

Chief Justice Dickson, The Court, and Restitution

Donovan Waters*

THE ASSOCIATION OF DICKSON C.J.C. and the Court with the subject of restitution is well known and Professor McCamus has highlighted the achievements in his very comprehensive remarks. As a commentator upon those remarks I would merely like to add a footnote on the circumstances in which the Dickson constructive trust came into being. In my opinion that is a story in itself. As for the substance of the Dickson constructive trust, it is a profound legacy to the future, but one whose full significance time has yet to tell.

The Court in Dickson's time developed a distinct character for the concept of restitution, because restitution as conceived by this Court embraced principles and remedies of the equity jurisdiction as well as the rules and remedies of law. The *Degelman* decision of 1954 had concentrated upon the quasi-contractual aspects of restitution,¹ but the introduction of the equitable principles and their connotations was due to the work of the Dickson era. As in the 1950s Rand J. had been so much the disseminator of the concept of restitution, so the formulation of the character and elements of the constructive trust, a remedy for breach by a party of the duty to make restitution, was apparently in large measure the achievement of Mr. Justice Dickson himself, aided forthrightly as he was by Madam Justice Wilson during the 1980s. It was while he was a puisne judge that he gave the famous minority judgment in *Rathwell v. Rathwell*,² and again as a puisne judge that he gave the majority judgment in *Pettkus v. Becker*.³ Today, thirteen years after his clear and carefully reasoned judgment in the *Rathwell* case, posterity can be forgiven for seeing Dickson J.'s words as simply another step forward in the historical

* Faculty of Law, University of Victoria. At the time this paper was written, Professor Waters did not have access to the paper submitted by Professor J.D. McCamus, but rather was responding to the latter's spoken remarks at the Dickson Legacy conference.

¹ *Degelman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725, [1954] 3 D.L.R. 785. See now P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990).

² [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289.

³ [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

evolution of the present Canadian law on the subject of the constructive trust. But in 1978 the minority opinion of the Laskin-Spence-Dickson group took place in very different circumstances from those which prevail today. The threesome of Supreme Court judges would have restricted the field of operation of the resulting trust to fact situations where intention to transfer property is clearly evident, and otherwise employ a constructive trust as a judicial discretionary remedy to secure property-owning equity between disputing parties. The highest courts of appeal elsewhere in the Commonwealth either had already rejected, or it was clear that they would reject, that theory of the constructive trust,⁴ and the prestigious Court of Appeal of New South Wales had also refused to accept the viewpoint that the constructive trust could be imposed upon parties.⁵ Indeed, most Commonwealth legal opinion viewed the imposition of such a trust, imposed regardless of the absence of evidence of intention, as a bold, some would say flagrant, assumption of the legislative function. It was said that both common law and equity involve inductive reasoning from established precedents. Imposing a fair property distribution upon the parties, whichever of them owns the assets in question prior to the court order, was simply to assert the validity of a judicial *ipse dixit*. It was not rooted in precedent. 'Unjust enrichment' was also popularly regarded elsewhere in the Commonwealth as a head of obligation that was persuasive only in common law North America. It might indeed be the common thread that connects various circumstances in which a plaintiff is able to recover, but it was thought to do little more than act as a catch-all description of those circumstances. It was seen as a telescoped description of results, not as a head of obligation like contract and tort.

All the same, the minority in *Rathwell* was convinced that the imposed constructive trust was the solution to a grave social problem, and the members of that minority were prepared to go out on a limb to establish that solution. They did not succeed, but in 1979, in *Pettikus v. Becker* — albeit by a majority position only — that approach prevailed, and among Commonwealth countries and jurisdictions the law in Canada has since taken its own path. The monumental change which these years between 1975 and 1979 produced in Canada can only be understood, I believe, against the background of the social history of those times.

⁴ e.g., *Pettitt v. Pettitt*, [1970] A.C. 777, [1969] 2 All E.R. 385, and *Gissing v. Gissing*, [1971] A.C. 886, [1970] 2 All E.R. 780 (H.L.).

⁵ *Allen v. Snyder*, [1977] 2 N.S.W.L.R. 685.

Between the end of the Second World War in 1945 and the 1970s there was no way in which the courts could assist a married couple who, without any agreement as to ownership, had acquired assets during the period of the marriage, by various joint efforts, but invariably, as was the age-old custom, taken those assets in the name of the husband. Community of property did not exist in common law jurisdictions, and as late as the eve of the Second World War most common law lawyers would have been of the view that the *Married Women's Property Acts* of 1870⁶ and 1882⁷ were the solution to the problem of property ownership as between spouses. Those Acts finally recognized the ability of a married woman to own property in her own name, and late Victorian and Edwardian society in England, from whence Canadian common law doctrine came, clearly was of the view that this placed husband and wife in a parity of position. Case law had done nothing, so far as matrimonial property was concerned (even the term "matrimonial property" did not exist), to reflect the enormous social change brought about by the First World War, and this despite the fact that the average young couple entering upon marriage in the 1920s or 1930s would often have very little indeed on entering marriage, acquiring assets not by the process of inheritance as pre-war wealthy people had done, but by dint of their various efforts to make the marriage a going concern.

