Trusts
Fall Term 2017

Lecture Notes – No. 13

VARIATION OF TRUSTS

Termination:

Where all beneficiaries are sui juris, and account for all absolute and contingent interests in the trust property, the beneficiaries can apply to the court to resettle the property without condition (that is, to require transfer to beneficiaries absolutely). This is known as the Rule in Saunders v Vautier, (1841), 49 ER 282.

Variation:

Chapman v Chapman: Sir Robert and Lady Chapman settled a trust. In 1950, Lady Chapman alone settled two more trusts. Each of the three trusts were to benefit the three children of Robert Macgowan Chapman, the only child of Sir Robert and Lady Chapman. In 1952, the combined value of the three trusts was approximately £80,000 (about $2.5 million in 2013 Canadian dollars). The only difficulty was that advice revealed a potential estate duty chargeable to the minor beneficiaries (regardless of the order in which the settlors would die) in the range of £30,000. Hence the need to vary the trust to avoid the tax liability if at all possible. An 'arrangement' (for such is the term for a proposed variation) was put to the Court in 1953 that would cure the problem by, essentially, collapsing three trusts into a single trust, eliminating some discretionary powers, and transferring property to the beneficiaries. As was the custom of the time, the matter was put before the Court dressed up as a dispute so that the Court might] exercise its 'compromise jurisdiction' and vary the trust on behalf of the minor grandchildren. Harman J. sitting as the court of first instance refused to consider the arrangement on the merits holding that the Court had no jurisdiction to vary the trust at all in these circumstances. An appeal was filed and heard in the Court of Appeal together with two other similar matters that year and dismissed (Lord Denning dissenting); [1953] 1 Ch. 218 (Eng. C.A.). A further, and unsuccessful, appeal was taken to the House of Lords; [1954] A.C. 429 (H.L.)..

The result of *Chapman v Chapman* was to end the practice of varying trusts in a Chambers proceeding through an artifice that had been relied upon in Chancery practice for some time. It also maintained a somewhat artificial distinction between trusts of land (which could be varied to cure defects under statute) and trusts of personalty in respect of variation. Following the House of Lords' decision, the exercise of the Court's inherent jurisdiction to vary a trust was restricted to very specific situations such as variation to preserve the trust assets *in extremis*. The Court's inherent jurisdiction to vary a trust was thus both restricted and exceptional, rather than flexible and conventional as had been

supposed. This was a surprising result with the potential to seriously disturb existing settlements and make the drafting of family trusts rather more complex. The law as stated in the House of Lords was accepted in Ontario that same year.

Reform: The reaction to *Chapman v Chapman* echoed the pragmatic view of Lord Denning in the Court of Appeal: '[i]t is not right to unsettle the jurisdiction of the court on these matters unless some high principle demands it, and I see none.' The Law Reform Committee was asked to study the issue and published a Report in 1957 which recommended changes to the law to extend the jurisdiction in statutory form. The British Parliament acted swiftly and enacted the *Variation of Trusts Act 1958*. Appropriately enough the first case decided under the new statute allowed the arrangement in the *Chapman* case; *Re Chapman's S.T. (No. 2),* [1959] 1 W.L.R. 372 (Eng. Ch). In essence, Parliament followed the path predicted by Lord Denning in the Court of Appeal - '[i]t is noteworthy that whenever the court has, of its own motion, placed limitations on its own jurisdiction - as it did on a few occasions in the second half of the nineteenth century - the legislature has intervened to remove those limitations.' Such was certainly the case in the aftermath of the *Chapman* litigation. As the English law changed in 1958 so did the law in Ontario and other common law provinces and jurisdictions. The Ontario statute – the *Variation of Trusts Act, 1959* - was enacted based on its English counterpart and expanded the restricted inherent jurisdiction to vary trusts in Ontario:

Variation of Trusts Act, RSO 1990, c.V.1, cb, p.350:

> **1.** (1) Where any property is held on trusts arising under any will, settlement or other disposition, the Ontario Court (General Division) may, if it thinks fit, by order approve on behalf of,
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> (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting;
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> (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;
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> (c) any person unborn; or
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> (d) any person in respect of any interest of the person that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,
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> any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

(2) The court shall not approve an arrangement on behalf of any person coming within clause (1) (a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.

Is the settlor's original intention relevant in varying a trust?

Re Irving
(1975), 11 OR (2d) 443 (Ont. H.C.J.)

