Trusts
Fall Term 2017

Lecture Notes – No. 14

INTRODUCTION TO THE CONSTRUCTIVE TRUST (CONT'D)

Sweet v. Moore
2017 ONCA 182 (Ont. C.A.)

This case is an interesting one dealing with unjust enrichment and remedial constructive trusts. It should be noted at the outset that leave to appeal has been granted by the Supreme Court of Canada; 2017 CanLII 53388 (S.C.C.).

Here the proceeds of a policy of life insurance on the life of the deceased were at issue. The proceeds were originally designated in favour of the deceased's separated wife and later the deceased's common law spouse. The separated spouse paid the premiums, and thus the facts are somewhat reminiscent of ***Richardson Estate v. Mew*, 2009 ONCA 403 (Ont. C.A.)**. In that case, a man died leaving an ex-wife (and their children) and a second wife (and their children). He died in a long-term care facility as he developed Alzheimer's Disease and required institutional care in his final years. The second wife managed his affairs using a Power of Attorney provided for that purpose. A question arose in respect of a life insurance policy payable to the first wife. It had been taken out originally when the deceased was married to his first wife and then made subject of a condition in the separation agreement between them that the first wife remain as beneficiary for a year (the end of his child care obligations). He told his second wife that he would designate her as the beneficiary at the end of the commitment under the separation agreement but never did so. Some few years later, the deceased became incapable of managing his affairs due to Alzheimer's Disease. The costs of his care exhausted his retirement savings and the second wife assumed the costs of his care including paying the premiums due on the life insurance policy. It wasn't entirely clear in the report of the judgement whether it was established as a matter of fact that the second wife did actually pay premiums with her own money and the suggestion was that if she did, the sum was relatively modest. In any case, the action was brought in unjust enrichment claiming a constructive trust over the policy.

The Court of Appeal in *Richardson Estate v. Mew* held that while the first wife may have been enriched, there was no corresponding deprivation and a juristic reason that allowed her to retain – the contract of insurance. That is, the plaintiff might have a theoretical claim against the Estate for the premiums that she paid; 'theoretical' because she inherited the Estate. As against the designated beneficiary (the first wife), there was no claim in unjust enrichment as the contract of insurance constituted a good juristic reason for her to retain the insurance proceeds. The separation agreement may have contained a standard clause release or renouncing all claims against the other's estate, but it is well recognized that the quality of title to insurance proceeds is unaffected where the policy continues to designate the former spouse as beneficiary upon death.

In *Sweet v Moore*, the separated spouse and the deceased agreed orally that the proceeds would go to the wife if she were to maintain the policy, which she did. It is

notable that a written separation agreement between the deceased and his wife which post-dated the oral agreement was silent on the question of the policy of insurance. In any case, the later change in beneficiary designation was not surreptitious and was made by the deceased (according to the applicant) to ensure the applicant's support.

The majority of the Court of Appeal, Strathy C.J.O. and Blair J.A., held that the appeal must be allowed as the Application Judge had decided the case based on the application of the doctrine of equitable assignment which was not raised by either side and was not subject of argument. Beyond, on the question of unjust enrichment, the majority held that the separated wife had no interest in the proceeds of the policy arising by way of unjust enrichment but did have a meritorious claim for return of the premiums that she had paid. Blair J.A. provided an overview:

> **Constructive Trust**
> [62] I begin this portion of the analysis with the observation that this is not one of those cases – in spite of what it may seem at first impression – where the "equities" are heavily weighted in favour of one party or the other.
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> [63] It is the case that Ms. Moore had an oral agreement with Mr. Moore that if she paid the premiums she would receive the proceeds of the Policy. It is the case that she paid the premiums. And it is the case that Mr. Moore breached the agreement by designating Ms. Sweet as the irrevocable beneficiary under the Policy.
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> [64] On the other hand, Mr. Moore was a man of limited means, living in the post-separation period on a disability pension, and suffering from the disabilities associated with his physical, mental and substance abuse issues. Ms. Sweet – who is herself disabled – took care of Mr. Moore and, for practical purposes, provided him with a home, a place to live, and a supportive family during the 13 years of their relationship.
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> [65] There is little, if any, evidence on the record as to Ms. Moore's present financial needs. She continues to live in the former matrimonial home after Mr. Moore's transfer of his one-half interest at the time of separation. Ms. Sweet would appear from the record to be in financial need. Indeed, her evidence is that she was made a beneficiary of the Policy because Mr. Moore wanted to ensure that she would be able to remain in the apartment home that she had occupied for 40 years by the time of his death.
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> [66] On these facts, it cannot be said that Ms. Sweet is no more than a volunteer who gave nothing in exchange for being named irrevocable beneficiary, or that she is simply the recipient of a windfall. She was a 13-year spouse with heavier than normal caregiving duties (both she and Mr. Moore were disabled in varying degrees) and was the person primarily responsible for the home that they lived in.
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> [67] On the application, Ms. Moore's position was that she was entitled to the Policy proceeds on the basis of unjust enrichment. On appeal, her approach was more nuanced. She continued to rely on unjust enrichment but embraced the application judge's finding of equitable assignment in support of the claim, as well. She submitted that the application judge was correct in

