

Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada

MITCHELL McINNES*

I. INTRODUCTION

THE SUPREME COURT OF CANADA recently rejected the proposition that the constructive trust invariably is premised upon proof of unjust enrichment¹ While open recognition of the possibility of non-restitutionary constructive trusts certainly is welcome, the Court's decision nevertheless is unsatisfactory as it contributes to a line of cases in which the principle of unjust enrichment is obscured or misrepresented. The aim of this paper is to identify the types of claims that should be classified as falling under the rubric of unjust enrichment and consequently that give rise to constructive trusts that are restitutionary in nature.

The discussion that follows is comprised of three parts. The first considers, in relatively abstract terms, the principle of unjust enrichment as it alternatively has been formulated in Canada and abroad. It will be suggested that the domestic version is unfortunate as it invites a number of analytical errors. The second part of the discussion briefly explains the nature of the constructive trust. Historically, that difficult concept generally was conceived as a substantive institution. In recent years, however, the Supreme Court of Canada has rendered the concept even more complex by also developing its distinctly remedial capabilities. Finally, the third part analyses the case law found at the intersection of unjust enrichment and constructive trust. The thesis that emerges from that analysis is that the Supreme Court has experienced considerable difficulty in reconciling those two principles primarily because it has not consistently articulated a clear conception of unjust enrichment. That failure, in turn, seems largely attributable to the fact that the Court too often has fallen prey to

* B.A., LL.B., LL.M., Ph.D., Assistant Professor, Faculty of Law, University of Western Ontario. I would like to thank Ms. Alison Huges, Dr. Robert Chambers, and Professor Albert Oosterhoff for their helpful comments on earlier drafts of this paper.

¹ *Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214 (S.C.C.) [hereinafter *Soulos*].

the dangers inherent in the Canadian formulation of the unjust enrichment principle.

As a preface to the discussion, however, it is necessary to identify several issues that lie beyond the scope of this paper and that will not be considered in significant detail. First, as a result of the Supreme Court of Canada's adoption of a remedial role for the constructive trust, the concept has come to be used as a discretionary² form of relief. A number of commentators, especially those of English training, object to that development.³ Nevertheless, Canadian courts clearly cherish the flexibility afforded by the remedial constructive trust⁴ and are unlikely to relinquish it soon. In the interests of brevity, this paper will accept that fact as a given and will not contribute to the already voluminous literature on point.

Aside from a few, brief observations, this paper will not question the dichotomisation of constructive trusts into "institutional/substantive" and "remedial" varieties. It may be that the Supreme Court of Canada eventually will come to adopt a unified principle based primarily upon the latter species.⁵ For the time being, however, the constructive trust continues to be conceived in dual terms.

No attempt will be made to define the specific criteria that the courts ought to consider in deciding whether to impose constructive trusts. Compared with personal forms of relief, the constructive trust affords a number of exceptional benefits.⁶ For that reason, it is both especially appealing to claimants and highly contentious. And while the Supreme Court of Canada has addressed the issue on several occasions,⁷ a great deal of work remains to be done if the construc-

² See *infra* note 57 and accompanying text.

³ See, for example, P. Birks, "Proprietary Rights as Remedies" in P. Birks, ed., *Frontiers of Liability*, Vol. 2 (New York: Oxford University Press, 1994) 214 at 223.

⁴ In *Rawluk v. Rawluk*, Cory J. spoke glowingly of the remedial constructive trust as a mechanism by which the courts can apply "that treasured and essential measure of individualized justice and fairness" and "achieve a fair and just result": (1990), 65 D.L.R. (4th) 161 at 181 (S.C.C.) [hereinafter *Rawluk*].

⁵ See *infra* note 58 and accompanying text.

⁶ Most notably, the constructive trust provides the plaintiff with priority over general creditors in the event of the defendant's insolvency and allows the plaintiff to take advantage of increases in the value of the affected asset. For a list of other possible benefits, see A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 4th ed. (Scarborough: Carswell, 1992) at 367.

⁷ See especially *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.) [hereinafter *LAC Minerals*]; *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.) [hereinafter *Peter*]; *Soulos*, *supra* note 1.

tive trust is to properly respect the interests of plaintiffs, defendants, and third parties.⁸ That project, however, must await another day.

Finally, this paper does not purport to provide an exhaustive analysis of the restitutionary implications of every instance of constructive trust.⁹ As explained in Part IV, constructive trusts are imposed in a diverse array of circumstances. Some, obviously, are explicable on the basis of the principle of unjust enrichment; others are not. The discussion that follows is concerned primarily with the large grey area in which the Supreme Court has recently applied constructive trust analyses without fully exploring the restitutionary aspects of its actions. Specifically, the Court arguably has (i) imposed such relief in cohabitation cases in the erroneous belief that it was thereby providing a restitutionary remedy for an action in unjust enrichment; (ii) failed to recognise that some constructive trusts that respond to wrongful actions also reverse unjust enrichments; and (iii) introduced unnecessary complications by forcing cases of one type of unjust enrichment into an analysis applicable to a different type of unjust enrichment.

II. UNJUST ENRICHMENT

A. The Generic Principle

In 1937, Seavey and Scott, authors of the *Restatement of the Law of Restitution*, considered the case law historically classified under the rubric of "restitution" and distilled it into the proposition that "[a] person who is unjustly enriched at the expense of another is required to make restitution to the other."¹⁰ That formulation presents a useful statement of law and undeniably has played a significant role in the development of the Canadian law of restitution.¹¹ It is, however, dangerously ambiguous.

⁸ A number of excellent papers already have been written: see especially D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priority Over Creditors" (1989) 68 *Can. Bar Rev.* 315; R. Goode, "Property and Unjust Enrichment" in A. Burrows, ed., *Essays on the Law of Restitution* (New York: Oxford University Press, 1991) at 215.

⁹ For an excellent discussion on point, see D. Hayton, "Constructive Trusts: Is the Remedy-ing of Unjust Enrichment a Satisfactory Approach?" in T.G. Youdan, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 205.

¹⁰ American Law Institute, *Restatement of the Law of Restitution: Quasi-Contract and Constructive Trusts*, § 1 (1937).

¹¹ See P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 1990) at 11-21.

As subsequent scholarship more clearly explained, one person may be unjustly enriched “at the expense of another” in either of two ways.¹² First, the case law unequivocally recognises that the defendant may be enriched “at the expense of” the plaintiff in a *subtractive* sense if he receives a benefit subtracted from her.¹³ Take the paradigm case in which Pamela mistakenly pays \$500 to David: he is enriched “at her expense” because of the flow of wealth from her to him. In such situations, restitutionary relief is awarded essentially as a means of redressing a disequilibrium caused by the transfer of value from one party to the other. Second, the case law also recognises that the defendant may be enriched “at the expense of” the plaintiff in a *wrongs* sense if he receives a benefit as a result of committing a wrong against her. For example, consider the case in which David secures a benefit of \$500 by breaching a fiduciary obligation owed to Pamela: he is enriched “at her expense,” regardless of whether or not she suffers any economic loss, because the accretion to his wealth results from his wrong against her. In such situations, restitutionary relief is awarded essentially as a means of redressing the defendant’s wrongful acquisition.

The relevant ambiguity easily is identified and accommodated by the basic principle of unjust enrichment as it is formulated outside of Canada:

- (i) an enrichment to the defendant;
- (ii) gained at the plaintiff’s expense;
- (iii) as a result of an unjust factor; and
- (iv) in circumstances that do not give rise to a defence.¹⁴

For immediate purposes, the important point is that with respect to the second element, an enrichment may occur in either the *subtractive* sense or the *wrongs* sense. Though it perhaps more readily points to the former than the latter, the relevant phrase undeniably lends itself to either mode of proof. Thus, while it may be more common to refer to the incurrence of an economic loss when speaking of an “expense,” that term also naturally encompasses the notion of victimisation.

The Canadian formulation is obviously different in several respects. The principle of unjust enrichment is comprised of three elements:

- (i) an enrichment to the defendant;

¹² P. Birks, *An Introduction to the Law of Restitution*, rev’d ed. (New York: Oxford University Press, 1989) at 23–24; R. Goff & G. Jones, *The Law of Restitution*, 1st ed. (London: Sweet & Maxwell, 1966) at 16.

¹³ For ease of discussion, when speaking in the abstract, this paper will use male pronouns for defendants and female pronouns for plaintiffs.

¹⁴ *Pavey & Matthews Pty Ltd. v. Paul* (1987), 162 C.L.R. 221 (H.C. Aus.); *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.).

- (ii) a corresponding deprivation to the plaintiff; and
- (iii) the absence of any juristic reason for the enrichment.¹⁵

For present purposes, the most significant difference pertains to the second element.¹⁶ Unlike the phrase “at the expense of,” which naturally connotes both loss and victimisation, the phrase “corresponding deprivation” appears to insist upon a “plus/minus” equation and, hence, to require a loss to the plaintiff. The effect of that apparent requirement is dramatic.

Returning to the second paradigm described above, the trustee who improperly realises a \$500 benefit by breaching his fiduciary duty certainly may be said to be enriched “at the expense of” the beneficiary in the wrongs sense of the operative phrase. However, if she suffers no (subtractive) economic loss as a result of the wrong, only a strained definition allows his victim to argue that she experiences a “corresponding deprivation.” In such cases, the plaintiff’s only role consists of suffering a normative violation: she held a right that ought not to have been infringed. And because there was no depletion to her wealth, it seems inaccurate to speak of that violation as a “deprivation.” Moreover, even if plain meaning is set aside and the sufferance of a normative violation is held to constitute a “deprivation,” that deprivation would not obviously “correspond” to the trustee’s enrichment. The notion of correspondence generally entails a relationship between parallel concepts. The correspondent of the defendant’s normative infringement is the plaintiff’s normative violation. The law of restitution, however, is generally concerned not with redressing normative infringements and violations, but rather with reversing unjust economic enrichments.¹⁷ Accordingly, the requirement of a “corresponding deprivation” would appear to require proof that the plaintiff experience an economic (not normative) loss correspondent to the defendant’s economic (not normative) gain.¹⁸ If that is

¹⁵ See, for example, *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289 at 306 per Dickson J. [hereinafter *Rathwell*]; *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 at 274 per Dickson J. [hereinafter *Pettkus*]; *Hunter Engineering Co. v. Syncrude Canada Ltd.* (1989), 57 D.L.R. (4th) 321 at 349 per Dickson C.J.C. [hereinafter *Hunter Engineering*]; *Peel v. Canada* (1992), 98 D.L.R. (4th) 140 at 152 per McLachlin J. [hereinafter *Peel*].

¹⁶ The Supreme Court of Canada, however, has occasionally referred to the second element of the principle of unjust enrichment in terms of “the plaintiff’s expense”: see, for example, *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411 at 424–425, 434 [hereinafter *Citadel General Assurance*]; *Gold v. Rosenberg* (1997), 152 D.L.R. (4th) 385 at 396 [hereinafter *Gold*].

¹⁷ M. McInnes “‘Passing On’ In the Law of Restitution: A Reconsideration” (1997) 19 *Sydney L. Rev.* 179 at 183–193; cf. E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995). In cases of enrichment by wrongs, the courts also are concerned to formulate rules that deter misconduct: *Soulos*, *supra* note 1 at 221.

