In particular, invocations of conscience at times suggest that the focus is on the state of the defendant's conscience, while other times it appears that it is the adjudicator's conscience at play. Still other times, "conscience" appears to refer to some objective moral or ethical notion.

Given that its implications today are so nebulous, the author questions why conscience as a judicial concept is so persistent. The author suggests that it may be in some part due to "reflex repetition". Beyond this, however, the author suggests that the use of the judicial notion of conscience persists because of the continuing impetus to include moral criteria in the law, as well as the need for the law to accommodate particular cases within the framework of generality which is thought to make law.

Les références à la «conscience» sont de plus en plus fréquentes chez les tribunaux canadiens ayant une compétence judiciaire d'equity. Il s'agit pourtant d'un concept problématique puisque l'interprétation qu'en font les juges n'est pas claire. Bien que la notion juridique de «conscience» existe depuis plus de cinq siècles, il est difficile de présumer de la continuité du concept sous-jacent. L'auteur indique qu'une définition plus claire du terme est cruciale, étant donnée l'utilisation qu'en font les juges ayant la compétence d'equity à titre de critère normatif servant à évaluer le comportement d'un individu.

La première partie de l'article étudie le développement de l'equity du XV^e au XIX^e siècle, en analysant parallèlement le sens donné à la «conscience». Les références actuelles à ce concept sont ensuite abordées. Ces références, pourtant fréquentes, sont superficielles et présentent le désavantage de ne pas tenir compte de la problématique associée à ce terme et de ne pas faire preuve de conscience historique. Les références à la conscience semblent parfois mettre l'accent sur l'état de la conscience du défendeur, sur celle de l'adjudicateur dans d'autres circonstances ou, d'autres fois encore, faire référence à une notion morale ou éthique objective.

Étant donné le caractère incertain du concept de conscience, l'auteur analyse les raisons qui justifient sa persistance à titre de concept juridique. Il explique que cette persistance pourrait être en partie due à une «répétition réflexe». En conclusion, l'auteur attribue toutefois cette continuité à la tendance à inclure des critères moraux en droit ainsi qu'à la nécessité à laquelle fait face le droit de placer les cas particuliers dans le cadre de généralité dont il est constitué.

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Introduction

Recently, in *Soulos v. Korkontzilas*,¹ McLachlin J. cited A.J. McClean for the proposition that “the concept of ‘good conscience’ ... lies at ‘the very foundation of equitable jurisdiction.’”² She then proceeded to invoke the notion of “[g]ood conscience as the unifying concept underlying constructive trust,” and concluded that such trusts are to be understood “under the broad umbrella of good conscience.”³ What is particularly interesting here is her repeated invocation of “conscience” as a—indeed, perhaps as *the*—touchstone of equity. She is not unique in this regard among those who have noticed the “recent rejuvenation”⁴ or “renewed vigour”⁵ of equity. In Australia, Sir Anthony Mason sees “the underlying values of equity” as “centred on good conscience”;⁶ I.J. Hardingham has observed that “[p]erhaps the overriding aim of all equitable principle is the prevention of unconscionable behaviour”;⁷ and Paul Finn has noted that “the unconscionability principle (as distinct merely from the specific unconscionable dealings doctrine) is becoming as imperialistic in equity as the neighbourhood principle is in tort law ...” In England, Margaret Halliwell has advocated the (re-)recognition of conscience as integral to equity,⁸ and J.D. Davies has noticed its “re-awakening”.⁹

¹ [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 [hereinafter *Soulos* cited to S.C.R.].

² *Ibid.* at 232-33, citing A.J. McClean, “Constructive and Resulting Trusts—Unjust Enrichment in a Common Law Relationship—*Pettkas v. Becker*” (1982) 16 U.B.C. L. Rev. 156 at 169.

³ *Soulos*, *ibid.* at 233.

⁴ *Ibid.* at 240. See L.I. Rotman, “Deconstructing the Constructive Trust” (1999) 37 Alta. L. Rev. 133. Rotman comments that “the key point of the *Soulos* judgment is its sanction of the constructive trust based on good conscience” (*ibid.* at 154).

⁵ Sir A. Mason, “The Place of Equity and Equitable Remedies in the Contemporary Common Law World” (1994) 110 L.Q. Rev. 238 at 238.

⁶ C.J. Rossiter & M. Stone, “The Chancellor’s New Shoe” (1988) 11 U.N.S.W.L.J. 11 at 23.

⁷ *Supra* note 5 at 258.

⁸ I.J. Hardingham, “Unconscionable Dealing” in P.D. Finn, ed., *Essays in Equity* (Sydney: Law Book Company, 1985) 1 at 1.

⁹ P. Finn, “Commerce, the Common Law and Morality” (1989) 17 Melb. U.L. Rev. 87 at 89. See also J.W. Carter & A. Stewart, “Commerce and Conscience: The High Court’s Developing View of Contract” (1993) 23 U.W.A. L. Rev. 49 at 50, 63, 64.

¹⁰ See generally M. Halliwell, *Equity and Good Conscience in a Contemporary Context* (London: Old Bailey Press, 1997). Alison Dunn, reviewing this book, comments that “[r]eferences to conscience and the prevention of unconscionable conduct have become increasingly prevalent in judicial pronouncements at all court levels and across many equitable jurisdictions ...” (A. Dunn, “Equity is Dead. Long Live Equity!” (1999) 62 Mod. L. Rev. 140 at 141).

¹¹ J.D. Davies, “The Re-awakening of Equity’s Conscience: Achievements and Problems” in S. Goldstein, ed., *Equity and Contemporary Legal Developments* (Jerusalem: Hebrew University of Jerusalem, 1992) 46 at 46.

To be sure, equity has long been associated with conscience. Thus, Norman Doe reminds us that, in the medieval period, “conscience formed the basic authority for the chancellor’s jurisdiction,”¹² and D.E.C. Yale, discussing the early Chancery, notes that conscience was “recognized as a juristic principle (at least from the late fifteenth century) ...”¹³ C.K. Allen sees the “philosophical and theological conception of *conscience*” as the “one general principle which more than any other influenced equity as it was developed by the Chancery.”¹⁴ Writing in the early sixteenth century, Christopher St. German, in *Doctor and Student*, expounded equity largely in terms of conscience.¹⁵ Later, in the seventeenth century, the “father of modern equity”, Lord Nottingham, was still regularly invoking conscience,¹⁶ and referring to Chancery as a “court of conscience”.¹⁷ Although W.H.D. Winder tells us that “[b]efore the opening of the eighteenth century precedent was rapidly superseding conscience as the foundation of practical equity,”¹⁸ at least the *discourse* of conscience remained. Thus, Lord Camden, in 1769, could say that the jurisdiction of the Chancery was built upon “the everlasting maxims of equity and conscience,”¹⁹ and that “GOOD faith and conscience are the rules, by which every transaction is judged in this court ...”²⁰ Even Lord Eldon, quintessentially associated with the *rigor aequitatis* in the early nineteenth century, often referred to conscience when commenting on the equitable jurisdiction.²¹ It is, apparently, not until 1878 that we find a judge saying, categorically, that the Chancery

¹² N. Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge: Cambridge University Press, 1990) at 132. He also reminds us that “conscience also was e[x]tensively employed as a moral authority fundamental to the common law” (*ibid.*). See also *ibid.*, c. 6, “Conscience in the Common Law”.

¹³ D.E.C. Yale, “Introduction” in D.E.C. Yale, ed., *Lord Nottingham’s Chancery Cases*, vol. 1 (London: Selden Society, 1957) i at xxxvii [hereinafter *Chancery Cases Vol. 1*].

¹⁴ C.K. Allen, *Law in the Making*, 6th ed. (Oxford: Clarendon Press, 1958) at 389 [emphasis in original].

¹⁵ C. St. German, *Doctor and Student*, ed. by T.F.T. Plucknett & J.L. Barton (London: Selden Society, 1974). St. German’s argument is, of course, much more complex than this observation suggests. See e.g. T. Endicott, “The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity” (1989) 47 U.T. Fac. L. Rev. 549.

¹⁶ See e.g. *Cox v. Quantock* (1674): “Wherefore though rights in law are governed by rules of law, yet rules in equity are governed only by conscience” (*Chancery Cases Vol. 1*, *supra* note 13, 102 at 102).

¹⁷ See e.g. *Coke v. Bishop* (1677) in D.E.C. Yale, ed., *Lord Nottingham’s Chancery Cases*, vol. 2 (London: Selden Society, 1961) 570 at 570 [hereinafter *Chancery Cases Vol. 2*].

¹⁸ W.H.D. Winder, “Precedent in Equity” (1941) 57 L.Q. Rev. 245 at 247.

¹⁹ See *Durour v. Ferraro* in F. Hargrave, *Juridical Arguments and Collections*, vol. 2 (London, 1799) at 307.

²⁰ *Ibid.* at 310-11.

²¹ See D.R. Klinck, “Lord Eldon on ‘Equity’” (1999) 20 J. Legal Hist. 51.

Division is “not ... a Court of Conscience, but a Court of Law.”²² This assertion, however unequivocal, appears hardly to have been, or at least remained, definitive.

Justice McLachlin’s invocation of conscience as the (or, certainly, a) key to equity is, therefore, not without precedent and—Sir George Jessel’s dictum notwithstanding—it is far from aberrant in the late twentieth century. Indeed lip service, at least, to “conscience” by judges exercising equitable jurisdiction is quite commonplace, and probably becoming more so. So sustained an example as McLachlin J.’s in *Soulos* can only give it impetus.²³ At the same time, it must be said that the concept, as a criterion of judicial practice, is far from unproblematic for a number of reasons. One is that, while frequently invoked, “conscience” is seldom defined.²⁴ Another, which follows from the first, is that—as critics at least as far back as the author of *The Replication of a Serjeant at the Laws of England*, early in the sixteenth century, have complained—“divers men, divers conscience”.²⁵ That is to say, “conscience” as a concept may be viewed as being variable or even arbitrary. Thus, a recurrent difficulty is imparting to the notion of conscience the kind of objective character that might allow it to cohere with the desideratum of “stability” in the law—or, indeed, with the rule of law itself.²⁶

²² *Re National Funds Assurance Co.* (1878), 10 Ch.D. 118 at 128, Jessel M.R. See also *Re Telescriptor Syndicate*, [1903] 2 Ch. 174 at 195-96, Buckley J.

²³ Among recent cases quoting McLachlin J.’s observations on conscience are *Leclair v. Leclair Estate* (1998), 159 D.L.R. (4th) 638, [1998] 9 W.W.R. 182 (B.C. C.A.), Ryan J.A.; *Knight v. Huntington* (1999), 4 B.L.R. (3d) 95 (Sask. Q.B.); *Manderson v. Foster*, [2000] B.C.J. No. 1029 (S.C.), online: QL (BCJ); *Alvest Properties v. Roppelt* (1998), 236 A.R. 201, [1999] 6 W.W.R. 725 (Q.B.); *White Resource Management v. Durish* (1998), 230 A.R. 201 (Q.B.); *Gusto Estate v. Whyte* (1998), 125 Man. R. (2d) 108, [1998] 10 W.W.R. 405 (Q.B.); *Medhurst Hogg Sobotka Leong & Associates v. Mutual Gail* (1999), 104 O.T.C. 81 (Sup. Ct. J.); *Simon v. Simon* (1998), 80 O.T.C. 338 (Gen. Div.); *Holt v. Williamson* (1998), 55 O.T.C. 330, 21 E.T.R. (2d) 55 (Gen. Div.); *Canada Deposit Insurance Corp. v. Principal Savings and Trust Co.* (1998), 224 A.R. 331, [1999] 4 W.W.R. 188 (Q.B.); *Scottish & York Insurance Co. v. Co-operators General Insurance Co.* (1998), 56 O.T.C. 81, 3 C.C.L.I. (3d) 302 (Gen. Div.); *Sugarman v. Duca Community Credit Union* (1998), 38 O.R. (3d) 429, 56 O.T.C. 253 (Gen. Div.).

²⁴ Thus *e.g.* Carswell’s *Words and Phrases* mentions only two judicial efforts to define “conscience”, both of them in the context of the protection of “freedom of conscience” under the *Canadian Charter of Rights and Freedoms*, s. 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. See *Words and Phrases*, vol. 2, C (Scarborough, Ont.: Carswell, 1993) s.v. “conscience”. Neither “equity and good conscience” nor “good conscience” is listed in *Words and Phrases*.

²⁵ See J.A. Guy, ed., *Christopher St. German on Chancery and Statute* (London: Selden Society, 1985) at 101. For modern examples, see Deane J. in *Muschinski v. Dodds* (1985), 62 A.L.R. 429 at 452, 160 C.L.R. 583 (H.C.), referring to “the formless void of individual moral opinion”; P. Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 U.W.A. L. Rev. 1, characterizing “unconscionable” as “so unspecific that it simply conceals a private and intuitive evaluation” (*ibid.* at 17).

²⁶ See *e.g.* P. Birks, “Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment” (1999) 23 Melb. U.L. Rev. 1 [hereinafter “Equity, Conscience and Unjust Enrichment”]. Birks states

Related to this point about variability is the question of whose conscience is in issue. A third broad problem, again related to the first two, is that of the semantic slippage that the concept may have experienced over, say, five hundred years.²⁷ That is, the *word* has remained the same, but can we assume continuity of the underlying concept? Lord Nottingham may have used the expression “good conscience”;²⁸ so may McLachlin J., but does it mean the same thing to these two judges? From this the following question might arise: Does the concept of “conscience”, which, when it was originally worked out, might have had judicial cogency, still have that quality today? And, if it does, is it the same cogency, or must its cogency, as a judicial criterion, be understood in other ways?

My project in this article is to assess the status of “conscience” as a touchstone of equity in current Canadian judicial practice, with the above-mentioned problems or questions in mind, and at least implicitly querying what the concept adds to other notions conventionally associated with equity, such as “fairness”, “justice”, responsiveness to the particulars of the individual case, and so on. Because conscience came into equity so long ago (indeed, it may have preceded “equity”), and because some of my questions have to do with changed meanings,²⁹ I shall first try to convey some sense of how conscience, particularly in relation to equity, was conceived historically. I make no pretense to writing anything like a history of conscience; I shall simply look at a few fairly representative examples, mainly from the transitional—and seminal—period of the sixteenth and seventeenth centuries, to suggest the context of early chancellors’ understanding of their jurisdiction as implicating “conscience”. I shall then consider a number of aspects of the current invocation of the concept by Canadian courts exercising equitable jurisdiction. What I expect to conclude is that, though frequent, these invocations are perfunctory, almost completely failing to acknowledge the problematics of “conscience”, and displaying virtually no historical consciousness. This leaves the question why, if the courts are so little disposed to examine the implications of the concept, they are nevertheless so ready to mention it, and even to proclaim its centrality. Answers to such questions tend to be conjectural: by way of conclusion, I shall offer a few conjectures of my own.

that “conscience of the intuitive kind is ... antithetical to the rule of law” (*ibid.* at 22). Even Halliwell, *supra* note 10 at 5, an enthusiastic proponent of conscience, seems to endorse Roscoe Pound’s characterization of it as an “anti-legal element”.

²⁷ See generally C.S. Lewis, “Conscience and Conscious” in *Studies in Words*, 2d ed. (Cambridge: Cambridge University Press, 1967) 181.

²⁸ As e.g. in *Hinckly v. Hinckly* in *Chancery Cases Vol. 1*, *supra* note 13, 75 at 75.

²⁹ It is worth recalling here Bertrand Russell’s observation that “ordinary language is shot through with the fading hues of past philosophic theories.” See B. Russell, *Wisdom of the West* (London: Macdonald, 1959) at 309.

