"JUICE FORMULATION IS NOT ROCKET SCIENCE" AND OTHER OBSERVATIONS: *CADBURY SCHWEPPES INC.* v. *FBI FOODS LTD.*

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The Cadbury Schweppes case is the most recent example of the Supreme Court of Canada's ruminations on equitable obligations in commercial contexts. While the case was determined by the Court to concern the matter of breach of confidence, the application of fiduciary doctrine to the relationship between the companies in question was also considered. This commentary examines the Court's consideration of equitable doctrines and their application to commercial relations, both in the Cadbury Schweppes case and more generally. It also looks at the Court's assessment of compensation for the breach of duty found to exist in light of equitable principles.

L'affaire Cadbury Schweppes est l'exemple le plus récent des ruminations de la Cour suprême du Canada concernant les obligations en equity dans un contexte commercial. Bien que la Cour ait déterminé que le point en litige était la violation du devoir de confiance, elle considère également l'application de la doctrine du rapport fiduciaire à la relation entre les sociétés en cause. Ce texte examine les conclusions de la Cour en matière des doctrines d'equity et leur application dans le contexte des relations commerciales, à la fois dans l'affaire Cadbury Schweppes et en général. L'évaluation par la Cour de l'indemnisation pour violation du devoir de confiance qui s'impose à la lumière des principes d'equity fait également l'objet d'étude.

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I. INTRODUCTION

The use of equitable doctrines in commercial relations has not always been received with open arms. Indeed, as will be discussed later in this commentary, there has been considerable judicial reluctance to impose equitable doctrines, particularly fiduciary relations, to commercial contexts.[1] The *Cadbury Schweppes* decision is the most recent example of the judicial continuation of this trend at the Supreme Court of Canada.[2]

While Justice Binnie, for the Court, observed that "Juice formulation is not rocket science,"[3] the matters before the Court in the case were quite complex. The decision illustrates the current Court's thinking about the law's regulation of the interaction between parties in commercial relationships. It also provides insight into the Supreme Court of Canada's assessment of the function of equitable doctrines such as breach of confidence and fiduciary obligations in commercial contexts. Finally, the judgment touches upon compensatory considerations that had been left uncertain by the same Court's judgments in *Canson Enterprises Ltd.* v. *Boughton & Co.*[4] and *Hodgkinson* v. *Simms*.[5]

II. THE FACTS

The *Cadbury Schweppes* case is about Clamato, a tomato juice and clam broth beverage, and the relationship between the party holding the product's trademark and formula, the party licenced to produce it, and the licencee's successor. In the late 1970's, Duffy-Mott licensed Caesar Canning Ltd. ("Caesar Canning") to manufacture, distribute, sell, and market Clamato in Ontario and Western Canada. The licensing agreement was divided into 12-month periods, renewable indefinitely if Caesar Canning achieved a minimum volume of sales in each 12-month period.

Under the terms of the licensing agreement, Caesar Canning was precluded from using the trademark "Clamato" upon the termination of the agreement. Moreover, Caesar Canning was prohibited from manufacturing or distributing any product "which includes among its ingredients clam juice and tomato juice" for a period of 5 years after the termination of the agreement.[6] Following the expiry of those 5 years, Caesar Canning was free to compete with the Clamato brand.

In the spring of 1979, Caesar Canning's Clamato licence was extended to include the rest of Canada. In producing the beverage, Caesar Canning used local suppliers for all ingredients, save for the pre-mixed dry seasoning (the "dry-mix"),

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[1] Note, for example, the comments by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council*, [1996] 2 All E.R. 961 at 987, [1996] A.C. 669 (H.L.): "... wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs ..."

[2] *Cadbury Schweppes Inc.* v. *FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 [hereinafter *Cadbury Schweppes* cited to S.C.R.].

[3] *Ibid.* at 181.

[4] [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129.

[5] [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 [hereinafter cited to D.L.R.].

[6] *Cadbury Schweppes, supra* note 2 at para. 152.

which was provided by Duffy-Mott and its successor, Cadbury Schweppes. Under the federal *Food and Drugs Act*[7] and its regulations, disclosure of all ingredients in descending order of quantity was required on the product label. However, throughout the licensing agreement, the precise formula of the dry-mix was unknown to Caesar Canning and its successor, FBI Foods Ltd. ("FBI Foods"). While neither Caesar Canning nor FBI Foods knew the dry-mix formula, they did receive information about Clamato's recipe and manufacturing procedures to enable them to produce the beverage. This information was found to be confidential by the trial judge and was not questioned by the parties upon appeal.

In May, 1981, Caesar Canning contracted with FBI Foods to manufacture Clamato and related products under what was described as a "tolling agreement." Under this agreement, to which Duffy-Mott consented, but was not a party to, FBI Foods was paid a set fee for each case of juice it produced. The duration of the contract was 5 years, with a provision for earlier termination under various circumstances, including the termination of the Clamato licensing agreement between Duffy-Mott and Caesar Canning. To enable FBI Foods to manufacture Clamato, it was given confidential information about the Clamato recipe and methods of production.

In 1982, the respondent, Cadbury Schweppes, acquired Duffy-Mott and decided to regain control over the production and marketing of Clamato in Canada. To that end, it notified Caesar Canning on April 15, 1982 that the existing licensing agreement, as well as the tolling agreement between Caesar Canning and FBI Foods, would terminate in 12 months time. Caesar Canning was then offered a contract to produce Clamato under a set fee-per-case arrangement, which it declined.

With notification that its rights to produce and sell Clamato were coming to a close, Caesar Canning immediately began to work on developing a competing product. Caesar Canning's manager of quality control and quality assurance, Lorne Nicklason, developed a tomato-based juice in late 1982 working from the list of ingredients and processing specifications for Clamato. This new juice, called Caesar Cocktail, did not contain clams or other seafood in its formulation. Nicklason also ensured that the chemical composition of Caesar Cocktail was distinguishable from Clamato by using different levels of salt, pH, and soluble solids.

Caesar Cocktail began to be sold commercially on April 15, 1983, immediately after the conclusion of Caesar Canning's licensing agreement with Cadbury Schweppes. FBI Foods agreed to co-pack Caesar Cocktail after it had been advised by Caesar Canning that the production and sale of the juice was not in breach of Caesar Canning's covenants with Cadbury Schweppes.

By the time Caesar Cocktail debuted in the marketplace, Cadbury Schweppes had already become aware of its existence. Cadbury Schweppes had discovered the precise formula of Caesar Cocktail in late March, 1983, when it placed a technical expert on the auditing team performing the final financial audit of Caesar Canning under the licensing agreement. Caesar Canning had no knowledge that Cadbury Schweppes was aware of Caesar Cocktail. Meanwhile, Cadbury Schweppes took no steps to prevent the manufacture and sale of Caesar Cocktail nor objected to Caesar Canning about its production of the juice. Both Cadbury Schweppes and Caesar Canning were under the mistaken belief that the absence of clam broth in Caesar Cocktail prevented the former from prohibiting the latter's manufacture and sale of the beverage.

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[7] R.S.C. 1985, c. F-27.

Caesar Cocktail proved to be a reasonable success, although its market share was far behind Clamato's.[8] Despite this success, Caesar Canning ran into financial difficulty, ceasing production on October 23, 1985 and making an assignment in bankruptcy shortly thereafter. FBI Foods, which was dependent upon the production of Caesar Cocktail for much of its business, purchased Caesar Canning's assets, including the Caesar Cocktail formula and associated rights, for $955,000. The sale of assets was completed on January 10, 1986. A wholly-owned subsidiary of FBI Foods, FBI Brands, became responsible for the production and sale of Caesar Cocktail. It manufactured and sold the product under various brand names throughout Canada.