¹⁸ *Peter*, *supra* note 7 at 645 per McLachlin J.

true, then the apparent effect of the semantic turn taken by Canadian law at the second stage of the unjust enrichment principle is to confine the law of restitution to cases involving unjustified transfers of wealth between the plaintiff and the defendant (*i.e.*, cases of subtractive enrichment). That part of the law of restitution involving cases in which the defendant acquires a benefit, perhaps from a third party, as a result of committing a wrong against the plaintiff (*i.e.*, cases of enrichment by wrongs) vanishes.

That vanishing act, however, is merely an illusion. Centuries of law are no more obliterated by the innocuous turn of a judicial phrase than a rabbit is obliterated by the distracting wave of an illusionist's hand. Though hidden away, both the law and the rabbit continue to exist. The only difference between the two is that, once hidden away, the law, unlike the rabbit, is apt to become misunderstood.

B. Enrichment by Subtraction: The Autonomous Action in Unjust Enrichment

The significance of the ambiguity inherent in the second element of the principle of unjust enrichment extends beyond mere identification of the manner of the defendant's acquisition of a benefit. It also fundamentally affects the cause of action that the plaintiff must prove and the measure of relief to which she may be entitled.

The success of a claim arising from subtractive enrichment is premised upon proof of the elements of the principle of unjust enrichment: (i) an enrichment to the defendant, (ii) a corresponding deprivation to the plaintiff, and (iii) an absence of juristic reason for the deprivation. In such circumstances, those elements comprise the *autonomous action in unjust enrichment*. Although technically superfluous, reference to the "autonomy" of the action usefully stresses the fact that the plaintiff need not prove the elements of any other cause of action. For example, it emphasises that she need not establish that the defendant committed a wrongful act (as is true of claims arising in, for example, tort law) or that he failed to fulfil a promise (as is true of claims arising in contract law). In that sense, then, unjust enrichment constitutes an independent head of civil obligations.

If the plaintiff succeeds in proving the elements of the autonomous action in unjust enrichment, she invariably becomes entitled to restitutionary relief.¹⁹ "Restitution" is the only possible legal response to the triggering event of unjust enrichment; the defendant is always required to "give back" that which he received from the plaintiff.²⁰ Because the autonomous action in unjust enrichment seeks to redress enrichments that the defendant subtracted from the

¹⁹ Subject, of course, to the extent to which the defendant is able to prove a defence.

²⁰ Birks, *Introduction*, *supra* note 20 at 16–18.

plaintiff, other remedial alternatives simply do not arise. The notion of compensation for the plaintiff's loss cannot independently²¹ guide the quantification of relief because it fails to take into account the defendant's gain and thereby ignores part of the relevant equation.²² Similarly, the notion of disgorgement of the defendant's gain cannot independently²³ guide the quantification of relief because it fails to take into account the plaintiff's deprivation and thereby ignores a different part of the relevant equation.²⁴ It makes little sense to inquire into the defendant's enrichment and the plaintiff's corresponding deprivation when determining the issue of liability, but to then ignore those same factors when determining the appropriate measure of relief. Consequently, in cases of subtractive enrichment, restitutionary relief, generally,²⁵ is calculated with reference to the highest amount common to both the defendant's gain and the plaintiff's loss.²⁶

C. Enrichment by Wrongs: Remedial Restitution

Although obscured by the Canadian formulation of the second element of the principle of unjust enrichment ("corresponding deprivation to the plaintiff"), it is clear from the case law that restitutionary relief may be available to the

²¹ The extent of the plaintiff's loss, however, is relevant in demonstrating that she suffered a deprivation corresponding to the defendant's enrichment.

²² For example, that approach wrongly would allow a court to award the plaintiff the full amount of her loss even though the defendant received a benefit of lesser value. Such a situation might arise, for example, if the plaintiff mistakenly spent \$500 repairing the defendant's vehicle, but thereby only raised its value by \$200.

²³ The extent of the defendant's gain, however, is relevant in demonstrating that he received an enrichment.

²⁴ For example, that approach wrongly would allow a court to award the amount of the defendant's gain to the plaintiff even if she ultimately suffered no corresponding deprivation or a deprivation of a lesser amount: *Greenwood v. Bennett*, [1973] Q.B. 195 (C.A.) per Denning L.J. Such a situation might arise, for example, if she shifted the expense attendant upon the defendant's enrichment onto a third party and thereby avoided any corresponding economic deprivation through a process of "passing on": cf. *Air Canada v. British Columbia* (1989), 59 D.L.R. (4th) 161 (S.C.C.) [hereinafter *Air Canada*]; and McInnes, "Passing On" *supra* note 17.

²⁵ Exceptions exist. Canadian courts are noticeably willing to ignore guiding principles when awarding relief in cohabitation cases: below at Part IV(A).

²⁶ *Air Canada*, *supra* note 26 at 193–194 per LaForest J. Elsewhere in the Commonwealth, it has been suggested that the amount of the plaintiff's loss does not constitute a limit on the measure of her recovery: see, eg., *Kleinwort Benson v. South Tyneside MBC*, [1994] 4 All E.R. 972 at 984–985 (Q.B.); *Kleinwort Benson v. Birmingham City Council*, [1996] 4 All E.R. 733 (C.A.); *Commissioner of State Revenue v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51 at 75 (H.C. Aus.); cf., M. McInnes "'At the Plaintiff's Expense': Quantifying Restitutionary Relief" [forthcoming].

plaintiff, regardless of whether or not she suffered a subtractive loss, if the defendant received an enrichment as a result of committing a wrong against her. Such relief does not, however, respond to the autonomous action in unjust enrichment. Nor is the applicable measure of relief quantified with reference to the highest amount common to both the defendant's gain and the plaintiff's loss.

As explained more fully in Part IV(C), an enrichment by wrong differs from an enrichment by subtraction in so far as it does not trigger the autonomous cause of action in unjust enrichment.²⁷ Instead, relief for the wrong is available through proof of a cause of action lying outside the law of restitution.²⁸ *Keech v. Sandford*²⁹ is the classic illustration. The defendant held a lease on trust for the plaintiff. When the lessor refused the defendant's request to renew the lease for the plaintiff, the defendant acquired it for himself. The plaintiff successfully brought a claim under the equitable action for breach of fiduciary duty and the defendant was compelled to hold the lease on constructive trust for the plaintiff.³⁰

An enrichment by wrong further differs from an enrichment by subtraction with respect to measures of relief. As noted above, the autonomous action in unjust enrichment redresses an instance of subtractive enrichment with an award of truly "restitutionary" relief. The defendant is compelled to "give back" that which he obtained from the plaintiff; the quantum of the award represents the highest amount common to the defendant's gain and the plaintiff's loss. The courts do not follow the same principles in redressing instances of enrichment by wrongs. Because the defendant's gain need not have been subtracted from the plaintiff, the extent of her loss (if any) does not constitute a limit to the

²⁷ In some circumstances, however, the same set of facts may support alternative claims based on an enrichment by wrong and an enrichment by subtraction. Discussed below at text accompanying *infra* note 113.

²⁸ In effect, the second part of the generic principle of unjust enrichment contains an off-ramp. If the plaintiff establishes that the defendant received a subtractive enrichment from her, she proceeds in a straight line to proof of the third part of the principle ("absence of juristic reason/unjust factor") and onwards to restitutionary relief. If, however, she establishes that he was enriched "at her expense" as a result of committing a wrong against her, she must veer away from the third part of the principle and seek to establish the elements of an action, other than the autonomous action in unjust enrichment, that supports a restitutionary, gain-based remedy. The matter is explored more fully in Part IV(C).

²⁹ (1726), 25 E.R. 223 [hereinafter *Keech*].

³⁰ Similarly in *Reading v. A.G.*, [1951] A.C. 507 (H.L.). The defendant abused his position as a sergeant with the British armed forces by accepting a bribe to secure passage through the streets of Cairo of trucks bearing illicit goods. Regardless of the fact that the British military could not possibly have received the bribe itself (because it could not possibly have participated in black-marketeering), it was entitled to disgorgement of the defendant's ill-gotten gains on the basis of the action for breach of fiduciary duty.

amount of relief granted. She is entitled to disgorgement of the wrongful gain in any event.³¹

III. CONSTRUCTIVE TRUSTS

AS MCLACHLIN J. RECENTLY STATED, the constructive trust is “an ancient and eclectic institution.”³² Although it has been employed for centuries, it continues to defy clear or rigid classification. In broad terms, however, it has commonly been conceived in two forms: institutional and remedial.

A. Institutional Constructive Trusts³³

Historically, the constructive trust was approached as a substantive institution through which Equity enforced the requirements of good conscience in a number of discrete circumstances. Upon the occurrence of certain events, a party automatically³⁴ became a constructive trustee and as such was required to hold affected property for the benefit of another.³⁵

The Courts of Chancery long exercised their authority to recognise constructive trusts within the context of, and by analogy to, express trusts. Thus, a constructive trust arose if a trustee under an express trust profited from the trust or otherwise used his position for personal advantage.³⁶ Within the same context, a constructive trust was also imposed upon a stranger to an express trust who, as a trustee *de son tort*, took it upon himself to possess and administer

³¹ Because the defendant may be required to provide to the plaintiff (the value of) a benefit that was received from a third party, he is not invariably required to “give back” his unjust enrichment. In such circumstances, it is more accurate to speak of “giving up” or “disgorging”: Birks, *Introduction*, *supra* note 12 at 12.

³² *Soulos*, *supra* note 1 at 221.

³³ For general discussions of the nature and scope of the institutional constructive trust, see Oosterhoff & Gilless *Trusts*, *supra* note 6 at c. 8–9; D.W.M. Waters, *The Constructive Trust: The Case for a New Approach in English Law* (London: University of London, 1964); D.W.M. Waters, *The Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at c. 11; D.J. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 14th ed. (London: Butterworths, 1987); E.H. Burn, *Maudsley & Burns' Trusts and Trustees: Cases and Materials*, 5th ed. (London, Butterworths, 1996) at c. 7; G. Elias, *Explaining Constructive Trusts* (London: Sweet & Maxwell, 1990); and P.H. Pettit, *Equity and the Law of Trusts*, 7th ed. (London, Butterworths, 1997) at c. 9.

³⁴ A constructive trust nevertheless might be refused on the ground of, say, laches.

³⁵ While accurate over the general run of cases, that definition cannot explain all instances of the institutional constructive trust: below at note 38.

³⁶ *Keech*, *supra* note 29; cf. *Crocker & Croquip Ltd. v. Tomoos* (1957), 7 D.L.R. (2d) 104 (S.C.C.).

trust property,³⁷ or who knowingly assisted in a breach of trust,³⁸ or who knowingly received property in breach of a trust.³⁹ However, the constructive trust also extended into a variety of circumstances, unrelated to the express trust, in which Equity nevertheless perceived a need for such a response. Not surprisingly, abuses of non-trust fiduciary positions (such as those existing between solicitors and clients,⁴⁰ employees and employers,⁴¹ and company directors and corporations⁴²) attracted the constructive trust. But so too did a miscellany of other events. For example, the institutional constructive trust was activated by: (i) inequitable acquisitions of property *inter vivos*,⁴³ (ii) inequitable acquisitions of property upon death,⁴⁴ (iii) acquisitions of property by murder,⁴⁵ (iv) a mortgages of land,⁴⁶ and (v) mistaken payments.⁴⁷

³⁷ *Mara v. Browne*, [1896] 1 Ch. 199; *Maguire v. Maguire and Toronto General Trusts Corp* (1921), 64 D.L.R. 204 (Ont. H.C.J.).