I. Conscience and Early Equity

A.W.B. Simpson gives a sketch of “conscience” in the fifteenth-century Court of Chancery,³³ which is worth summarizing here, partly to remind ourselves of how remote from our own conceptions that “court of conscience” was, and partly to set the stage for later developments. Like others, he first observes that “conscience” was “the primary principle of decision” in the court at that time and into the early sixteenth century, and that, in the cases, “argument is directed to deciding what conscience requires.”³⁴ So far, this is unremarkable: it is what we all already know.

But Simpson goes on to describe more particularly what this focus of inquiry entailed—and here its peculiarity becomes striking:

For to a fifteenth-century ecclesiastic, sitting as a judge of conscience, in a court of conscience, to apply the law of conscience “for the love of God and in way of charity”, “conscience” did not connote, though it included, some principle of injurious reliance or good faith. It connoted what we now call the moral law as it applied to particular individuals for the avoidance of peril to the soul through mortal sin.³²

Simpson here is explicitly questioning another commentator’s impulse to explain in familiar terms to modern readers what the medieval chancellors had in mind. But what the chancellors “really” had in mind was the—to us—“most curious conception” that “the function of their adjudications” was the good of the souls of the *respondents* who came before them. Thus, Simpson offers the example of the chancellor—Archbishop Morton—who in 1491 gave as one of the grounds of his granting a remedy that, unless the respondent made amends, “he [would] be damned in Hell, and to grant a remedy in such a case, as I understand it, is to do well in accordance with conscience.”³⁴ Further, Simpson observes that the chancellor’s comment implicitly rebuffs the suggestion of Fineux C.J. “that the matter was one simply between a man and his confessor”: “the Chancellor’s point is that he is *in foro conscientie*; he proceeds upon the same principles as a confessor.”³⁵ One seventeenth-century judge summarized the situation by saying that “until the time of Henry the Eighth clergymen sat in Chancery; who [had] power over men’s consciences ...”³⁶ Indeed, as late as

³³ A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975), especially at 396ff.

³¹ *Ibid.* at 397.

³² *Ibid.* at 398 [emphasis in original]. See also T.S. Haskett, “The Medieval Court of Chancery” (1996) 14 L. & Hist. Rev. 245 at 275.

³³ G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1 (Buffalo, N.Y.: William S. Hein & Company, 1981) at 410-11.

³⁴ *Supra* note 30 at 399, citing Year Book 7 Hen. VII P.f. 10, pl. 2.

³⁵ Simpson, *ibid.* [emphasis in original].

³⁶ *Jones v. Morley* (1698), 88 E.R. 1234 at 1236.

1614, we can see a court expressing the view that, because corporations “have no conscience nor soule”, “no subpoena lieth against them.”³⁷

On this view, the concern of the Court of Chancery was unabashedly the “spiritual health” of the respondent and the inquiry into conscience was analogous to that of the confessional. In this latter process, the experts on conscience—whose requirements could ostensibly be “objectively established”³⁸—were the priest/confessors, who as a later Protestant writer complained, were in Catholic teaching “*judges of the Cases of conscience*, hauing in their owne hands a *judicarie power* and *authoritie ...*”³⁹ This characterization may be an oversimplification, but it captures a tendency and its imagery suggests the relevance of the picture to the ecclesiastical chancellors, who might be regarded as the custodians of knowledge about conscience and authorities on the subject of its exercise. Consonant with this notion of authoritative assessment of matters of conscience was the proliferation, in the fifteenth century, of manuals of casuistry—the *summa de casibus conscientiae*—to which, Simpson speculates, the chancellors would not have been averse to turning for “guidance in deciding cases in accordance with conscience.”⁴⁰

This account may be contestable, but it is at least plausible. What it suggests is a picture of a “court of conscience” in which the focus was on the condition of the respondent’s soul, and in which this inquiry was carried out by persons regarded as having authoritative insight into such matters, or having access to authoritative sources of such insight. One might well wonder whether any modern judge invoking the traditional language of “conscience” has anything remotely like this picture in mind.

In the early sixteenth century, St. German offered a searching—and apparently destabilizing—analysis of conscience in relation to equity. In his *A Little Treatise Concerning Writs of Subpoena*, he responded to the charges of the author of *The Replication of a Serjeant at the Laws of England* that conscience was too protean a criterion for adjudication by saying it is wrong to suppose that the chancellor, “whiche is alwaies appoynted to his office by the kinge as a man of singular wysdom and good conscience” and “having so strayte rules to thorder of his conscience,” “wilbe disceyvede thourghe ... errours in conscience.”⁴¹ This, in itself, does not tell us much; it is consistent with the notion of the chancellor as possessor and authoritative dispenser of knowledge about conscience which we have just noticed. It implies that it is possi-

³⁷ *Tipling v. Pexall* (1614), 80 E.R. 1085 at 1085, Manwood C.B.

³⁸ See Haskett, *supra* note 32 at 272.

³⁹ T. Pickering, “Epistle Dedicatorie” in W. Perkins, *The Whole Treatise of the Cases of Conscience* (1606; Amsterdam: Theatrum Orbis Terrarum, 1972) 1 at 4 [emphasis in original].

⁴⁰ *Supra* note 30 at 401.

⁴¹ Guy, *supra* note 25 at 124.

ble to attain to more or less adequate understanding of conscience so that errors may be precluded. This language—the language of “error”—suggests that conscience may be right or wrong, which in turn suggests the existence of some objective criterion of rightness in matters of conscience. Earlier in the same work, St. German had intimated something of the nature of that criterion: “But the conscience that the Chauncellor is bounde to followe is that conscience which is groundede upon the lawe of God, and the lawe of *reason*, and upon the lawe of the realme not contrary to the saide lawes of God nor to ye lawe of reason.”⁴² So what makes the chancellor’s “conscience” better is not merely that he is possessed of “syngular wysdom”, but that it is grounded in the law of God, of reason, or of the realm.

St. German develops his theory of conscience, and of conscience in relation to equity, in *Doctor and Student*. I do not propose to look in detail at his elaboration of these issues; I merely want to highlight two things: first, his reiteration of the objectivity of the standard against which conscience judges, and second, his identification of that standard with “law”, including human laws. As did others before him, St. German distinguished conscience, strictly conceived, from the related idea of *synderesis*, which he describes as “a naturall power or motive force of the rational soule sette *always* in the hyghest parte therof mouynge and sterrynge it to good & abhorrynge euyll.”⁴³ Noteworthy here is that *synderesis* is the “motive force” that moves the soul towards good and away from evil. St. German adds that “some men” call *synderesis* “the law of reason for it mynystreth the pryncyple of the lawe of reason the whiche be in euery man by nature ...”⁴⁴ What distinguishes conscience per se, however, is that whereas *synderesis* is “concerned with the universal aspect of things to be done,” “conscience says and imports more appropriately knowledge with something else, that is to say, with some particular act.”⁴⁵ In other words, the distinctive function of conscience is to relate general precepts to particular situations.

In a similar vein, the seventeenth-century Protestant casuist William Ames observes that the operation of conscience is tripartite, or syllogistic: “That which doth dictate or giue the proposition is called *Synteresis*, by the Schoolmen *Synderesis*. The assumption especially and peculiarly is called *Syneidesis*, the conclusion is the *Krisis*, or Judgment.”⁴⁶ That is, *synderesis* tells us what the law is; *syneidesis* involves our

⁴² *Ibid.* at 123.

⁴³ *Supra* note 15 at 81 [emphasis in original]. St. German adopts the spelling “sinderesis”.

⁴⁴ *Ibid.* at 83.

⁴⁵ *Ibid.* at 87 [emphasis in original].

⁴⁶ W. Ames, *Conscience with the Power and Cases Thereof* (1639; Amsterdam: Theatrum Orbis Terrarum, 1975) at 4 [emphasis in original]. E. Rose, *Cases of Conscience: Alternatives Open to Recusants and Puritans under Elizabeth I and James I* (Cambridge: Cambridge University Press, 1975) at 185ff. identifies Ames and his mentor, Perkins (see *supra* note 39), as among the most influential Puritan casuists of the period.

recognizing of our particular action or proposed action; and the “third act of Conscience”, the *krisis*, is an act “whereby a man applyeth unto himselfe the Law of God, which concerneth either his Action or Condition.”⁴⁷

What I want to emphasize about this account is that conscience, to the sixteenth- and seventeenth-century mind, was not simply an act of subjective moral judgment whose “sincerity” vindicated the individual actor—as it tends to be for us in the twentieth century. Rather, a crucial appurtenant to conscience was *synderesis*—what moves and permits us to apprehend the *law*. Thus, there was such a thing (as we have seen already in our reference to St. German’s *Little Treatise*) as an *erroneous conscience*—a person following his or her own conscience might nevertheless, objectively, be doing wrong: “Sinne is sinne, and so remaineth notwithstanding any contrarie perswasion of the conscience.”⁴⁸ There was another side to this coin, however; the person doing the objectively right thing, but against his or her conscience, was committing another kind of wrong, because “conscience, though erroneous, binde alwaies so, that hee that doth against it, sinneth.”⁴⁹ This might seem harsh, but, given the two elements (law and individual judgment), it is theoretically coherent, and imparts some kind of sense to the application of “conscience” (particularly, “good”—as opposed to erroneous—conscience) as a criterion of legal judgment, irrespective of the subjective attitude of the actor. The question is whether our present age has a similar account that would justify our considering “conscience” as something more than the authentic moral sentiment⁵⁰ of the individual involved.

The other aspect of St. German’s treatment that I want to mention has to do with the source of the law which provides the major premise in the syllogism of conscience. In more than one place in *Doctor and Student*, we are told that “conscience must alway be groundyd vpon some lawe,”⁵¹ and, as we have already seen in the *Little Treatise*, the possibilities are three-fold: if conscience cannot be grounded upon the law of reason or the law of God or “the law of man”, “there is no grounde wherupon conscience ... may be groundyd.”⁵² St. German’s further analysis of the relationship between human law and the other two laws is interesting. He says, for example, that “conscience neuer resysteth the lawe of man nor addeth nothyng to it” except in three cases: first, “where the law of man is in it selfe dyrectely agaynst the law of rea-

⁴⁷ Ames, *ibid.* at 28.

⁴⁸ Perkins, *supra* note 39 at 47.

⁴⁹ Ames, *supra* note 46 at 11. Compare Perkins, *ibid.* at 47-48.

⁵⁰ See K. Thomas, “Cases of Conscience in Seventeenth-Century England” in J. Morrill, P. Slack & D. Woolf, eds., *Public Duty and Private Conscience in Seventeenth-Century England* (Oxford: Clarendon Press, 1993) 29 at 52.

⁵¹ *Supra* note 15 at 163. The same sentiment is expressed in slightly different terms in *ibid.* at 111, 133.

⁵² *Ibid.* at 163.

son or els the lawe of god”; second, “where the generall groundes of the law of man worketh in any pertyculer case agaynst the sayd lawes as it may do”; and third, “where there is no lawe of man prouyded for hym that hathe right to/a thinge by the lawe of reason or by the law of god.”⁵³ Of the first of these cases—where human law directly contravenes the law of reason or the law of God, then “properly it can not be called a law but a corrupcyon.”⁵⁴ So, strictly speaking, conscience either accords with the law or operates only to mitigate the generality of the law, or to fill in gaps.

A number of comments might be made about this. For one thing, conscience might be dictated by human law: “all lawes made by man whiche be not contrarye to the law of god must be obseruyd & Kerte *and that in conscyence*.”⁵⁵ Obedience to human law is concordant with conscience. Moreover, the operation of conscience is understood in relation to human law—it involves correcting and supplementing that law. This constitutes rather a shift of emphasis from the concern for the spiritual health of the respondent that we have seen, and that is an aspect of the “confessional” characterization of conscience. Thus, although St. German does continue to speak of conscience, and does envisage “absolute” criteria (law of reason, law of God) for its operation, the effect of his undertaking is a secularization of the concept and a recognition of its being more fully implicated in human law, as a modifying force.

One can identify a number of processes at work following upon or paralleling St. German’s initiative. One of these I have already intimated: as the editors of *Doctor and Student* observe, “It is St. German, as much as any single individual, who is responsible for the fact that today we have courts of equity rather than of conscience.”⁵⁶ Others, too, have remarked the shift from courts of conscience to courts of equity during the sixteenth century and after.⁵⁷ In Simpson’s view, the distinction is captured in Lord Ellesmere’s identification in *The Earl of Oxford’s Case*⁵⁸ of the two “offices” of the chancellor: “to correct men’s consciences for frauds” and “to soften and modify the extremity of the law.”⁵⁹ The first, Simpson says, is “Conscience”; the second, “Equity”. It is interesting, for example, that the well-known casuist William Perkins, in his *Epieikeia, or a Treatise of Christian Equity and Moderation* (1604) should scarcely mention conscience, but conceive equity almost exclusively in terms of the second of Lord Ellesmere’s categories: “The matter whereabout this public equity is

⁵³ *Ibid.* at 207-208.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 147 [emphasis added].

⁵⁶ *Ibid.* at xlvi. See also R. Janda, “Legal Architecture, Equity and Christopher St. German” in J.E.C. Brierley et al., eds, *Mélanges Paul-André Crépeau* (Cowansville, Qc.: Yvon Blais, 1997) 373.

⁵⁷ See Simpson, *supra* note 30 at 400; J.H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990) at 123.

⁵⁸ (1615) 1 Ch. Rep. 4.

⁵⁹ *Supra* note 30 at 400.

conversant is the right and convenient, and the moderate and discreet execution of the laws of men."⁶⁰ If it is true that "conscience" was being superseded by "equity" in this way in the sixteenth and seventeenth centuries, it is somewhat ironic that modern courts and commentators remain so ready to invoke the discourse of conscience.⁶¹ The matter is, of course, more complex. For one thing, in spite of Simpson's interpretation of Lord Ellesmere's words, they can be read as recognizing a dual jurisdiction in Chancery—that is, a jurisdiction based partly on conscience, and partly on "equity" in the sense of the moderation of the extremity of the law. Indeed, even today, equity evinces a preoccupation with "fraud" in one form or another—ostensibly a matter of "conscience".

Another process going on at this time is identified by Richard Janda, referring to St. German, as follows: "The Doctor thus recharacterizes *sinderesis* as the 'spark of reason'—*scintilla rationis* ... The significance of this recharacterization is that *sinderesis* is understood by the Doctor to connect each of us to God through our own faculties."⁶² As we have seen, the medieval ecclesiastical chancellor could be regarded as being authoritative on matters of conscience—something about which Protestant casuists complained. For them, conscience was a matter for the individual, not some external arbiter. Thus, Milton's God says that He "will place within them [human beings] as a guide / My Umpire *Conscience*, whom if they will hear, / Light after light well us'd they shall attain ..."⁶³ Camille Sights has observed that, while "Roman Catholic casuistry was designed to guide the clergy in the confessional," "Protestantism assumes that ultimately everyone is his own casuist and must think through every moral doubt for himself."⁶⁴ Although the theory was that the standard of rectitude was still objective (conscience is *God's* "umpire"; it "bindeth according as it is informed of the will of God"⁶⁵), there was a potential ambiguity in the idea that "God hath given

⁶⁰ I. Breward, ed., *The Work of William Perkins* (Abingdon, U.K.: Sutton Courtenay Press, 1970) at 484.

⁶¹ In addition to those works already noticed, see D. Otto, "A Barren Future? Equity's Conscience and Women's Inequality" (1992) 18 *Melb. U.L. Rev.* 808. Otto writes that "[e]quity appeals to the conscience of the wrongdoer in the name of morality and justice" (*ibid.* at 814). Interestingly, Halliwell, *supra* note 10, defines conscience at 2 in terms reminiscent of Lord Ellesmere's *second* "office": "A better definition of conscience has to be in relation to the mitigation of strict law ..."

⁶² Janda, *supra* note 56 at 404.