In 1986, some three years after Caesar Cocktail had debuted on the Canadian market, Cadbury Schweppes obtained new legal advice about its rights respecting the licensing agreement and the creation, production, and sale of Caesar Cocktail. In response to this advice, Cadbury Schweppes sent a letter to FBI Brands, requesting it cease and desist in the production and sale of Caesar Cocktail and its associated brands. FBI Brands ignored the letter, insofar as Cadbury Schweppes had no contractual claim against it, but only against the defunct Caesar Canning. Cadbury Schweppes commenced a civil action against the FBI companies ("FBI") and the chief operating officer of FBI Foods, Lawrence Kurlender, in 1988.

III. THE JUDGMENTS BELOW

At trial, Huddart J. dealt only with Cadbury Schweppes' claim for breach of confidence. She determined that the information imparted to Caesar Canning and FBI about Clamato was confidential trade know-how. She further found that, aside from any express or implied contractual arrangements, there was a well-understood obligation of confidentiality in the food industry respecting disclosures of trade or manufacturing secrets. The trial judge also held that the parties recognized that the information in question was to be used only for the purpose for which it had been provided.

Huddart J. concluded, on the basis of the judgment in *LAC Minerals* v. *International Corona Resources Ltd.*,[9] that Caesar Canning had wrongfully used this confidential information in its reformulation of the Clamato recipe to create Caesar Cocktail. Indeed, she held that the Caesar Cocktail product was "derived so entirely from the Clamato formulation as to be a virtual copy without clams. The other variations were very minor."[10] The trial judge also found that Caesar Cocktail could not have been formulated by Nicklason without Caesar Canning's possession of Clamato's formula and process information.[11] However, she concluded that a product, as similar to Clamato as Caesar Cocktail, could have been developed without using the Clamato recipe or using clam juice had Caesar Canning hired a person with appropriate juice-formulating skills. She further found that such a person could have been hired by

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[8] Cadbury Schweppes had led general evidence to indicate that Clamato's national market share dropped from 83.1 percent to 77.8 percent in the 12 months following termination of the licensing agreement and that Caesar Cocktail earned 7.1 percent of the national market during this same time.

[9] [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter *LAC Minerals* cited to D.L.R.].

[10] *Cadbury Schweppes v. FBI Foods Ltd.*, [1994] 8 W.W.R. 727 at 734, 93 B.C.L.R. (2d) 318 at 325 [hereinafter *Cadbury Schweppes* B.C.S.C. cited to W.W.R.].

[11] *Ibid.*

Caesar Canning at a modest cost.[12]

While Huddart J. held that Caesar Canning had misused confidential information, she considered the value of the information to be transitory and of marginal importance.[13] She calculated the measure of compensation for the defendants' misuse of the confidential information on the basis of the plaintiffs' waiver of any claim to disgorgement or an accounting of profits.[14] She concluded that Cadbury Schweppes had suffered no financial loss from the misuse of information, since Clamato continued to dominate its market niche. However, she found that FBI had wrongfully obtained a 12-month springboard into the juice market through the use of the confidential information to produce Caesar Cocktail. But for Caesar Canning's breach of confidence, she held that it would have taken the company another 12 months to produce a competitor product to Clamato. Consequently, she awarded what she described as "headstart damages," calculated on the basis of the anticipated cost to Caesar Canning of hiring a consultant to help develop a competitive product to Clamato during the 12-month notice period.[15] The registrar assessed these damages at $29,761.20.

Cadbury Schweppes' claim for a permanent injunction against FBI was dismissed. The former's failure to voice its concerns to FBI until 1986 and to commence legal action until 1988 was deemed to be fatal to its claim for injunctive relief. Furthermore, on the basis of the judgments in *Seager* v. *Copydex Ltd.*[16] and *Coco* v. *A.N. Clark (Engineers) Ltd.*,[17] Huddart J. questioned the appropriateness of an injunction where: (a) much of the confidential information was determined to be either public knowledge or of marginal significance and; (b) any injury suffered could be satisfactorily remedied by monetary compensation.

Upon appeal to the British Columbia Court of Appeal,[18] Newbury J.A., for the court, held that there had been a breach of confidence and that a product similar to Caesar Cocktail could have been developed independent of the use of the confidential information within 12 months, but was not. Nevertheless, she held that Cadbury Schweppes could not be restored to a market monopoly position if it was possible for legitimate competition to have come from Caesar Canning/FBI or others.[19] In assessing compensation, she rejected the trial judge's "consulting fee" valuation in favour of an amount equal to the sum Cadbury Schweppes would have earned if it had sold the volume of Caesar Cocktail sold by the defendants in the 12 months following termination of the licensing agreement. She then ordered a reference to determine what

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[12] *Ibid.*

[13] The trial judge made this determination by holding that: (a) the ingredients of Clamato were public knowledge; (b) the absence of clam broth from Caesar Cocktail did not worry consumers; (c) a blind taste test conducted by the National Food Laboratory had concluded that consumers could detect a difference between Caesar Cocktail and Clamato, albeit with some hesitation; and (d) Clamato's true marketing edge, its trademark, was not infringed upon by the defendants.

[14] Upon receipt of the trial judgment, the plaintiffs' new counsel had attempted to reopen the waiver of an accounting of profits, but the application was denied.

[15] *Cadbury Schweppes* B.C.S.C., *supra* note 10 at 260-1.

[16] [1967] 2 All E.R. 415, [1967] 1 W.L.R. 923 (C.A.).

[17] [1969] R.P.C. 41, [1968] F.S.R. 415 (Ch.D.).

[18] (1996), 138 D.L.R. (4th) 682, 23 B.C.L.R. (3d) 325 (C.A.) [hereinafter *Cadbury Schweppes* B.C.C.A. cited to B.C.L.R.].

[19] *Ibid.* at 345.

this amount was. Newbury J.A. also found that a permanent injunction against FBI was appropriate. As she explained:

> ... [T]he interests of justice require [the] Court to enjoin the continued breach of confidence by the defendants – that is, that it enjoin the defendants from making use in the manufacture of a tomato cocktail, the specifications, technical information, advice, and derivatives thereof, that were disclosed to Caesar Canning Ltd. and/or the defendants or any of them in confidence pursuant to the Licensing and Tolling Agreements, and that are not otherwise generally known.[20]

FBI appealed the judgment to the Supreme Court of Canada. Cadbury Schweppes cross-appealed the limitation of its compensation to the 12-month "head start" period.

IV. THE SUPREME COURT OF CANADA'S ANALYSIS

The unanimous judgment of the Supreme Court[21] affirmed that a breach of confidence had occurred. While Binnie J. explained that the case in question was one of third party liability, insofar as FBI had obtained its information from Caesar Canning, he acknowledged that FBI's receipt of that information "was burdened with the knowledge that its use was to be confined to the purpose for which the information was provided, namely the manufacture of Clamato under licence."[22]

The Court found, as did the lower courts, that no breach of fiduciary duty existed.[23] The case was deemed to not be one which fell within established categories of fiduciary relationships. As Binnie J. reasoned, "[i]n this case there is nothing in the relationship between a juice manufacturer and its licensee to suggest that the former surrendered its self-interest or rendered itself 'vulnerable' to a discretion conferred on the latter."[24] Citing the case of *M.(K.)* v. *M.(H.)*,[25] he concluded that the "overriding deterrence objective applicable to situations of particular vulnerability to the exercise of a discretionary power ... does not operate here."[26]

He also determined that the facts of the case in question did not satisfy the "exceptional criteria for the creation of a fiduciary duty outside those established categories."[27] Although the use of confidential information was held to place a confider in a position of vulnerability to its misuse by the confidee, the duty of the confidee not to misuse the information was deemed not to require the imposition of fiduciary principles. Rather, such a breach was said to have been more properly pursued via an action for breach of confidence or breach of an express or implied contractual term.[28] As Binnie J. concluded, "there is nothing special in this case to elevate the breached

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[20] *Ibid.* at 351-2.

[21] Rendered by Binnie J. per L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, and Bastarache JJ.

[22] *Cadbury Schweppes, supra* note 2 at 158.

[23] *Ibid.* at 164.