³⁸ *Barnes v. Addy* (1874), 9 Ch. App. 244; *Air Canada v. M & L Travel Ltd.* (1993), 108 D.L.R. (4th) 592 (S.C.C.) [hereinafter *M & L Travel*]. In cases of trustees *de son tort* and knowing assistance, the court merely imposes personal liability to provide compensation for loss; because the defendant need not have acquired property, there is no proprietary interest that the plaintiff can claim. The language of "constructive trusts" consequently seems inappropriate.

³⁹ *Re Montagu's Settlement Trusts*, [1987] 1 Ch. 264; *Citadel General Assurance supra* note 16; *Gold, supra* note 16.

⁴⁰ *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.).

⁴¹ *A.G. for Hong Kong v. Reid*, [1994] 1 All E.R. 1 (P.C.); cf. *Lister v. Stubbs* (1890), 45 Ch.D. 1 (C.A.); *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] 57 D.L.R. (2d) 557 (S.C.C.).

⁴² *Cook v. Deeks*, [1916] 1 A.C. 554 (P.C.); *Zwicker v. Stansbury*, [1953] 2 S.C.R. 438.

⁴³ *Rouchefoucauld v. Boustead*, [1897] 1 Ch. 196 (C.A.); *Follis v. Albemarle* (1941), 1 D.L.R. 178 (Ont. C.A.).

⁴⁴ *McCormick v. Grogan* (1869), 4 L.R. H.L. 82 (secret trust); *Dufour v. Pereira* (1796), 21 E.R. 332 (mutual wills). On the question of whether the trusts applied in such situations are express or constructive in character, see *Oosterhoff & Gillese, supra* note 6 at 490, 498.

⁴⁵ *Schobelt v. Barber*, [1967] 60 D.L.R. (2d) 519 (Ont. H.C.J.).

⁴⁶ *Coppring v. Cooke* (1684), 23 E.R. 463; *Frost Ltd. v. Ralph* (1980), 115 D.L.R. (3d) 612 (Nfld. T.D.).

⁴⁷ *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105; *Zaidan Group Ltd. v. City of London* (1987), 36 D.L.R. (4th) 433, *aff'd* on other grounds (1990), 64 D.L.R. (4th) 514 (Ont. C.A.); *Phoenix Assurance Co. of Canada v. City of Toronto* (1981), 129 D.L.R. (3d) 351 (Ont. S.C.).

B. Remedial Constructive Trusts

Notwithstanding occasional efforts at reform,⁴⁸ English law generally maintains the traditional view of the constructive trust as a substantive institution.⁴⁹ As the citations in the preceding sub-section indicate, Canadian courts similarly continue to recognise constructive trusts in circumstances that historically attracted the institution. In the past twenty years, however, they have also embraced the remedial constructive trust.

The story of the remedial constructive trust has been told many times⁵⁰ and for present purposes need only be recounted summarily. It began in earnest during the late 1970s with growing dissatisfaction among some members of the Supreme Court of Canada regarding the disposition of domestic property disputes. Non-titled partners to marriage and marriage-like arrangements fared poorly under traditional forms of analysis⁵¹ and consequently, in the days before provincial matrimonial property legislation, often suffered grave injustices upon the dissolution of relationships. Laskin J. acted upon the need for reform, drew from the American experience,⁵² and fashioned a remedial constructive trust based on the principle of unjust enrichment. While he initially did so in dissent,⁵³ his reasoning increasingly commanded the support of his colleagues,⁵⁴ and by 1980 a majority of the Supreme Court agreed that a non-titled party could be awarded proprietary relief upon proof of the cause of action in unjust enrichment.⁵⁵ Today, although the bulk of cases dealing with the remedial constructive trust continue to be concerned with domestic situations, clearly that form of relief may also be available in other contexts.⁵⁶

⁴⁸ See, for example, *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 (C.A.) per Denning L.J.

⁴⁹ E.H. Burn, *Maudsley & Burn's Trusts and Trustees: Cases and Materials*, *supra* note 33 at 248–249; cf. J.G. Riddall, *The Law of Trusts*, 5th ed. (London: Butterworths, 1996) at 445–451.

⁵⁰ See, for example, G.H.L. Fridman, *Restitution*, 2d ed. (Toronto: Carswell, 1992) at 437–44; Maddaugh & McCamus, *supra* note 11 at 87–93.

⁵¹ See, for example, *Pettitt v. Pettitt*, [1970] A.C. 777 (H.L.); *Gissing v. Gissing*, [1971] A.C. 886 (H.L.); *Murdoch v. Murdoch* (1973), 41 D.L.R. (3d) 367 (S.C.C.) [hereinafter *Murdoch*].

⁵² *Restatement*, *supra* note 10 at para. 160; A.W. Scott & W.F. Fratcher, *The Law of Trusts*, 4th ed. (London: Macdonald & Evans, 1989) at 462.4; G.G. Bogert, *The Law of Trusts and Trustees*, 2d ed. (St. Paul, Minn.: West, 1978) at para. 471.

⁵³ *Murdoch*, *supra* note 51.

⁵⁴ *Rathwell*, *supra* note 15.

⁵⁵ *Pettkus*, *supra* note 15.

⁵⁶ *LAC Minerals*, *supra* note 7 at 49 per LaForest J.; *Hunter Engineering*, *supra* note 15 at 383 per Wilson J.

The remedial constructive trust differs from the traditional conception of the institutional constructive trust in several important respects. Most significantly, as its name suggests, it acts merely as a remedy for an independent cause of action; it constitutes a judicial response to a triggering event, rather than a triggering event in itself. Moreover, as an equitable remedy, it is discretionary. Despite some equivocation in the Supreme Court of Canada,⁵⁷ it differs from the traditional, institutional constructive trust in that it does not automatically arise upon the occurrence of extra-curial events; its existence, rather, is dependent upon a court's decision to award liability in proprietary, rather than personal, form.

Unfortunately, having adopted the remedial constructive trust, Canadian law appears somewhat uncertain about the continued status of the institutional constructive trust. As previously noted, there is no doubt that the courts continue to impose constructive trusts in circumstances that traditionally would have supported the substantive institution. Occasionally, however, the Supreme Court has equivocally suggested that such situations have become subsumed under a broad notion of remedial constructive trust.⁵⁸ Thus, in *Soulos*,⁵⁹ McLachlin J. spoke in terms that alternatively appeared to support and reject the proposition that Canadian law features both forms of constructive trust.⁶⁰ Even more intriguing, she exercised a discretion in circumstances that historically would have given rise to a constructive trust automatically.⁶¹ In contrast,

⁵⁷ On the basis of the Supreme Court of Canada's decision in *LAC Minerals*, it appeared clear that the remedial constructive trust truly was remedial and that it arose only once a court exercised its jurisdiction in favour of recognition: *supra* note 7 at 48–52. Cory J.'s majority decision in *Rawluk*, however, adopted the seemingly irreconcilable position that the applicable constructive trust: (i) was remedial, but (ii) arose at the time of the triggering event of unjust enrichment: *supra* note 4 at 176. Of course, as McLachlin J. suggested in her vigorous dissent, it is not immediately apparent how a court could have a discretion to accept or refuse recognition of a pre-existing, substantive property right: at 183–188. Fortunately, Cory J. now appears to have recanted and to have accepted that the remedial constructive trust is awarded only in a court's discretion: *Peter*, *supra* note 7 at 639–640.

⁵⁸ In *Rawluk*, McLachlin J. raised, but expressly refrained from deciding, the status of the institutional constructive trust: *supra* note 4 at 185. Cf. *LAC Minerals supra* note 7 at 50 *per* LaForest J.

⁵⁹ *Supra* note 1 at 221–223, 225, 227, and 229. The case is discussed at text accompanying *infra* notes 108 and 135.

⁶⁰ McLachlin J.'s ruling that constructive trusts are not invariably based on the principle of unjust enrichment is immaterial to the present point because there is no necessary correlation between unjust enrichment and either form of constructive trust. As explained below, only some instances of the institutional constructive trust respond to an unjust enrichment. The same also may be true of the remedial constructive trust.

⁶¹ To reiterate, whereas automatic creation is a hallmark of the institutional constructive trust, discretion is a hallmark of the remedial constructive trust.

in *Citadel General Assurance Co. v. Lloyds Bank of Canada*,⁶² the Court appeared to treat a constructive trust as arising automatically upon an act of "knowing receipt," a category of case that historically fell under the umbrella of the institutional constructive trust. It seems likely that the traditional model persists, albeit perhaps in occasionally modified form.

IV. UNJUST ENRICHMENT AND CONSTRUCTIVE TRUSTS

NOMENCLATURE NOTWITHSTANDING, the constructive trust does not sit easily within the law of trusts. Granted, it shares certain characteristics with other forms of trusts. Most notably, a constructive trustee typically⁶³ holds property for the benefit of another individual, in much the same manner as an express trustee. The dissimilarities, however, are far more numerous and far more significant.⁶⁴ For example, the constructive trust often is distinguished from the express trust in that it arises as a matter of law, rather than intention.⁶⁵ Moreover, the constructive trustee does not share the powers usually available to the express trustee. He is not burdened with the obligations of an express trustee; his only duty, typically, is to convey the affected property to the trust beneficiary. By the same token, whereas the express trust is generally intended to create an enduring relationship, the constructive trust is normally raised for the finite purpose of effecting a particular result.

Given the range of circumstances to which it applies, and given the differences existing between it and other forms of trusts, commentators generally regard the constructive trust as anomalous at best. Waters' comments are typical:

[T]here never was a theme behind the use of the constructive trust by Chancery. It was never any more than a convenient and available language medium through which for the Chancery mind the obligations of parties might be expressed or determined.⁶⁶

The apparent impossibility of reconciling all instances of constructive trusts to a single theory has not, however, dissuaded judges and jurists from attempting the task. Most recently, the Supreme Court held in *Soulos* that all constructive

⁶² *Supra* note 16.

⁶³ Exceptions exist: discussed at *supra* note 38.

⁶⁴ See, for example, Riddall, *supra* note 49 at 446-447.

⁶⁵ See, for example, Oosterhoff & Gillese, *supra* note 6 at 370; Waters, *Trusts*, *supra* note 33 at 17; cf. R. Chambers, *Resulting Trusts* (New York: Oxford University Press, 1997) at 221-224 (the role of intention in the creation of resulting trusts).