⁶³ J. Milton, "Paradise Lost: Book III" in H.C. Beeching, ed., *The Poetical Works of John Milton* (London: Oxford University Press, 1916) 227 at 232 [emphasis in original].

⁶⁴ C. Sights, *The Casuistical Tradition in Shakespeare, Donne, Herbert, and Milton* (Princeton, N.J.: Princeton University Press, 1981) at 35. For a discussion of Roman Catholic and Puritan casuistry, in the context of religious dissent, see Rose, *supra* note 46, c. 6, 11, respectively.

⁶⁵ See Ames, *supra* note 46 at 7.

to every particular man a proper Conscience to be as a God unto him ...”⁶⁶ That is, if there was a “Deity” in each person’s “bosom”,⁶⁷ the potential variability of conscience must have become much more insistently evident. Lowell Gallagher has described aspects of the process as follows:

The objective morality that had guided the first school of casuists—the “tutorists”—in their search for truth and for a single resolution of a case was covertly challenged by the gradual development of a subjective morality that led a later school of casuists—the “probabilists”—in their search for verisimilitude and for multiple, probable resolutions ...⁶⁸

In their note on “conscience”, the editors of the *OED* describe an analogous process. They point out that, originally, the word was “a noun of condition”, but that “it came gradually to be thought of as an individual entity ... of which each man possessed *one*, and thus it took *a* and *plural*”: “So *my conscience, your conscience*, was understood to mean no longer our respective shares in the common quality *conscience*, but to be two distinct individual *consciences*, mine and yours.” In other words, we see here a process of subjectivization and relativization of “conscience”, which makes its role as a criterion of judicial decision increasingly problematic. Hence, for example, John Selden’s famous observation that equity—understood in terms of conscience—is a “[r]oguish thing”.⁶⁹

Yet another process, probably deriving from the preceding, is what might be called the “bifurcation of conscience”—the increasing prominence of the dichotomy of public *versus* private conscience. We can imagine that, in the medieval period, there was a concept of “conscience” in which persons participated, or at least, there was a notion of conscience about which some category of persons were authorities. These notions support a unitary concept of conscience. However, this unitary conscience becomes pluralized: everybody now has his or her internal “umpire”. Given this process of fragmentation, the notion of conscience as a juridical standard becomes hardly tenable. So, if we are to use conscience in this way, we have to distinguish it from the private consciences of discrete individuals.

⁶⁶ R. Sanderson, *Several Cases of Conscience Discussed in Ten Lectures*, trans. R. Codrington (1660) at 36, quoted by Slights, *supra* note 64 at 20.

⁶⁷ W. Shakespeare, *The Tempest*, ed. by F. Kermode (London: Methuen and Co., 1954) at 2.1.273.

⁶⁸ L. Gallagher, *Medusa’s Gaze: Casuistry and Conscience in the Renaissance* (Stanford, Cal.: Stanford University Press, 1991) at 6-7. Rose, *supra* note 46, observes at 72 that these “schools”—together with another, “probabilism”—existed within Catholic casuistry. Thus, it was probably the “individualism” of dissenting Protestantism, rather than a “new theory”, that influenced the variedness of Protestant casuistry.

⁶⁹ F. Pollock, ed., *Table Talk of John Selden* (London: Selden Society, 1927) at 43.

Thus, for example, Yale notes that increasingly “[t]he Chancellor ... acquire[d] the status of keeper of the royal conscience”⁷⁰—as opposed to, say, the consciences of the parties or the personal conscience of the chancellor himself. Yale says that one of the earliest examples of the assertion of this point in generalized form occurs in Francis Bacon’s *Reading on the Statute of Uses* (1600), which quotes a dictum of Fenner J.: “[U]ses are ordered and guided by conscience, either by the private conscience of the feoffee, or the general conscience of the realm, which is Chancery.”⁷¹ Another example occurs in a letter of Sir Francis Moore to Bishop John Williams upon the latter’s accession to the office of lord keeper in 1621: he is taking upon himself “a power of jurisdiction according to Equity and Conscience ... But that Conscience is the King’s committed to the Chancellor and if the Chancellor shall in his own private Conscience be of another opinion than he is persuaded the King his master would be, he is to judge according to the King’s Conscience and not his own ...”⁷²

The point is insisted upon by Lord Nottingham, as we have seen, a seminal figure in the history of equity. We have already noticed that Lord Nottingham regularly engages in the discourse of conscience; he refers to his court as a “court of conscience”,⁷³ and he frequently invokes conscience in his decision making.⁷⁴ Sometimes, these invocations are reminiscent of the earlier concept—as when, for example, he in *Hickson v. Wytham*⁷⁵ says that legacies ought to be postponed to payment of debts because the latter “concern the soul of the defunct” and that to “abridge” the payment of

⁷⁰ “Introduction”, *supra* note 13 at xxxix. See also N. Underhill, *The Lord Chancellor* (Lavenham, U.K.: Lavenham Press, 1978) at 92-93.

⁷¹ J. Spedding, R.L. Ellis & D.D. Heath, eds., *The Works of Francis Bacon*, vol. 7 (London: 1872; reprinted New York: Garrett Press, 1968) at 401.

⁷² D.E.C. Yale, “Introduction” in D.E.C. Yale, ed., *Lord Nottingham’s “Manual of Chancery Practice” and “Prolegomena of Chancery and Equity”* (Holmes Beach, Fla.: Wm. W. Gaunt & Sons, 1986) 1 at 78 [hereinafter *Prolegomena of Chancery and Equity*]. The problematics of this position had been observed by Lord Ellesmere in his tract on “The Royall Prerogative” (1604): “[S]eeing the Conscience and discretion of euerie man as particular and priuate to himselfe, soe as the discretion of the Iudge Cannot properlie, or possiblie be the discretion or Conscience of the King,” “anie such subordinate [*i.e.* to the king] Iudge ... is bound to thinke that to be his sound discretion which the law (which is the Kings owne will) sheweth vnto him to be that Iustice which ought to be administered.” In other words, the conscience of the king is manifest in the law, which the judge is bound to apply, eschewing any resort to his own conscience or purporting otherwise to know the king’s conscience. See L.A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press, 1977) at 198.

⁷³ In addition to *Coke v. Bishop*, *supra* note 17, see *Burges v. Skinner* in *Chancery Cases Vol. 1*, *supra* note 13, 31; *Hatchett v. Bindon* in *Chancery Cases Vol. 2*, *supra* note 17, 565; *Moor v. Hinton* in *ibid.*, 619; *Clerk v. Perryer* in *ibid.*, 782.

⁷⁴ See *e.g.* *Nurse v. Yerworth* in *Chancery Cases Vol. 1*, *ibid.*, 70; *Bowyer v. Birds* in *ibid.*, 192; *Rosser v. Evans* in *ibid.*, 221; *Salsbury v. Bagott* in *Chancery Cases Vol. 2*, *ibid.*, 500.

⁷⁵ *Chancery Cases Vol. 1*, *ibid.*, 136.

debts “were to expound the testator’s will so as to die in mortal sin.”⁷⁶ And sometimes he seems to regard his own conscience as being at stake—as when, in *Lawrence v. Berney*,⁷⁷ he says, “I will never charge my conscience with promoting an apparent injustice.”⁷⁸

However, he does emphasize the distinction between private and public conscience. In *Honywood v. Bennett*,⁷⁹ he says that he has “nothing to do” with that which binds a person “in honour and private conscience”; his concern is with “legal and regular equity”.⁸⁰ And in *Butler v. Harrison*,⁸¹ he says of a doubtful second marriage, “Let the plaintiff consider that between God and his conscience ... my business is to see to a just performance of agreements.”⁸² In more than one place, he explicitly elaborates on the distinction. Thus, in the *Prolegomena of Chancery and Equity*, he observes that some cases are only to be considered “between a man and his confessor”:

And God forbid, a man should use no better conscience than the Chancery can compell him, however the rule must always hold, that 'tis not fit for a court of equity to do everything that is fit to be done; for there is a twofold conscience, viz. *Conscientia politica et civilis, et conscientia naturalis et interna*. Many things are against inward and natural conscience, which cannot be reformed by the regular and political administration of equity: for if equity be tied to no rule, all other laws are dissolved, and everything becomes arbitrary.⁸³

Several things are worth noting here. One is the explicit distinction between the internal and the political conscience. Another is that the internal conscience apparently imposes higher standards than the political conscience. Yet another is that trusting to the internal conscience would result in “arbitrariness”: this appears to recognize the variability that the individuated Protestant conscience seems to entail. Elsewhere, Lord Nottingham expresses similar sentiments. In *Cook v. Fountain*,⁸⁴ he again insists that the “conscience” by which he must proceed is “*civilis et politica*, and tied to certain measures”; the court has “nothing to do” with “a conscience which is only *naturalis et interna*”: this is a matter “between a man and his confessor”; following it

⁷⁶ *Ibid.* at 137. See also *Foly v. Paston* in *Chancery Cases Vol. 2*, *supra* note 17, 792 at 792-93. Compare *Hide v. Seymor* in *ibid.*, 709.

⁷⁷ *Chancery Cases Vol. 2, ibid.*, 581.

⁷⁸ *Ibid.* at 584.

⁷⁹ *Chancery Cases Vol. 1, supra* note 13, 214.

⁸⁰ *Ibid.* at 214.

⁸¹ *Chancery Cases Vol. 2, supra* note 17, 549.

⁸² *Ibid.* at 549-50. He does, however, appear to be affected by the fact that “some casuists” would hold the marriage lawful.

⁸³ *Supra* note 72 at 214.

⁸⁴ *Chancery Cases Vol. 1, supra* note 13, 362.

would mean that men might “lose their estates by the mere fancy and imagination of a chancellor.”⁸⁵

If all this sounds rather alien and esoteric, that is precisely the point. It seems to me highly unlikely that modern courts, when they invoke and purport to apply “conscience” as a “foundation of equity”, have in mind anything like “conscience” in many of the ways it was understood in the early development of equity. We inhabit a different conceptual universe.

What I have endeavoured to do, then, by way of setting the stage for looking at contemporary invocations of “conscience” by courts exercising equitable jurisdiction, is to indicate the complexity of the concept, some of the changes it underwent, and its early recognition as problematic as a standard of judgment. We can see the ostensible concern of the medieval Chancery with the state of respondents’ souls as justifying resort to “conscience”, and we can perhaps grasp the notion of “objective conscience” apprehended and applied by ecclesiastical authority, although the idea may seem oxymoronic to us.⁸⁶ We can see in the “Protestant” idea of conscience another account which portrays it as theoretically unified and objective: so, for example, Ames’s tripartite structure includes *synderesis*, that faculty which permits us to apprehend the “Law”. But this account, in its emphasis on personal introspection and individual moral accountability, contains within itself a tendency towards subjectivism and relativism. This appears to have been recognized by Lord Nottingham, who insists that the conscience which he, as a judge, is invoking cannot be this idiosyncratic, personal faculty, but must be something else. Arguably, the process of relativization of conscience has continued, so that Keith Thomas, comparing modern ideas about conscience with those of the seventeenth century, can say that we are today the inheritors of “the proto-Romantic belief in the authenticity of individual sentiment”,⁸⁷ and the editors of *Doctor and Student* can observe that “[c]onscience in modern times, at least in popular speech, is merely the subjective sense of right and wrong possessed by a particular individual ...”⁸⁸ If indeed the current meaning of conscience is something like “subjective moral intuition about particular situations”, we must ask whether contemporary courts are giving some more restricted or technical meaning to the word—for example, something akin to Lord Nottingham’s *conscientia publica et civilis*.

⁸⁵ *Ibid.* at 371.

⁸⁶ Thus, so eminent a legal historian as Baker can observe: “It is not certain how medieval chancellors arrived at their decisions, but the word ‘conscience’ has an ad hoc, subjective ring to it” (*supra* note 57 at 123).

⁸⁷ Thomas, *supra* note 50 at 52.

⁸⁸ *Supra* note 15 at xxvi. Birks makes this point emphatically when he associates “conscience” with “intuition” or even “gut reaction” (“Equity, Conscience and Unjust Enrichment”, *supra* note 26 at 23-25).

II. Conscience in Current Canadian Equity

As I have already intimated, it is far from unusual to find “conscience” linked with “equity” in recent Canadian judicial discourse.⁸⁷ But before exploring the significance of these allusions to “conscience” in the context of equity, I should make a few preliminary observations.

A. Some Preliminaries

1. “Conscience” Judicially Defined?

First, the word “conscience” is seldom explicitly defined or explained. Indeed, as we have noticed, *Words and Phrases Judicially Defined* is not particularly illuminating, offering only instances in the context of the *Charter*. In *MacKay v. Manitoba*,⁸⁹ Twaddle J.A. explains: “It is self-judgment on the moral quality of one’s conduct or the lack of it. Disapproval of the thoughts or conduct of another person is not a matter of conscience.”⁹¹ This is suggestive of the subjectivity of conscience to the contemporary mind; indeed, it is so subjective that it cannot be the basis of judging another’s “thoughts or conduct”. Similarly, the comments of Huband J.A. (dissenting) point to the relativity of “conscience”, almost identifying it with individual “sensitivities”.⁹² In *Gwynne v. Canada (Minister of Justice)*,⁹³ Goldie J.A. wrestles with the meaning and implications of “conscience”—again in a non-equity context. He observes of the “shock the conscience”⁹⁴ test applied in extradition cases that it “has a strong objective component as well as the apparent subjective element,”⁹⁵ and cites *R. v. Kindler*⁹⁶ for language such as La Forest J.’s “outrageous to the values of the Cana-

⁸⁹ At one point during the course of research for this article, I found the following in Quicklaw’s Canadian Judgments database: for the search “equity /4 conscience”, 175 occurrences; for “equity /5 conscience”, 194 occurrences; for “equity /6 conscience”, 205 occurrences; for “equity /8 conscience”, 220 occurrences.

⁹⁰ (1985), 39 Man. R. (2d) 274, 24 D.L.R. (4th) 587 (C.A.) [hereinafter *MacKay* cited to Man. R.]. Twaddle J.A. refers at 277 to *The Oxford English Dictionary*, which defines conscience as “the sense of right and wrong as regards things for which one is responsible; the faculty ... which pronounces upon the moral quality of one’s actions or motives, approving the right and condemning the wrong.” See *The Oxford English Dictionary*, 2d ed., s.v. “conscience”. See also text following note 68.

⁹¹ *MacKay*, *ibid.* at 277.

⁹² *Ibid.* at 278.

⁹³ (1998), 50 C.R.R. (2d) 250, 103 B.C.A.C. 1 (C.A.), leave to appeal to S.C.C. refused, [1998] 1 S.C.R. ix [hereinafter *Gwynne* cited to C.R.R.].

⁹⁴ *Ibid.* at 259.

⁹⁵ *Ibid.*

⁹⁶ [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438 [hereinafter *Kindler* cited to S.C.R.].

dian community”⁹⁷ and McLachlin J.’s “offends the Canadian sense of what is fair, right and just” and “shocking and fundamentally unacceptable to our society.”⁹⁸ Referring to the latter’s distinction between the “subjective views” of the judge and objective assessment of the attitudes of Canadians, Goldie J.A. concludes that although the case “presents circumstances subjectively abhorrent,” they were not sufficiently unconscionable, in the objective sense, to be contrary to the principles of fundamental justice.⁹⁹ In this view, then, objectivity is imparted to “conscience” by the attempt to assess some conventional “Canadian” attitude to the matter in issue.