[24] *Ibid.*

[25] [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 [hereinafter *M.(K.)* cited to D.L.R.].

[26] *Cadbury Schweppes, supra* note 2 at 164.

[27] *Ibid.* at 163.

[28] *Ibid.* at 165.

duty to one of a fiduciary character."[29] It was further determined that a remedy for breach of confidence could include equitable measures of compensation without the necessity of finding that a fiduciary relationship existed.[30]

The Court held that a proprietary remedy was inappropriate in the circumstances on two grounds. First, proprietary relief was held to be improper because the information misused by Caesar/FBI was deemed to be "nothing very special."[31] Second, the Court held that, but for the appellants' breach, Cadbury Schweppes would nonetheless have faced legitimate competition from Caesar Cocktail in the juice market within 12 months.[32] Binnie J. did determine, however, that non-proprietary compensation was owing to Cadbury Schweppes. He declared that Cadbury Schweppes was entitled to compensation that would place the company in the position it would have occupied but for the breach.[33] The amount of compensation awarded was deemed to be the same under either a tort or equitable approach.[34]

In determining the quantum of compensation to Cadbury Schweppes, Binnie J. emphasized that, while the Clamato formula and related processes were a unique combination of elements, some or all of the constituent elements of the juice were widely known throughout the juice industry.[35] As he explained:

> Juice formulation is not rocket science. A consultant skilled in the art and deploying a variety of techniques could have come up with a plausible clam-free copycat product within 12 months to bring the respondents' commercial "opportunity" to a close. Moral indignation is not a factor that is to be used to inflate the calculation of a compensatory award. The respondents' entitlement is to no more than restoration of the full benefit of this lost but time-limited opportunity.[36]

Therefore, compensation was held to be assessed on the basis of the value of the information misused by the appellants that would provide a realistic measure of

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[29] *Ibid.*

[30] See the further discussion of this point in the section entitled "Breach of Confidence," *infra.*

[31] This characterization was derived from that established by Lord Denning M.R. in *Seager* v. *Copydex (No. 2)*, [1969] 2 All E.R. 718 at 719-20 (C.A.), where he classified confidential information into three categories: "nothing very special," "something special," and "very special indeed."

[32] In making this assertion, the Court assumed that Caesar Canning would have been able to derive a Clamato-esque juice within 12 months after the licensing agreement came to a close. While this may well have been possible, considering that Clamato's ingredients were public knowledge, it is an assumption that cannot be proven conclusively. Nowhere in the Court's discussion was any mention of the presence, or lack thereof, of other pseudo-Clamato products that may have been able to substantiate this assumption.

[33] *Cadbury Schweppes, supra* note 2 at 175.

[34] *Ibid.*

[35] *Ibid.* at 180. As stated earlier, the ingredients contained in Clamato – although not their proportions – would have been public knowledge because of the labelling requirements of the *Food and Drugs Act, supra* note 7.

[36] *Ibid.* at 181.

relief and not overcompensate the respondents.[37]

Binnie J. disagreed with the trial judge's finding that the market value of the confidential information was the appropriate approach to determining compensation payable to Cadbury Schweppes.[38] He concluded that the key to assessing equitable compensation was the duration of Cadbury Schweppes' lost opportunity, or the economic advantage that the company would have derived after the cancellation of the licensing agreement if the breach had not occurred.[39]

Binnie J. held that the British Columbia Court of Appeal's assumption that, had Caesar Cocktail not been commercially available, Clamato would have filled the void with an equivalent amount of sales was also in error. Consequently, he determined that the measure of financial compensation directed by the appellate court was inappropriate, in that it had the effect of saddling FBI with losses that could not all be reasonably attributed to the misuse of the confidential information. For this reason, he directed that the compensation awarded to Cadbury Schweppes was to be based upon losses sustained by the company that were attributable to the breach of confidence only during the 12 month period following the termination of the licensing agreement.[40]

Injunctive relief was denied because of Cadbury Schweppes' delay in asserting its rights combined with FBI's change of circumstances caused by its reliance on the former's inactivity.[41] While Binnie J. acknowledged that the law "would lose its deterrent effect if defendants could misappropriate confidential information and retain profits thereby generated subject only to the payment of compensation if, as and when they are caught and successfully sued,"[42] he articulated the reasons for the Court's refusal to grant injunctive relief in the following manner:

> ... [O]ne's indignation in this case has to be tempered by an appreciation of the equities between the parties at the date of the trial. Eleven years had passed since Caesar Cocktail went into production, using "nothing very special" information that could promptly have been replaced (had the respondents made a timely fuss) by substitute technology accessible to anyone skilled in the art of juice formulation. At the date of trial, it would have been manifestly unfair to allow information of peripheral importance to control the grant of injunctive relief. The equities in favour of the respondents' claim for an injunction to put Caesar Cocktail off the market rightly yielded to the appellants' equities in continuing a business to whose

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[37] As Binnie J. explained, *ibid.* at 187, "Equity will avoid unjustly enriching the confider by overcompensating for 'nothing very special' information just as it will avoid unjustly enriching the confidee by awarding less than realistic compensation for financial losses genuinely suffered."

[38] Indeed, Cadbury Schweppes had advanced this same argument, contending that it was not in the business of selling its trade secrets to competitors, therefore rendering the market value of the information irrelevant.

[39] *Cadbury Schweppes, supra* note 2 at para. 186.

[40] *Ibid.* at 194.

[41] *Ibid.* at 190. FBI's change in circumstance was occasioned by its purchase of Caesar Canning's assets for $955,000, which was held by Binnie J. to have been influenced, at least in part, by Cadbury Schweppes' failure to take action against Caesar Canning for its misuse of confidential information about Clamato.

[42] *Ibid.* at 191.

success the confidential information had so minimally contributed.[43]

Binnie J. further explained that to grant Cadbury Schweppes injunctive relief "would inflict competitive damage on the appellants in 1999 far beyond what is necessary to 'restore' the respondents to the competitive position they would have enjoyed 'but for' the breach 16 years ago."[44] Consequently, the permanent injunction granted by the British Columbia Court of Appeal was vacated.

The appeal was allowed with costs and the referee entrusted to determine the quantum of relief by the British Columbia Court of Appeal was directed to calculate the compensation payable to Cadbury Schweppes "required to restore to the respondents what the respondents have lost as a result of the appellants' breach of confidence."[45] Cadbury Schweppes' cross-appeal against the limitation of their compensation to the 12 months after notice of the termination of the licensing agreement (the "head start" period) was rejected with costs.

V. BREACH OF CONFIDENCE

The primary focus of the Supreme Court in *Cadbury Schweppes* was on the breach of confidence committed by Caesar Canning/FBI when information about Clamato was used for unauthorized purposes, *i.e.* to create a mock Clamato product. Since the parties had accepted the trial judge's finding that confidential information pertaining to Clamato had been imparted, the Court was not faced with determining whether a breach of confidence existed, but with a compensatory determination arising out of that finding.

In acknowledging the nature of Cadbury Schweppes' claim as one of third party liability against FBI, the Court imposed liability upon FBI for its use of the information because of its knowledge of the restrictions on its use imposed by Duffy-Mott/Cadbury Schweppes under the licensing agreement. The fact that FBI had received the information from Caesar Canning and not from Duffy-Mott or Cadbury Schweppes was held to be immaterial. As Binnie J. explained, Equity will impose liability upon a third party who receives confidential information if that third party receives the information with knowledge that it was communicated in breach of confidence or becomes aware of the confidential nature of the information at a later date.[46]

The imposition of liability for misuse of confidential information may therefore be seen to follow similar patterns in other areas of law. It is consistent, for example, with the imposition of liability for knowing receipt of trust property in breach of trust, where a third party who knowingly receives trust property acquired in breach of trust for that person's own use or benefit incurs personal liability for such receipt.[47] Under

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[43] *Ibid.* at 192. Binnie J.'s rationale for denying the respondents their claim for injunctive relief may be seen to replicate McLachlin J.'s common sense view of causation articulated in her judgment in *Canson Enterprises Ltd.* v. *Boughton & Co.*, *supra* note 4 at 163.