⁶⁶ Waters, *Constructive Trust*, *supra* note 33 at 39. Cf. E.I. Sykes, "The Doctrine of Constructive Trust" (1941) 15 *Austrl. L.J.* 171 at 175: "a vague dust-heap for the reception of relationships which are difficult to classify or which are unwanted in other branches of the law."

trusts are referable to a two-part principle of "good conscience." A constructive trust may arise if either the defendant obtains a benefit as a result of a wrongful act against the plaintiff, or regardless of any wrongdoing, the defendant would be unjustly enriched to the plaintiff's detriment if permitted to retain a benefit.⁶⁷ Superficially, at least, that formulation very much resembles the generic principle of unjust enrichment. The first instance of "good conscience" corresponds to the notion of enrichment by wrong and the second instance corresponds to the notion of enrichment by subtraction.⁶⁸ Significantly, however, McLachlin J. emphatically rejected the proposition that all constructive trusts are based on the principle of unjust enrichment.⁶⁹

The need for such repudiation arose from a stream of comments in the Supreme Court that began in 1980 and that seemed to indicate clearly that the constructive trust is invariably premised upon proof of unjust enrichment.⁷⁰ In *Pettkus v. Becker*, Dickson J. stated that "[t]he principle of unjust enrichment lies at the heart of the constructive trust."⁷¹ That statement was adopted by LaForest J. in *LAC Minerals Ltd. v. International Corona Resources Ltd.*, who further explained that the availability of a constructive trust turns on a two-step approach:

First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is an appropriate remedy to redress that unjust enrichment. ... Much of the difficulty [associated with an over-expansive notion of constructive trust] disappears if it is recognized

⁶⁷ (1997), 146 D.L.R. (4th) 214 at 227. By way of clarification, McLachlin J. stated that the former type of situation was comprised largely, if not exclusively, by cases to which the institutional constructive trust traditionally applied.

⁶⁸ As discussed below, it might have been preferable for McLachlin J. to have recognised that the facts fell within the notion of enrichment by wrong: Part IV(B).

⁶⁹ While McLachlin J. improperly may have narrowed the scope of the generic principle of unjust enrichment by excluding the notion of enrichment by wrong (below at Part IV(B)), she undoubtedly was correct in denying the restitutionary nature of some constructive trusts: below at text accompanying note 79.

⁷⁰ While divided, academic opinion also often placed the constructive trust on a restitutionary footing: see, for example, Waters, *Constructive Trust*, *supra* note 33; R. Goff & G. Jones *The Law of Restitution*, *supra* note 12 at 60; Maddaugh & McCamus, *supra* note 11 at 78ff. Cf. A.J. McClean, "Constructive and Resulting Trusts—Unjust Enrichment in a Common Law Relationship: *Pettkus v. Becker*" (1982) 16 U.B.C. L. Rev. 156; J.L. Dewar, "The Development of the Remedial Constructive Trust" (1982–84) 6 Est. & Tr. Q. 312.

⁷¹ *Supra* note 15 at 273. As LaForest J. subsequently confirmed, however, the converse is not true. "The constructive trust does not lie at the heart of unjust enrichment. It is but one remedy, and will only be imposed in appropriate circumstances": *LAC Minerals supra* note 7 at 48.

that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out.⁷²

Similarly, a majority of the Court in *Brissette Estate v. Westbury Life Insurance Co.* held that “[t]he requirement of unjust enrichment is fundamental to the use of the constructive trust.”⁷³

The reason for such seemingly unequivocal, but misleading, language is unclear. At least in the formative days of the remedial constructive trust, it may be that the Court consciously (if ambiguously) refrained from referring to non-restitutionary species of constructive trust for fear of exacerbating the already complex and controversial task of devising means of consistently securing relief for non-titled domestic partners.⁷⁴ If so, that initial employment of the remedial constructive trust as a response to the cause of action in unjust enrichment in matrimonial and *quasi*-matrimonial circumstances unintentionally created the perception of a paradigm that became difficult to disturb; unjust enrichment and constructive trusts apparently came to be regarded by some members of the Court as an invariably fixed pair. Whatever the explanation for the passages quoted in the preceding paragraph, however, it is difficult to believe that the Court’s aim in *Pettkus v. Becker* truly was to discard the traditional learning that had accumulated around both restitutionary and non-restitutionary constructive trusts and to embrace a unitary conception based upon unjust enrichment. *Soulos* is important insofar as it gives force to that skepticism. Nevertheless, the decision leaves largely unresolved the difficult question as to which constructive trusts do respond to unjust enrichment.

Some constructive trusts are clearly restitutionary; others clearly are not. The Supreme Court’s recent decision in *Citadel General Assurance Co. v. Lloyds Bank of Canada*⁷⁵ illustrates the former proposition. The plaintiff insurer arranged to have a company called “Drive On” act as its agent for the collection of premiums. Drive On was a subsidiary of a company called “International Warranty.” Both companies held accounts at the defendant bank and both accounts habitually were in overdraft. On instructions from International Warranty’s president, the bank made nightly transfers from Drive On’s general account (which held the premiums that the subsidiary had collected on the plaintiff’s behalf) into the parent’s account. The effect of that arrangement was a reduction in International Warranty’s overdraft and hence an economic benefit to the bank. In time, Drive On’s financial position worsened and it began to default on its payments; when the company eventually ceased operations, it

⁷² *Supra* note 7 at 48, 51.

⁷³ (1993), 96 D.L.R. (4th) 609 at 614 *per Sopinka J.* [hereinafter *Brissette*].

⁷⁴ *Supra* at Part III(B); D.W.M. Waters, “The Constructive Trust in Evolution: Substantive And Remedial” (1990–1991) 10 *Est. & Tr. J.* 334 at 377.

⁷⁵ *Supra* note 16.

owed the plaintiff more than \$600 000. As Drive On was judgment proof, the insurer brought an action against the bank on the basis of "knowing receipt." The claim was successful. The agent had committed a breach of trust in failing to remit the collected premiums to the insurer and the bank had received trust property with sufficient knowledge that it was derived from that breach.⁷⁶ The important point for present purposes is that LaForest J. recognised that the constructive trust consequently imposed upon the defendant constituted a restitutionary response to an autonomous action in unjust enrichment⁷⁷: (i) the bank was enriched by the receipt of trust property (in the form of a reduction in International Warranty's overdraft); (ii) that enrichment came at the plaintiff's expense because it effectively represented wealth that was subtracted from the insurer; and (iii) the bank's knowledge that its enrichment was derived from a breach of trust constituted an unjust factor.⁷⁸

A prime example of a non-restitutionary constructive trust arises with respect to specifically enforceable contracts for the sale of land.⁷⁹ In *Rich v. Krause*,⁸⁰ the applicant entered into an agreement for the purchase of certain premises. After several years, during which she had paid off part of the price, she wished to convey her interest to a third party. Because that re-sale de-

⁷⁶ Specifically, it was held that liability for "knowing receipt" rests on the basis of constructive knowledge: *Citadel General Assurance*, *supra* note 16 at 434. In contrast, in cases of "knowing assistance," in which the defendant need not acquire property as a result of his participation in a breach of trust, the plaintiff must prove the defendant's actual knowledge, recklessness or wilful blindness regarding the dishonest scheme: *Gold*, *supra* note 16 at 394; *M & L Travel*, *supra* note 38. That difference turns upon the fact that whereas the law seeks merely to reverse unjust enrichments in cases of "knowing receipt," it is concerned to redress fraud in cases of "knowing assistance."

⁷⁷ *Supra* note 16 at 424, 434. See also *Gold*, *supra* note 16 at 396, 398.

⁷⁸ More precisely, the applicable unjust factor was a form of unconscientious receipt. Given its awareness of the general circumstances, the bank acted improperly in taking receipt of trust property without ascertaining whether or not the property was derived from a breach of trust. In so holding, LaForest J. rejected Birks' proposal that relief should be granted simply on the basis that the plaintiff did not truly intend to benefit the defendant: P. Birks, "Misdirected Funds: Restitution From the Recipient" (1989) 3 *Lloyds Mar. & Com. L.Q.* 296; P. Birks, *Restitution—The Future* (New York: Oxford University Press, 1992) at c. 2.

⁷⁹ In some situations, constructive trusts have been imposed to effect mere personal liability. Thus, the trustee *de son tort* and the individual guilty of knowing assistance are said to be "constructive trustees" even though they acquired no property and even though their only obligation is to provide compensation for loss. In such circumstances, restitutionary principles clearly do not arise; if the defendant was not enriched, the essence of the legal response obviously does not lie in reversing an unjust enrichment. (Moreover, the language of constructive trust seems inappropriate to describe mere personal liability.)

⁸⁰ [1975] 1 W.W.R. 87 (B.C.S.C.). See also *Lysaght v. Edwards* (1876), 2 Ch.D. 499; *Buchanan and James v. Oliver Plumbing and Heating Ltd.* (1959), 18 D.L.R. (2d) 575 (Ont. C.A.).

pended upon her ability to provide title, the applicant sought a vesting order. She was entitled to the order under the *Trustee Act* (upon payment into court of the amount remaining on the original purchase price) because her vendor, who had disappeared some time earlier, had become a constructive trustee of the property upon entering into the initial contract. The constructive trust in *Rich v. Krause* clearly was non-restitutionary; the circumstances revealed neither an enrichment by subtraction nor an enrichment by wrong.

Citadel General Assurance and *Rich v. Krause* were relatively easy cases. Often, however, the restitutionary or non-restitutionary character of a constructive trust is not so clear. The remainder of this paper will examine three types of situations in which the Supreme Court of Canada arguably has erred in its assessment.

A. Unjust Enrichment and Domestic Property Disputes

The Supreme Court of Canada has attempted to develop the constructive trust as a remedy for the autonomous cause of action in unjust enrichment largely through the medium of domestic property disputes. That is ironic. Although the results reached in such cases are eminently defensible on the level of social policy, the analysis that the Court has employed appears inconsistent with the orthodox principle of unjust enrichment and the relief that it has awarded appears irreconcilable with the concept of restitution.

While the generalised concept of unjust enrichment reflects abstract principles of justice, its application in specific cases turns upon particular rules.⁸¹ Consequently, domestic property disputes properly are resolved not on the basis of broad, societal notions of fairness, but rather on the basis of the three part action in unjust enrichment. In the family context, the first and second elements of that principle can usually be satisfied without great difficulty. While the Court's approach to the issue of enrichment often appears to be largely intuitive, an individual who contributes money or services to a matrimonial or quasi-matrimonial relationship usually renders a legally recognisable enrichment to his or her partner. Money invariably is enriching⁸²; services also may be enriching if, for example, they are requested or freely accepted by the recipient, or if they create an incontrovertible benefit either by saving the recipient a necessary expense or by providing him with a financial gain.⁸³ Thus, in *Pettkus v. Becker*, the male defendant was able to save enough money to purchase farm land only because the female plaintiff assumed responsibility for his living expenses. So too he was able to operate a financially successful apiary partly because she

⁸¹ *Peter*, *supra* note 7 at 643–644 *per* McLachlin J.

⁸² *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783 at 799 (Q.B.) *per* Goff J.