Per Pennell J:

The form of words used **in s. 1 of the Act makes it clear that the Court's power is an extremely broad one.** It has the power to "vary or revoke all or any trusts or enlarge the powers of the trustee". It may do this for "any arrangement by whomsoever proposed and whether or not there is any other person beneficially interested". The Court is to be governed throughout by "what it thinks fit" and its only other direction is that it "shall not approve an arrangement … unless the carrying out thereof appears to be for the benefit of that person". The thrust of s-s. (2) seems to be that **the status quo should be upheld under any trust unless positive factors are shown to be in favour of the variation or revocation of the trust on a rather general principle of it being for the benefit of the person on whose behalf the Court is approving the variation.**

What is or is not included in the expression "for the benefit of the person"? Few precedents under the Ontario Act have been fitted to these words. On the other hand, decisions are manifold in England and sister Provinces under legislation not dissimilar. These judgments have been brought together for my guidance through the industry of counsel. The search in all these cases was to **find the intention of the founder of the trust and then to decide whether the proposed arrangement remains within the ambit of the intention. The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flouted arbitrarily. It can never be pretended that the Court has the power to make a new will in the guise of approving an arrangement under the Variation of Trusts Act.**

…

The Court is concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. By way of a brief prefatory summation then, and further to the powers conferred under s. 1 of the Variation of Trusts Act, approval is to be measured, inter alia, by reference to these considerations: **First, does it keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is**

acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?

Russ v BC (Public Trustee)
(1994), 3 ETR (2d) 170; 1994 CanLII 1730 (BCCA)

Finch J.A.

44 The relevant provisions of the Act are set out in paragraph 3 above. Section 1 empowers the Court to approve a proposed variation "... if it thinks fit...". Section 2 mandates that approval not be given, unless the proposed arrangement "appears to be for the benefit" of those for whom approval is required.

45 The appellant says that in exercising his discretion in this case, the learned chambers judge erred in failing to take account, sufficiently or at all, of the settlor's intention. The appellant relies upon this passage from the Ontario case of *Re Irving* (1975), 1975 CanLII 714 (ON SC), 11 O.R. (2d) 443, 66 D.L.R. (3d) 387 at 394 (Ont. H.C.):

> The Court is concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. By way of a brief prefatory summation then, and further to the powers conferred under s. 1 of the Variation of Trusts Act, approval is to be measured, inter alia, by reference to these considerations: First, does it keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?

46 The appellant says that Re Irving has been cited with approval and applied in: Kunater v. Royal Trust Corp. of Canada (1980), 1980 CanLII 697 (BC SC), 23 B.C.L.R. 287 (S.C.); Sandwell & Co. Ltd. v. Royal Trust Corp. of Canada (1985), 1985 CanLII 761 (BC CA), 17 D.L.R. (4th) 337 (B.C.C.A.); Re

Assie Estate (1985), 1985 CanLII 2751 (SK QB), 45 Sask. R. 124, (sub nom. Canada Permanent Trust Co. v. Assie) reflex, 24 E.T.R. 278 (Q.B.); Salt v. Alberta (Public Trustee) (1986), 1986 CanLII 1695 (AB QB), 45 Alta. L.R. (2d)
331, 71 A.R. 161, 23 E.T.R. 225 (Q.B.); and Finnell, supra.

47 The authority referred to which interprets our legislation and which is binding upon us is Sandwell, supra. There, Carrothers J.A., giving the judgment of the Court, said this at 342-43:

> To say that these existing provisions are binding and unalterable is to deny the very purpose and intent of the Trust Variation Act, which is to approve, if the court sees fit, an amendment even though it offends the original terms of the trust. At common law, the rule that a trust may be varied by all beneficiaries of the trust, actual and contingent, provided they are sui juris and consent, was established by Saunders v. Vautier (1841), Cr. & Ph. 240, reflex, 41 E.R. 482. In this case some of the deferred beneficiaries are not located and some of the contingent beneficiaries are not identified, perhaps not even born, and are not of full legal capacity. Hence the Trust Variation Act extends the common law rule and empowers the court in its discretion to approve the amendment of the trust on behalf of such persons, in this case the deferred participants and the contingent beneficiaries. The only impediment or fetter on the court's discretion is contained in the above-quoted s. 2 to the effect that the court shall not approve an arrangement on behalf of such persons unless the carrying out of that arrangement appears to be for the benefit of those persons.
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> The weight of the evidence is that all pension benefits are to be enhanced under the new plan. The learned chambers judge found that the new plan would result in greater benefits to all participants and beneficiaries than provided by the old plan. The prohibition of s. 2 does not apply in this case.
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> I would apply the third test enunciated by Pennell J. in the case of Re Irving (1975), 1975 CanLII 714 (ON SC), 66 D.L.R. (3d) 387, 11 O.R. (2d)
> 443, and cited with approval by Ruttan J. in Kunater et al. v. Royal Trust Corp. of Canada (1980), 1980 CanLII 697 (BC SC), 23 B.C.L.R. 287 at p.
> 289. I would ask: "Is the benefit to be obtained on behalf of those for whom the court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to