American cases are rather more informative, offering a range of implications associated with the concept for the twentieth-century mind. Again, many of the attempts to define “conscience” occur in the context of “liberty of conscience” issues, so one might expect the emphasis to be different from the “equity and good conscience” context. In *Harden v. State*,¹⁰⁰ Tomlinson J. tells us that conscience is “that moral sense in man which dictates to him right and wrong”,¹⁰¹ in *Miller v. Miller*,¹⁰² Dean J., adopting the same definition, notes the variability of “conscience”: “this sense differs in degree in individual members of society,” although “no reasonable being ... is wholly destitute of it.”¹⁰³ Interestingly, some of the cases emphasize the distinction between conscience and “rational belief”. Thus, in *United States v. Badt*,¹⁰⁴ we are told that “a conviction ... arrived at solely on intellectual or rational grounds” is not the same as “the compelling voice of conscience”; conscience “confesses the inadequacy of intellect and transcends reason itself.”¹⁰⁵ And, in *United States v. Nordlof*,¹⁰⁶ Kiley Cir. J. insists, at some length, that “conscience is not the same as thinking”:

[T]he dictates of conscience are involuntary and compulsory and outside the control of the holder of the beliefs. We can perhaps control our thinking concerning whether and to what extent a moral duty exists prior to the operation of conscience on a moral issue. We can also control, when faced with the moral issue, whether or not to follow the dictates of conscience. But, as Kant points out, when a moral issue presents itself and demands action, “then conscience speaks involuntarily and inevitably.”¹⁰⁷

⁹⁷ *Ibid.* at 832.

⁹⁸ *Ibid.* at 850.

⁹⁹ *Gwynne*, *supra* note 93 at 260-61.

¹⁰⁰ 216 S.W.2d 708 (Tenn. 1948).

¹⁰¹ *Ibid.* at 711.

¹⁰² 41 A. 277 (Pa. 1898).

¹⁰³ *Ibid.* at 280.

¹⁰⁴ 53 F. Supp. 906 (D.N.Y. 1943), *Burke* D.J.

¹⁰⁵ *Ibid.* at 907.

¹⁰⁶ 440 F.2d 840 (7th Cir. 1971).

¹⁰⁷ *Ibid.* at 843-44.

Perhaps even more problematic is the following, from *People v. Stewart*:¹⁰³

Principle is the result of judgment, is tested by reason, definable by argument, and yields to the decision of an intelligent mind. Conscience springs from some internal source of self-knowledge which acknowledges no superior, bows to no authority, yields to no administration, and is governed by no law; it ignores reason, defies argument, and is unaccountable and irresponsible to all human tests and standards.¹⁰⁹

On this characterization, “conscience” appears, for one thing, to be quite distinct from the medieval concept, which emphasized the role of reason.¹¹⁰ Moreover, this new kind of conscience seems antithetical to law: it is not amenable to reason, argument, or any human tests or standards. Presumably, then, if “conscience” is to be a criterion of legal judgment, it must be understood in some other way.

Some American cases have, when considering the context of equity, suggested how to give more objective content to the notion. In *Brown v. Fidelity Union Trust Co.*,¹¹¹ Berry V.C. accepts Pomeroy’s account of “conscience, considered as a source of equity jurisdiction,” as “synonymous with ‘good faith.’”¹¹² Lamm P.J. in *Johnson v. United Rys. Co. of St. Louis*¹¹³ says that “‘conscience,’ as the term is used in equity, is not the mere caprice of the individual chancellor as if equity was measured out in each case by such varying measuring rod as ‘the length of the chancellor’s foot,’ but is administered by fixed principles.”¹¹⁴ In a similar vein, Loughran J., in *National City Bank of New York v. Gelfert*,¹¹⁵ observes that

[t]he “conscience” which is an element of the equitable jurisdiction is not the private opinion of an individual court, but is rather to be regarded “as a metaphorical term, designating the common standard of civil right and expediency

¹⁰³ 7 Cal. 140 (Cal. 1857). D.R. Price, “The Conscience of Judge and Jury: Statutory Unconscientiousness as a Mixed Question of Law and Fact” (1981) 54 Temple L.Q. 743, cites Karl Llewellyn at 752 for the observation that while the conscience of the court might be shocked “intellectually”, that of a juror would be shocked “viscerally”.

¹⁰⁹ *People v. Stewart*, *ibid.* at 143.

¹¹⁰ See e.g. the comment that “the Chancellor’s wisdom [was] not ‘singular’ in the sense of being arbitrary or idiosyncratic, but in the sense of being singularly thorough in its adherence to reason and to human law, insofar as it accords with reason” (G. Behrens, “An Early Tudor Debate on the Relation between Law and Equity” (1998) 19 J. Legal Hist. 143 at 151).

¹¹¹ 159 A. 809 (N.J. Ch. 1932).

¹¹² *Ibid.* at 809.

¹¹³ 127 S.W. 63 (Mo. 1910).

¹¹⁴ *Ibid.* at 71.

¹¹⁵ 29 N.E. 2d 449 (N.Y. 1940).

combined, based upon general principles and limited by established doctrines
... a judicial and not a personal conscience."¹¹⁶

Now, "conscience" is a *metaphorical* term, relating not so much to morality as to "civil right and *expediency* combined".

Another characterization of "conscience", this time by an Australian court, suggests that "judicial conscience" is both objective and relative. Observing that his court remains "a court of conscience", Young J. in *Lincoln Hunt Australia Pty v. Willesee*¹¹⁷ asserts that "[w]hat is unconscionable will depend to a great degree on the court's view as to what is acceptable to the community as decent and fair at the time and in the place where the decision is made."¹¹⁸ The criterion is objective insofar as it involves a "community standard"; it is nevertheless relative to "time" and "place".

A discussion paper prepared for the Victorian Law Commission,¹¹⁹ advocating the adoption of "unconscionability" as the core concept in contract law, again displays the ambiguity of the concept. Interestingly, the paper's authors choose conscience in preference to other notions such as "justice", "reasonableness", "fairness", and "good faith" because "these [other] concepts are less empirically grounded than is 'conscience' in communal knowledge."¹²⁰ They note that "[t]he derivation of the word suggests shared knowledge, and therefore not idiosyncratic speculation," and quote Rousseau for the proposition that virtue's principles are "graven on every heart".¹²¹ This is reminiscent of earlier understandings that we have noted. The authors then go on to describe "conscience" in more contemporary terms. It is, they say, "the common name for a psychological force which has observable effects in every human being,"¹²²—which suggests, almost, that it is something that can be studied and accounted for by the behavioural sciences. Moreover, they again comment on its relative nature: what is unconscionable "must necessarily be judged by reference both to the

¹¹⁶ *Ibid.* at 452, citing 1 *Pomeroy's Equity Jurisprudence* (4th ed.), s. 57. See also *Pierpont v. Fowle*, in terms reminiscent of Lord Nottingham: "Precedents are to govern 'conscience' in chancery as well as at common law. It is not conscience naturalis et interna, but civilis et politica" (Fed. Cas. No. 11, 152, 2 Woodb. & M. 23).

¹¹⁷ [1986] 4 N.S.L.W.R. 457 (N.S.W. S.C., Equity Div.).

¹¹⁸ *Ibid.* at 463. Compare Halliwell, *supra* note 10, observing at 9 that conscience is to be understood "in terms of society's current conception of justice and fairness." This seems to be something like Cardozo J.'s conception of conscience in equity too. See H.J. Powell, "'Cardozo's Foot': The Chancellor's Conscience and Constructive Trusts" (1993) 56 L. & Contemp. Probs. 7, stating at 22 that the relevant "signposts were, for Cardozo, the 'customary morality, the prevailing standard of right conduct, the *mores* of the time'" [emphasis in original].

¹¹⁹ Victorian Law Commission, *An Australian Contract Code: Discussion Paper No. 27* (Melbourne: Law Reform Commission of Australia, 1992).

¹²⁰ *Ibid.* at 8.

¹²¹ *Ibid.*

¹²² *Ibid.*

values of the wider community and to the accepted morality of the particular environment in which it occurs,” so that “[w]hat is conscionable in the stock market depends on different considerations from what may be conscionable in the supermarket.”¹²³ So, although “graven on every heart”, “conscience” is also what is agreed upon, conventionally, by the particular community in issue.¹²⁴

My purpose in citing these examples is not to present an exhaustive survey of definitions of “conscience”, but to indicate that the term has been understood in various ways—from some kind of non-rational internal impulse to measurable communal attitudes or conventions—and that its meaning is therefore not self-evident. We cannot simply assume, then, that the word will be unambiguous when it is invoked, without explanation, by the courts. It is a problematic notion.

2. Conscience and Unconscionability

A second preliminary observation has to do with the “doctrine of unconscionability”, which has an established and fairly heavily analyzed place in the law.¹²⁵ Although this doctrine has obvious affinities with conscience in equity in general and, indeed, is a specific instance of its application,¹²⁶ it has acquired a fairly specific meaning which is beyond the scope of any detailed consideration in this article. The distinction I wish to make, implicit in Finn’s distinguishing of “the unconscionability principle” from “the specific unconscionable dealings doctrine”,¹²⁷ has been captured by Beverley McLachlin, writing extrajudicially:

The word “unconscionability” arises continually in the study of equity, and it is one which potentially raises confusion over its generally descriptive versus its specific, technical use. On the one hand, Professor Hardingham ... suggests that “perhaps the overriding aim of all equitable principle is the prevention of unconscionable behaviour.” In this sense, unconscionability is not a term of art,

¹²³ *Ibid.* at 9.

¹²⁴ Significantly, the authors of the discussion paper take their quotations from a thesaurus of quotations, and although they cite examples of the “substantial literature on conscience”, they do not analyze this; nor do they acknowledge that conscience might mean different things to, say, Milton and Jung.

¹²⁵ See e.g. G.T. McLaughlin, “Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles” (1992) 14 *Loy. L.A. Int’l & Comp. L.J.* 439, pointing out at 440 that the amount of scholarly literature on unconscionability is “enormous”.

¹²⁶ See M. Sneddon, “Unconscionability in Australian Law: Development and Policy Issues” (1992) 14 *Loy. L.A. Int’l & Comp. L.J.* 545, stating at 563 that “[l]ike many other equitable doctrines, unconscionable dealing began as a general rule of conscience.”

¹²⁷ See text accompanying note 9.

but a term referring to the goals of equity ... The doctrine of unconscionability, however, is a specific form of equitable relief.¹²⁸

Here, my concern is with unconscionability (indeed, more particularly, with conscience) in the broad or general sense, as informing the basic approach of equity. Nevertheless, as a particular instance of the phenomenon I am exploring, "unconscionability" in the technical sense does involve themes that do concern me—for example, whether a defendant actually has to have a guilty conscience¹²⁹ (whatever that might be), and whether "conscience", as a criterion of judgment, is in some sense antithetical to "law".¹³⁰

3. Non-Chancery "Equity and Good Conscience"

A third preliminary observation is that many of the equity/conscience couplings occur in cases dealing with statutes that confer on courts or other decision makers the power to decide according to "equity and good conscience".¹³¹ These cases are not

¹²⁸ B. McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts* (Scarborough, Ont.: Carswell, 1993) 37 at 45. See also Sneddon, *supra* note 126 at 547; La Forest J. in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 405-406, 117 D.L.R. (4th) 161, distinguishing unconscionability from other concepts like fiduciary obligations, undue influence, and negligent misrepresentation; Mason J. in *Commercial Bank of Australia v. Amadio* (1983), 46 A.L.R. 402 at 412, 151 C.L.R. 447 (H.C.), noting that although a range of equitable doctrines are based on "good conscience", "relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage." S.M. Waddams, "Unconscionability in Contracts" (1976) 39 Mod. L. Rev. 369, argues at 369, n. 5, that applying "unconscionable" to "inequitable conduct in general" "deprives the word of specific meaning."

¹²⁹ See Sneddon, *ibid.* at 559, discussing conflicting views in cases such as *Collier v. Morlend Finance Corp. (Vic) Pty.*, [1989] A.S.C. 58 (N.S.W. C.A.); *Custom Credit Corp. v. Lupi* (1990), [1992] 1 V.R. 99 (S.C. (A.D.)).

¹³⁰ See Sneddon, arguing that "[a]n equitable doctrine based on conscience cannot and should not be reduced to a set of rigid rules, for to do so is to convert equity into law" (*ibid.* at 565). Recall Halliwell, *supra* note 10, characterizing at 5 "the role of conscience in the law" as "anti-legal".

¹³¹ See e.g. *The Division Courts Act*, R.S.O. 1927, c. 95, s. 55; *Small Claims Court Act*, R.S.O. 1980, c. 476, s. 57; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 78(3); *The Education Act*, R.S.S. 1978 (Supp.), c. E-0.1, s. 243(1). Among the cases dealing with these kinds of provisions are *Harris v. Carnegie*, [1933] O.R. 844 at 847, [1933] 4 D.L.R. 766 (C.A.); *Sereda v. Consolidated Fire and Casualty Insurance Co.*, [1934] O.R. 502 at 505, [1934] 3 D.L.R. 504 (C.A.) [hereinafter *Sereda* cited to O.R.]; *Smith v. Galin* (1956), 3 D.L.R. (2d) 302 at 305, [1956] O.W.N. 432 (C.A.) [hereinafter *Galín* cited to D.L.R.]; *Federal Discount Corporation v. St. Pierre and St. Pierre*, [1962] O.R. 310 at 326, 32 D.L.R. (2d) 86 (C.A.); *Nunez-de-Cela v. The May Co.* (1974), 1 O.R. (2d) 217 at 220 (C.A.); *Johanson v. Williamson* (1977), 18 O.R. (2d) 585 at 587, 22 C.P.C. 191 (Sm. Cl. Ct.) [hereinafter *Johanson* cited to O.R.]; *Brockman v. Sinclair* (1979), 26 O.R. (2d) 276 at 279 (Sm. Cl. Ct.) [hereinafter

representative of traditional judicial equity, and therefore are of only tangential relevance to the focus of this article. Nevertheless, they do provide some intimations of what courts are prepared to make of the collocation “equity and good conscience”. Notably, courts seem never to distinguish the two elements in the expression; “good conscience” appears not to be considered apart from “equity”. It is thus not clear what “conscience” is understood to add to the exercise of such jurisdiction. What we do find is “equity and good conscience” being taken to mandate “the advancement of justice”,¹³² to permit the court “to disregard technical defects which would defeat the justice of the claim,”¹³³ or to “prevail over legal niceties”.¹³⁴ In one case in which the Small Claims Court is described as a “Court of equity and ‘good conscience’”, the judge opines that “[p]erhaps ‘good conscience’ means only equity unfettered by the technicalities that have increasingly encumbered the rules of equity.”¹³⁵ Interestingly, it is the technicalities not so much of law, but of equity, that are tempered by “conscience” in this view. But this all still sounds rather like the “equity” (as opposed to “conscience”) to which Simpson, for example, refers: that which mitigates the rigidity of the law.¹³⁶ It seems to have little to do with examining the moral condition of the parties. Although there is some suggestion in some of these cases, or related cases, that “equity and good conscience” entail a kind of non-law alternative,¹³⁷ it appears to

Brockman]; *Xerox Canada v. Neary* (1984), 47 O.R. (2d) 776 at 788, 43 C.P.C. 274 (Prov. Ct.); *Canada (A.G.) v. Khimani* (1985), 50 O.R. (2d) 476, 8 O.A.C. 359 (H.C.J.); *Moore v. Canadian Newspaper Co.* (1989), 69 O.R. (2d) 262 at 264, 60 D.L.R. (4th) 113 (H.C.J.); *Teachers of Saskatchewan v. Blaine Lake School Division No. 57* (1996), 148 Sask. R. 124 at 133, 140 D.L.R. (4th) 287 (C.A.). See also J. Keough, “The Duty to Act with Equity and Good Conscience” (1998) 36 L. Soc. J. 59.

¹³² *Kingston v. Suventure International Travel*, [1989] O.J. No. 2674 at para. 2 (Sm. Cl. Ct.), online: QL (OJ).

¹³³ *Galín*, *supra* note 131 at 305, cited in *e.g. Suedfeld v. Lancia*, [1993] O.J. No. 1693 at para. 20 (Sm. Cl. Ct.), online: QL (OJ); *Pilato v. Traveller’s Insurance Co. of Canada*, [1986] O.J. No. 1427 (Sm. Cl. Ct.), online: QL (OJ).