⁸³ *Peel*, *supra* note 15.

contributed substantial labour to the enterprise. *Sorochan v. Sorochan* involved a similar situation.⁸⁴ Although the male defendant already held title to the disputed farm when he entered into a relationship with the female plaintiff, her services both obviated the need for him to hire a farmhand and preserved the commercial value of the land. And in *Peter v. Beblow*,⁸⁵ the male defendant was undeniably enriched by the female plaintiff's household services not only because they allowed him to avoid the expense of hiring a housekeeper, but also because they dissuaded welfare authorities from taking into care his previously neglected children. Moreover, the enrichment received by the defendant in each of those cases clearly was enjoyed "at the plaintiff's expense" in the subtractive sense of that phrase; the man's gain resulted from the woman's deprivation.⁸⁶

Of course, mere proof that the defendant received an enrichment at the plaintiff's expense is not a sufficient basis for awarding restitutionary relief. The claimant also must prove, under the third element of the cause of action in unjust enrichment, absence of any juristic reason for the enrichment, or, stated more positively, that the enrichment resulted from an unjust factor.⁸⁷ In *Pettkus v. Becker*, Dickson J. accordingly sought to justify the imposition of a remedial constructive trust on the basis of "free acceptance":

As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.⁸⁸

Unfortunately, while theoretically sound, that approach cannot explain the facts of the case.⁸⁹ Free acceptance works as an unjust factor because it establishes that the defendant acted unconscientiously⁹⁰: despite an opportunity to

⁸⁴ (1986), 29 D.L.R. (4th) 1 at 6 (S.C.C.) [hereinafter *Sorochan*].

⁸⁵ *Supra* note 7 at 626.

⁸⁶ Because the defendant in *Rawluk* conceded that he had been unjustly enriched, the Court was not required to analyse the elements of the plaintiff's cause of action: *supra* note 4 at 167 *per* Cory J., 182 *per* McLachlin J. And although the Court loosely employed the language of the remedial constructive trust in *Palachik v. Kiss*, it actually awarded the plaintiff mere personal, rather than proprietary, relief: (1983), 146 D.L.R. (3d) 385 (S.C.C.). That case, accordingly, falls outside the scope of this paper.

⁸⁷ *Pettkus*, *supra* note 15 at 274.

⁸⁸ *Ibid.* at 274.

⁸⁹ Gardner persuasively makes the point: "Rethinking Family Property" (1993) 109 L.Q. Rev. 263 at 269-274.

⁹⁰ P. Birks, "In Defence of Free Acceptance" in A Burrows, ed., *Essays on the Law of Restitution* (New York: Oxford University Press, 1993) 105.

reject, he took receipt of a benefit for which he knew (or ought to have known) that the plaintiff reasonably expected payment, even though he did not intend to fulfil that expectation. From the outset, however, Mr. Pettkus made it abundantly clear to Ms. Becker that he intended to hold the land and the bee-keeping business for himself alone.⁹¹ How, then, could she possibly have had a reasonable expectation of receiving an interest? And by the same token, how could he have known of such an expectation? A similar critique may apply to the Court's reliance upon the notion of free acceptance in *Sorochan*. While the plaintiff undoubtedly rendered valuable services to the defendant's farming operation for over forty years, he specifically had refused her request to transfer part of the land into her name.⁹² It therefore is debatable whether or not she could have held the requisite reasonable expectation.⁹³

The Court's approach to the third element of the autonomous action in unjust enrichment was even less satisfactory in *Peter v. Beblow*.⁹⁴ At the defendant's request, the plaintiff moved into his home, cared for his children, and performed substantial household work. McLachlin J. rationalised an award of relief on the bases that: the plaintiff had not acted pursuant to a common law, equitable, or statutory obligation to render such services to her *de facto* husband, and there was no policy reason to exclude homemaking and child-rearing services from the operation of the principle of unjust enrichment. However, as Dickson C.J.C. implicitly recognised in *Sorochan v. Sorochan*,⁹⁵ such factors merely explain why relief need not be withheld; they do not reveal an unjust factor capable of supporting a restitutionary claim.⁹⁶ Consequently, the findings relied upon by McLachlin J. negated possible defences, but they did not positively argue in favour of relief.

⁹¹ *Pettkus*, *supra* note 15 at 271–273, *cf.* 274. The trial judge characterised the plaintiff's assumption of responsibility for meeting the defendant's living expenses during the early years of their relationship as "risk capital invested in the hope of seducing a younger defendant into marriage": quoted at 271. Such language was criticised in the Supreme Court of Canada as being "gratuitously insulting" (*per* Ritchie J. at 265) and "lack[ing] ... in ... gallantry" (Dickson J. at 272).

⁹² *Supra* note 84 at 7. It also may be relevant that he declined her invitation of marriage during the early part of their relationship.

⁹³ Unfortunately, the trial judgment is unreported and neither the Supreme Court of Canada nor the Alberta Court of Appeal discussed the facts at length. While the tenor of Dickson C.J.C.'s opinion suggests that the defendant may have expressed ignoble intentions from the start, it is possible that it was not until late in the relationship that he gave the plaintiff reason to believe that he intended to hold the farm for himself exclusively.

⁹⁴ *Supra* note 7.

⁹⁵ *Supra* note 84 at 7.

⁹⁶ Free acceptance was, however, proposed by Cory J. in his concurring opinion: *supra* note 7 at 635.

Even if the facts of the cases under consideration do support the cause of action in unjust enrichment, the decisions often remain suspect. When required to calculate the extent of a remedial constructive trust, the Court has invariably employed a loose approach that very often has proceeded with reference to the parties' reasonable expectations.⁹⁷ Granted, as discussed above, reasonable expectations may have a role to play in determining the threshold question of *liability*. They may, for example, reveal that a defendant's actions were unconscientious and hence supportive of an unjust factor. They also may be pertinent to a court's decision regarding the appropriate *form of relief*, be it personal or proprietary.⁹⁸ However, they should not be relevant to the *quantum of relief* that is available with respect to an unjust enrichment. The cause of action in unjust enrichment supports only one response: restitution.⁹⁹ Having received a benefit at the plaintiff's expense as a result of an unjust factor, the defendant is required to "give back" that which he gained and that which the claimant lost. Simply stated, there is no conceptual correlation between the notions of reasonable expectation and restitution. The former may reflect the latter, but only coincidentally. Thus, given her contributions to an enterprise, a person may reasonably believe herself entitled to the value of those contributions; however, she also may reasonably believe herself entitled to something more or less. Moreover, the fulfilment of reasonable expectations and the imposition of restitutionary relief do not share the same remedial orientation. The former looks forward to what the claimant believed she would receive; the latter looks back to what the defendant unjustly received at the plaintiff's expense.

There are reasons to doubt that the decisions under consideration can properly be described as "restitutionary." That is hardly surprising. While full discussion of the issue lies beyond the scope of this paper, clearly neither the facts nor the social values underlying the cases readily lend themselves to an orthodox unjust enrichment analysis.¹⁰⁰ Thus, any attempt to precisely unravel the economic consequences of a failed matrimonial or *quasi*-matrimonial relationship will encounter difficulties for the obvious reason that the parties typically will have entered into a free exchange of benefits and burdens without any thought

⁹⁷ *Peter supra* note 7 at 645 and 652 *per* McLachlin J., 633, 635, 638, 639–640, and 642 *per* Cory J.; *cf. Pettikus supra* note 15 at 277 *per* Dickson J. See also *Rawluk supra* note 4 at 180, 181 *per* Cory J. In *Sorochan*, neither party appealed the trial judge's assessment of relief and hence the issue was not explored by the Court: *supra* note 84 at 13. The tenor of the decision nevertheless may support an approach to quantification that is based on reasonable expectations: *Birks, supra* note 3 at 222.

⁹⁸ *Sorochan, supra* note 84 at 15 *per* Dickson C.J.C.; *Peter, supra* note 7 at 637 *per* Cory J.; *LAC Minerals supra* note 7 at 51 *per* LaForest J.

⁹⁹ *Supra* at text accompanying note 20.

¹⁰⁰ See generally P. Parkinson, "Beyond *Pettikus v. Becker*: Quantifying Relief for Unjust Enrichment" (1993) 43 U.T.L.J. 217.

of legal consequences. Aside from the forensic obstacles consequently created by such circumstances, the claimant must overcome conceptual requirements (such as "free acceptance") that historically were devised for use between parties who dealt at arm's length. Moreover, in the domestic context, it may not suffice for the purposes of social justice simply to restore unjust enrichments (properly defined). The essence of the plaintiff's complaint is not merely that the defendant unjustly received wealth that had been subtracted from her. It further encompasses: the full range of advantages and disadvantages, both economic and non-economic, that arise in conjunction with societally assigned gender roles,¹⁰¹ and societal expectations that domestic relationships engender. Consequently, although it may be possible to rehabilitate the Supreme Court's use of the unjust enrichment principle in the present context,¹⁰² the wisdom of doing so is debatable. There is a serious danger that policy-driven decisions rendered in cohabitation cases will inhibit the proper evolution of the cause of action in unjust enrichment and the remedy of constructive trust, in other types of cases.¹⁰³

B. Overlooking Enrichment By Wrong

The generic principle of unjust enrichment contains an important ambiguity: an unjust enrichment may arise from either an enrichment by subtraction or an enrichment by wrong. In the former situation, the plaintiff's claim lies in the autonomous action in unjust enrichment and the appropriate measure of relief is calculated with reference to the value that the defendant gained and the plaintiff lost. By contrast, an enrichment by wrong is addressed through a cause of action found in another area of law and is remedied through an award that compels disgorgement of the defendant's gain. The plaintiff need not have suffered an economic deprivation corresponding to the defendant's enrichment; it is sufficient that she was the victim of a wrong that he committed.

Although a constructive trust may respond to either species of unjust enrichment, the Supreme Court of Canada repeatedly has confused the relationship between the two concepts in the context of wrongs. In some cases, it simply has overlooked the restitutionary implications of its decisions; in others, it has attempted to address claims arising from wrongful acquisitions as though they arose from subtractive enrichments.

In the past, the Supreme Court avoided the first type of error by properly recognising that an unjust enrichment may arise on the basis of wrongful con-

¹⁰¹ For example, the deleterious effect that cohabitation might have on a woman's career.

¹⁰² For example, through the robust use of presumptions: R. Scane, "Relationships 'Tantamount to Spousal,' Unjust Enrichment and Constructive Trusts" (1991) 70 *Can. Bar Rev.* 260.

¹⁰³ *Peter*, *supra* note 7 at 651 *per* McLachlin J.

duct by the defendant, regardless of any economic loss to the plaintiff.¹⁰⁴ In *Canadian Aero Service Ltd. v. O'Malley*,¹⁰⁵ the plaintiff company conducted extensive preparatory work in the hope of securing a contract to photograph and map parts of Guyana. That work was performed by senior officers who subsequently resigned from the company and successfully bid on the same project for themselves. Laskin J. held that the officers had acquired the contract in breach of fiduciary obligations owed to the plaintiff and therefore were required to disgorge their profits¹⁰⁶:

Liability ... for breach of fiduciary duty does not depend upon proof by Canaero that, but for [the officers'] intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, *unjust enrichment*, I would not interfere with the quantum [calculated by the trial judge].¹⁰⁷

More recently, however, the Court failed to characterise a similar situation as falling within the generic principle of unjust enrichment. The plaintiff in *Soulos v. Korkontzilas*¹⁰⁸ wished to purchase an investment property and to that end arranged for the defendant, a real estate agent and fellow member of Toronto's Greek community, to act on his behalf. Among the agent's recommendations was a building in which the client's banker was a tenant. The plaintiff found the prospect of becoming his banker's landlord appealing and accordingly instructed the defendant to present an offer. Following a series of negotiations, the owner of the premises replied with a counter-offer. The agent, however, failed to convey that information to his client. Indeed, to the contrary, he falsely told the plaintiff that the owner had decided against sale. He did so in order to conceal the fact that he had purchased the property for himself (in his wife's name). Three years later, the plaintiff discovered the defendant's deception and brought an action for breach of fiduciary duty. Although he initially sought proprietary relief and monetary damages in the alternative, he sensibly abandoned the latter claim at trial; because the defendant had purchased the property at market value, the plaintiff conceded that the alleged wrong had not caused him to suffer any loss. Despite the absence of injury, however, he main-

¹⁰⁴ The point also is recognised in the leading texts: Maddaugh & McCamus, *supra* note 11 at 32–35, 52, cc. 22–27; Fridman, *Restitution*, *supra* note 50 at c. 11.