[44] *Cadbury Schweppes, supra* note 2 at 192.

[45] *Ibid.* at 198.

[46] *Ibid.* at 157.

[47] Liability for knowing receipt may only take place where the person in receipt of the trust property receives it in his or her personal capacity and not as an agent of the trustee. See *Citadel General Assurance Co.* v. *Lloyds Bank Canada,* [1997] 3 S.C.R. 805, 152 D.L.R. (4th)

both scenarios, the confidential information or the trust property is burdened with the knowledge of the purpose to which it ought properly be used. Consequently, liability is not imputed only to the party with firsthand knowledge, but may be properly imposed upon others who inherit the information with knowledge of the limits on its use. Since FBI was found to have had actual knowledge of the restrictions on the use of the confidential information, particularly since it had been initially given the information under the tolling agreement, there was no need for the Court to determine whether constructive knowledge would have been sufficient.[48]

The Court also addressed the characterization of breach of confidence as a *sui generis* cause of action derived from multiple roots in Equity and the common law, as suggested by Sopinka J. in *LAC Minerals*. Sopinka J.'s rationale for characterizing breach of confidence as *sui generis* was to provide courts with greater flexibility in the fashioning of a remedy. In *Cadbury Schweppes*, Binnie J. held that characterizing anything as *sui generis* was apt to cause confusion until jurisprudence became further developed in the subject area in question.[49] Indeed, one need only look to Canadian aboriginal rights jurisprudence to observe the significant problems that can develop as a result of the characterization of legal rights or entities as *sui generis*.[50] In that area of law, the term "*sui generis*" has often been invoked by courts to avoid defining or providing content to aboriginal or treaty rights.[51]

As for the basis of remedy, Binnie J. concluded that it was not necessary to characterize breach of confidence as *sui generis* to enable the court to draw from either common law or equitable modes of compensation. Rather, he determined that the form of relief available for breach of confidence was "dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations."[52] This point was further emphasized by his statement that "whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the appropriateness of a particular equitable remedy but does not limit the court's jurisdiction to grant it."[53] Along this same line, Binnie J. held that it was not necessary to find the existence of a fiduciary relationship in order for a court to award equitable remedies in a breach of

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385 [hereinafter *Citadel* cited to D.L.R.]; *Gold* v. *Rosenberg*, [1997] 3 S.C.R. 767, 152 D.L.R. (4th) 411 [hereinafter *Gold* cited to D.L.R.].

[48] In knowing receipt cases, which are similar to the facts in *Cadbury Schweppes* because of FBI's receipt of the confidential information, the Supreme Court has held that constructive knowledge is sufficient to found liability: see *Citadel*, *ibid.* and *Gold*, *ibid.* Liability is deemed to fall as a result of the stranger's *receipt* of the property and the questionable circumstances which ought to have made the stranger inquire into how the property was obtained: see also *Carl B. Potter Ltd.* v. *Mercantile Bank of Canada Ltd.*, [1980] 2 S.C.R. 343, 8 E.T.R. 219. In such a situation, the stranger in knowing receipt may not, in good conscience, be permitted to retain property that the stranger knows, or ought to know, was obtained in breach of trust.

[49] *Cadbury Schweppes, supra* note 2 at 162.

[50] For additional commentary on this point, see J. Borrows and L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 *Alta. L. Rev.* 9.

[51] See L.I. Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada," (1997), 36 *Alta. L. Rev.* 1 at 8: "... [R]ecent decisions have demonstrated that rather than opening up new avenues of analysis, characterizing Aboriginal and treaty rights as *sui generis* provided a means to avoid definition."

[52] *Cadbury Schweppes, supra* note 2 at 160.

[53] *Ibid.* at 161 (emphasis in original).

confidence action.[54] In spite of this assertion, he briefly considered whether a fiduciary relationship existed in the circumstances.

VI. FIDUCIARY RELATIONSHIP

In determining whether a fiduciary relationship existed between the parties in *Cadbury Schweppes*, Binnie J. emphasized that the Supreme Court has long held that the policy objectives underlying fiduciary relationships did not generally apply to business entities dealing at arm's length.[55] In support of this proposition, he cited both Wilson J.'s dissenting judgment in *Frame* v. *Smith*,[56] in which she formulated a "rough and ready guide" for the imposition of fiduciary obligations, and Sopinka J.'s affirmation of her findings in *LAC Minerals*.

In *Frame*, Wilson J. held that fiduciary relationships possess three general characteristics:

> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[57]

She elaborated upon her third characteristic by stating that, because beneficiaries must be vulnerable at the hands of their fiduciaries, "fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length."[58] Her statement has subsequently been cited as precluding the application of fiduciary principles to most commercial relationships.[59]

The rationale for not imposing fiduciary obligations upon commercial actors is that those parties are presumed to be sufficiently sophisticated to protect themselves from exploitation or harm at the hands of other commercial actors.[60] Thus, the ability

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[54] *Ibid.* at 178, citing the *LAC Minerals* decision, *supra* note 9.

[55] The obvious question that arises in response to this statement is "What constitutes an 'arm's length' dealing between commercial actors?"

[56] [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 [hereinafter *Frame* cited to D.L.R.].

[57] *Ibid.* at 99.

[58] *Ibid.* at 100.

[59] One notable exception, which was recognized by the Court in *Cadbury Schweppes*, may be seen in *Hodgkinson* v. *Simms*, *supra* note 5.

[60] See, for example, R. Flannigan, "Commercial Fiduciary Obligation" (1998), 36 *Alta. L. Rev.* 905 at 913; P. Finn, "Fiduciary Law and the Modern Commercial World" in E. McKendrick, ed., *Commercial Aspects of Trusts and Fiduciary Obligations*, (Oxford: Clarendon Press, 1992) 7 at 13-14:

> ... [C]ourts in many jurisdictions have demonstrated some reticence in subjecting parties to commercial agreements negotiated at arms' length, to fiduciary duties ... That reticence flows in some measure from an acceptance (i) that, at least in contracts of this type, the parties themselves, first and foremost, are to be the authors of their respective rights and obligations, and (ii) that fiduciary duties should, in consequence, only be imposed upon them

of the parties to engage in self-help is deemed to expunge the need for legal intervention in the form of fiduciary obligations. This argument is reminiscent of those in favour of an absolutist "freedom of contract" regime, whereby parties to contracts ought to be free to order their affairs as they see fit without concern for external regulation by law. The function of the courts under such a structure is simply to enforce the bargains thereby constructed.[61]

It might seem, upon first glance, that the *Cadbury Schweppes* decision falls in line with an absolutist "freedom of contract" argument. Indeed, Binnie J. expressly stated that "a contractual term that deals expressly or by necessary implication with confidentiality negate[s] the general obligation otherwise imposed by equity ..."[62] While he also affirmed the notion of "private ordering" as found by the Supreme Court in *BG Checo*,[63] that does not necessarily entail an acceptance that the parties in *Cadbury Schweppes* had ordered their affairs entirely through contract. Indeed, the Court's judgment clearly demonstrates the intrusion of law into the contractual affairs of the parties. Initially, Binnie J. held that "the law will supplement the contractual relationship by importing a duty not to misuse confidential information ..."[64] Later, because of his determination that "the respondents did not bargain for the unfair competition of having their own know-how, imparted in confidence, used against them," he found that "the contract cannot reasonably be read as negating the duty of confidence imposed by law."[65] Thus, a review of the *Cadbury Schweppes* decision demonstrates its inconsistency with an absolutist "freedom of contract" argument.

As attractive as the argument in favour of an absolutist contractual regime may be to some, it is not reflective of contemporary contractual jurisprudence and certainly not representative of that governing commercial enterprise. Indeed, virtually every form of business organization incorporates fiduciary responsibility,[66] either under the common law or statute.[67] Thus, Flannigan suggests that "when commercial actors select

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> when, and to the extent that, this is necessary and appropriate to give effect to the expectations they could properly entertain in consequence of their contract given the business setting in which it occurs.