> accept?" In this case I would answer that test in the affirmative and allow the appeal.
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> 48 It is apparent that the Court there did not consider the discretion afforded by the Act to be limited by all of the factors referred to in Re Irving, supra. In particular, the Court was clear to say that the only limitation upon the discretion conferred by s. 1 was the requirement of s. 2 that the proposed variation be for the benefit of those for whom the Court's approval is required.
>
> 49 The language of s. 1, which authorizes the Court to vary or revoke any trust, is inconsistent with the suggestion that the settlor's intention is a consideration at all, much less a consideration of first importance. The Act says nothing concerning the settlor's intention, or of any obligation upon the Court to weigh that intention along with other factors in deciding whether to approve a proposed variation.
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> 50 In my respectful view, the Court need not consider whether the basic intention of the settlor is preserved. The Court is not charged under the Act with protecting the interests of the settlor. If the proposition put forward by the appellant were correct, the Court would not be able to approve any arrangement that was not such as to keep alive the basic intention of the settlor, in spite of great benefits that might be created for infants and unborn persons.
>
> 51 Many variations to a trust are at odds with the intention of the settlor. If, as argued by the appellant, the wishes of the settlor may not be thwarted, notwithstanding benefits to the infants and unborn, then the powers afforded by the Act would be meaningless.
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> 52 In my respectful view, the learned chambers judge did not err in his appreciation of the discretion afforded by the Act. I would not give effect to this ground of appeal.

The fact that the settlor’s intentions are at variance with the variation is not fatal; *Teichman v Teichman Estate* (1996), 134 DLR (4th) 155 (Man CA). Indeed all variations are contrary to the intention of the settler; the court has a jurisdiction to vary coupled with protection of vulnerable beneficiaries.

Re S. (N.) (Trustees of)
(2007), 36 E.T.R. (3d) 43 (NSSC)

Here there was a large family trust. Two minor beneficiaries were entitled to income for education and maintenance until age 19 (and the trustee had a power to encroach), and thereafter the capital was to be conveyed to them. The trustee sought to vary to delay the capital conveyance until the beneficiaries were age 25.

Per DK Smith ACJ:

> 20 After considering the matter, I am fully satisfied that delaying the capital distribution of each of these trusts until each child attains the age of 25 years is for the benefit of both A.J. and N.S.
>
> 21 These trust funds, which are presently valued in excess of one million dollars each, should appreciate significantly in value between now and the date that each child attains the age of majority. Under the proposed variation, each beneficiary will become a co-trustee of his or her respective trust upon attaining the age of 19. Delaying the capital distribution of each fund for six years will afford each beneficiary an opportunity, once they have become an adult, to learn and acquire the skills that are necessary to manage an **inheritance of this magnitude. This, in my view, is very much to their benefit.**
>
> 22 Between the ages of 19 and 25 years each beneficiary will continue to receive the income from the investment of the trust funds and, in addition, the trustees will be able to provide each beneficiary such sums of the principal as the trustees in their discretion consider necessary or desirable for the support, maintenance or education of each beneficiary.
>
> 23 I appreciate that by delaying the capital distribution there is a possibility of disadvantage to the beneficiaries. For example, the market may change significantly during these six years with the result that the value of each trust fund could decline. I refer in this regard to the comments of Russell, J. in *Druce's Settlement Trusts, Re,* [1962] 1 All E.R. 563 (Eng. Ch. Div.) where it is stated at p. 565:
>
> .....Any arrangement is capable of being regarded as beneficial under the Variation of Trusts Act, 1958, if it can, on balancing probabilities, be regarded as a good bargain, and the fact that in improbable circumstances, no benefit, or even some loss is possible, does not necessarily deprive the arrangement of that quality.....

24 I am satisfied that in the circumstances of this case the advantages of the proposed arrangement far outweigh any possible disadvantages that may exist.

25 **Referring back to the considerations set out in *Irving, Re, supra,* I am further satisfied that the basic intention of the testator is maintained with the proposed arrangement. In particular, each beneficiary will still receive 32.5% of the residue of W.H.D.'s estate; nothing in this decision will alter the vested interest that each child has in the estate; each beneficiary is still entitled to receive the annual income arising from the investment of the trust funds and the trustees will continue to have a power of encroachment upon the capital of the trust for the support, maintenance or education of each child.**

26 Finally, I am satisfied that the benefit to be obtained as a result of the proposed variation is one that a prudent adult, motivated by intelligent self-interest and sustained consideration of the expectancies and risks of the proposal made, would be likely to accept.

27 The issue of whether it is proper for the court to approve a variation which will defer the receipt of an inheritance beyond the date when a beneficiary reaches the age of majority has been considered previously, by a number of courts, with differing results.

...