¹⁰⁵ (1973), 40 D.L.R. (3d) 371 (S.C.C.) [hereinafter *Canadian Aero*].

¹⁰⁶ As the plaintiff had not sought a constructive trust, the relief necessarily was personal: *supra* note 105 at 392.

¹⁰⁷ *Supra* note 105 at 392 [emphasis added]; cf. 383–384 (referring to the plaintiff's expense in the subtractive sense).

¹⁰⁸ *Supra* note 1.

tained that he was entitled to a constructive trust over the building upon compensating the defendant with respect to his purchase. The claimant's motivation obviously was not economic; the value of the property actually had decreased during the intervening years. Rather, it lay in the fact that in becoming his banker's landlord, he would gain prestige within the Greek community.

In allowing the claim, McLachlin J. appropriately rejected the proposition that the constructive trust invariably is premised upon proof of unjust enrichment. Her decision nevertheless is unsatisfactory insofar as it fails to recognise that an unjust enrichment *did* arise on the facts before her. Indeed, the acquisition of a benefit through a breach of a fiduciary duty is the paradigm of an enrichment by wrong.¹⁰⁹ Thus, while the constructive trust that arose in *Soulos v. Korkontzilas* certainly served McLachlin J.'s goal of protecting the integrity of the fiduciary duty owed by a real estate agent to his client, it also served the function of reversing the agent's unjust enrichment. McLachlin J.'s failure to recognise that point is likely attributable to the Canadian version of the second element of the principle of unjust enrichment. As previously suggested, in speaking of a "corresponding deprivation,"¹¹⁰ that formulation (falsely) appears to require proof that the plaintiff suffered a financial loss equivalent in value to the defendant's gain. And in so doing it tends to exclude the possibility that the defendant may be enriched "at the plaintiff's expense" as a result of the commission of a wrong.

Of itself, the failure to expressly recognise that the principle of unjust enrichment encompasses both enrichment by subtraction and enrichment by wrong may be of relatively little cause for concern. While there are sound arguments for bringing both types of situations under the same general heading,¹¹¹ it undoubtedly would be possible to treat them entirely independently. The principle of unjust enrichment could be confined to cases in which the defendant is required to "give back" a subtractive enrichment; discussion of the restitutionary response of "disgorgement" of wrongful acquisitions could be given over wholly to the substantive areas of law that contain the causes of actions that support gain-based remedies.¹¹² What is critical, however, is that each type of case be approached according to its own internal logic. An enrichment by subtraction *must* proceed on the basis of the autonomous action in unjust enrichment for which restitution is the invariable remedy; an enrichment by wrong *must* be understood simply to support a restitutionary remedy under a cause of action lying outside the scope of the law of restitution. Unfortunately,

¹⁰⁹ See, for example, *Keech supra* note 29.

¹¹⁰ *Soulos supra* note 1 at 217.

¹¹¹ See, for example, Maddaugh & McCamus, *supra* note 11 at 34–36; cf. Birks, *Introduction supra* note 3 at 39–44.

¹¹² L.D. Smith, "The Province of the Law of Restitution" (1992) 71 *Can. Bar Rev.* 672.

the same error that led McLachlin J. to overlook the restitutionary nature of the constructive trust in *Soulos v. Korkontzilas* also has caused the Supreme Court of Canada to mix the analyses applicable to the two forms of unjust enrichment.

C. Enrichment By Wrong, Alternative Analyses, and Erroneous Mixtures

In considering the availability of a constructive trust as a response to unjust enrichment, the Supreme Court of Canada on a number of occasions has improperly analysed an enrichment by wrong as if it was an enrichment by subtraction. Granted, though theoretically pure, the distinction between the two species of unjust enrichments is sometimes factually blurred. A single set of events may support both forms of analyses. Thus, just as a claimant may enjoy concurrent actions in, for example, tort and contract, so too, as Dickson C.J.C. recognised in *Hunter Engineering Co. v. Syncrude Canada Ltd.*,¹¹³ she may enjoy concurrent rights to the autonomous action in unjust enrichment and to restitutionary relief for a cause of action lying outside of the law of restitution.¹¹⁴ That possibility of “alternative analysis” is an inevitable and desirable feature of a legal system that recognises multiple causes of action arising from a single set of circumstances. However, it also is a trap for the unwary. Unless the two types of claim are assiduously distinguished, they are apt to become confusingly mixed. Elements from one may become combined with elements from the other to produce a hybrid that is incapable of honestly reflecting or properly serving either parent. Similarly, the fact that unjust enrichment may take either of two forms creates the risk of mistaken identity even when alternative analysis is not truly possible. The Court appears to have fallen prey to those dangers on several occasions.

The most notable illustration is found in *LAC Minerals Ltd. v. International Corona Resources Ltd.*¹¹⁵ As a result of exploratory drilling, the plaintiff discovered that land owned by a third party, Mrs Williams, likely contained mineral deposits. It shared that information with the defendant in anticipation of entering into a joint venture. The proposed partnership never materialised and the defendant acquired the Williams property for itself. A majority of the Supreme Court of Canada, represented by LaForest J.’s opinion, held that the defendant

¹¹³ *Supra* note 15 at 349–350.

¹¹⁴ Consider the situation in which David, through deception, induces Pamela to pay \$5 000 to him. There is an enrichment by subtraction. Aside from the wrongfulness of David’s conduct, Pamela’s intention in transferring the money was vitiated by error; she is entitled to get back the payment by means of the autonomous action in unjust enrichment. However, there also is an enrichment by wrong. Aside from the vitiation of Pamela’s intention, David acted wrongfully in obtaining the money; he is required to give back the payment by means of the tort action in deceit.

¹¹⁵ *Supra* note 7.

had acted in breach of a duty of confidence and that the land was subject to a constructive trust in the plaintiff's favour. That decision was entirely defensible on the theory of enrichment by wrong. Having established the constituent elements of the cause of action in confidence,¹¹⁶ a claimant may be entitled to various forms of relief. For example, the defendant may be subject to a personal obligation either to account for its profits¹¹⁷ or to provide compensation for the plaintiff's loss.¹¹⁸ But so too a court exceptionally may remedy a breach of confidence by ordering the defendant to hold wrongfully acquired property on constructive trust for the plaintiff.¹¹⁹ On the remarkable facts of *LAC Minerals*, such proprietary relief was found appropriate. Evidence suggested that the Williams property might yield one of the richest gold mines in history, but given uncertainties regarding the amount of gold available and the future of gold prices, the value of the land was impossible to calculate with reasonable accuracy. By ordering the transfer of the property to the plaintiff under a constructive trust, the Court was able to avoid that difficulty and to ensure that the claimant ultimately received sufficient relief.¹²⁰

While the relief awarded in *LAC Minerals* may be defensible, the actual decision is problematic in so far as LaForest J. purported to justify the imposition of a constructive trust on the basis of the cause of action in unjust enrichment. Several difficulties arise on that view. Acquisition of the Williams property undeniably constituted an enrichment for the defendant. In order for the second part of the cause of action in unjust enrichment to have been satisfied, however, the defendant must have enjoyed an enrichment by subtraction and not

¹¹⁶ That is: (i) information of a confidential character, (ii) imparted to the defendant in circumstances importing an obligation of confidence, and (iii) used by the defendant in an unauthorised manner and to the detriment of the plaintiff: *Coco v. AN Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.).

¹¹⁷ Tellingly, LaForest J. suggested in *LAC Minerals* that the remedy of accounting "[u]sually ... is not restitutionary" because "while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense": (1989), 61 D.L.R. (4th) 14 at 46. Thus, despite using the international version of the second element of the principle of unjust enrichment (rather than the Canadian notion of a "corresponding deprivation"), LaForest J. failed to appreciate that in the case of an enrichment by wrong, the defendant may be required to disgorge his gain, and hence effect a restitutionary result, regardless of the fact that the plaintiff suffered no loss.

¹¹⁸ *Seager v. Copydex Ltd. (No. 2)*, [1969] 2 All E.R. 718 (C.A.).

¹¹⁹ Indeed, such was the result in the Supreme Court's decision in *Pre-Cam Exploration and Development Ltd. v. McTavish*, *supra* note 41. That decision was cited by LaForest J., but distinguished by Sopinka J. in dissent: *LAC Minerals*, *supra* note 7 at 49 and 76.

¹²⁰ The imposition of a constructive trust also was guided by a number of other considerations, including the fact that the defendant sought to benefit from its intentional wrongdoing and the fact that, but for the defendant's wrong, the plaintiff (probably) would have acquired the Williams property: *supra* note 7 at 51.

simply an enrichment by wrong. It was not enough that the defendant had acquired the Williams property as a result of breaching the duty of confidence that it owed to the plaintiff; despite the fact that the claimant had not previously owned the disputed land, the defendant's benefit effectively must have been subtracted from the plaintiff. LaForest J. sought to overcome that obstacle by means of a robust application of the notion of "interceptive subtraction." While the requirement of subtractive enrichment typically is satisfied by proof that the defendant received a benefit directly from the plaintiff, exceptionally it is satisfied by proof that the defendant received from a third party a benefit that, but for the facts otherwise constituting the unjust enrichment, would have accrued to the plaintiff. The precise scope of that rule is somewhat uncertain, but LaForest J.'s citations suggest that it is limited to situations in which, but for the defendant's actions, the plaintiff *certainly* would have received the enrichment.¹²¹ It is questionable, however, whether that test was met on the facts of *LAC Minerals*. Notwithstanding more emphatic restatements by LaForest J.,¹²² the trial judge merely found that "but for the actions of [the defendant], [the plaintiff] *probably* would have acquired the Williams property."¹²³ Of course, probability is not certainty.

LaForest J.'s treatment of the third part of the cause of action in unjust enrichment is even more troublesome. It was held that the defendant's enrichment was rendered unjust as a result of its breach of confidence.¹²⁴ The third branch of the cause of action in unjust enrichment was satisfied by proof of the cause of action in breach of confidence. Inelegance is the least of the problems affecting that approach.¹²⁵ The causes of action in breach of confidence and unjust enrichment are wholly independent. In each instance, the constituent elements of proof derive from the inner logic of the action and, more immediately, from the case law. And as a matter of precedent, it is clear that while the

¹²¹ *Air Canada supra* note 24 at 193–194 per LaForest J.; Birks, *Introduction, supra* note 3 at 133–139. Cf. G. Jones, *Goff & Jones: The Law of Restitution, supra* note 12 at 36–38; A. Burrows, *The Law of Restitution, supra* note 8 at 45–54.