> holding that the irrevocable designation of beneficiary provisions in the Insurance Act did not provide a juristic reason for Ms. Sweet's receipt of the proceeds. In the end, she fell back upon the more expansive view that a constructive trust may be imposed "where good conscience requires it".
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> [68] I have already concluded that, on the way the case was framed and argued before the application judge and on the record as it currently exists, it is not open for the court to determine whether the oral agreement constituted an equitable assignment. I turn, then, to a consideration of whether the claim for unjust enrichment can otherwise stand or, if not, whether a remedial constructive trust should be found on some other "good conscience" basis in these circumstances.
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> [69] In my view, Ms. Moore's claim cannot succeed on either basis.

As to the claim in unjust enrichment, the argument fails on the same basis that it did in *Richardson Estate v. Mew*: the beneficiary designation in favour of the common law spouse was an adequate juristic reason to explain why the proceeds should be paid to the designated beneficiary. As to a "good conscience" trusts, Blair J.A. held:

> **"Good Conscience" Trusts**
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> [100] There has been considerable debate in the jurisprudence and in academia about whether resort to the remedial constructive trust in Canada is now limited to two categories since the Supreme Court of Canada's decision in *Soulos* – unjust enrichment and wrongful acts – thereby eliminating resort to a more elastic "good conscience" trust, i.e., one based on no more than a sense of fairness to the effect that it would be "against all good conscience" to deny a plaintiff recovery in the circumstances of a particular case. At the end of the day, Ms. Moore submits that good conscience is satisfied by giving effect to the oral agreement without which the Policy would not have continued to exist.[5]
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> [101] It has long been accepted that equity is quintessential never-say-never terrain, and that concepts respecting its application develop with the times and to meet the needs of particular circumstances. This long-standing principle may work against establishing a completely closed set of categories as the foundation for imposing a remedial constructive trust.
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> [102] At the same time, McLachlin J. was pretty clear in *Soulos* that, while a constructive trust "may be imposed where good conscience so requires" (para. 34), "[t]he situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories" (unjust enrichment and situations where property had been obtained by a wrongful act) (para. 36). It was her view that "[w]ithin these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate" (para. 43). Rothstein J. re-affirmed this view in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 (CanLII), [2012] 3 S.C.R. 660, at paras. 144-145.

> [103] I do not think it is necessary to resolve this debate for purposes of this appeal.
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> [104] Most of the authorities in which courts have been willing to override a beneficiary designation can be explained on the basis of an agreement between one of the claimants and the insured that removed the insured's ability to designate a later beneficiary. As noted earlier, Shannon involved a separation agreement in which the insured undertook to name his first spouse as a beneficiary irrevocably. In Bielny, the separation agreement required the insured to name the children of the first marriage as irrevocable beneficiaries. In Fraser v. Fraser, the trial judge found on the facts that the terms of the separation agreement requiring the insured to maintain the plaintiff as beneficiary were tantamount to an irrevocable designation.
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> [105] Whether these authorities need to be re-examined in light of *Soulos*, as suggested in some authorities – see, for example, *Love v. Love*, 2013 SKCA 31 (CanLII), 359 D.L.R. (4th) 504 – is not something that need be determined here. As I have concluded above, it was not open to the application judge on this record to hold that the oral agreement between the Moores constituted an equitable assignment, or that it was tantamount to an irrevocable beneficiary designation.
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> [106] Absent those considerations, I do not see anything in the circumstances of this case that would place it in some other "good conscience" category not caught with the rubric of either wrongful act (not asserted here) or unjust enrichment. For that reason, I do not see the need to resolve the foregoing debate about whether *Soulos* has restricted the categories for imposing a remedial constructive trust to unjust enrichment or wrongful act or whether there remains some additional "good conscience" basis.
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> [107] Simply because wrongful act is not asserted, and unjust enrichment is unsuccessful, does not mean that some other "good conscience" basis must exist on the facts. To engage in such an exercise, on this record at least, it seems to me, would undermine the rationale for creation of the juristic reason element in the first place.
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> [Footnote omitted.]