[After reviewing the authorities on variation applications of this sort]

35 I am of the view that when dealing with an application pursuant to the *Variation of Trusts Act,* the court can approve any arrangement that the testator could have put in place him or herself, provided that the arrangement is fit and for the benefit of the person for whom approval is required. In the case at Bar, the testator could have arranged the trusts so that the capital was distributed to each beneficiary at the age of 25. Despite the comments in *Purves, Re, supra,* I am satisfied that the court can delay the distribution of the capital of each of these trust funds beyond the age of majority.

36 That takes me to the issue of the rule in *Saunders v. Vautier* [1835-42] All E.R. 58 and the question of whether that decision precludes the granting of this application. In *Buschau v. Rogers Communications Inc.,* [2006] 1
S.C.R. 973 (S.C.C.) the Supreme Court of Canada (at ¶ 21) described the rule in *Saunders v. Vautier, supra,* as follows:

> 21 The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 628:
>
> If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.
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> According to D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it.

37 The issue is raised as to whether the court should grant this application in light of the fact that based on the rule in *Saunders v. Vautier, supra,* at the age of 19 either of these beneficiaries, assuming that they are not under any disability, can require their trust to be terminated and the trust funds paid out to him or her without regard to the terms of the trust or the wishes of the trustees.

38 Nothing in this decision will alter the rule in *Saunders v. Vautier, supra.* In addition, in my view, nothing in the rule in *Saunders v. Vautier, supra,* prevents the court from approving the proposed variation.

39 **The effect of this arrangement is that the trustees will not be obliged to *automatically* distribute the capital of the trusts to A.J. and N.S. once each child attains the age of majority. However, the right of each child to seek relief based on the rule in *Saunders v. Vautier, supra,* or in any other manner provided by law, will not be altered. In order to insure that there is no confusion in this regard, the Order that will issue as a result of this decision will specifically state this. In addition, the Order will include a provision which will require the trustees to serve on each beneficiary, at the age of majority, a true copy of the Will of the late W.H.D. as well as a certified copy of my Order.**

40 In conclusion, I am satisfied that the proposed variation is for the benefit of both A.J. and N.S. and I am further satisfied that there is nothing that prevents the court from granting the relief requested. An Order will issue accordingly.

Question: why allow this at all?

INTRODUCTION TO CONSTRUCTIVE TRUSTS AND UNJUST ENRICHMENT

Chase Manhattan Bank v. Israel-British Bank
[1981] Ch 105

This was a mistaken payment case between two banks, with the issue being whether the mistaken payment could be made subject of a constructive trust in favour of the trustee in bankruptcy of the insolvent payor. It was held that that a person who paid money to another under a factual mistake retained an equitable property in it, and, the conscience of that recipient was subjected to a fiduciary duty to respect his proprietary right; that the plaintiff had a right to trace the money was founded on a persistent equitable proprietary interest. Goulding J reviewed the American law on point in some detail (both banks were in New York) and held that a constructive trust arose on institutional grounds in such a case – automatically and not remedially – and on the day of the mistaken payment.

The case highlights the need for a principled approach to recovery and the limitations of relying on 'conscience'.

'***Unjust Enrichment'*: A Guide for the Perplexed**

Restitution and *Unjust Enrichment* are concepts that often occur together and are often confused; indeed, at the level of theory, there is much that is contentious in the area of law, even taxonomy. In the past, substantive grounds for a remedy and the remedy itself have often been conflated, especially in respect of proprietary remedies in equity. We now try to draw distinctions. *Restitution* is the response which consists in causing one person to give up to another an enrichment received at his expense (the property itself) or its value in money. We use the term to describe the remedies which have that common function. The prototypical example is a constructive trust over profits taken by a trustee in breach of fiduciary duty. *Unjust enrichment* is not the same as restitution, but is a reason for making restitution or compensation; other reasons might be that there is an enforceable contract or the defendant has committed a wrong.

If our understanding is that unjust enrichment is somehow as foundational to the law as contract or wrongs, and is different from each, then the principle must be prescriptive and capable of being stated with some degree of precision. On the other hand, perhaps the principle is still developing such that it is premature to expect a precise statement at this stage of its evolution and a descriptive approach is sufficient.

The Canadian Supreme Court has dealt with principles of unjust enrichment and restitution as such since ***Degleman v Guaranty Trust Co. of Canada*, [1954] SCR 725** a case featuring a disappointed nephew who was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave the gift and the nephew sued on the oral contract. The Supreme Court of Canada held that the *quantum meruit* claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities. Cartwright J for the majority held:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the

> obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

This is, of course, sounds like very familiar territory – *Equity Will Not Allow a Statute to be Used as an Instrument of Fraud* and the law doesn't allow for the benefits to be retained upon the traditional equitable standard of conscience. Given that the contract was unenforceable, however, what is the ultimate rationale for liability in *Degleman*? It can't be the contract and thus 'implied contract' or 'quasi contact' was rejected by both the majority and the concurring minority. Unjust enrichment (the retention of a benefit without valid reason) best rationalized liability in the Court's view. One instantly appreciates the potential for an elegant solution rather than some soft standard like conscience or fairness, but then it becomes necessary to develop how the standard is more intellectually coherent than the traditional devices by which equity achieves a more fair result in the circumstances.