¹³⁴ *Johanson*, *supra* note 131 at 587; *Brockman*, *supra* note 131 at 279.

¹³⁵ *Greek Parents’ Association of Toronto (Trustee of) v. Parents’ Association of the Greek Canadian School of Rexdale (The Elms) (Trustees of)*, [1989] O.J. No. 2658 at para. 9 (Sm. Cl. Ct.), *Caswell Prov. Ct. J.*, online: QL (OJ) [hereinafter *Greek Parents’ Association*].

¹³⁶ *Rotman*, *supra* note 4, seems at 157 to understand “conscience” in these terms: the Court of Chancery could “deal with matters based on large and liberal notions of fairness and justice, as opposed to the rigid taxonomy of the common law.” It is not clear, however, that there is necessarily a positive connection between, say, casuistry and flexibility, so that an approach based on “conscience” is inevitably to be associated with “liberality”.

¹³⁷ See *e.g. Food Services of America v. Pan Pacific Specialties* (1997), 32 B.C.L.R. (3d) 225 at 232 (S.C.), an arbitration case, in which a contrast is drawn between applying “the applicable law to the dispute” and deciding a dispute “in accordance with ‘equity and good conscience.’” Historically, this was at least sometimes the situation: see *e.g. Scott v. Bye* (1824), 130 E.R. 338, where Best C.J., discussing at 339 the Southwark Court of Requests (a “court of conscience”), says that “the judgment is to be according to equity and good conscience, that is such as plain men, ignorant of the rules of law, which the judges of that court must be, shall think just.”

be accepted that they can only supplement, not supplant, the “strict law”. So, in *Sereda*, Riddell J.A. says that

the fact that the Division Court is a Court of Equity and Good Conscience [does not] entitle the Judge ... to decide contrary to law—any more than that other Court of Equity and Good Conscience, the former Court of Chancery could, at least from Lord Eldon’s time, depart from its former decisions to do what might be considered the just thing in a particular case,¹³⁸

and Mackay J.A. in *Galín* says that being empowered to do what is “just and agreeable to equity and good conscience” “does not ... entitle the Judge to disregard the general principles of law.”¹³⁹ Thomson Prov. Ct. J., in *Mitchell v. Kovacs*,¹⁴⁰ makes a similar point—but rather more colourfully: “I appreciate,” he says, “that this court of all courts is a court of equity and good conscience.” But that does not entitle him “to holus-bolus create a cause of action and a remedy.”¹⁴¹

Such linkings of equity and conscience, even to the extent that they may indicate something about “Chancery equity”, are not particularly illuminating, at least in a positive sense. “Conscience” tends merely to be submerged in some general notion of equity as that which mitigates the strictness or the technicality of the law; it appears to have little independent vigour.

4. “Conscience” Repeated

A final preliminary observation is that many of the instances in which equity appears to be understood in terms of conscience are not “original”; that is, the same passages from precedent cases making the connection are repeated again and again, often with nothing new by way of explanation or analysis being added. Among the favourite passages for quotation are the following. First, various excerpts from Lord Mansfield’s judgments, for example, “The plaintiff can recover no more than he is in equity and good conscience entitled to.”¹⁴² Second, although not explicitly linking *equity* and conscience, are the words of Parke B. in *Kelly v. Solari*:¹⁴³ “[I]t is against conscience to

¹³⁸ *Sereda*, *supra* note 131 at 505-506.

¹³⁹ *Galín*, *supra* note 131 at 305.

¹⁴⁰ [1987] O.J. No. 342 (Prov. Ct.), online: QL (OJ).

¹⁴¹ *Ibid.*

¹⁴² *Dale v. Sollet* (1767), 4 Burr. 2133, 98 E.R. 112 [hereinafter *Dale*]. Cited *e.g.* in *Re Sutcliffe & Sons*, [1933] O.R. 120 at 126, [1933] 1 D.L.R. 562 (C.A.), Middleton J.A.; in *Victoria Steel Products v. Matassa Contractors* (1987), 25 C.L.R. 238 at 258 (Ont. H.C.J.), Sutherland J. In *Nepean Hydro Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347 at 366-67, 132 D.L.R. (3d) 193, Dickson J. (dissenting) quotes from *Bize v. Dickason* (1786), 1 T.R. 285, 99 E.R. 1097, to similar effect.

¹⁴³ (1841), 9 M. & W. 54, 152 E.R. 24 [hereinafter cited to M. & W.].

retain” money paid by mistake of fact.¹⁴⁴ Third, we have the words of Idington J. in *Bank of Montreal v. R.*:¹⁴⁵ “[P]rima facie it is against equity and good conscience that the party who received [money] should retain it.”¹⁴⁵ Yet another oft-quoted passage is that of Cardozo J. in *Beatty v. Guggenheim Exploration Co.*:¹⁴⁶ “A constructive trust is the formula through which the conscience of equity finds expression.”¹⁴⁶ A fifth involves the words of Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairne Lawson Combe Barbour*:¹⁴⁷ the doctrine of unjust enrichment is designed “to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep,”¹⁴⁷ which in Canada is often filtered through the judgment of Lambert J.A. in *Atlas Cabinets & Furniture v. National Trust Co.*,¹⁴⁸ in combination with other references to “equity and good conscience”.¹⁴⁸ Finally, there is this from the judgment of Dawson J. in *Hospital Products v. United States Surgical Corp.*,¹⁴⁹ referring to fiduciary relationships: “[I]nherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance on the other and requires the protection of eq-

¹⁴⁴ *Ibid.* at 58. Cited e.g. in *Shortoaks v. Mobil Oil Canada*, [1976] 2 S.C.R. 147 at 156-57, 55 D.L.R. (3d) 1, Martland J. [hereinafter *Shortoaks* cited to S.C.R.]; *Royal Bank of Canada v. LVG Auctions* (1983), 43 O.R. (2d) 582 at 588, 2 D.L.R. (4th) 95 (H.C.J.), Cromarty J.; *Sabena Belgian World Airlines v. Gulf Products Co.* (1992), 132 A.R. 227 at 232-33 (Q.B.), Deyell J.

¹⁴⁵ (1907), 38 S.C.R. 258.

¹⁴⁶ *Ibid.* at 280. Cited e.g. in *McLaughlin v. Mitchell*, [1949] O.R. 105 at 120, [1949] 1 D.L.R. 755 (C.A.), Hogg J.A. (dissenting in part); *Shortoaks*, *supra* note 144 at 159, Martland J.; *C.I.B.C. v. Clover White Honey Farm* (1986), 51 Sask. R. 18 at 21, [1986] 5 W.W.R. 678 (Q.B.), Walker J.; *Crown Trust Company v. Flynn* (1987), 76 N.B.R. (2d) 420 at 422, 25 E.T.R. 302 (C.A.), Ayles J.A.

¹⁴⁷ 122 N.E. 378 (N.Y. 1919) [hereinafter *Beatty*].

¹⁴⁸ *Ibid.* at 380. Powell, *supra* note 118, observes at 16 that this passage has been quoted in “dozens of later opinions” and speaks of the “canonization of Cardozo’s language”. This is frequently cited at second-hand. See e.g. A.W. Scott, *The Law of Trusts*, 3d ed. (Boston: Little and Brown, 1967); *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 at 455, 41 D.L.R. (3d) 367, Laskin J. (dissenting); *Spears v. Levy* (1975), 9 N.S.R. (2d) 340, 52 D.L.R. (3d) 146 (S.C. (A.D.)), MacKeigan C.J.N.S.; *Becker v. Pentkus* (1978), 20 O.R. (2d) 105 at 111-12, 87 D.L.R. (3d) 101 (C.A.), Wilson J.A.; *Cleveland v. Gillis Estate* (1986), 74 N.S.R. (2d) 406 at 411 (Co. Ct.), Plameter C.J.C.C.; *Joudrey v. Gavel’s Estate* (1988), 86 N.S.R. (2d) 159 at 166, 29 E.T.R. 233 (Co. Ct.), Freeman C.C.J.

¹⁴⁹ (1942), [1943] A.C. 32, [1942] 2 All E.R. 122 (H.L.) [hereinafter cited to A.C.].

¹⁵⁰ *Ibid.* at 61.

¹⁵¹ (1990), 68 D.L.R. (4th) 161, 45 B.C.L.R. (2d) 99 (C.A.) [hereinafter *Atlas Cabinets* cited to D.L.R.].

¹⁵² *Ibid.* at 172. See e.g. *Sampson v. Locations West Property Management* (1993), 82 B.C.L.R. (2d) 157 at 162-63 (C.A.), Rowles J.A. [hereinafter *Sampson*]; *Porta-Flex Products (P.E.I.) v. Bank of Montreal* (1993), 108 Nfld. & P.E.I.R. 221 at 230 (P.E.I. S.C.), DesRoches J. [hereinafter *Porta-Flex*]; *British Columbia v. National Bank of Canada* (1994), 119 D.L.R. (4th) 669 at 692, [1995] 2 W.W.R. 305 (B.C. C.A.), Hollinrake J.A. [hereinafter *National Bank* cited to D.L.R.].

¹⁵³ (1984), 55 A.L.R. 417, 156 C.L.R. 41 (H.C.) [hereinafter *Hospital Products* cited to A.L.R.].

uity acting upon the conscience of that other.”¹⁵⁴ Again, in Canada, this is almost never quoted directly, but rather is repeated from the opinion of Sopinka J. in *Lac Minerals v. International Corona Resources*.¹⁵⁵

A number of comments might be made about this phenomenon of reiteration—apart from the obvious one of judicial fondness for precedent. For one thing, it artificially inflates the number of equity/conscience linkings. A few such connections tend merely to be repeated, giving rise to the question whether each repetition can count as a deliberate reassertion or readoption. The frequency of the iterations tends to give these few instances a formulaic quality; they become a kind of unreflecting incantation.

A related point, to which I have already alluded, is that there seems to be virtually no new analysis when these formulae are repeated. This is particularly noticeable in an instance like the *Hospital Products* quotation, which appears with a kind of grim regularity. Generally, it is invoked for the “vulnerability” point, the “acting upon the conscience” point being repeated almost incidentally. Whether this indicates that it is uncontentious, or simply unimportant, is unclear. A rare instance of critical engagement with “conscience” as a criterion occurs in the judgment of Martland J. in *Shortoaks*; he cites Scrutton L.J. in *Holt v. Markham*,¹⁵⁶ criticizing Lord Mansfield’s language in *Sadler v. Evans* (“a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money”)¹⁵⁷ as giving rise to “a history of well-meaning sloppiness of thought.”¹⁵⁸

A further point is that these repetitions seem to appear with little sense of historical context. As we have seen, the original observations span a few centuries and a few continents: Lord Mansfield in eighteenth-century England, Baron Parke in nineteenth-century England, Idington J. in turn-of-the-century Canada, Cardozo J. in early-twentieth-century United States, Lord Wright in wartime England, Dawson J. in late-twentieth-century Australia. Does “conscience” have a constant meaning in all these contexts?¹⁵⁹ Perhaps it does, but I am skeptical. As we have seen, the concept probably underwent quite extensive and complex changes in the sixteenth and seventeenth centuries, and different courts have given it different meanings in the modern period. Thus, for example, discussing conscience around Lord Mansfield’s time, Lord Kames

¹⁵⁴ *Ibid.* at 488.

¹⁵⁵ [1989] 2 S.C.R. 574 at 599-600, 61 D.L.R. (4th) 14. I shall not attempt to list all the cases which quote Sopinka J. quoting Dawson J.; there are at least twenty-five in my list.

¹⁵⁶ [1923] 1 K.B. 504 (C.A.).

¹⁵⁷ (1766), 4 Burr. 1984 at 1986, 98 E.R. 32.

¹⁵⁸ *Shortoaks*, *supra* note 144 at 161.

¹⁵⁹ Powell, *supra* note 118, makes a similar point. He notes at 26-27 that Cardozo J. “assumed the existence of a [common] moral tradition,” but that “[w]e live in different world than the one Benjamin Cardozo believed lie inhabited.”

suggests that we have a common moral sense or kind of conscience: “The contrivance, simple and beautiful, is, to bind us by a law in our nature to regulate our conduct by the common sense of mankind, even in opposition to what otherwise would be our own sense or private conviction.”¹⁶⁰ Is it accepted today that a “law of nature” gives us a common sense of what is right and wrong?¹⁶¹ Or, to take another example: Idington J., whose assertion in *Bank of Montreal v. R.* is one that tends to get repeated, observed in another case that “[t]he answer was palpably untrue and should not have been made by any one having due regard to his own honour.”¹⁶² Admittedly, this seems to have little to do with conscience, but one could ask what concept of conscience might be held by someone whose judicial sensibility includes the notion of “honour”.

B. Speaking of Conscience

Having made these preliminary observations, I return to the question of what courts making the equity/conscience connection are ostensibly doing. I use the word “ostensibly” advisedly, for as I have already indicated, there is very little in the way of explicit elaboration of what “conscience” means in this context, however often it is referred to. Therefore, we must search for implicit meanings. In carrying out this search, I propose to adopt the following plan. First, I shall try to identify and assess aspects of contexts in which conscience is linked to equity, taking note of, first, what concepts conscience is coupled with, by way of looking for a kind of “definition by association”, second, adjectives attaching to “conscience”, and third, indications of what might be called the “dynamic” relation between equity and conscience. As we shall see, the cases yield at best a sketchy picture. Second, I shall examine at greater length two further questions, namely, Whose conscience is (apparently) at stake in the exercise of this jurisdiction? and, Are there any indicia of the *objectivity* of conscience as a judicial criterion? Third, with the context so developed in mind, I shall return to a closer consideration of *Soulos*, in an attempt to tease out whatever guidance it may give us about conscience as a standard for courts to follow.

1. Some Verbal Contexts

First, then, to some contextual indicators. The first sub-topic here is: What is conscience associated with in the relevant contexts? My suggestion is that we can get some sense of how conscience is understood by seeing what other concepts it is

¹⁶⁰ *Principles of Equity*, 2d ed. (Edinburgh, 1767) at 9.

¹⁶¹ Mason, *supra* note 5, suggests at 259 that the renewed emphasis on conscience is indicative of “a period of legal transition in which we have been moving from an era of strict law to one which gives greater emphasis to equity and natural law.” I am not sure how widely this view is accepted.

¹⁶² *Arnprior (Town of) v. United States Fidelity and Guaranty Co.* (1915), 51 S.C.R. 94 at 103, 21 D.L.R. 343.

linked to—perhaps an unusual application of the interpretive maxim *noscitur a sociis*. This process cuts many ways, of course; it may be as easy to infer that a distinction is intended when two things are mentioned together as to infer that they have something in common. Nevertheless, it is at least plausible that, in such instances, some similarity is being highlighted.

As I have already intimated in examples I have given, far and away the most common collocation is “equity and good conscience”.¹⁶³ Variants include “equity and conscience”,¹⁶⁴ “conscience and equity”,¹⁶⁵ and “equity and honest conscience”.¹⁶⁶ The question is whether the two terms in these expressions are simply related concepts or are meant as in some way synonymous. Answering this question is largely a matter of conjecture, since the cases give little guidance. Sometimes, the grammatical form of the collocation suggests a distinction. Thus, in *Brown v. Premier Trust Co.*,¹⁶⁷ McRuer C.J.H.C. says that “[n]either equity nor good conscience would permit [a particular] contention to prevail,”¹⁶⁸ and in *Guertin v. Royal Bank of Canada*,¹⁶⁹ Cromarty J. similarly writes, “I do not think that ... a court should either in equity or good conscience make a declaration.”¹⁷⁰ The “neither/nor” and “either/or” constructions suggest that the concepts are different; however, no further indication of *how* they differ appears. Indeed, it may be that they are being used synonymously or “exegetically”.¹⁷¹ Elsewhere, the two are treated as functioning to achieve essentially the same end. So, in *Hegeman*, Wright J. tells us that “conscience and equity ... temper the legal situation.”¹⁷² But this is rather vague; we are not told, for example, whether this tempering occurs in different ways, depending upon whether “conscience” or “equity” is doing it—say, in terms of the distinction that we have seen Simpson make between the operation of the two.