Upon this point, Lauwers J.A. dissented. Justice Lauwers wrote:

> [144] In order to contextualize the ruling in *Soulos*, it is necessary to acknowledge a perennial tension in the common law tradition between, on the one hand, the formal demands of the law as dispensed by the old common law courts, and, on the other hand, the mercies of equity dispensed by the old chancery courts. (Indeed, this tension helps explain some of the differences between my colleague and me.)
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> [145] The way equity operated is well known. When the common law courts reached a particularly harsh result flowing from the demands of formality and rigorous logic, chancery courts could intervene and mitigate the result in

certain circumstances by exercising authority over the defendant's conscience and compelling the defendant not to act on his or her full legal rights.

[146] Law claims the virtues of certainty and predictability, while equity claims the virtues of doing justice and upholding fairness in particular cases. As my colleague observes, the ancient criticism of equity is that its mercies varied arbitrarily with the length of the Chancellor's foot. The fundamental tension lives on, even though law and equity have been fused in Ontario since the late 19th century.

[147] The constructive trust cases show this tension. Judges imposing constructive trusts sometimes cite the magnanimous words of Lord Denning in *Hussey v. Palmer*, [1972] 3 All E.R. 744 (C.A.), who spoke of a constructive trust, at p. 747, as:

[A] trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it.

[148] The tension between the legal and equitable impulses is evident in *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834. Dickson J., at pp. 847-848, speaking for the majority, described the attributes of a remedial constructive trust:

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. [Citations omitted and emphasis added.]

[149] However, Martland J., in dissent, saw the majority's extension of the constructive trust remedy in Pettkus as undesirable, because he found, at p. 859, that: "It would clothe judges with a very wide power to apply what has been described as 'palm tree justice' without the benefit of any guidelines." He then asked: "By what test is a judge to determine what constitutes unjust enrichment?" He answered: "The only test would be his individual perception of what he considered to be unjust." This was what he resisted.

Lauwers J.A. went on to describe the creative nature of equity and a reading of the jurisprudence in the Supreme Court of Canada that should not be read as limiting constructive trusts to wrongs and unjust enrichment. Lauwers J.A. wrote:

[175] In *Soulo*s, McLachlin J. worked through the history of constructive trusts in order to discern whether and how to recognize a remedial constructive trust for wrongful acts, which was the particular problem in the case before her. In my view she did not purport to restate and reframe the law of constructive trusts for all purposes, and she said nothing to close the categories of constructive trusts. Had she intended to abolish good conscience constructive trusts beyond the categories of unjust enrichment and wrongful acts, then one would have expected clear and definitive language to that effect, but there is none. Instead, McLachlin J.'s choice of language justifies the conclusion that the court expected constructive trust law to continue to develop beyond the categories of unjust enrichment and wrongful act.

[176] Justice McLachlin disagreed with the position that a constructive trust cannot be imposed where there has been no unjust enrichment, at para. 16, which was the real issue in the case. She stated, at para. 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.

[177] Justice McLachlin made several other pertinent observations of more general application, at paras. 20-22:

Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them.

…

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. The language used makes no such claim. A. J. McClean, … describes the ratio of *Pettkus v Becker* as a "a modest enough proposition". He goes on: "It would be wrong ... to read it as one would read the language of a statute and limit further development of the law".

Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations.

[Emphasis added.]

[178] Justice McLachlin also noted, at para. 17, that the law of England and Canada could well be diverging:

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.

She embarked on a review of English law, noting, at para. 24: “In sum, the old English law remains part of contemporary Canadian law and guides its development.”