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. **There is no doubt that there exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action.** We can now say with confidence:

> A remedy based upon unjust enrichment may be ordered where there is
>
> (a) a benefit to or enrichment of one party, and
> (b) a corresponding detriment to or deprivation suffered by the other party, and
> (c) the absence of any juristic reason for the benefit or enrichment to be retained.

The 'juristic reason' involves consideration of (i) traditional categories that would allow the benefit to be retained and (ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained tested on both the reasonable expectations of the parties and public policy considerations. All of this is set out in the *Garland* case.

Garland v Consumers Gas Co.
2004 S.C.C. 25

Here the Court set out a more detailed method for the application and development of the action for unjust enrichment. This was a class action against a utility company for charging late payment penalties at a rate contrary to the Criminal Code notwithstanding that the penalties were authorized by the Ontario Energy Board. The action for unjust enrichment was successful and the defendant was ordered to repay the amounts received. At issue in *Garland v Consumers Gas Co.* was less the presence of benefit and deprivation (which was clear) and more the nature and method of analysis of the juristic reason that might justify retention. Iacobucci J. held:

> 40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment" while English courts require "that the enrichment be unjust"… It is not of great use to speculate on why Dickson J. in *Rathwell*, *supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" …
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> …
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> 43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable… But, at the same time, there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.
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> 44 … the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery… The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
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> 45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason

> why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> 46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

This is both a significant and a substantial development in the Canadian law of unjust enrichment, and the action as an autonomous non-parasitic claim is now undeniable. If we proceed from the understanding that what a court will not countenance is a view of '*unjust* enrichment' as an idiosyncratic weighing of the equities of an individual case on subjective criteria ('palm-tree justice' to use the familiar phrase), then *Garland v Consumer's Gas Co.* identifies a principle that is both pragmatic (existing categories that would not interfere with the defendant's retention of the benefit are preserved despite their own inherent frailties) and dynamic (new categories can be created, but on a principled basis). The interim state – 'there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category' – does pose a concern but also clarifies the still developing normative core of the action. That is, unjust enrichment is bound up with a treatment of subjective expectations that are objectively reasonable and where no public policy bars recovery.

Alberta v Elder Advocates of Alberta Society
2011 SCC 24

This was a class action brought against the Crown in right of Alberta by a class of 12,500 long-term care residents, half of whom were over age 85 and all of whom were disabled or mentally incapable and had extensive physical needs. A variety of claims were brought to challenge the level of 'accommodation charges' levied by the provincial government for housing and meals arguing, in essence, that the charges were so excessive that they represented a subsidy of medical services in contravention of the regime established under the Canada Health Act.

While the class action claim was held to be unsustainable as a matter of law on three of the claims, the litigation was allowed to go forward based on the claim of unjust enrichment. The claim is interesting as the plaintiffs argued that the level of accommodation charges were in excess to the cost to the Crown of providing the services in question or reasonable charges representing the necessary equivalencies of enrichment and deprivation. Given that the level of charges were fixed through a legislative act (which was important in the Court holding that no fiduciary duty arose),

one might anticipate that no unjust enrichment claim could succeed as a matter of law. Moreover, in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, the Court had held that public law principles rather than a private law action for restitution was to be the preferred mode of redress whether taxes were collected pursuant to *ultra vires* legislation. Enter the Charter, s.15.

McLachlin C.J.C. held at para. 91-92, 97-98:

> In my view, *Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating restitution of taxes levied under an *ultra vires* statute, on the ground that the framework of unjust enrichment is ill-suited to dealing with issues raised by a claim that a measure is *ultra vires*. However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes paid under an *ultra vires* statute. It is not therefore precluded by this Court's decisions in *Kingstreet*. The pleading should be allowed to go to trial, at which point the propriety of the claim for unjust enrichment may be explored more fully in the context of the evidence adduced.
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> With respect to whether or not a juristic reason exists, Alberta argues that the regulation setting the maximum allowable accommodation charge is a complete answer to any claim in restitution. However, the claim that the regulation is itself invalid is a *Charter* claim, subject to *Charter* remedies.
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> …
>
> The plaintiffs plead that the imposition on the class members of an obligation to pay health care costs violates s. 15(1) of the *Charter*. They say the charges were imposed solely on the basis of the class members' age, mental disability, physical disability, or some combination thereof, and the consequent infringement of their equality rights is not demonstrably justified under s. 1 of the *Charter*. They seek restoration of the accommodation charges and damages under s. 24(1) of the *Charter*, and a declaration that the listed provisions are of no force or effect to the extent of their inconsistency with s. 15(1).
>
> My understanding is that the plea for relief under s. 15(1) is not directly challenged by the Province. Although the Province argues that a class action is not the preferable procedure for the *Charter* claim or its remedy, the Crown does not seek to strike the plea of discrimination itself; instead, it asks that we order it to proceed in another form. In light of my other conclusions, especially the survival of the plea of unjust enrichment, and without commenting on its merits, I would permit the s. 15 claim to proceed as part of the class action.