[61] Note, for example, the remarks of Jessel M.R. in *Printing & Numerical Registering Co.* v. *Sampson* (1875), L.R. 19 Eq. 462 at 465: "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

[62] *Cadbury Schweppes, supra* note 2 at 167.

[63] *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 27, 99 D.L.R. (4th) 577 [hereinafter *BG Checo*].

[64] *Cadbury Schweppes, supra* note 2 at 165.

[65] *Ibid.* at 167 (emphasis in original).

[66] A notable exception would be the sole proprietorship, in which there is no need for fiduciary obligations since the sole proprietor has no partners or other interested parties involved in the business to which duties of a fiduciary nature could be owed.

[67] Note, for example, section 28 of the Ontario *Partnership Act*, R.S.O. 1990, c. P-5, ss. 28 (duty to render true accounts and full information of all things affecting the partnership), 29 (accountability for private profits earned from any transaction concerning the partnership or from the use of partnership property, name, or business connection), and 30 (duty of partner not to compete with firm or else forced to account for profits made from competing business); also, note section 134(1)(a) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 [hereinafter *OBCA*], which states:

a business form, they select fiduciary responsibility."[68]

The fact that parties to a relationship may be commercial actors and that their relationship is commercial in nature does not, in and of itself, require that fiduciary obligations not be present. The application of fiduciary law is not concerned with the actors involved or whether the relationship fits within accepted categories of fiduciary relations.[69] Its focus is whether fiduciary standards of conduct and responsibility ought to be imposed upon a particular relationship or on any component of that relationship because of the nature of the parties' interaction. Thus, where party A has reposed trust and confidence in party B and B's exercise of discretion over the A's interests has rendered A vulnerable to B, B may be deemed to be under a fiduciary obligation to act in A's interests. This determination may apply as equally to purely commercial relations, where appropriate, as to other forms of interaction.

Fiduciary law is applied in such situations to preserve the integrity of certain socially-necessary or valuable relationships that arise because of human interdependency. Maintaining the viability of an interdependent society requires that that interdependency be closely monitored to avoid the potential for abuse existing within such relations. Individuals are far more apt to subject themselves to situations of dependence or reliance upon others if they can be assured that their interests are protected and that their consequent vulnerability created by that interaction is not unfairly exploited. Fiduciary law satisfies this additional need by providing protection for beneficiaries who are involved in fiduciary relations from actions against their interests by unscrupulous fiduciaries. Law's intervention is required because individual beneficiaries or external factors such as social mores or the morals of the marketplace cannot completely eliminate the potential for individuals to abuse the trust and confidence placed in them by others. In the infamous words of Justice Cardozo in *Meinhard* v. *Salmon*:

> Many forms of conduct permissible in a work-a-day world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity had been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the

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> 134. (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
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> (a) act honestly and in good faith with a view to the best interests of the corporation ...

Note also section 248(3) of the *OBCA* relating to oppression, under which a court is given broad powers to make "any interim or final order it thinks fit" to rectify the matters complained of. The breadth of judicial discretion under the statutory oppression regime could make even fiduciary remedies appear limited by comparison.

[68] Flannigan, *supra* note 60 at 913.

[69] See *Tate* v. *Williamson* (1866), 2 L.R. Ch. App. 55 at 60-1; *Canadian Aero Service Ltd.* v. *O'Malley*, [1974] S.C.R. 592, 40 D.L.R. (3d) 371 at 383; *Guerin* v. *R.* (1985), 13 D.L.R. (4th) 321 at 341, 55 N.R. 161 (S.C.C.); *LAC Minerals*, *supra* note 9 at 29; *M.(K.)*, *supra* note 25 at 326.

crowd.[70]

More recently, Justice La Forest's majority judgment in the Supreme Court of Canada decision in *Hodgkinson* v. *Simms* echoed these same sentiments in relation to professional advisory relationships:

> ... [I]n many advisory relationships norms of loyalty and good faith are often indicated by the various codes of professional responsibility and behaviour set out by the relevant self-regulatory body. The *raison d'etre* of such codes is the protection of parties in situations where they cannot, despite their best efforts, protect themselves, because of the nature of the relationship. These codes exist to impose regulation on activity that cannot be left entirely open to free market forces.[71]

In *Cadbury Schweppes*, Binnie J. expressly acknowledged that fiduciary obligations may be imposed upon commercial relations, where appropriate, notwithstanding the general principle established in *Frame* and affirmed in *LAC Minerals*.[72] This author has taken exception to this general principle and its mischaracterization of vulnerability in fiduciary relations in an earlier article, arguing instead that vulnerability is a consequence, rather than a catalyst, of fiduciary relations.[73] In spite of allowing for the possibility of a finding of fiduciary relations in an arm's length commercial context, Binnie J. concluded that the relationship in question did not fall within the realm of fiduciary law.[74] He also found that there was no reason to describe the breach of confidence that existed in the case as a breach of fiduciary duty.[75]

If fiduciary relationships create vulnerability rather than vice versa, the fact that Cadbury Schweppes became vulnerable to the exploitation of its trade secrets as a result of the relationship created under the licensing arrangement suggests that a fiduciary relationship could have existed between the parties. As a licensee, Caesar Canning was under a duty not to use the confidential information provided to it for purposes not authorized by the licensing agreement. FBI fell under the same restriction when it purchased Caesar Canning's assets. However, the primary basis for imposing fiduciary obligations is the creation of a vulnerability arising out of a *relationship* between parties, not simply the existence of vulnerability. Indeed, vulnerability may exist in ordinary contractual relationships that are not properly characterized as fiduciary.

While Caesar Canning had a definite relationship with Cadbury Schweppes, was that relationship properly characterized as an "arm's length commercial transaction" that ought not give rise to fiduciary obligations (assuming that an adequate definition of such a transaction is obtainable)? In the context of their relationship, Caesar Canning and Cadbury Schweppes were not entirely free to pursue their self-interests. Each party was restricted in its activity by the nature of the agreement between them. Caesar Canning could not compete with Cadbury Schweppes in the tomato-clam cocktail

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[70] 164 N.E. 545 at 546, 62 A.L.R. 1 (N.Y. Ct. Appls. 1928).

[71] *Supra* note 5 at 187.

[72] *Supra* note 2 at 163.

[73] L.I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24 Man. L.J. 60.

[74] See notes 24-9.

[75] See note 30.

market during the currency of the licensing agreement, nor could it manufacture or distribute any product "which includes among its ingredients clam juice and tomato juice" for a period of 5 years following the termination of the agreement. Meanwhile, Cadbury Schweppes could not assign the rights to manufacture and produce Clamato in Canada to a company other than Caesar Canning unless (a) Caesar Canning failed to achieve the minimum volume of sales contemplated in the agreement, or (b) the current 12-month licence period had elapsed. In this regard, the companies' rights and obligations were intertwined. Where such an intertwining of rights exists in a commercial context, along with the sharing of confidential information, a fiduciary relationship could well exist.

Although Caesar Canning may be seen to have been involved in a contractual, if not fiduciary, relationship with Cadbury Schweppes, FBI had no direct relationship with the latter.[76] If, however, FBI may be properly regarded as an agent or delegate of Caesar Canning, or a successor to the company, then it would be possible for a fiduciary relationship to exist between FBI and Cadbury Schweppes. By receiving the confidential information about Clamato under the tolling agreement with Caesar Canning, FBI could be regarded as a delegate of Caesar Canning, insofar as it was delegated the responsibility to manufacture Clamato and was subject to the same limitation on the use of the confidential information as Caesar Canning was. In addition, by purchasing Caesar Canning's assets, FBI most certainly fits the role of successor. When this characterization of FBI's involvement is made, the perfunctory rejection of fiduciary obligations by the Supreme Court appears more questionable than it was portrayed as being in Binnie J.'s judgment.