There is no doubt that, but for the coming of the Second World War in 1939 following the long and debilitating period of the Great Depression, there would have been some degree of complaint even as early as the 1930s, in light of the fact that the party in whose name the property stood took that property on the cessation of the marriage. But the divorce rate in that decade among middle and low income people remained low. That was still the era when the unhappy soldiered on, "because of the children" and the economic interdependence of the family members.

The Second World War caused another major social change, and after that War things were set for legal change throughout the major common law jurisdictions of England and Wales, Canada, Australia, and New Zealand. During the War women had played a vital role in all theatres of activity, and after the War they were determined, as their ex-service husbands were quickly to discover, that if marriage broke down there should be a reasonable sharing of the assets that

⁶ 33 & 34 Vict., c. 93.

⁷ 45 & 46 Vict., c. 75.

had been acquired in the husband's name. Even in England, the oldest of the common law societies, marriage was no longer seen in any way, in particular among middle and higher income people, as a subservience of the female to the male, and women increasingly saw it as a relationship socially and economically of partnership.

Already in the 1950s, when the first pre-War and wartime marriages proved no longer able to meet the expectations of the parties in the post-War years, there was an evident problem, and the problem came to a head in the 1960s. Trial courts were looked to in all these countries to find some formula through which assets might be shared on the breakdown and termination of marriage. Courts began to find from the most slender of evidence the intention to share in the acquisition of assets, and many a judicial order appeared to be based on something very close to a fictional finding of fact. Lord Denning M.R.'s division of the Court of Appeal in England became associated with theories about the resulting trust and the constructive trust which were obviously aimed at enabling the courts to do what was right and just in the circumstances,⁸ and first instance courts in England and then throughout the Commonwealth were not slow to pick up this lead. It enabled judges in the front line, as it were, to deal with the very human problems that were confronting them daily. While the legislatures of the world hung back, unable to agree as to what legislative response was appropriate, the pressure on the courts only increased. Newspapers, magazines, radio and television programs throughout the common law world were quite clear as to what the courts needed to do, but very few indeed of their publishers and producers recognized the real doctrinal problems which the appellate courts were experiencing everywhere, even in some divisions of the contemporary Court of Appeal in England.

The *Pettitt v. Pettitt* and *Gissing v. Gissing* decisions in the House of Lords in 1970 struggled with the serious legal issue of how far the intention of the titled spouse to give an interest to the non-titled spouse can be inferred from conduct and lifestyle, indeed, the very character of matrimony. Was matrimony to be regarded as a *sui generis* relationship that the courts should approach from a different angle than would be the case with other property disputes? Both of those decisions revealed various shades of opinion among the members of the House, but all were ultimately to agree that the constructive trust could not be seen as an obligation to submit to the allocation of

⁸ *Hussey v. Palmer*, [1972] 1 W.L.R. 1286, is the clearest example of Lord Denning's thinking.

assets that is thrust upon the parties regardless of the intention of the party with title. The Lords did not deny that the constructive trust arose by operation of law as opposed to the intention of the title-owning party. That was not under attack. The constructive trust, however, had traditionally been employed to rectify cases of fraudulent deprivation, and the titled party in a marriage breakdown is not a tortfeasor, nor is that person constructively fraudulent in pointing out where title lies. Fraud in this connection is regarded as occurring where, as a result of agreement or the assumed role of the title holder, title should have been transferred by the holder to another, but in violation of that obligation that transfer has not been made. Their Lordships were in fact recognizing the very clear common law principle that the individual's right of property is fundamental to the system, and that it is not for the courts to assume the power to take property from one person and give it to another simply because that seems to the particular court a fair solution. Moreover, their Lordships felt that there were clear policy overtones in this whole issue between spouses. In England it was for Parliament to consider all the implications of the problem, and exercise its sovereignty to make an appropriate policy decision. If it was thought by Parliament to be appropriate, and a discretion was then conferred upon the courts to divide assets between spouses on the basis of fairness and equity in the circumstances, then the courts would of course forthrightly exercise that power.

But that power had not been given, and in England it was not given until later in 1970.⁹ In Canada views were held within the Supreme Court of Canada along the same lines. Martland J. and Ritchie J. shared the conclusion expressed by the House of Lords, and Beetz J. of the Quebec civilian tradition held the same view. It was not for the courts to take away property from anyone and give it to another. That assumption of authority could not be made; the legislature of the relevant province had to give such a power. Laskin J., as he then was, had dissented forcefully from that opinion in *Murdoch v. Murdoch*¹⁰ in 1975, believing strongly that something had to be done to deal with a grave social problem and an inactivity in any legislative quarter.