¹⁶³ The cases are too numerous to list.

¹⁶⁴ *Canadian Imperial Bank of Commerce v. Shaw*, [1985] B.C.J. No. 1441 (S.C.), Wetmore J., online: QL (BCJ) [hereinafter *Shaw*].

¹⁶⁵ *Hegeman v. Rogers*, [1971] 3 O.R. 600 at 612, 21 D.L.R. (3d) 272 (H.C.J.), Wright J. [hereinafter *Hegeman* cited to O.R.]; *Mabri Construction v. Thomas C. Assaly Corporation* (1974), 6 O.R. (2d) 178 at 179 (H.C.J.), Weatherston J., quoting Lord Mansfield in *Dale*, *supra* note 142; *Blanchard v. Bank of Montreal* (1989), 81 Sask. R. 49 at 51, [1990] 1 W.W.R. 682 (Q.B.), Batten J.

¹⁶⁶ *Carmichael Estate v. George Weston*, [1994] B.C.J. No. 461 at para. 29 (S.C.), Drossos J., online: QL (BCJ) [hereinafter *Carmichael Estate*].

¹⁶⁷ [1947] O.R. 50, [1947] 1 D.L.R. 593 (H.C.J.) [hereinafter *Brown* cited to O.R.].

¹⁶⁸ *Ibid.* at 71.

¹⁶⁹ (1983), 43 O.R. (2d) 363 (H.C.J.).

¹⁷⁰ *Ibid.* at 376.

¹⁷¹ See *Chichester Diocesan Fund & Board of Finance v. Simpson*, [1944] A.C. 341, [1944] 2 All E.R. 60 (H.L.), Lord Simonds.

¹⁷² *Supra* note 165 at 606.

Some cases do suggest that conscience is distinctive in its operations, however. In *Baskerville v. Thurgood*,¹⁷³ Cameron J.A. tells us that "the concept of 'fiduciary relation' originated in the courts of Equity—or conscience as they are sometimes called in view of the early ecclesiastical influences at work in the Court of Chancery and the rigorous standards of integrity the court thus insisted upon."¹⁷⁴ This implies that "conscience" was particularly concerned with "rigorous standards of integrity". But, shortly thereafter, Cameron J.A. goes on to speak of "taking personal advantage of another's confidence or trust" as "wholly offensive to Equity's standards of integrity."¹⁷⁵ So the standard that was particularly associated with "conscience" is now a feature of equity generally. As we have already noticed, in *Greek Parents' Association*, Caswell Prov. Ct. J. apparently distinguished "conscience" by suggesting that it was "equity unfettered by the technicalities that have increasingly encumbered the rules of equity." Again, this does not tell us a great deal, other than that "conscience" permits some kind of flexibility and informality, possibly unconnected with any notion of morality or integrity. Certainly, none of this amounts to a reasoned or coherent exposition of what the distinctive role of "conscience" is.

"Conscience" occurs with other related words in the cases. We find "justice and good conscience",¹⁷⁶ "justice, equity and good conscience",¹⁷⁷ "right, justice, equity and good conscience",¹⁷⁸ "conscience and fairness",¹⁷⁹ and "equity, conscience and reason".¹⁸⁰ Again, how close the connection is between these words is a matter of conjecture. As we have seen, while "reason" was inextricably involved with "conscience"¹⁸¹ for someone like St. German in the sixteenth century or Ames in the seventeenth, some American courts have made a point of sharply distinguishing these

¹⁷³ (1992), 100 Sask. R. 214, (*sub nom.* 582872 *Saskatchewan v. Thurgood*) 93 D.L.R. (4th) 694 (C.A.) [hereinafter cited to Sask. R.].

¹⁷⁴ *Ibid.* at 225.

¹⁷⁵ *Ibid.* at 227.

¹⁷⁶ See e.g. *O'Connor v. Carthew*, [1984] O.J. No. 332 at para. 22 (H.C.J.), Hollingsworth J., online: QL (OJ) [hereinafter *O'Connor*], citing Lord Denning in *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 at 1290, [1972] 3 All E.R. 744 (C.A.); *Biljanic v. Biljanic Estate* (1994), 4 E.T.R. (2d) 253 at 263 (B.C. S.C.) [hereinafter *Biljanic*].

¹⁷⁷ *Canada (A.G.) v. Zaprawa* (1987), 37 D.L.R. (4th) 556 at 559, 52 Alta. L.R. (2d) 235 (Q.B.), Master Quinn.

¹⁷⁸ *Re Victoria Park Community Homes and Buzza* (1975), 10 O.R. (2d) 251 at 256 (Co. Ct.), Stayshyn J.

¹⁷⁹ *Clark Drummie & Co. v. Ryan* (1997), 188 N.B.R. (2d) 91 at 105, 146 D.L.R. (4th) 311 (Q.B.), Turnbull J. [hereinafter *Clark Drummie* cited to N.B.R.].

¹⁸⁰ *Shaw*, *supra* note 164.

¹⁸¹ Thus, in *Doctor and Student*, the Doctor insists that, in order to explain conscience, he must first explain *synderesis* and reason (*supra* note 15 at 79ff.), and Ames says: "I call Conscience *Judgement*, First, to shew that it belongs to the Vnderstanding, not to the Will" (*supra* note 46 at 1).

two faculties. What Canadian courts have in mind in conjoining some of these concepts is difficult to divine.

Another point worth considering, if only briefly, is the adjectives that are associated with "conscience" in the context of equity. One encounters several of these. In *Soulos*, McLachlin J. quotes McClean, quoting Lord Mansfield, who uses the expression "safe conscience" in *Moses v. Macferlan*.¹⁸² This suggests fairly strongly the idea of a moral condition free from peril; the "conscience" here is very much that of the party and not, say, of the court. Perhaps something similar might be said of "honest conscience":¹⁸³ this appears to be an attribute of a party, although it lacks the connotation of "free from spiritual danger" that "safe" has. At the same time, there is some ambiguity here. For one thing, a person's conscience might be "honest" without necessarily being objectively "correct": is there any sense of this distinction in the use of the expression? Moreover, while on the one hand Drossos J. says that "the recipient could not in equity and honest conscience resist repayment," which suggests that it is the recipient's conscience that must be honest, on the other, he says that "there is no basis in equity or honest conscience to deny recovery to the respondent." Here it is less clear that the "honest conscience" is an attribute of the party; rather, it is the court which—by refusing to "deny recovery"—is acting on the basis of "honest conscience". Whether Drossos J. has any sense of the shift in emphasis is, I think, doubtful.

Overwhelmingly the most common adjective attached to conscience is "good", as I have already intimated in my reference to the frequency of the expression "equity and good conscience". At this point, I want merely to highlight the ambiguity of this expression. Lewis, for example, notes that a "good conscience" might be a *clear* conscience; that is, one which is not aware of having done anything wrong, or a *sound* conscience; that is, one which correctly discerns good and evil actions. But there is a further complication here; one might have, subjectively, a clear conscience, but may not have, objectively, a sound conscience. Thus, I might say that I am able, in "good conscience", to insist on the strict letter of a contract. However, on another view, my insistence might be "against equity and good conscience". In making this assessment, a court is not consulting my conscience; if it did, it would say that my conscience is not "good" in the sense of "sound"—or, in the old writers' terms, it would say that I have an erroneous conscience. In other words, in using the expression "in good conscience", the court is purporting to have insight into what right conduct would objec-

¹⁸² (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.). Another instance of this expression is Story J.'s *Commentaries on Equity Jurisprudence*, 2d ed., vol. 2 (Boston: Little and Brown, 1839) at para. 1255: "the true question is [...] whether [a party] can now, with a safe conscience, ex aequo et bono, retain it." This has been reproduced in some modern Canadian cases: see generally *Co-operators General Insurance Co. v. Porteous* (1986), 9 B.C.L.R. (2d) 179 at 187 (S.C.), Gow L.J.S.C.; *Zaidan Group v. London (City of)* (1987), 58 O.R. (2d) 667 at 669, 36 D.L.R. (4th) 443 (H.C.J.), Barr J.

¹⁸³ *Carmichael Estate*, *supra* note 166 at para. 29.

tively be. “Good conscience”, therefore, appears to be a non-subjective concept—perhaps contrasting with simple “conscience”, which might suggest the subjective concept. That is, if I act according to conscience, I am doing what I think or feel is right; if I act according to good conscience, I am doing what *is* right. Again, the courts do not explain themselves in this way; they simply repeat the formula. But this is my sense of what they are getting at. If it is, it suggests an unarticulated judicial retention of a notion of non-subjective conscience. I shall return to this topic a little later.

The third contextual point that I wish to consider is what I have called the “dynamic relationship” between equity and conscience. We have noticed many examples of their passive concurrence (“in equity and good conscience”) and a few of their concurrent activity (“temper the legal situation by conscience and equity”). But, apart from these coordinate functions, equity and conscience are sometimes described as interacting, or acting upon each other, in some way. Thus, for some judges, equity *possesses* a conscience.¹⁸⁴ Holland J. in *Cherry Processing & Packaging Equipment v. Chrysler Canada*¹⁸⁵ tells us that, if something is inconsistent with conscience, this will cause things to happen in equity.¹⁸⁵ In *Anderson v. Anderson*,¹⁸⁷ we are told that “justice and equity” “stem ... from conscience”,¹⁸⁵ and in *Classic Communications v. Lascar*¹⁸⁷ that “equity stands ready to strike or defend as and when conscience commands.”¹⁸⁷ Thus, “Nothing can call forth this court into activity but [among other things] conscience ...; where these are wanting, the Court is passive, and does nothing.”¹⁸⁷ Such images suggest that conscience is the moving force in equity. On the other hand, sometimes the tables are turned: equity is active in relation to conscience. In *Robichaud v. Robichaud*,¹⁹² Logan J. says that “equity demands conscience ... in the prosecution of a claim,”¹⁹³ and in *Palachik v. Kiss*,¹⁹⁴ Wilson J. says, “Equity fastens on the conscience of the appellant.”¹⁹⁵ Conscience sometimes affects, but is sometimes affected by, equity.

¹⁸⁴ See Cardozo J.’s “the conscience of equity”, quoted in *e.g. O’Connor, supra* note 176 at para. 20; *Biljanic, supra* note 176 at 263.

¹⁸⁵ (1982), 18 B.L.R. 285 (Ont. H.C.J.).

¹⁸⁶ *Ibid.* at 325, quoting *Roblin v. Jackson* (1901), 13 Man. R. 328 at 340 (Co. C.A.).

¹⁸⁷ [1990] B.C.J. No. 705 (Co. Ct.), online: QL (BCJ).

¹⁸⁸ *Ibid.*

¹⁸⁹ (1985), 51 O.R. (2d) 769, 21 D.L.R. (4th) 579 (H.C.J.), Pennell J. [hereinafter cited to O.R.].

¹⁹⁰ *Ibid.* at 777.

¹⁹¹ *Brown, supra* note 167 at 69, quoting Lord Camden in *Smith v. Clay* (1767), 3 Bro. C.C. 647, 29 E.R. 743.

¹⁹² (1991), 120 N.B.R. (2d) 257, 34 R.F.L. (3d) 461 (Q.B.) [hereinafter cited to N.B.R.].

¹⁹³ *Ibid.* at 271.

¹⁹⁴ [1983] 1 S.C.R. 623, 146 D.L.R. (3d) 385 [hereinafter *Palachik* cited to S.C.R.].

¹⁹⁵ *Ibid.* at 635.

As I have already intimated, observations arising from these instances of courts' invocation of "conscience" are tentative at best. It is not clear, for example, whether, or to what extent, "conscience" is synonymous with "equity", "justice", "fairness", or "reason". Nor have the courts explained to us what they mean by "good conscience", although this apparently implies some kind of adherence to objective rectitude. And sometimes, though not consistently, conscience is portrayed as that which moves equity to act. The picture is suggestive, but fragmentary.

2. Whose Conscience?

This brings us to the two distinct but related questions that I set out earlier: Whose conscience do the courts have in mind? and, How do courts impart objectivity to the notion of conscience as a standard of judgment? We will recall that, in the medieval Court of Chancery, the focus was very much on the spiritual condition of (usually) the defendant, although it applied objective criteria (based on accepted moral precepts, applied by chancellors having spiritual authority) to that assessment. Later, it appears, the variability of "conscience"—despite theoretical refutations—became a more nagging issue, and one response was a shift in emphasis to "the conscience of the king", as a way of creating at least the impression of objectivity. The ambiguity of the locus of conscience persists today, albeit inexplicitly, and it still relates to the question of whether "conscience" can provide anything other than a subjective moral standard.

First, then, to the question, Whose conscience?¹⁹⁶ The courts are not consistent in their response to this question. Nor do they appear very conscious of it as an issue—they simply assert or imply one locus or another without recognizing it as problematic.

Most frequently, courts are simply vague about whose conscience they are referring to: "conscience" is treated almost as an attribute without a possessor. Thus, we encounter assertions like "[T]he Court ... acting in equity and good conscience, enjoins a person from perpetrating a fraud,"¹⁹⁷ or "This is not a situation where equity and good conscience demand that the province not be permitted to retain these monies."¹⁹⁸ Sometimes the context implies that it is the conscience of a party that is in issue—as, for example, when we are told that someone has undertaken an obligation and "equity [will hold] him in conscience to that obligation,"¹⁹⁹ or when the conduct of

¹⁹⁶ Powell, *supra* note 118 at 19, has observed the ambiguity of the answer to this question in some of Cardozo J.'s statements.

¹⁹⁷ *Nicholson v. Riach* (1997), 34 B.C.L.R. (3d) 381 at 388, 11 R.P.R. (3d) 69 (S.C.), Burnyeat J., quoting Davie C.J. in *Hudson's Bay Co. v. Kearns* (1896), 4 B.C.R. 536 (S.C.).

¹⁹⁸ *Air Canada v. R.* (1984), 52 B.C.L.R. 262 at 268 (S.C.), Macdonald J.

¹⁹⁹ *Terra Energy v. Kilborn Engineering Alberta* (1997), 198 A.R. 241 at 279 (Q.B.), Cairns J., citing A.J. Black, "Joint Ventures, Partnerships and Fiduciary Duties: *United Dominions Corporation v. Bryan Pty.*" (1986) 15 Melb. U.L. Rev. 708 at 725.

a party is seen as refuting a claim that the retention of funds is “against equity and good conscience”.²⁰⁰ However, even in these cases, the attribution is at best tentative, perhaps betraying courts’ uncertain apprehension of the nature and implications of conscience in these settings.

Nevertheless, one does encounter instances in which conscience is more explicitly attributed to a particular entity. Some suggest that it is still a party’s conscience which is at stake, either in the sense that it is examined in determining liability, or in the sense that it is what is affected by the intervention of equity. Examples of the former occur in *Hodgkinson v. Simms*²⁰¹ (“The object of [equitable] discovery is to ascertain the state not merely of the party’s consciousness, but of his conscience”²⁰²); in *Metropolitan Stores of Canada v. Nova Construction Co.*²⁰³ (“If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction [why should equity disrupt the transaction?]”²⁰⁴); and in *CC Chemicals v. Sternson Ltd.*²⁰⁵ (in deciding to issue an injunction, “[T]he English Court has regard to the personal attitude of the person who has obtained the foreign judgment”),²⁰⁶ as well as in a number of cases making the point that notice binds the conscience of a purchaser, successor in title, etc.²⁰⁷ Examples of the latter occur in *Re 771225 Ontario v. Bramco Holdings Co.* (“Equity acts on the conscience”);²⁰⁸ in the oft-quoted passage from *Hospital Products* (“the protection of equity acting upon the conscience of that

²⁰⁰ *National Bank*, *supra* note 152 at 692.