Unjust Enrichment and Cohabitational Partners: Background

Much of the recent Supreme Court of Canada jurisprudence on unjust enrichment has arisen in respect of the rights of married and cohabitational partners. After a hesitant start, the Court not only developed the law respecting cohabitational partners with

reference to principles of unjust enrichment but, in so doing, had the opportunity to develop unjust enrichment itself.

In **Pettkus v. Becker [1980] 2 S.C.R. 834**, the Court moved beyond an approach rooted in 'common intention' resulting trusts and extended the unjust enrichment principle from the marital context to the cohabitational context. Dickson J held:

> The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* (1760), 2 Burr. 1005 put the matter in these words: "... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury... How then does one approach the question of unjust enrichment in matrimonial causes? ... there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries...

Family law policy largely, but not exclusively, explains liability; the recognition that the same policy reasons that Parliament acted upon in dealing with property rights and support obligations on matrimonial breakdown apply, at least to some extent, where the partners are not married. This isn't to say that marriage is not significant, but that 'common law marriage' is not insignificant. The vehicle for providing relief is identified as unjust enrichment, but that principle isn't a freestanding one but incorporates equitable remedies and principles. In the early cases it isn't immediately clear whether equity is the reason for granting a remedy (and is part of the unjust enrichment principle) or only called upon to provide proprietary relief (and is thus somehow separate from the law of unjust enrichment).

Peter v. Beblow [1993] 1 S.C.R. 980, dealt with the question as to whether an indirect benefit (the provision of domestic services during twelve years of cohabitation) was sufficient to justify a proprietary remedy (a constructive trust) to redress the unjust enrichment of one of the partners in the relationship. It could, but proprietary relief is not to be preferred given the inherent risk of prejudicing the legitimate rights of third parties in the property based on the same sorts of considerations that are apparent in any commercial law context. The implication is to stress the coherence of unjust enrichment doctrine rather than the family law context in rationalizing the Court's approach to justifying liability. McLachlin J., for the majority, held:

> 24 I doubt the wisdom of dividing unjust enrichment cases into two categories -- commercial and family -- for the purpose of determining whether a constructive trust lies. A special rule for family cases finds no support in the jurisprudence... Moreover, the notion that one can dispense

> with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust. Finally, the creation of special rules for special situations might have an adverse effect on the development of this emerging area of equity. The same general principles should apply for all contexts, subject only to the demonstrated need for alteration... the concern for clarity and doctrinal integrity with which this Court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.
>
> 25 ... [w]here a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given him or her a special link to the property, in which case a constructive trust arises.

Hence, in dealing with unjust enrichment claims, one must consider the claim within developed doctrine in unjust enrichment infused with public policy considerations relevant in the context. In this way, institutional integrity is maintained and public policy preserved. The remedial response is to be flexible but personal remedies (orders for damages) ought to be preferred over proprietary relief. Family law policy remains central, but the institution of unjust enrichment, if one can put it that way, begins to take on a more formalized structure as a result.

Kerr v. Baranow
2011 SCC 10

Vanasse v. Seguin:
The couple was in a 12-year cohabitational relationship and had 2 children. Spousal and child support were ordered in addition to compensation for unjust enrichment of close to $1 million. The claim was successful at trial on the basis that during a 3-year period the plaintiff moved from Ottawa to Halifax, that she left her employment and took up sole responsibility for the household so that her partner could devote himself to developing his business. The business was sold at the end of the three-year period for $11 million. How to value the benefits conferred? The ‘value received’ approach looks to the value of the services alone, the ‘value survived’ approach traces the services into an asset which may grow as a result of the contribution. At trial, the ‘value survived’ approach was taken. The Court of Appeal held that the approach was wrong and should have been based on value received on a quantum meruit basis.

Kerr v. Baranow:
Here the cohabitational relationship was 15 years. The woman was awarded, inter alia, a resulting trust over part of a real property valued to be $315,000. One issue was the provision of benefits in the form of extensive personal care by the man to the woman following a stroke during the course of the relationship. She required extensive care made more difficult by a personality change that included persistent anger towards the man. The trial judge considered both parties’ financial contributions to the acquisition of property but largely ignored the man’s provision of services.