It would appear that the Supreme Court's finding that Cadbury Schweppes did not suffer much of a loss as a result of the unauthorized use of confidential information in the creation of Caesar Cocktail mitigated against its finding of a fiduciary obligation in the circumstances. The following commentary by the Court is telling on this point:

> In this case, the licensing arrangement expressly contemplated open competition upon termination, subject to a period of five years to avoidance of what came to be recognized as a useless limitation, namely mixing clam broth with tomato juice. While the law will supplement the contractual relationship by importing a duty not to misuse confidential information, there is nothing special in this case to elevate the breached duty to one of a fiduciary character.[77]

Equally indicative of the Court's belief that Cadbury Schweppes' loss was insignificant was its repetition of the finding that the confidential information was "nothing very special" as well as its sardonic quip that a rocket scientist was not required to produce a copycat Clamato that tasted good enough to satisfy members of the public. The lack of uniqueness of the Clamato product was further emphasized when the Court suggested that "It must have come as an unpleasant surprise to Duffy-Mott when Caesar Cocktail was able to substantially replicate the look, smell, texture and taste of Clamato juice, and win a significant share of the market without resort to

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[76] As stated earlier, while Cadbury Schweppes' predecessor, Duffy-Mott, had consented to the tolling agreement between Caesar Canning and FBI Foods, it was not a party to that agreement.

[77] *Cadbury Schweppes*, *supra* note 2 at 165.

clam broth or other seafood extract."[78]

If it is true that the Court did not find a fiduciary obligation because of its perceptions that (a) the "loss" in question was insignificant and (b) that it was a foregone conclusion that Clamato would have legitimately faced competition in the juice market at some point, then the Court used inappropriate considerations in determining whether a fiduciary obligation ought to have existed in the circumstances. The imposition of fiduciary principles is not dependent on the degree of loss suffered, or whether a loss occurred at all. Fiduciary law is applied where the circumstances of the parties' interaction warrant its application. Relevant considerations include: the reposing of trust and confidence; the creation of vulnerability of one party at the hands of another, and; the need to protect that vulnerability, as a matter of policy, in situations where the party exercising discretion over the vulnerable party's interests ought to be prevented from acting in self-interest – or the interests of third parties – at the expense of the vulnerable party. A fiduciary's departure from the standard of conduct required is what then gives rise to a finding of breach.

A fiduciary may not rebut an allegation of breach simply by showing that the beneficiary also benefited from the transaction in question. Similarly, a fiduciary will not be alleviated from liability for breaching a fiduciary duty by showing that any actions taken were entered into in good faith. Liability arises as a result of the fact of breach itself, not from the presence of *mala fides* or the absence of *bona fide* activity. As Lord Russell of Killowen explained in *Regal (Hastings) Ltd.* v. *Gulliver*:

> The rule of equity, which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*: or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.[79]

In accordance with this understanding of fiduciary relations, it has also been held that a fiduciary may not refute a *prima facie* inference of breach by demonstrating that the beneficiary's loss would have occurred notwithstanding the breach of duty by the fiduciary. This principle is often described as "inevitability of loss" in fiduciary jurisprudence.[80]

It is true that Caesar Cocktail could have been legitimately developed at some point after the termination of the licensing agreement, thereby eliminating Clamato's exclusive niche in the juice market. Also, since Clamato's ingredients were public knowledge, it was entirely possible that Caesar Canning or another competitor could have developed a rival juice. However, these factors are not as important in the

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[78] *Ibid.* at 153.

[79] [1942] 1 All E.R. 378 at 386 (H.L.).

[80] See *British American Elevator Co.* v. *Bank of British North America* (1914), 20 D.L.R. 944, 6 W.W.R. 1444 (Man. K.B.); *Brickenden* v. *London Loan & Savings Co.*, [1934] 3 D.L.R. 465 at 469, 2 W.W.R. 545 (P.C.); *Island Realty Investments Ltd.* v. *Douglas* (1985), 19 E.T.R. 56 at 64 (B.C.S.C.).

consideration of whether to apply fiduciary principles to the situation in *Cadbury Schweppes* as the fact that Caesar Cocktail was not legitimately developed, but was developed in breach of a duty not to use confidential information. In this sense, "ifs" and "buts" may as well be raisins and nuts for the relevance they have in determining if a fiduciary relationship exists and whether it has been breached.

VII. COMPENSATORY CONSIDERATIONS

At the Supreme Court of Canada, FBI sought to convince the Court that the British Columbia Court of Appeal's judgment was too harsh, in that it made FBI an insurer of the respondents' profits in the year following termination of the licensing agreement. FBI argued that it ought not be made to carry such a burden, since Cadbury Schweppes caused the termination of the agreement. It insisted that Cadbury Schweppes ought properly bear the brunt of any losses suffered as a result of Clamato's market dislocation because of the change in responsibility for its production, marketing, and distribution. FBI also sought a vacating of the permanent injunction against the manufacture and sale of Caesar Cocktail and its associated brands.

Cadbury Schweppes maintained that FBI's misuse of the confidential information about Clamato was analogous to FBI having converted Cadbury Schweppes' property to its own use. As a result, Cadbury Schweppes sought to overturn the Court of Appeal's limitation of its compensation to profits it would have earned to the 12 months following termination of the licensing agreement. It sought compensation for the information that it argued was "pirated" and exploited contrary to the purpose for which it was shared under the licensing agreement.

The Supreme Court ordered that the direction as to compensation provided by the British Columbia Court of Appeal continue, but on modified terms. These modifications were broken down into five considerations. First, the Court stated that the loss attributable to the breach of confidence was to be restricted to the 12-month period following the termination of the licensing agreement. Guidance to determining the measure of compensation was to be taken from the American Restatement (Third) of Unfair Competition, chapter 4, section 45, which states:

> e. Relief measured by plaintiff's loss. A frequent element of loss resulting from the appropriation of a trade secret is the lost profit that the plaintiff would have earned in the absence of the use by the defendant. The plaintiff may prove lost profits by identifying specific customers diverted to the defendant. The plaintiff may also prove lost profits through proof of a general decline in sales or a disruption of business growth following the commencement of use by the defendant, although the presence of other market factors that may affect the plaintiff's sales bears on the sufficiency of the plaintiff's proof. If the evidence justifies the conclusion that the sales made by the defendant would have instead been made by the plaintiff in the absence of the appropriation, the plaintiff may establish its lost profits by applying its own profit margin to the defendant's sales.[81]

Second, the compensable period was restricted to the 12 months following

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[81] *Cadbury Schweppes*, *supra* note 2 at 194.

termination of the licensing agreement, as held by the Court of Appeal.[82] The rationale behind this determination was that on April 15, 1983, one year after the termination, the formulation for Caesar Cocktail did not comply with the terms of the anti-competition provisions established under the agreement, thereby instigating a breach of the agreement.[83] Cadbury Schweppes' attempt to have this period extended was dismissed because the Court found that "the market advantage created by the 'nothing very special' information lapsed at the end of the 12-month period."[84] Consequently, Binnie J. stated that to continue the compensation period beyond this time would unjustly benefit Cadbury Schweppes.

The third modification was that the referee determining compensation should have regard to the American Restatement's discussion of "other market forces" in the assessment of the amount payable. These factors included the effect caused by the fact that Cadbury Schweppes had just taken over the production and sale of Clamato when the licensing agreement expired and thus did not have the same developed infrastructure for that purpose as the appellants, who had engaged in that business since the late 1970's.[85] Fourthly, the Court suggested that the referee might consider the royalties payable under the licensing agreement for the last 12 months of the agreement, insofar as the appellants had frustrated Cadbury Schweppes' intention to exit the licensing business by using at least part of what had been licensed. For this reason, Binnie J. recommended that the referee might want to consider whether all or a portion of the fees payable to the appellants ought to be included in the calculation of compensation.[86] Finally, the referee was advised to keep in mind that the objective in awarding compensation was a "broadly equitable result," that did not require mathematical exactitude.[87] Binnie J. concluded by stating that these five considerations were not exhaustive, but were put forward in an attempt to save the parties time and money when it came time to assess the measure of compensation payable.