²⁰¹ [1988] B.C.J. No. 1934 (S.C.), Gow J., online: QL (BCJ).

²⁰² *Ibid.*, quoting from *Lyell v. Kennedy (No. 2)* (1884), 27 Ch.D. 1.

²⁰³ (1987), 76 N.S.R. (2d) 130 (S.C. (T.D.)), Hallett J. [hereinafter *Metropolitan Stores*].

²⁰⁴ *Ibid.* at 148, quoting Russell L.J. in *Riverlate Properties v. Paul* (1974), [1975] 1 Ch. 133 at 140, [1974] 2 All E.R. 656 (C.A.) [hereinafter *Riverlate* cited to Ch.]. See also *Alcan Auto Parts v. Parkland Farm Power & Equipment*, [1990] B.C.J. No. 1028 (S.C.), online: QL (BCJ) [hereinafter *Alcan Auto*]; *Cadbury Schweppes v. FBI Foods*, [1999] 1 S.C.R. 142 at 171, 167 D.L.R. (4th) 577.

²⁰⁵ [1981] 1 F.C. 541, 116 D.L.R. (3d) 239 (T.D.), Cattnach J. [hereinafter cited to F.C.].

²⁰⁶ *Ibid.* at 563, quoting Atkin L.J. in *Ellerman Lines v. Read*, [1928] 2 K.B. 144 (C.A.). See also *Winslow v. Richter* (1989), 61 D.L.R. (4th) 549 at 558 (B.C. S.C.), Wood J., citing *Consul Development Pty. v. D.P.C. Estates Pty.* (1975), 5 A.L.R. 231, 132 C.L.R. 373 (H.C.), for “equity’s concern for the conscience of the defendant”; Wetmore L.J.S.C. in *Holmes v. Margolese* (1983), 27 R.P.R. 158 at 163 (B.C. S.C.): “Actions in equity are founded to some extent on conscience. Here there is no blemish on the conscience of the defendant.”

²⁰⁷ See *Morse v. Kizer* (1919), 59 S.C.R. 1 at 8, 46 D.L.R. 607; *Goodman v. Freeborn*, [1967] 1 O.R. 454 at 471, 61 D.L.R. (2d) 200 (H.C.J.); *Re Bouris and Button* (1976), 9 O.R. (2d) 305 at 313, 60 D.L.R. (3d) 233 (H.C.J.); *Law-Woman Management Corp. v. Regional Municipality of Peel* (1991), 2 O.R. (3d) 567 at 583, 17 R.P.R. (2d) 62 (Gen. Div.); *Harris v. McNely* (2000), 47 O.R. (3d) 161 at 167, 130 O.A.C. 282 (C.A.).

²⁰⁸ (1994), 17 O.R. (3d) 571 at 576, 36 R.P.R. (2d) 295 (Gen. Div.), Feldman J., quoting *Gibbon v. Mitchell*, [1990] 1 W.L.R. 1304, [1990] 3 All E.R. 338 (Ch.D.).

other”);²⁰⁹ in *Palachik* (“Equity fastens on the conscience of the appellant”);²¹⁰ in *Anderson, Smyth & Kelly Customs Brokers v. World Wide Customs Brokers* (“equity will intervene ... by acting on the conscience of the fiduciary”);²¹¹ and *Rideout v. Kinney* (“The basis of the doctrine of a secret trust is the obligation imposed on the conscience of the primary donee”).²¹²

Again, these examples demonstrate the persistence of the tendency to speak about a party’s conscience, some of them using language suggesting that this is a rather subjective exercise (Is the person’s conscience “clear”? What is the condition of that person’s conscience?). At the same time, there is something fictional about all this. I doubt whether, to adopt Lord Eldon’s expression, a court today ever really “ransacks” a party’s conscience.²¹³ Moreover, one wonders in what sense equity “acts upon the conscience”. Certainly, the courts do not attempt to awaken the sleeping conscience of a defendant, expecting that newly aroused faculty to persuade that person to mend his or her ways. The court simply orders the party to do something, or refrain from doing something, subject to an external sanction. It does not inquire into the internal moral condition of such a party. At most it might be said that the court orders the person to act in the way that it thinks a sound or properly instructed conscience would dictate.

In contrast to these cases are those in which conscience is an attribute of the decision maker, or the institution that the decision maker represents. Thus, we encounter references to “the conscience of the court”,²¹⁴ or to “equity’s conscience”²¹⁵ or “the conscience of equity”.²¹⁶ A number of comments might be made about these usages. First, they are figurative expressions: “equity” is an abstract concept, which cannot literally have a conscience; in these usages it is personified. The same might be said of “the court” which, though consisting of persons, is itself a conscienceless institution.

²⁰⁹ *Supra* notes 153, 154.

²¹⁰ *Supra* notes 194, 195. See also *Hollett v. Hollett* (1993), 106 Nfld. & P.E.I.R. 217, 50 E.T.R. 22 (Nfld. S.C. (T.D.)), Green J.

²¹¹ [1996] 7 W.W.R. 736 at 743, 39 Alta. L.R. (3d) 411 (C.A.).

²¹² (1992), 125 N.B.R. (2d) 124 at 139 (Q.B.).

²¹³ *Ex parte Greenway* (1802), 31 E.R. 1321 at 1322.

²¹⁴ *Chan v. Hayward* (1983), 44 B.C.L.R. 251 at 256 (S.C.) [hereinafter *Chan*].

²¹⁵ *Hogar Estates Limited in Trust v. Shebron Holdings* (1979), 25 O.R. (2d) 543 at 562, 101 D.L.R. (3d) 509 (H.C.J.); *Can-Dive Services v. Pacific Coast Energy Corp.* (1995), 21 C.L.R. (2d) 39 at para. 123 (B.C. S.C.) [hereinafter *Can-Dive Services*].

²¹⁶ See *Beatty*, *supra* note 147 at 386, and the Canadian cases which quote Cardozo J.’s words, *supra* note 148. See also *Westcoast Savings Credit Union v. McCallum*, [1985] B.C.J. No. 211 at para. 16 (Co. Ct.), online: QL (BCJ), quoting from *Graham v. Voth Bros. Construction* (1974), [1982] 6 W.W.R. 365, 39 B.C.L.R. 305 (Co. Ct.); *Hunt v. T & N plc*, [1990] 3 W.W.R. 474 at 480, 43 B.C.L.R. (2d) 138 (S.C.). Apparently what happens in some of these cases is that the “conscience of equity” is “shocked”: see e.g. *Bryden v. Hawkins*, [1949] O.R. 393, [1949] 3 D.L.R. 252, McRuer C.J.H.C.; *Barrett v. Krebs*, [1995] 3 W.W.R. 23, 27 Alta. L.R. (3d) 27 (Q.B.), Hunt J.

Bouck J., explaining the meaning of the expression "the conscience of the court", says that it is "arbitrio boni viri (an award of a good man according to justice)."²¹⁷ Thus, it is the judge's conscience that is operating. Second, apart from the fact that these expressions are figurative, they reflect more accurately what is going on than do expressions suggesting that a party's conscience is being examined. The judge (representing the court or equity) is identifying and applying a standard generated by his or her sense of rectitude or appropriateness. Third, I wonder how "conscious" any of these usages are—in the sense of the judge asking him- or herself: "What are the implications of my saying that we are exploring the defendant's conscience, or binding it? What does it mean when I say that we are invoking the conscience of equity?" Rather, my impression is that these expressions tend to be repeated without much reflection.

3. Objectifying Conscience

This brings me to my next point: How do courts conceive conscience as an objective concept? This issue is in some measure, although not necessarily, implicated in what I have just been discussing; locating conscience in the litigants may tend to make it more subjective than locating it in, say, "equity". However, no judge whom I have encountered who has referred to a party's conscience has acknowledged that he or she was invoking a subjective notion; they have simply not explored the implications of what they say. One has the impression that judges invoking conscience consistently have in mind some kind of objective standard, but what that is is generally no more than hinted at.

Some formulations imply, in a general way, that the "conscience" referred to does not involve simply individual moral intuitions. The phenomenon to which I have referred of abstracting conscience from any identifiable possessor is an instance of this: it suggests that conscience has a kind of autonomy or detachment, that it exists in a separate world of qualities. When, for example, we encounter the assertion that "[i]t would not be consistent with equity and good conscience to permit the bargain to remain unimpeached,"²¹⁸ we have the impression that conscience is "out there"—removed from what any one person thinks is right. Another formulation having similar effect is the expression "principles of equity and good conscience";²¹⁹ this suggests, at least, that "conscience" consists of already-existing norms.

A useful starting point for an inquiry into how contemporary courts might conceive the objectivity of conscience is *Riverlate*—not, to be sure, a Canadian case, but

²¹⁷ *Chan*, *supra* note 214 at 256.

²¹⁸ *Black v. Wilcox* (1976), 12 O.R. (2d) 759 at 764, 70 D.L.R. (3d) 192 (C.A.).

²¹⁹ *Broadhurst & Ball v. American Home Assurance Co.* (1990), 1 O.R. (3d) 225 at 241, 76 D.L.R. (4th) 80 (C.A.); *Schmieder v. Singh*, (1996), 46 C.P.C. (3d) 84 at 91 (Ont. Gen. Div.).

cited in more than one Canadian case.²²⁰ As we have already seen, Russell L.J. says that “equity operates on conscience” and that a transaction should not be disrupted “if conscience is clear” at the time it is entered. Then he goes on:

If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to attitudes of much the greater part of ordinary mankind (not least the world of commerce), and would be venturing on the field of moral philosophy in which it would soon be in difficulties.²²¹

Russell L.J. seems here to be discounting a definition of conscience that would involve the strictest ethical rectitude; indeed, he explicitly cautions against “venturing on the field of moral philosophy.” Thus, in spite of references to “rigorous standards of integrity” that we have seen elsewhere, conscience in Russell L.J.’s sense appears to involve something considerably less exacting. This is, in a general way, reminiscent of what Lord Nottingham says: he suggests, as we have seen, that the exigencies of private conscience are much stricter than are those of public conscience, and he explicitly disclaims, in his judicial persona, being concerned with private conscience or morality. For Russell L.J., “conscience” seems to be almost as much a prudential as an ethical notion: What kind of conduct would the world of commerce generally accept?²²² The test, therefore, becomes something like “community standards of behaviour”—with which, of course, the law commonly enough is concerned and with which “conscience”, in any distinctive sense, has little enough to do.

Something like what Russell L.J. is getting at seems to be intended by the expression “sound commercial conscience” which one not uncommonly encounters—for example, in *Atlas Cabinets*.²²³ Sometimes the expression used is “commercial good conscience”, again in *Atlas Cabinets*, as well as *Porta-Flex*. In both these cases “want of commercial good conscience” is equated with “injustice”.²²⁴ Once again, it is not clear to what extent prudential, as opposed to ethical, notions are intended by these expressions, although at least one judge suggests that they are not merely pragmatic in import: “What makes good business sense does not necessarily equal sound commer-

²²⁰ See *Metropolitan Stores*, *supra* note 203 at 148–49; *Alcan Auto*, *supra* note 204.

²²¹ *Riverlate*, *supra* note 204 at 141.

²²² Compare Sneddon: “At the most general level, unconscionable conduct is conduct that offends the conscience of society, as determined by the courts” (*supra* note 126 at 562).

²²³ *Supra* note 151 at 172, quoted in *Sampson*, *supra* note 152 at 163; *Porta-Flex*, *supra* note 152 at 230; *Bratsch Holding v. Zen* (1996), 73 B.C.A.C. 244 (S.C.).

²²⁴ *Atlas Cabinets*, *ibid.* at 173; *Porta-Flex*, *ibid.* at 231.

cial conscience.”²²⁵ Professor Waters has suggested that the “general criterion” in many of these cases is “community standards of commercial morality” which are related to “the system’s sense of conscience”.²²⁶ “Conscience” tends to be identified with what will maintain the confidence of the players in the commercial system.

The cases contain other intimations of how “conscience” might be understood in its objective sense. Sometimes, “fairness” seems to be the test: in *Clark Drummie*, Turnbull J., noting that to allow a wife continuing enjoyment of her husband’s interest in the matrimonial home “would prick equity’s conscience”, goes on to do what he thinks is “fair” in the circumstances;²²⁷ and in his incarnation as Turnbull J.A. in *Royal Insurance Co. of Canada v. Coronation Insurance Co.*,²²⁸ he opines that the trial judge, in using “principles of equity and good conscience”, “applied the proper test of fairness.”²²⁹ Again, “fairness” strikes me as an ostensibly objective criterion, but I am not sure how much “conscience” adds to it. Fairness can be assessed without necessarily consulting the moral condition of the parties.

Another case in which the concept of conscience applied seems not to depend upon what might be regarded as distinctive about conscience is *Can-Dive Services*. There, Shaw J. observes that “[i]n general the ‘against conscience’ element” arises where a party knowingly takes advantage of another’s mistake. He goes on, however, to say that “the conscience of equity may be invoked where, although there was no actual knowledge of the mistake, circumstances were such that a reasonable person ... ought to have known of the mistake.”²³⁰ It is difficult to see why a person’s conscience should be engaged by what he or she did not know; the whole point is the personal state of the party. Shaw J., of course, is not talking about the party’s conscience, but about “the conscience of equity”. But one wonders, again, whether “conscience” adds anything here: do we talk about the “conscience” of tort law when we are considering the reasonable person standard in negligence?

What the foregoing tells us, I believe, is that when it comes to discerning courts’ invocation of the notion of “conscience” as a criterion in equity, we can at best “know in part and prophesy in part”. There is in the cases very little in the way of sustained

²²⁵ *Bramalea v. 620923 Ontario* (1992), 8 O.R. (3d) 151 at 164 (Gen. Div.), Klowak J.

²²⁶ D.W.M. Waters, Case Comment on *Lac Minerals v. International Corona Resources* (1990) 69 Can. Bar Rev. 455 at 469-71, quoted by Montgomery J. in *Ontex Resources v. Metalore Resources* (1990), 75 O.R. 513 at 554 (Gen. Div.).

²²⁷ *Supra* note 179 at 107.

²²⁸ (1993), 144 N.B.R. (2d) 9 (C.A.).

²²⁹ *Ibid.* at para. 16.

²³⁰ *Supra* note 215 at para. 120. Southin J.A., in the appeal case, adopts a different view: “[Q]uestions of unconscionability are not matters to be determined on what someone ought to have known, but what he did know” (*Can-Dive Services v. Pacific Coast Energy Corp.*, [2000] 5 W.W.R. 683 at 753, 74 B.C.L.R. (3d) 30 (C.A.)).

discussion, and what we can tease out of judges' usually very cryptic observations often suggests that they are relying on other concepts (fairness, justice, reasonableness) to which "conscience" apparently adds little that is distinctive; indeed, they ultimately shy away from what makes "conscience" a distinctive notion. Perhaps what we are left with is Southin J.'s rather tautological observation that "good conscience is the conscience which a court of equity [still, apparently, a "court of conscience"²³¹] imposes."²³²

C. Soulos Again

With this context in mind, let us return to *Soulos* and try, if we can, to pin down what it tells us about conscience. In many ways, McLachlin J.'s majority judgment in the case recapitulates what we have already seen. Moreover, it perpetuates a number of the ambiguities in the use of "conscience" as a judicial criterion.