¹²² *LAC Minerals supra* note 7 at 22 and 44.

¹²³ *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 25 D.L.R. (4th) 504 at 546; cf. 542–543: "On a balance of probabilities I find that, but for the actions of Lac, Corona would have acquired the Williams property."

¹²⁴ *LAC Minerals supra* note 7 at 45.

¹²⁵ The reason for LaForest J.'s unusual approach is not entirely clear. As suggested in the text, the Supreme Court of Canada's unique formulation of the second and third parts of the cause of action in unjust enrichment probably confused the issue. Moreover, while the facts before him readily pointed to a traditional "wrongs" analysis, LaForest J.'s interpretation of comments made in *Pettikus v. Becker* ("unjust enrichment lies at the heart of the constructive trust") may have led him mistakenly to believe that the availability of the constructive trust (which he clearly wished to impose) was premised upon proof of an unjust enrichment of the "subtractive" variety that was found in *Pettikus: supra* note 15 at 48.

action for breach of confidence provides a vehicle through which an enrichment by wrong may be rectified, it plays no role in remedying a subtractive enrichment under the autonomous action in unjust enrichment. Unfortunately, the Canadian version of the third part of the action in unjust enrichment tends to obscure that point. To ask of "an absence of any juristic reason" for an enrichment does relatively little to point the inquiry in the proper direction.¹²⁶ The international formulation, which demands proof of an "unjust factor," better reflects the fact that the determination of whether or not the defendant's enrichment is "unjust" is made with reference to those considerations that judicially have been recognised as positively calling for the reversal of an enrichment.¹²⁷

One of the great achievements of recent scholarship has been the classification and explication of the "unjust factors."¹²⁸ Thus, while specific issues occasionally engender debate, it is commonly agreed that the bases upon which the courts reverse subtractive enrichments are threefold: (i) non-voluntary transfer by the plaintiff, (ii) unconscientious receipt by the defendant, and (iii) policy considerations. As suggested by LaForest J.'s opinion in *LAC Minerals*, it might seem that the cause of action in breach of confidence falls under those headings and hence can be brought within the autonomous action in unjust enrichment. After all, is the acquisition of a benefit through a breach of confidence not: (i) the product of a "non-voluntary transfer" from the plaintiff, (ii) "unconscientious," or, at the very least (iii) contrary to "public policy"? The answer must be in the negative. The proposition is fatally flawed because it approaches the unjust factors at an intolerably high level of abstraction. The aim of the modern law of restitution largely has been to avoid the imprecision that attends upon loosely-defined notions of "unjust enrichment"¹²⁹ and that historically inhibited the proper evolution of the subject. And from that perspective, it is clear that the unjust factors are not simply loose rubrics under which all manner of claims can be brought. Rather, they serve to focus attention on the *particular* types of

¹²⁶ Indeed, it may even superficially appear to ask simply of the absence of a defence: M.M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 *Alta. L. Rev.* 407 at 431-434; cf. *Peter*, *supra* note 7 at 636 *per* Cory J., 648 *per* McLachlin J.

¹²⁷ *Peel*, *supra* note 15 at 151-152, 164; *Zaidan Group Ltd. v. City of London* (1987), 36 D.L.R. (4th) 443 at 448 (Ont. H.C.J.). Thus, in *Pettkus v. Becker*, where Dickson J. articulated the Canadian formulation of the principle of unjust enrichment, the defendant's subtractive enrichment was considered unjust because the plaintiff proved the unjust factor of "free acceptance": *supra* note 15 at 274 (S.C.C.).

¹²⁸ See especially Birks, *Introduction*, *supra* note 3; P. Birks & R. Chambers, *The Restitution Research Resource 1997* (New York: Oxford University Press, 1997) at 2-3.

¹²⁹ *Holt v. Markham*, [1923] 1 K.B. 504 at 513 *per* Scrutton L.J. ("well-meaning sloppiness of thought").

events that support relief under the autonomous action in unjust enrichment.¹³⁰ Thus, while the notion of “non-voluntary transfer” is the most open-textured of the three, even it is recognised to take several specific forms.¹³¹ Similarly, the notion of “unconscientious receipt” does not allow liability to be imposed on the basis of vague notions of conscientiousness; it directs attention to a set of detailed (if sometimes controversial) rules.¹³² So too “policy” motivated restitution occurs not on the basis of broad notions of public policy, but rather in response to clearly defined rules.¹³³ And, as a final step in the argument, it need merely be pointed out, as a matter of precedent, that the cause of action in breach of confidence does not satisfy any of those sets of rules.¹³⁴

Some eight years after the decision in *LAC Minerals*, the Supreme Court of Canada’s tendency to confuse the notions of enrichment by wrong and enrichment by subtraction in constructive trust claims re-surfaced in Sopinka J.’s intriguing dissent in *Soulos v. Korkontzilas*.¹³⁵ A real estate agent acquired property in breach of a fiduciary duty that he owed to a client. Because of a downturn in the economy, the breach ultimately was not financially advantageous; indeed, the agent suffered a loss as a result of having paid market value. Nevertheless, for personal reasons, the client sought a constructive trust over the property in exchange for indemnification of the agent’s purchase price and resulting loss.

¹³⁰ As LaForest J.A. stated, “[c]ourts will not venture far onto uncharted sea when they can administer justice from a safe berth”: *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 at 241 (N.B. C.A.). See also *LAC Minerals*, *supra* note 7 at ; cf. *Peel*, *supra* note 15 at 154–155, and 164 *per* McLachlin J. (recognising the possibility of incremental and analogical expansion).

¹³¹ A claimant may have non-voluntarily conferred an enrichment because she was: (i) ignorant of the relevant events and hence formed no intention at all, (ii) subject to a mistake or some form of compulsion and hence formed an intention that was vitiated by circumstance, or (iii) provided a benefit in anticipation of an event that never occurred and hence merely formed a qualified intention.

¹³² See, for example, *Pettkus*, *supra* note 15 at 274; Birks, “Free Acceptance” *supra* note 90; cf. A. Burrows, *The Law of Restitution*, *supra* note 8 at 315–320.

¹³³ See, for example, *Air Canada*, *supra* note 24 *per* Wilson J.; *Woolwich Equitable Building Society v. IRC*, [1993] A.C. 70 (H.L.) *per* Lord Goff (recovery of payments made under *ultra vires* demand); M McInnes “Restitution and the Rescue of Life” (1994) 32 *Alta. L Rev* 37 (recovery for services rendered in emergencies). See generally Birks, *Introduction*, *supra* note 3 at c. 9.

¹³⁴ Of course, in *LAC Minerals*, it may be that the same events that supported the cause of action in breach of confidence also supported proof of one of the unjust factors. Thus, the plaintiff perhaps could have argued that it had suffered from impaired intention in so far as it had not meant for the defendant to acquire the Williams property for itself. On that analysis, however, the wrongful character of the acquisition logically would have been irrelevant to the claim in unjust enrichment; the fact, and not the cause, of the plaintiff’s impaired intention would have been of determinative significance.

¹³⁵ *Supra* note 1.

Sopinka J. would have denied the claim because he believed (contrary to the majority) that the availability of a constructive trust is invariably premised upon proof of unjust enrichment. And by "unjust enrichment," he meant the autonomous action in unjust enrichment that responds to subtractive enrichments. Given the facts of the case, however, he held that the first part of that action could not be satisfied: since the defendant purchased the property at market value, he did not gain a pecuniary benefit.¹³⁶

As a matter of precedent and principle, that analysis is incorrect. A constructive trust was imposed in the leading case of *Keech v. Sandford*¹³⁷ simply because the fiduciary obtained a lease by reason of his position; the profitability of the acquisition was immaterial. Likewise, the mere fact that Korkontzilas acquired property in breach of a fiduciary duty was a sufficient basis for liability; it should not have mattered that he had paid market value. That proposition follows from the very nature of the concept of enrichment. Proof of enrichment often is problematic when a claimant seeks to recover the monetary value of an alleged benefit, rather than the benefit itself. Restitutionary claims arising from the provision of services are illustrative. In such circumstances, the defendant may be able to avoid liability by "subjectively devaluing" the purported enrichment.¹³⁸ That is, he may argue that the imposition of liability intolerably would infringe upon his freedom of choice because he no longer is in a position to return the alleged benefit *in specie*,¹³⁹ and regardless of its objective value, the alleged benefit held no value for him personally.¹⁴⁰ Such an argument, however, was not properly available in *Soulos*. In claiming a constructive trust, the plaintiff was seeking recovery of the property itself, rather than its value. And because valuation consequently was irrelevant, the defendant could not have re-

¹³⁶ *Supra* note 1 at 239, 241–242, *cf.* 224 *per* McLachlin J. On Sopinka J.'s analysis, the second part of the cause of action could not be satisfied either. Absent an enrichment to the defendant, the plaintiff could not have suffered a *corresponding* economic deprivation. Regardless of his desire to become his banker's landlord, and notwithstanding the breach, the plaintiff remained free to (and in fact did) acquire another investment property at market value. Unfortunately, Sopinka J.'s reasoning on point is motivated largely by the questionable assumption that all civil obligations are intended to prevent wrongful loss: at 236–237. Surely, however, some obligations (of which the fiduciary's are paradigm) are imposed at least in part to prevent wrongful gain: *cf.* 226–227 *per* McLachlin J.

¹³⁷ Discussed *supra* at text accompanying note 29.

¹³⁸ Birks, *Introduction*, *supra* note 3 at 109.

¹³⁹ *Taylor v. Laird* (1856), 25 L.J. Ex. 329 at 332 *per* Pollock C.B.: "[o]ne cleans another's shoes; what can the other do but put them on?"

¹⁴⁰ Or, more precisely, he did not exercise a choice to expend resources in order to acquire the services: Birks, *Introduction*, *supra* note 3 at 110.

course to the plea of subjective devaluation.¹⁴¹ The existence of an enrichment therefore was quite clear; any lingering doubts surely should have been dispelled by the plaintiff's offer to indemnify the defendant in exchange for proprietary relief.

In *obiter dicta*, Sopinka J. indicated that if he *had* recognised an enrichment, he would have further found that the agent had been unjustly enriched at the client's expense. Of course, the obvious explanation would have been that the plaintiff had suffered an expense insofar as he was the victim of the defendant's breach: enrichment by wrong. Interestingly, however, Sopinka J. believed that the expense would have been of the subtractive variety. He arrived at that conclusion through (implicit) application of the maxim that "[e]quity regards as done that which ought to have been done."¹⁴² Thus, he reasoned that because the defendant should have acquired the property for the plaintiff, if at all, he should be treated as having done so. A cause of action in unjust enrichment purportedly arose as a result: (i) the agent was enriched through the receipt of a benefit, (ii) that benefit effectively represented a subtraction from the client's wealth, and (iii) the enrichment was unjust, presumably because the client did not intend the agent to have the benefit.