Cromwell J. held:

> [84] It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.
>
> [85] I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.
> Thus, as appropriate, the law can address the unjust enrichment of one partner (or is or her estate) who leaves the relationship with a disproportionate share of accumulated assets.

Furthermore, Cromwell J. held that the law shall not look to artificial constructions of doctrine unsuited to this context. Thus, the Court has explicitly held that the law of resulting trusts shall no more play a role in this area – '[t]he point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property.' Rather what is required is an approach that is principled and speaks to the realities of the context:

> ... the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.

For ease, it may be easiest to consider the law in the practical steps of the action.

(1) Has there been an enrichment and corresponding deprivation?

The essence of the action in unjust enrichment builds upon a correspondence between enrichment and deprivation. This is an economic analysis that looks to the presence of a real benefit (whether proprietary or in services) from the plaintiff that remains with the defendant. See generally *Belvedere v Brittain Estate*, 2009 ONCA 1**.**

(2) Is there a traditional juristic reason that allows the defendant to retain?

The crux of the action in unjust enrichment is whether there is a valid reason at law for the benefit to be retained; if not, there should be a remedy to return it (compensation), and perhaps make restitution (e.g. disgorging gains made with the property).The judgment of the Court in Garland v Consumers Gas Co., 2004 S.C.C. 25, puts the onus on the plaintiff to show that no 'no juristic reason from an established category exists to deny recovery, the burden shifts to the defendant to show that recovery by the plaintiff should not be ordered in the circumstances of the case based on the reasonable expectations of the parties and public policy considerations. Although inelegantly couched in the negative, the clear message is that the court can order a return of the enrichment (and even create new categories of juristic reasons of general application) based on the expectations of the parties and policy.

(3) If there is no traditional juristic reason, is the defendant allowed to retain based on the reasonable expectations of the parties?

Kerr v Baranow identifies a new doctrine, the 'joint family venture'. One would think that it would be relevant at this point of the analysis if a new juristic reason of general application has been established. However, it is precisely the case that it is not as there is no presumption that a cohabtitational relationship should give rise to a presumption of sharing wealth. However, the same considerations that are relevant as to whether there is a 'joint family venture' are relevant to making out whether there were reasonable expectations of the parties to share acquired and accumulated wealth. Thus, this is a fact-specific exercise based on the circumstances of the individuals and policy arguments respecting the fairness of wealth sharing in those circumstances. Where there was no actual expectation of sharing, the defendant has a good defence to the claim unless the court (presumably) interferes to imply such an expectation as a matter of policy. In this respect the Court approaches the matter as an exercise of its equitable jurisdiction (which does seem odd given the removal of the question to unjust enrichment from the law of trusts):

> [45] Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in Peter rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also Nova Scotia (Attorney General) v. Walsh, 2002 SCC 83 (CanLII), 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 61.)

(4) If there is no juristic reason and the parties shared no realistic expectation to allow the defendant to retain, can the plaintiff claim a proprietary remedy?

The majority of the discussion in *Kerr v Baranow* is dedicated to the remedial response to a good claim in unjust enrichment. The most problematic part of the unjust enrichment analysis where the claim is made based on contributions by the plaintiff to the acquisition or maintenance of property in the hands of the defendant in the form of money or services or both is the remedial response. This is particularly so in the family law context where the contributions may be indirect. As such, guidance is to be welcomed.

Proprietary remedies are controversial ones. Obviously the plaintiff would prefer to have property which is available immediately rather than an order for a monetary payment in most cases, but there is always the risk of prejudice to third parties are difficulties in recognizing proprietary interests accruing to both the plaintiff and the defendant in any given case. Hence the traditional reluctance to order a remedy in the form of a constructive trust rather than a monetary award.

In *Kerr v Baranow*, the Court continues the cautious approach to proprietary relief. If 'the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour.' A minor or indirect contribution will not suffice, and, a monetary award is insufficient. No new ground is broken here. Rather, we continue on with a traditional remedial orientation.

(5) If the plaintiff's remedy is not proprietary but rather a monetary one, was there a 'joint family venture'?

If the award it to be a monetary one, then obviously there must be a method to value the plaintiff's contributions and provide restitution to him or her on that basis. Here the Court reiterates that the context is not commercial in character and thus one must have regard for that context in determining the nature of the remedy. Past cases have struggled with how to determine the nature of the contributions made by both cohabitational partners and how to value those contributions – on a fee-for-service basis (quantum meruit) or with reference to the value of the property now in the hands of the defendant ('value survived')? At the outset, Cromwell J. makes a key holding – limiting recovery to valuation based on quantum meruit is inappropriate:

> [58] In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of quantum meruit claims. Finally, it is not mandated by the Court's judgment in Peter. For those reasons, this remedial dichotomy should be rejected. The discussion which follows is concerned only with the quantification of a monetary remedy for unjust enrichment; the law relating to when a proprietary remedy should be granted is well established and remains unchanged.