In discussing causation issues in *Cadbury Schweppes*, Binnie J. adhered largely to the "but for" test for compensation that has its basis in principles of restitution. The essence of the "but for" test is straightforward – but for a particular action, a certain

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[82] Why this is a separate principle is unclear. If the first modification was to "assess the loss attributable to the breach of confidence, if any, sustained by the respondents during the 12-month period following the termination," it would seem to render the second modification redundant.

[83] While the agreement was initially breached on April 15, 1983, should that entail that Cadbury Schweppes receive no compensation for the breach of confidence that certainly arose prior to that point? After all, for Caesar Cocktail to have been market-ready on April 15, 1983, the process of development, refinement, consumer testing, etc. would have had to have began much earlier, using a reformulation of Clamato that constituted the breach of confidence. Therefore, it could be legitimately argued that there were actually *two* breaches committed, a breach of confidence for using the information about Clamato for unauthorized purposes and a breach of the anti-competition provisions of the licensing agreement.

[84] *Cadbury Schweppes*, *supra* note 2 at 196.

[85] *Ibid.* at 196-197. This point was conceded by counsel for the respondents during oral argument, where it was explained, *ibid.* that the appellants "had the distribution system, they had the experience, they'd built up the market and they had the contacts." Ironically, this point, which was made to emphasize Cadbury Schweppes' vulnerability to the breach of confidence, potentially ended up limiting Cadbury Schweppes' compensation.

[86] *Ibid.* at 197.

[87] *Ibid.*

result would not have occurred. This approach was appropriate in the context of *Cadbury Schweppes*, particularly since Binnie J. had determined, on the basis of *LAC Minerals*, that a court possessed jurisdiction in a breach of confidence action to grant a remedy "dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations."[88] The "but for" test has been the subject of some controversy, however. This controversy is evidenced, in particular, by the Supreme Court's judgment in *Canson Enterprises Ltd.* v. *Boughton & Co.*,[89] in which the "but for" test was abandoned in a breach of fiduciary duty action in favour of a "common sense view of causation" that advocated a blending of common law and equitable principles in the fashioning of an appropriate measure of relief.

Traditionally, equitable doctrines were unconcerned with notions of causation, foreseeability, intervening act, remoteness, mitigation of damages, and other considerations that have long affected the quantum of remedy under the common law.[90] Their concern was restitutionary – to restore wronged parties to the positions that they would have been in had the wrong not occurred.[91] In focussing on the principle of restitution, Equity accounted for the connection between a breach of duty and the loss incurred through a "but for" test of causation. This approach may be contrasted with the essential element of common law tests of causation – whether the loss was caused by or reasonably flowed from the breach.[92]

A corollary to the "but for" test of causation is the principle of inevitability of loss, discussed earlier. This latter principle is sometimes referred to as the *Brickenden* rule, after the dicta of the Privy Council in *Brickenden* v. *London Loan & Savings Co.*[93] In that case, Lord Thankerton explained the principle in the following manner:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by another factor.[94]

When the "but for" test of causation is used in conjunction with the notion of inevitability of loss, the result can be quite harsh on the person in breach of an equitable obligation. In such situations, where it is demonstrated that, but for the breach, a loss

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[88] *Ibid.* at 160.

[89] *Supra* note 4.

[90] While the *Chancery Amendment Act, 1858 (U.K.)*, 21 & 22 Vict. c. 27, also known as *Lord Cairns' Act*, and the fusion of legal and equitable jurisdictions have enabled courts to impose both common law and equitable remedies, the doctrinal basis of equitable measures of compensation was unconcerned with these notions. See I.E. Davidson, "The Equitable Remedy of Compensation" (1982) 13 Melbourne Univ. L. Rev. 349 at 352.

[91] Indeed, this principle was emphasized by La Forest J. in the Supreme Court of Canada's most recent major pronouncement on fiduciary law in *Hodgkinson* v. *Simms*, *supra* note 5 at 199.

[92] This essential element is further refined by notions such as the reasonable contemplation of the parties, intervening act, proximate cause, or what was reasonably foreseeable to the parties.

[93] *Supra* note 80.

[94] *Ibid.* at 469.

would not have been suffered, the person who is found to be in breach may not escape liability by demonstrating that the loss was inevitable, *i.e.* that it would have occurred notwithstanding the breach. Consequently, it may be seen that the breach of duty need not be *the* cause of the loss, but only *a* cause of it.[95]

In *Cadbury Schweppes*, Binnie J. referred to the "but for" standard on more than one occasion. Initially, he held that, "but for" the breach of confidence, Cadbury Schweppes would have faced competition in the juice market from a legitimately formulated, produced, and marketed version of Caesar Cocktail within 12 months.[96] He then found that the policy objectives under either Equity or tort supported a restoration of Cadbury Schweppes to the position it would have been in "but for" the breach.[97] He used the same "but for" principle in his review of the Court of Appeal's permanent injunction against the sale of Caesar Cocktail. In rejecting the appropriateness of such an injunction, he said "An injunction in the circumstances of the present case would inflict competitive damage on the appellants in 1999 far beyond what is necessary to 'restore' the respondents to the competitive position they would have enjoyed 'but for' the breach 16 years ago on April 15, 1983."[98]

Despite his continued affirmation of the "but for" principle, Binnie J. departed from the *Brickenden* rule when he stated that "the Court is free to draw inferences from the evidence as to what would likely have happened 'but for' the breach."[99] *Brickenden* clearly states that what would have happened "but for" the breach is irrelevant. Instead, the breach and its effects are all that the court ought to be concerned with in the formulation of an appropriate measure of relief. Thus, under the *Brickenden* rule, whether Caesar Cocktail could or could not have been formulated without the misuse. of the confidential Clamato information is irrelevant since the beverage was, in fact, formulated through the misappropriation of that information. Using the rule in *Brickenden*, therefore, the Supreme Court of Canada ought to have focussed only on what actually occurred - namely, the production and sale of a product developed through the misuse of confidential information - rather than whether Caesar Cocktail *could* have been developed without using such information.

It may be seen, then, that Binnie J.'s approach in *Cadbury Schweppes*, by allowing the Court to speculate as to what could have happened if the confidential information had not been misused, is more consistent with the "common sense view of causation" advocated by McLachlin J. in *Canson* than the *Brickenden* rule, which was followed by the Supreme Court in *Hodgkinson*. It could be suggested that the reason

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[95] J.D. Davies, "Equitable Compensation: Causation, Foreseeability and Remoteness" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993) 297 at 304.

[96] *Cadbury Schweppes*, *supra* note 2 at 173.

[97] *Ibid.* at 175. See also *ibid.* at 178, citing *Nocton* v. *Lord Ashburton*, [1914] A.C. 932 at 952 (H.L.). See also *ibid.* at 179: "The objective in a breach of confidence case is to put the confider in as good a position as it would have been but for the breach"; *ibid.* at 186: "In my view, the key to the assessment of equitable compensation in this case is the expected duration of the respondents' 'lost opportunity' *i.e.*, the economic advantage they would have enjoyed after the cancellation of the licence 'but for' the breach."

[98] *Ibid.* at 192. See also at 193 where, in relation to the Court of Appeal's rejection of the "consulting fee" approach upheld at trial, Binnie J. held that that approach "would not restore the respondents to the position they would have been in but for the breach."