⁹ *Matrimonial Proceeding and Property Act*, 1970, c. 45, ss. 4 and 5. For an examination in depth of the historical background to the turmoil in the 1970s over matrimonial property rights, see D.M. Waters, "The Trust as a Picture of the Family: Yesterday, Today — and Tomorrow?" Joseph Trachtman Lecture, 1987, The American College of Probate Counsel.

¹⁰ [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367.

Where else could the parties turn for an equitable solution but to the courts? And in 1978 he was joined by Dickson and Spence JJ. in the well-known *Rathwell* decision. Laskin J., now Chief Justice, stood aside while Dickson J. wrote the minority opinion which followed the *Murdoch* dissent. One should also remember the outcry across the country which followed the *Murdoch* decision in 1975. The media was convinced as to the solution that should have been reached, and probably the greater part of society was in agreement. But in Canada, even more so than in England, hardly anyone outside the small circle of property lawyers properly understood the doctrinal dispute that was firmly ensconced at the heart of this issue, and in my opinion academics also have given less than their due to the majority opinions in *Murdoch* and *Rathwell*. However, Dickson J. felt in 1978 with Laskin C.J.C. that policy required the move that Laskin J. had advocated in 1975. 1978 was the year in which matrimonial property legislation finally began to appear in all the provinces across Canada,¹¹ and it is ironic that only a year later, in *Pettkus v. Becker*, the Laskin-Spence-Dickson opinion finally prevailed in the Supreme Court. It was too late to achieve much for the marriage breakdown cases — legislation had given the courts the needed power — but Canadian courts now finally had a doctrinal solution to the marriage or cohabitation property problem, deduced from the case law itself.

The effort that went into the minority opinion in *Rathwell v. Rathwell* and the majority opinion in *Pettkus v. Becker*, both penned by Dickson J., can best be explained not only by the scholarship of the now retiring Chief Justice, but by his real appreciation of the intense doctrinal interest this issue possessed. The Canadian Supreme Court was making a move that was the first in the Commonwealth, and even today, ten years later, the courts of the other Commonwealth jurisdictions are hesitant to follow this same course.¹² It was a time when confidence, resolution, social awareness, and doctrinal grasp had to come together. In my opinion this was one of the great moments of the career of Brian Dickson.

¹¹ See A. Bissett-Johnson & W.H. Holland, *Matrimonial Property Law in Canada* (Agincourt, Ont.: Burroughs, 1980) (an updated looseleaf publication).

¹² See, e.g., *Muschinski v. Dodds* (1986), 160 C.L.R. 583, and *Baumgartner v. Baumgartner* (1987), 164 C.L.R. 137, 76 A.L.R. 75 (Aust. H.C.). The whole subject is valuably discussed in D. Hayton, "Constructive Trusts — Is the Remedying of Unjust Enrichment a Satisfactory Approach" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 205.

Though it was a response to the problem of matrimonial property disputes, the Canadian theory of the constructive trust was not introduced in either *Rathwell* or *Pettkus* as a solution solely for that factual problem. Had that been the approach, one shudders to think of the artificial lines of distinction that would subsequently have arisen. Dickson J. adopted "unjust enrichment" as the basic principle with which to solve the matrimonial problem of property allocation, but in doing so he introduced the constructive trust as a proprietary remedy for all cases where unjust enrichment has occurred, whether or not the particular circumstances involve matrimonial breakdown. The trilogy of criteria for determining whether unjust enrichment has occurred — enrichment of one party, a corresponding deprivation in another, and the lack of a juristic reason for that enrichment — became applicable to all circumstances where one party has gained at the expense of another. Other Commonwealth jurisdictions have not generalized the basis of recovery in this way; in each of the other Commonwealth countries matrimonial property disputes continue to be seen as a discrete ground for the determination of appropriate remedy. Moreover, between 1978 and 1980 it was not at all clear in my opinion upon what basis courts in England, Australia, and New Zealand were proceeding with regard even to these discrete matrimonial property dispute cases. Estoppel had been canvassed, particularly in England,¹³ and that curious creature, the common intention constructive trust, had also appeared in England and Wales.¹⁴ Some years after *Pettkus v. Becker* an eminent judge of the High Court of Australia had suggested that unconscionability is a better explanation of the various circumstances in which the court may intervene to give remedy where the improper withholding of property has occurred.¹⁵ More recently, in the case of *Gillies v. Keogh*,¹⁶ Cooke P. of the New Zealand Court of Appeal has expressed the opinion that whether one approaches these issues on the basis of constructive trust, unjust enrichment, imputed common intention, or estoppel is of no real consequence, because in his view essentially all those rationales express the same set of values.