While ingenious, that analysis is difficult to accept. The equitable maxim traditionally has been applied to achieve that which a court could order to be done, to effectuate a pre-existing obligation and to fulfil an anticipated result. For example, a specifically enforceable contract for a lease creates an equitable lease¹⁴³; a trustee under a will who is obliged to convert wasting, reversionary, or

¹⁴¹ See Chambers, *Resulting Trusts*, *supra* note 65 at 95; Burrows, *Restitution*, *supra* note 121 at 7. Not infrequently, the lay person and the lawyer define "enrichment" differently. For example, it may seem intuitive that the person whose car has received highly desirable (but non-necessary) repairs has been "enriched." Nevertheless, there is considerable debate amongst scholars as to whether the recipient in such a situation is "enriched" in a legally relevant sense if she has not sold the vehicle in its improved state and thereby received a financial gain from the services: see generally M. McInnes, "Incontrovertible Benefits in the Supreme Court of Canada" (1994) 23 Can. Bus. L.J. 122. Consequently, the restitutionary concept of "enrichment" should be thought of as a term of art and should be defined carefully.

¹⁴² Curiously, Sopinka J. did not refer to the Privy Council's advice in *A.G. for Hong Kong v. Reid*, [1994] 1 A.C. 342 (P.C.). Without attempting to interpret the facts of the case as supporting a subtractive enrichment under the autonomous action in unjust enrichment, Lord Templeman used the equitable maxim to overcome the rule in *Lister & Co. v. Stubbs* (1890), 45 Ch.D. 1 (C.A.) and to thereby impose a constructive trust over property acquired with bribes received through breach of a fiduciary duty. That decision has been the subject of several excellent commentaries: see, for example, P. Birks, "Property in the Profits of Wrongdoing" (1994) 24 U. West. Austl. L. Rev. 8; J. Beatson "Proprietary Claims in the Law of Restitution" (1995) 25 Can. Bus. L.J. 60; D.W.M. Waters, "Proprietary Relief: Two Privy Council Decisions—A Canadian Perspective" (1995) 25 Can. Bus. L.J. 90; D. Crilley, "A Case of Proprietary Overkill" [1994] *Restitution L. Rev.* 57.

¹⁴³ *Walsh v. Lonsdale* (1882), 21 Ch.D. 9.

otherwise unauthorised property into permanent, income bearing property is treated as having done so from the moment that the duty arose¹⁴⁴; and an ineffective exercise of a power of appointment is regarded as having been properly exercised if the donee expressed an intention to do so but used inappropriate means.¹⁴⁵ The same pattern might be stretched to cover the facts of *Soulos*. Given the nature of the parties' relationship, it makes some sense to say that if the agent acquired the property, he should have done so on the client's behalf.¹⁴⁶ Sopinka J., however, purported to articulate a much broader proposal that also explained cases in which the plaintiff could not possibly have acquired the benefit through an agency relationship with the defendant and cases in which the defendant was subject to an obligation to refrain from acquiring the benefit at all.¹⁴⁷ Application of the maxim in such circumstances seems intolerably artificial. Is it really appropriate for a court to say (as Sopinka J. suggested) that a military man who breaches a fiduciary obligation that he owed to his government by participating in a smuggling ring should be treated as having received the bribes on behalf of the government because that is what he ought to have done?¹⁴⁸

Moreover it is difficult to see how that equitable maxim can convert cases of enrichments by wrongs into cases of enrichments by subtractions. Sopinka J.'s broad proposal might follow either of two lines of reasoning. First, it might be thought that the defendant's *acquisition* of a benefit constitutes a subtractive enrichment. Given that the benefit undeniably is derived from a third party, the subtraction necessarily must be of the interceptive variety that LaForest J. noted in *LAC Minerals*. On that issue, however, the maxim is irrelevant. It either is or is not possible to say that, but for the defendant's receipt of the enrichment, the benefit (probably) would have accrued to the plaintiff¹⁴⁹; the equitable presumption simply offers no assistance in the determination of the matter. Second, as seems more likely, Sopinka J. might have thought that the defendant's

¹⁴⁴ *Howe v. Lord Dartmouth* (1802), 32 E.R. 56.

¹⁴⁵ *Re Anstis* (1886), 31 Ch.D. 596.

¹⁴⁶ Cf. Goode, "Property" *supra* note 8 at 219 ("deemed agency gains").

¹⁴⁷ *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) (constructive trust imposed upon secret profit acquired by employee even though plaintiff employer's internal policy precluded it from receiving the profits directly); *Reading v. A.G.*, [1951] A.C. 507 (H.L.) [hereinafter *Reading*] (constructive trust imposed upon bribes received by sergeant in British army even though plaintiff government could not have received the money directly).

¹⁴⁸ *Reading*, *supra* note 147.

¹⁴⁹ In *Soulos*, the defendant's enrichment arguably was interceptive. It appears that the plaintiff would have purchased the property if he had been informed of the vendor's offer: (1991), 4 O.R. (3d) 51 at 69 (H.C.J.). In cases like *Reading* and *MacMillan Bloedel*, however, the claimant could not have acquired the benefit, regardless of the wrongdoer's act.

retention of a benefit received from a third party constitutes a subtractive enrichment. The analysis presumably would run as follows. The wrongdoer should not have acquired the benefit for himself, but having done so, he should pay it over to the plaintiff. And because Equity regards as done that which ought to be done, the defendant's actual retention of the enrichment effectively constitutes a subtraction from the plaintiff's wealth; it is no different than if the defendant reached into the plaintiff's pocket and stole her money. The obvious problem with that approach, however, is that it would convert every wrongful acquisition¹⁵⁰ into a subtractive enrichment capable of supporting the autonomous action in unjust enrichment. The law of civil obligations would be substantially redrawn.

The most significant objection to Sopinka J.'s proposal is that it misrepresents the true essence of a plaintiff's claim. Contrary to his analysis, the purpose of the client's action in *Soulos* was not to recover a benefit that unjustly had been taken from him; he was not complaining that he had been deprived of something that he previously held or to which he previously was entitled. Rather, in establishing the defendant's wrong, the plaintiff sought to compel disgorgement of a benefit that had been acquired from a third party; the client essentially was complaining that his victimisation was the cause of the agent's gain. Consequently, the appropriate analysis arose not through enrichment by subtraction under the cause of action in unjust enrichment, but rather through enrichment by wrong under the cause of action for breach of fiduciary duty.

The final judgment for consideration is *Brissette Estate v. Westbury Life Insurance Co.*¹⁵¹ Although Sopinka J.'s majority opinion likely was correct on the actual facts of the case,¹⁵² his *obiter dicta* regarding the decision of *Schobelt v. Barber*¹⁵³ once again suggest a failure properly to distinguish restitutionary claims based on acquisitive wrongs from those based on subtractive enrichments. In *Schobelt*, the defendant murdered his wife, with whom he had held certain land in joint tenancy. When he sought to exercise his right of survivorship to the property, his wife's estate brought an action in opposition. Moorhouse J. allowed the defendant to acquire full interest in the land, but ordered him to hold an undivided one-half interest on constructive trust for the de-

¹⁵⁰ Or, at least, every acquisition that results from the commission of a wrong that supports gain-based remedies. In such circumstances, the defendant becomes subject to an obligation that Equity could (fictionally) regard as having been fulfilled.

¹⁵¹ *Supra* note 73.

¹⁵² A husband and wife acquired an insurance policy that paid a benefit to the survivor upon the death of the other. The husband killed the wife and renounced any interest under the policy. The deceased's estate, however, sought to recover the benefit of the policy. A majority of the Court rejected the claim, *inter alia*, on the ground that the insurer was not unjustly enriched by its refusal to comply with the estate's demand.

¹⁵³ (1966), 60 D.L.R. (2d) 519 (Ont. H.C.J.).

ceased's next of kin. In so doing, the trial judge invoked, as a means of "preventing ... unjust enrichment,"¹⁵⁴ the public policy rule that prohibits a person from acquiring a benefit through wrongdoing.

Sopinka J., assuming that the unjust enrichment in *Schobelt* was of the subtractive variety, spoke of the need for proof that, but for the defendant's actions, the plaintiff (or her estate) would have acquired the disputed property.¹⁵⁵ That characterisation appears incorrect. The benefit accruing to the defendant by right of survivorship clearly had not been directly subtracted from his wife or her estate. Nor could it be said, under the doctrine of interceptive subtraction, that the victim certainly (or even probably) would have outlived her husband and hence eventually would have enjoyed the right of *jus accrescendi*. By the same token, the measure of relief awarded by the court did not conform to the principle that limits liability under the cause of action in unjust enrichment to the lesser of the defendant's gain and the plaintiff's loss.¹⁵⁶ The estate received an undivided half interest in the property despite the fact that it had not established a corresponding economic deprivation. Consequently, if the relief awarded in *Schobelt* actually was restitutionary, it bore a far stronger resemblance to the notion of restitution for wrongs, than to the notion of subtractive enrichment.¹⁵⁷ The husband's enrichment resulted from his act of murder. That enrichment was acquired at his wife's "expense" in the sense that she was the victim of his wrong. And, finally, the constructive trust imposed by the court was designed to strip the defendant of his ill-gotten gains.

¹⁵⁴ *Supra* note 153 at 524–525. Given that the husband was able initially to exercise his right of survivorship, it seems more accurate, and more consistent with a restitutionary analysis, to say that the imposition of a constructive trust "reversed" an unjust enrichment.

¹⁵⁵ *Supra* note 73 at 613–614. Cf. *Rosenfeldt v. Olsen* (1986), 25 D.L.R. (4th) 472 (B.C.C.A.).

¹⁵⁶ *Air Canada*, *supra* note 24.

¹⁵⁷ Arguably, the decision in *Schobelt* does not properly fall within the notion of restitution for wrongs either. There are several grounds for doubt. In the technical terms of criminal law, the husband's wrongful act of murder was committed not against his wife, but rather against the state. Accordingly, on an orthodox restitutionary analysis, neither the wife nor her next of kin bore the requisite nexus to the wrongdoer's benefit. Similarly, restitution typically arises in connection with wrongful conduct merely as a remedial possibility under a recognised civil cause of action. However, murder is not a cause of action and torts such as battery are not recognised as restitution-yielding wrongs. Finally, just as homicide precludes a joint tenant from enjoying a pre-existing right of survivorship, so too it disentitles a person from newly acquiring property by other means, such as through a will or intestacy. Consequently, outside the joint tenancy situation, the guiding principle prevents, rather than reverses, the wrongdoer's enrichment. The law of restitution, however, generally is concerned with reversing unjust enrichments: Birks, *Introduction*, *supra* note 3 at 15. See generally Burrows, *Restitution*, *supra* note 121 at 380; cf. K. Mason & J.W. Carter, *Restitution Law in Australia* (Sidney: Federation Press, 1995) at 601–602, 726, 727; Maddaugh & McCamus, *Restitution*, *supra* note 11 at c. 22.

IV. CONCLUSION

THE AIM OF THIS PAPER has been to explore the relationship between the principles of constructive trust and unjust enrichment. McLachlin J.'s affirmation in *Soulos v. Korkontzilas* that the former sometimes, but not invariably, is based on the latter is a useful start. However, a great deal more work needs to be done if the relationship is to be properly understood. Specifically, the Supreme Court of Canada must begin to clearly and consistently recognise that the generic concept of unjust enrichment contains two species, each of which is guided by its own internal logic and each of which proceeds upon the basis of its own rules. Until that is done, the constructive trust will continue, notwithstanding recent advances, to defy systematic explanation.