As we have already noticed, McLachlin J. sees "conscience" as integral to equity: "Good conscience [is] the basis for equitable intervention."²³³ In the context of her exploration of the bounds of the constructive trust, she repeatedly invokes "good conscience" as the "theme underlying constructive trust."²³⁴

At the same time, she does not directly address the problem of defining "conscience". Certainly, she says nothing about what we have highlighted as problems with the concept as a judicial standard—for example, its ostensible subjectivity and variability—although she does acknowledge that it suffers from "the disadvantage of being very general".²³⁵ While noting the presence of "good conscience" in equity "from earliest times", she displays no awareness of (or, at least, concern about) what I have referred to as the "semantic slippage" that has almost certainly occurred over time. And she tends to conflate "conscience" with related concepts, without explaining its distinctiveness. Thus, "Good conscience addresses ... fairness between the parties";²³⁶ the constructive trust "serves not only to do the justice between the parties that good conscience requires."²³⁷

²³¹ See e.g. *Servicemaster Industries v. Servicemaster of Victoria* (1979), 101 D.L.R. (3d) 376 at 379, 13 B.C.L.R. 15 (S.C.), Locke J.: "a Court of Equity, by definition a Court of conscience"; *Rayman Investments & Management v. Mariner Inn*, [1996] B.C.J. No. 1097 at para. 51 (C.A.), online: QL (BCJ), where Southin J.A. held that "[t]he court of equity is a court of conscience."

²³² *Re Ladner Downs and Crowley* (1987), 41 D.L.R. (4th) 403 at 428, (*sub nom. Ladner Downs v. Crowley*) [1987] 5 W.W.R. 322 (B.C. S.C.)).

²³³ *Soulos*, *supra* note 1 at 234.

²³⁴ *Ibid.* at 235.

²³⁵ *Ibid.* at 236.

²³⁶ *Ibid.* at 235.

²³⁷ *Ibid.* at 236.

Some of what McLachlin J. says suggests that the inquiry into “conscience” is concerned with the moral condition of the defendant. Thus, she notes that Carthy J.A., in the Ontario Court of Appeal, “asserted that the moral quality of the defendant’s act may dictate the court’s intervention,”²³⁵ and that the imposition of a constructive trust discourages “immoral conduct.”²³⁷ “Courts of equity,” she observes, “have always been concerned to keep the person who acts on behalf of others to his ethical mark.”²³³ This emphasis, although not explicitly referring to the conscience of the party, suggests that this might be what is at stake. At the same time, the only explicit attribution of the faculty “conscience” is to “the court.”²⁴¹ So, again, there is some ambiguity as to whose “good conscience” is in issue.

Apart from the question whether the *defendant’s* conscience is implicated in this inquiry, McLachlin J. appears to regard concern with the person’s moral condition as part, not of an ambiguity, but of a duality. Apparently approvingly, she sees the approach of the Court of Appeal as not only “condemn[ing] ... the agent’s improper act,” but also as “maintain[ing] the bond of trust underlying the real estate industry and hence the ‘integrity of the laws’ which a court of equity supervises.”²⁴² She repeats this theme: “Good conscience addresses not only fairness between the parties ... but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised.”²⁴³ On this view, “conscience” is not only implicated in morality; it also serves a social utilitarian function. Whether this latter concern relates to Lord Nottingham’s idea of “public conscience” is not evident.²⁴⁴ It does seem to bear some resemblance to notions of “sound commercial conscience”, which we have seen elsewhere.

McLachlin J. does go on to consider the sorts of factors that “inform” the inquiry into conscience, identifying three of these in the present context: (1) “the situations in which constructive trusts have been recognized in the past”; (2) “the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships”; and (3) “the absence of an indication [of] an unfair or unjust effect on the de-

²³⁸ *Ibid.* at 226.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.* at 243.

²⁴¹ *Ibid.* at 241.

²⁴² *Ibid.* at 227.

²⁴³ *Ibid.* at 235. Compare with where she speaks of “the high standards of trust and probity that commercial and other social institutions require if they are to function effectively” (*ibid.* at 236).

²⁴⁴ Halliwell, *supra* note 10, discusses at 13 the English Court of Appeal’s decision in *Tinsley v. Milligan*, [1992] Ch. 310, [1992] 2 All E.R. 391 (C.A.), *aff’d* (1993), [1994] 1 A.C. 340, [1993] 3 W.L.R. 126 (H.L.), and the invocation there of the notion of “public conscience” as “the conscience of right-thinking people”.

fendant or third parties.”²⁴⁵ What is interesting about this is that conscience is understood purely in terms of other judicial criteria: precedent, “justice”, preserving social institutions, absence of countervailing “unfairness”. Answering the concern that “good conscience” is “very general”, McLachlin J. says that “[p]articularity is found in the situations in which judges in the past have found constructive trusts”: “A judge ... will have regard not merely to what might seem ‘fair’ in a general sense; but to other situations where courts have found a constructive trust.”²⁴⁶ We cannot define “conscience”; its meaning consists in the individual instances of its recognition.²⁴⁷ Curiously, this seems to involve a new casuistry—a focus on individual cases, but apparently without an explicitly developed concept of *synderesis*. Conscience is reducible to “fairness” coupled with a search for precedents. It is not clear to me what “conscience” adds to these other, fairly typical, judicial preoccupations.

Once again, although “conscience” is heavily foregrounded in McLachlin J.’s judgment in *Soulos*, it is not very coherently elaborated. The ways in which it is elaborated tend to make it substantively superfluous.

Conclusion

On the face of it, then, “conscience”, though regularly invoked in the contemporary discourse of equity, seems not to be the subject of a very developed theory. Indeed, invocations of conscience seem to reflect various notions, most of them problematic and not obviously reconcilable with each other. Sometimes the language suggests that the focus is on the state of the defendant’s conscience, and how it might be “affected”—an anachronistic harking back to the confessional function of the early Chancery. Sometimes, it is the adjudicator’s conscience that appears to be in play, although courts tend to shy away from the implications of such a position. Sometimes what is meant seems to be some “objective” moral or ethical notion, which may variously be associated with “natural law” or with the accepted conventions of society or a segment of society. Sometimes, “conscience” consists of the aggregation of individual instances or cases in which the courts say it is operating.

This brings us to the question Why?: Why is conscience so persistent if its import and implications are really so nebulous? This in turn brings me to the “conjecture” that I promised at the outset of this article.

²⁴⁵ *Soulos*, *supra* note 1 at 236.

²⁴⁶ *Ibid.*

²⁴⁷ Compare Mason, *supra* note 5 at 258. Incidentally, this is one way of ascertaining the meaning of a word. A word’s *extension* is all the instances of its application: thus, its meaning is *a*, *b*, *c*, etc. On the other hand, a word’s *intension* are those criteria which tell us when the word should apply. I am, I suppose, criticizing McLachlin J. for shying away from the intension of “conscience”.

It may be that the persistence of “conscience” in this context is simply a matter of inertia. The word is part of the traditional discourse of equity, and it is simply being reiterated in an “automatic” way. I suspect that this accounts for many instances of its use, as, for example, when judges repeat the words of Sopinka J., repeating the words of Dawson J. On the other hand, a case like *Soulos*, in which the centrality of the concept is insisted upon, cannot be accounted for in terms of reflex repetition. It may call for a more complex explanation.

In this regard, Gallagher’s account is suggestive. He is, of course, considering casuistry in the religious or moral sense, and not, primarily, conscience in law. But, as he says, there are parallels; indeed, he speaks of “[t]he place of casuistical analysis in Tudor legal discourse” as being “well established”.²⁴⁸ Indeed, his explanation may be even more relevant to law than to moral inquiry per se, given law’s typical preoccupation with uniformity and consistency.

He remarks particularly upon the antinomies inherent in the discourse of conscience. Indeed, the basic configuration of casuistical analysis is paradoxical: it posits, on the one hand, *synderesis*, which supposes the existence of stable general laws which are “always right”, and on the other, conscience as involving the variability of perhaps infinite circumstances: “As an epistemological procedure, casuistry fostered a habit of dwelling on particularities and nuances of individual experience, a habit that resisted the putative purpose of casuistry: to reach a certain judgment of acts based on a clear definition of the boundary between culpability and innocence.”²⁴⁹ The point of casuistry was to give a certain answer; however, its methodology—the focus on particular contexts—tended to emphasize the relativity of the process of moral assessment. As we have seen, this tendency appears to have become more pronounced with the Protestant emphasis on introspection and unmediated individual moral accountability.

Looked at from a slightly different angle, assimilating cases of conscience to an institution like formal casuistry or “equity” was a way of “taming” them; Gallagher uses the expression “spiritual colonization”.²⁵⁰ That is, the particular or individual case tends to be anomalous, or at least marginal. It does not readily fit the general rule; it calls the boundary into question. It is thus destabilizing. If, however, it can be subsumed within an established institution or procedure, this tendency can be neutralized. The problem with cases of conscience was that the established procedure—casuistry—involved preoccupation with the particular, the context, the eccentric, which only reproduced and reinforced the destabilizing tendencies. As Gallagher puts it, the

²⁴⁸ *Supra* note 68 at 9. See also *ibid.* at 144ff. for a more extended discussion of equity in this context.

²⁴⁹ *Ibid.* at 6.

²⁵⁰ *Ibid.*

“praxis” of probabilistic casuistry “underlined the inscrutable character of conscience itself, which turns all secure, authoritative readings of a word, a gesture, or an event into provisional, unstable ones.”²⁵¹

At a certain point, when this destabilizing tendency becomes too insistent, it has to be confined or relegated to a “safe” place. As far as casuistry is concerned, Gallagher sees Pope’s locating it in the lunar sphere in *The Rape of the Lock* as emblematic of this process: “Naming casuistry the stuff of lunacy effectively announced the death of a discourse and, through that death, the sealing off of a potentially destabilizing vision of the social and political mechanisms behind the idea of rational human commerce.”²⁵²

We have already seen evidence of a parallel process in the history of equity, notably in St. German’s assimilation of “conscience” to “law”, and in Lord Nottingham’s emphatic distinction between “private conscience” (“with which I have nothing to do”) and “legal and regular equity”, between a conscience which is only “*naturalis et interna*” (again, with which “this Court hath nothing to do”) and a conscience which is “*civilis et politica*, and tied to certain measures.” Following all the implications of “conscience” is too destabilizing, too subversive of “law”,²⁵³ thus, it has to be curtailed; a line of demarcation has to be drawn between controllable and uncontrollable conscience. Uncontrollable conscience is relegated to the sphere of the private. Controllable conscience is assimilated to law and is identified with “science”: “if conscience be not dispensed by the rules of science, it were better for the subject there were no Chancery at all ...”²⁵⁴

Lord Nottingham is especially interesting because he was transitional. He was immersed in a milieu in which conscience means “what it used to mean”. Thus, he had to wrestle with it, to make the kinds of distinctions we have seen: if he had not, then the casuistical door might be thrown open, permitting who knows what to enter.

But, as Gallagher notes, even before Lord Nottingham’s time, there was a tendency in “official” discourse for “conscience” to achieve a pro forma status, as he puts it when he refers to “texts whose canonical status is related to their rhetorical pose as the disinterested purveyors of truth, a status underscored by internal references to conscience that have assumed a merely conventional value.”²⁵⁵ I take this to imply that the discourse of conscience assumed a privileged status that has persisted, but essentially as a rhetorical convention. Conscience, at least, “public conscience”, has to be

²⁵¹ *Ibid.* at 7.

²⁵² *Ibid.* at 3.

²⁵³ See Dunn, *supra* note 10 at 141, observing that Halliwell characterizes equity as having a “subversive place in the legal system”.

²⁵⁴ *Earl of Feversham v. Watson* in *Chancery Cases Vol. 2*, *supra* note 17, 637 at 639.

²⁵⁵ *Supra* note 68 at 12.

carefully limited, because any thoroughgoing delving into conscience involves “an epistemology of opacity and contingency”, “an interpretive practice that militate[s] against the authority of final answers.”²²⁵ It is, I think, fair to say that law, at least in its official manifestations, still hankers after “the authority of final [or at least general] answers.”

Something like this account might explain the status of “conscience” in current equity discourse. “Conscience” still has a privileged place in our legal culture. It is embedded in our inherited way of talking about equity. Moreover, it has a larger appeal, exemplified in its enshrinement in the *Charter*—although there what is protected is private conscience, a sphere into which state law may not intrude; that conscience is beyond law, unlike the conscience discussed here, which is said to inform part of the law. But both usages reflect the power of the word over our minds. At the same time, if “conscience” is taken literally, it is hard to reconcile with the desiderata of certainty and objectivity in the law. This is reflected in the reaction of judges like Sir George Jessel, insisting that the Court of Chancery is *not* a court of conscience, or in some (muted) comments of judges exercising a jurisdiction defined in terms of “equity and good conscience” to the effect that what they are doing is a kind of “non-law”.

Thus, coupled with the impetus to name conscience is the impetus not to say very much about it—perhaps because of the fear of having to say too much about it. So, McLachlin J. will acknowledge only that the notion is “very general”—which, as a reservation, is itself very general or vague, and which, arguably, evades what is problematic about “conscience”. Understandably, the courts are reluctant to contemplate full-blown casuistical inquiry, or to venture unreservedly into the “moral realism” that probably must underlie any objective theory of conscience.²²⁷ Similarly, the tendency to leave “conscience” unattributed, unattached to any particular subject, and to defer to the dictates of abstract “equity and good conscience”, is an aspect of this need to keep conscience at arm’s length. To say that what is in issue is the defendant’s conscience, for example, is to contextualize conscience, to attach it to someone—and to raise questions about subjectivity, variability, and so on. Even referring to “equity’s conscience” or “the court’s conscience”—as opposed to the judge’s conscience—is part of this process of distancing. Conscience is perhaps inevitably personal; by de-personalizing it, by attaching it to an institution (court) or an abstraction (equity), or by leaving it completely autonomous and decontextualized, judges can reinforce the impression that conscience is part of what Gallagher calls “the authorless, objective

²²⁶ *Ibid.* at 4.

²²⁷ See “Equity, Conscience and Unjust Enrichment”, *supra* note 26, where Birks makes the distinction between “the intuitive understanding of the difference between good and evil” and “the taxonomised and systematised understanding of that same difference, as taught by St Thomas Aquinas.”

order of things”,²⁵⁸ but without acknowledging the challenges that such a position entails—for example, that it implies some kind of “natural law”.²⁵⁹

One might be tempted to sum up by quoting the dictum of Pennell J.: “A court of equity, *rhetorically styled* one of conscience and righteousness”;²⁶⁰ the discourse of conscience is “merely rhetorical”, “just talk”. But I think that the current fascination with conscience is symptomatic of something deeper, involving at least two related factors. One of these is the continuing attractiveness of including moral criteria in the law. The difficulty with this, of course, is that we live in an age of moral relativism which is problematic for law, so that, in law “what is right” cannot be a matter of a general theory, but only what the courts have declared in individual cases. The other factor is, somewhat paradoxically, the need for the law to accommodate the particular case, but within the framework of generality that is thought to make law law. “Conscience”, of course, does highlight the individual, the particular,²⁶¹ but, as Gallagher notes, it carries with it the destabilizing tendency towards moral (and presumably legal) atomism. What is so intriguing about “conscience” is that it epitomizes the tension between moral realism and moral relativism and the tension between uniformity and diversity. The challenge for the law is to articulate these tensions more directly and coherently.

²⁵⁸ *Supra* note 68 at 151.

²⁵⁹ See *supra* note 161 and accompanying text.

²⁶⁰ *Syed v. McArthur* (1984), 46 O.R. (2d) 593 at 603 (H.C.J.) [emphasis added].

²⁶¹ Thus, at least one writer, Z. Rueger, “Gerson’s Concept of Equity and Christopher St. German” (1982) 3 *Hist. Pol. Thought* 1, observes at 9 that Jean Gerson’s notion of “equity” (if not of “conscience”) emphasizes its recognition of the individual, the “diverse and manifold nature of the human condition”.