¹³ See J.D. Davies, "New Directions in the Employment of Equitable Doctrine in England and Wales" in Youdan, *ibid.* at 383-84.

¹⁴ See Hayton, *supra*, note 12 at 226ff.

¹⁵ *Muschinski v. Dodds*, *supra*, note 12, *per* Deane J.

¹⁶ (1989), 2 N.Z.L.R. 327 at 330-31.

In *Pettkus v. Becker*, as in *Rathwell v. Rathwell*, Dickson J. decided to put the grounds of intervention upon the basis of unjust enrichment, and to move on at once to the important question of remedy. In my opinion it is this early, clear and concisely expressed, if possibly controversial, rationale for the court's intervention, which has taken Canadian law further down the path of remedy than many another jurisdiction. It is remedy which in my opinion is the central concern in this whole area of the unconscionable or inequitable withholding of benefit, and Canadians have had ten years to this point in which to consider the remedial question.

In *Sorochan v. Sorochan*¹⁷ Dickson C.J., as he then was, turned the spotlight more fully on this question of remedy. The criteria of enrichment, corresponding deprivation, and lack of juristic reason did not lead to the constructive trust; they led to the existence or otherwise of unjust enrichment. The constructive trust, he emphasized, is merely one remedy that is available, should unjust enrichment be found to exist. There is a clear line between proprietary remedy and personal remedy, and the *Sorochan* judgment, expressly apposing constructive trust and damages, facilitates the drawing of that all too often ignored distinction. The implications of the proprietary remedy — taking as against unsecured creditors of the unjustly enriched party — may well suggest in the particular circumstances that a personal remedy (e.g., damages) would be the more appropriate order. The implications and significance of this crucial matter of choice of remedy became apparent in *Lac Minerals Ltd. v. International Corona Resources Ltd.*¹⁸ (a case on which the Chief Justice did not sit), in which liability for breach of confidence was under consideration, and *in specie* restitution (i.e., constructive trust) was awarded against the self-seeking confidant. *Sorochan v. Sorochan* was the third in the trilogy of cases in which Brian Dickson set out the thesis of the Canadian constructive trust, as it was to become. In *Hunter Engineering Company Inc. v. Syncrude Canada Ltd.*¹⁹ he applied in a commercial dispute the criteria for establishing unjust enrichment, and though the difficulties of applying those criteria — given their necessarily general character — became very evident, Dickson C.J.C.

¹⁷ [1969] S.C.R. 38, [1986] 5 W.W.R. 289.

¹⁸ [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14. See further D.W.M. Waters, "*Lac Minerals Ltd. v. International Corona Resources Ltd.*" (1990) 69 Can. Bar Rev. 455.

¹⁹ [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321. See further, R. Flannagan, "*Hunter Engineering: The Judicial Regulation of Exculpatory Clauses*" *ibid.* at 514.

had used the opportunity to demonstrate in a divided Court how the criteria should be applied. His analysis is surely impeccable.

The mark of a great judge may be that such a person understands that the judiciary must balance the tension between policy and doctrine. If there is too heavy an emphasis on policy, and a correspondingly too light concern with doctrine, then it is unlikely that the judge's name, however immediately eminent, will survive the critical assessment of subsequent decades. Similarly, if the judge's opinions are heavily doctrinal, but insufficiently responsive to the policy issues of the day, then the same fate will overcome that name. When one looks at the judicial careers of people like Lord Justice Scrutton in the 1920s in England and Evatt J. in the 1930s in Australia, each of whose dissents were the making of majority judgments in the next decade, one sees how they balanced in each case policy and doctrine. Lord Wright in the 1930s did not prevail in England with his views on unjust enrichment, but the clarity of his thinking and the compelling, practical case for its adoption led to its having an influence way beyond the decade in which his judgments were given. Chief Justice Dixon in Australia and Chief Justice Duff in Canada each had an impact on generations to come because of the way in which they appreciated the balancing of social and economic concerns with the fulfilment of inductive common law reasoning. To my mind Chief Justice Dickson deserves to go down in history as one of those distinguished names. Not only were his judgments copiously researched and cogently reasoned, his prose relaxed yet exact and easily comprehensible, but he had a feel for the direction in which an argument could realistically be taken. He had the wisdom, if I may say so, to present and argue the law with a pattern of thinking upon which future judges might build refinements and delineations of their own. With the constructive trust and restitution he set the aim of doctrine sufficiently far ahead of other current thinking that further development of those ideas was attractive to the lower courts, while at the same time he was not so far ahead of those courts or in pursuit of a singular conviction of his own that the subsequent years could not build upon what he had put in place. Perhaps that is what the judicial name of note achieves — the way ahead is defined, its origins and character analyzed, the destination made clear. But in what manner to take that path — indeed, the course of the path itself — is left to the reflections and the experience of those who follow.