[99] *Ibid.* at 186, citing, among others, *LAC Minerals*, *supra* note 9 and *Rainbow Industrial Caterers Ltd.* v. *Canadian National Railway Co.*, [1991] 3 S.C.R. 3 at 15.

for the Court's departure from the *Brickenden* rule in *Cadbury Schweppes* may be rooted in its belief that awarding compensation on the basis of a strict, "but for" test without considering what would have happened if no breach had occurred was inequitable on a common sense analysis of the facts as presented. As Binnie J. stated in his judgment, "It would be inequitable to protect the respondents' interest in a commercial opportunity they never enjoyed by invoking undue solicitude for their 'nothing very special' information."[100]

One of the primary arguments against the "but for" test of causation is that it could insulate wronged parties from their own improper conduct where a prior breach of equitable obligation has occurred. If the wronged party's losses would not have arisen "but for" the breach, then the wronged party would appear to be protected at the expense of the party in breach, who becomes an insurer of all post-breach damage or loss that cannot be attributed to the wronged party's own fault.[101] Before dismissing this possibility as too harsh, or draconian, it is necessary to revisit the deterrence element of imposing such harsh sanctions on those in breach of equitable obligations.

It may be that such measures are appropriate only where a high standard of duty exists, as with a fiduciary relationship. Alternatively, it may as easily be determined that any breach of an equitable obligation carries with it the harshness and rigour of equitable compensatory principles. At the bottom line, however, if there is to be a departure from established principles, it would seem logical that a doctrinally-based rationale for such a departure is required. Either saying that the result achieved from the imposition of such principles is unfair or proceeding from a result-oriented approach is inconsistent with the principled application of both common law and equitable doctrines. While Equity provides flexibility in its remedies to render them appropriate to the situation at hand, it is necessary to consider not simply the financial cost involved in the determination of what is appropriate, but also the existence of any other reasons, such as deterrence, that would justify the imposition of more severe sanctions against those in default of their obligations.

Had the Supreme Court of Canada based its decision solely on what actually occurred, a legitimate response would have been to render FBI liable to account for profits made from the misuse of confidential information, namely profits made from the sale of Caesar Cocktail and its derivative products.[102] Alternatively, the same effect could have been achieved by imposing a constructive trust on those profits for the benefit of Cadbury Schweppes. The order directed by the Supreme Court delves into the realm of speculation and imposes improper presumptions on what actually occurred. The Supreme Court's directions as to FBI's liability essentially forgive Caesar Canning for misusing the confidential information. The Court's judgment imparts to FBI the benefit of having engaged the services of a juice consultant to develop Caesar Cocktail when Caesar Canning chose not to do so. It may be legitimately asked why FBI ought to receive the benefit of an action that could have been, but was not, taken at the expense of Cadbury Schweppes, an innocent party victimized by the breach of

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[100] *Cadbury Schweppes*, *supra* note 2 at 186.

[101] It would be inequitable – and contrary to the Equitable maxim "He who comes to Equity must come with clean hands" – to allow a wronged party to initiate further losses by his or her own improper actions and have those losses be attributed to the party in breach in situations where the former had direct control over whether any further loss would occur.

[102] But see *supra* note 14.

confidence. FBI was the successor to a party, Caesar Canning, that committed a wrong by misusing confidential information. FBI was expressly held to be under the same restrictions in its use of the information in question as Caesar Canning had been. In using the confidential information to develop and sell Caesar Cocktail, Caesar Canning/FBI obtained benefit from the unauthorized use of information belonging to Cadbury Schweppes. Nevertheless, the Supreme Court, in holding that a mock Clamato product could easily have been developed through legitimate means overlooks the fact that legitimate means were not used. The fact that the information in question was "nothing very special" ought not be considered as relevant a consideration in this context as the fact that information that the appellants were not entitled to use for personal profit was used for that very purpose. The improper use of confidential information is a serious matter within commercial relationships. As such, compensation for the misuse of such information ought to reflect the seriousness of this breach of commercial obligation.

Without the existence of legal protections for the misuse of confidential information, companies that own confidential information or trade know-how would be far more reluctant to share such information with others. The fierceness with which companies protect trademarks, copyright, and patents is indicative of the tremendous value associated with commercial proprietary rights to information. Holding parties who obtain confidential information to a high standard of care ensures that those parties will not misuse that information at the expense of the owner of the information. The small measure of compensation that Cadbury Schweppes is likely to receive in exchange for the misuse of its confidential information may result in other commercial actors reconsidering the extent to which they are willing to share confidential information with others for commercial purposes. That is precisely the response that the law should be seeking to prevent. In imposing strict standards on commercial actors, the law provides greater incentives for the continuation and proliferation of interdependent commercial relationships, including the sharing and licensing of confidential information. Far from restricting the ability of commercial actors to freely engage in business pursuits, such standards allow those actors to concentrate more intently on the business end of dealings without concern for what might happen if others that they are involved with engage in actions outside of permissible realms, as established, for example, by contract, common law, or Equity.

For those who object to law's intrusion into their affairs, private ordering is, as indicated by the *Cadbury Schweppes* decision, always an option. As Binnie J. expressly stated in *Cadbury Schweppes*, a contractual term can limit or negative a more general duty implied by either the common law or Equity.[103] Notwithstanding the ability of parties to engage in private ordering, their actions remain subject to judicial scrutiny if legal action ensues. This fact was made explicit in *Cadbury Schweppes*, where Binnie J. held that, notwithstanding the fact that the licensing agreement between Cadbury Schweppes and Caesar Canning provided the substance of the parties' legal obligations to each other, the contract "cannot reasonably be read as negating the duty of confidence imposed by law."[104]

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[103] *Supra* note 2 at 167, citing *337965f B.C. Ltd.* v. *Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129 (B.C.C.A.) and *BG Checo*, *supra* note 63.

[104] *Cadbury Schweppes*, *supra* note 2 at 168.

VIII. CONCLUSION

The *Cadbury Schweppes* case provides valuable insight into the Supreme Court of Canada's most recent thoughts on the equitable obligations of parties in a commercial context. It has also raised some interesting points about the Court's jurisdiction to grant relief for a breach of confidence. Given the recent changes in the Court's composition since its decision in *Hodgkinson* v. *Simms*, the newly-constituted court may want to revisit the implications of judgments such as *Hodgkinson* v. *Simms* and *Canson Enterprises Ltd.* v. *Boughton & Co.* in light of the principles it has espoused in *Cadbury Schweppes*. In particular, it may want to provide greater discussion and analysis of fiduciary principles, as well as the intersection of common law and equitable doctrines of causation the next time that those issues are pertinent to the matter before it.

The discussion of fiduciary principles herein should not be read to suggest that *Cadbury Schweppes* ought to have been decided on the basis of fiduciary law rather than breach of confidence. There appear to be a number of assumptions inherent in *Cadbury Schweppes* that need to be more fully fleshed out before such an assertion may be properly considered. In raising some issues that were not discussed by the Court or that were summarily dismissed, this paper has attempted to emphasize the Court's cursory treatment of equitable principles, such as fiduciary law and equitable compensation, and their application to commercial relations. While this is not a new development, the increasing application of fiduciary and other equitable principles to commercial contexts ought to provide an impetus for the Court to engage in more intense and sustained discussion on these matters.

Although the Supreme Court of Canada may be seen to have played fast and loose with speculative thoughts in *Cadbury Schweppes*, this paper has attempted to illustrate that this is neither a legitimate basis for the fashioning of a remedy in a particular case nor a rational method for establishing or explaining legal doctrine. The Court's presumption that an easy and inexpensive course of action was not followed, but could have been, ought not to mitigate clearly improper conduct. While it may be true that "juice formulation is not rocket science," the ability to distinguish fact from fiction and to impose liability on the basis of the former is certainly the function of juridical science. The facts in the *Cadbury Schweppes* case indicate that Caesar Canning misused confidential information to develop Caesar Cocktail. The fiction is the Court's speculation that Caesar Canning could have developed the product through legitimate means and within 12 months of the expiration of the licensing agreement. In establishing FBI's liability on the basis that Caesar Canning could have, but did not, hire a consultant to develop Caesar Cocktail, the Supreme Court has engaged in some "juicing" of its own which leaves one with a bad taste in one's mouth.