Aside from institutional values (flexibility in remedial response), precedent (*Peter v Beblow*), and evolution of legal doctrines, it really is the first reason that is the core of the judgment – the creation of a new model predicated on the existence of a 'joint family venture'. Cromwell J. explains:

> [60] At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in Peter, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.
>
> [61] There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in Clarke v. Clarke, 1990 CanLII 86 (SCC), [1990] 2 S.C.R. 795, at p. 807 (in relation to Nova Scotia's Matrimonial Property Act), ". . . the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. . . . The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized" (emphasis added).
>
> [62] Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

Thus, the presence of a joint family venture really does tilt towards equal sharing where one is present in the facts of the case. To that end the Court went on to consider what sorts of factors are relevant in recognizing that one exists in the circumstances:

> [87] My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich

> set of factual circumstances, what emerge as the hallmarks of such a relationship?
>
> [88] It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their ex post facto assertions or the court's view of how they ought to have done so.
>
> [89] In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

Cromwell J. went on to consider four such relevant factors: 'mutual effort', 'economic integration', 'actual intent', and 'priority of the family'. Where the joint family venture is present, it is not quantum meruit that is appropriate but rather a proportionate share of the asset in the hands of the defendant that is appropriate:

> [81] In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling quantum meruits". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

...

> [101] As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?
>
> [102] The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

Thus, the fact that the parties conferred mutual benefits upon one another is relevant to determining the fairness of the wealth being divided to reflect that fact as well as showing that there was a joint family venture in the first place. Rather than trying to value services on a quantum meruit basis, the court will have to consider fairness in recognizing proportional contributions – absent strong evidence to the contrary, one would think equality will rule here.

(6) If there was no 'joint family venture', what is the value of the contributions of the plaintiff on a fee-for-service basis? Is there any set-off for the defendant's services to the plaintiff?

Absent the new considerations respecting a joint family venture, and given the flexibility that should be shown at the remedial stage of an unjust enrichment claim, it is apparent that the court considering such a claim will be able to return to traditional quantum meruit and 'value survived' approaches as are appropriate to the circumstances.

Introduction to the Constructive Trust

Like the resulting trust, the constructive trust arises 'by operation of law' and as a result gives rise to many questions as to its nature and operation.

Sometimes the constructive trust is said to arise 'institutionally' (that is to say without reliance on judicial discretion), other times 'remedially' (as a response to a wrong, such as breach of fiduciary duty), and still other times in response to unjust enrichment (discussed above).

As a remedy, it is a powerful device because it is not merely a personal obligation but is properly proprietary (which places the successful plaintiff in priority before other creditors).

Perhaps most contentious point is whether the constructive trust can operate as an autonomous vehicle without parasitic reliance on an underlying wrong or other institutional event or without a strict financial loss to the plaintiff. Increasingly (but not exclusively) we look to the law of unjust enrichment to rationalize such uses of the constructive trust.

When does the constructive trust arise 'institutionally'?

It's difficult to list all the circumstances in which the constructive trust has been said to arise by operation of law in reference to some circumstances – one traditional category, by way of example, is the *trustee de son tort* (a person who undertakes to act as a trustee without any obligation) and another is the perfection of the settlor's intention (as in *Re Rose*, where S did everything possible to constitute the trust). Truly this is another area where the law of unjust enrichment attempts to bring more coherence to the law.

Soulos v. Korkontzilas
[1997] 2 S.C.R. 217

Here a real estate agent bought a property on his own account despite that he was acting as an agent for a potential purchaser in respect of that same property. The potential purchaser brought an action for breach of contract and fiduciary duty (amongst other causes of action) and sought a constructive trust as the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in his community. The issues subject of the discussion below were whether the constructive trust arose only on principles of unjust enrichment or whether the traditional equitable standard of conscience was still adequate (the majority held it was), and, whether an unjust enrichment to the defendant was required in all cases (the majority held it wasn't). It was held that a constructive trust could be ordered notwithstanding that the plaintiff suffered no clear financial loss and the defendant obtained no clear financial gain at his expense.

per McLachlin J (for the majority):

> 16 **The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment** in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff

can demonstrate no deprivation and corresponding enrichment of the defendant.

17 **The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain.** This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, The Constructive Trust (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which… the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations… on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development of the Remedial Constructive Trust" (1982-84), 6 Est. & Tr. Q. 312, at p. 317, citing Waters, supra.

20 Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Pettkus v. Becker*, supra.

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as Pettkus v. Becker should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized…

...

33. **… [t]he constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively**.

34 **It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships.** Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

Dissent per Sopinka J

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. **In my view, recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment.**

…

75 In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held

it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

76 In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there were gains in value, and therefore unjust enrichment, he or she would be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.