[179] Justice McLachlin was well aware that English law was evolving. She described the opposition in England to Lord Denning’s expansive view of constructive trust, at paras. 30-31. She added, at para. 37, that: “In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed in this direction.” She also surveyed the law in New Zealand and the United States.

[180] Justice McLachlin expressed a critical conclusion, at para. 25:

I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

[181] This led McLachlin J. to the heart of the matter, at paras. 34-35:

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.

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.

[Emphasis added.]

[182] These statements, in my view, decisively refute the appellant’s argument that a court can impose a constructive trust now in only two categories of cases: to remedy an unjust enrichment or a wrongful act.

(5) Concluding Observations on *Soulos*

[186] In my view, the Supreme Court left open four routes by which a court could impose the "ancient and eclectic institution" of a constructive trust: (1) unjust enrichment; (2) wrongful acts or wrongful gain; (3) circumstances where its availability has long been recognized" (para. 21), such as "situations where a constructive trusts have been recognized in the past" (para. 34) or "other situations where courts have found a constructive trust" (para 35); and (4) otherwise, where good conscience requires it. In relation to this last point, the *Soulos* court anticipated that the law of remedial constructive trusts would continue to develop, consistent with the words of Dickson J. in *Pettkus*, at p. 847-848: "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."

[187] I see no other way to give meaning to the words of McLachlin J. in *Soulos*, at para. 21: "This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Pettkus* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized." See also BNSF Railway Company v. Teck Metals Ltd., 2016 BCCA 350 (CanLII), 89 B.C.L.R. (5th) 274, at paras. 45-55.

[Emphasis in original; footnotes omitted.]

After reviewing some of the jurisprudence on constructive trusts and particularly remedial constructive trusts, Lauwers J.A. held as follows:[1]

Analysis

[265] The disappointed beneficiary cases utilize the rubric of unjust enrichment but gloss over the structural difference. This approach exemplifies the common law's inclination to use old tools for new tasks, even if they do not quite fit. We will always be feeling our way. As McLachlin J. noted in *Soulos* at para. 35: "The goal is but a reasoned, incremental development of the law on a case-by-case basis." That method is part of the genius of the common law.

[266] In managing the deployment of remedial constructive trusts in aid of good conscience, the discipline of particularity is important, as McLachlin J. noted. To repeat her words in para. 35 of *Soulos*: "Particularity is found in the situations in which judges in the past have found constructive trusts." She noted: "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." She saw this careful approach as essential to "a reasoned, incremental development of the law on a case-by-case basis."

[1] 2017 ONCA 182 at Paras. 265-276 (Ont. C.A.).

[267] I recapitulate the findings that must be made for a court to impose a constructive trust on life insurance proceeds, which have emerged so far in the cases involving disappointed beneficiaries. These serve as limits to discipline judicial discretion. First, the defendant has been enriched and the plaintiff deprived in a family context, not in the market world. Second, the deceased's ruling intent, before resiling, was to benefit the plaintiff. That intent can be found in an oral agreement, a separation agreement or in a court order, but it must comprise an obligation. Third, there is a proprietary link between the plaintiff and the life insurance proceeds. It is this life insurance policy that is in issue, not some other. Finally, providing the plaintiff with the remedy of a constructive trust does not breach any law. Experience with constructive trusts in the disappointed beneficiary context would undoubtedly add other refinements.

[268] The disappointed beneficiary cases represent a distinct type of case in which the constructive trust remedy is disciplined by the common structure and elements of the dispute, which ought to serve to assuage the concern that equity is off on a frolic of its own, paying no attention to the law. Equity follows the law; the imposition of a constructive trust does not block the law's operation, which in this case is the operation of the Insurance Act; it imposes an obligation in conscience on the appellant the moment her entitlement to the proceeds attaches, one that requires her to hold the proceeds in trust for the respondent.

[269] To my mind, the disappointed beneficiary cases constitute a genus in which a constructive trust can be imposed on life insurance proceeds consistently with the reasoning of McLachlin J in *Soulos*. They are situations in which courts have found a constructive trust.

[270] I do not agree with the appellant's argument that those disappointed beneficiary cases in which the court granted a remedial constructive trust have been overtaken by *Soulos* and are not good law, for several reasons.

[271] First, I am not persuaded by the obiter in *Ladner* and *Love* that the British Columbia Court of Appeal's reasoning in *Roberts* is to be doubted in light of *Soulos*. Neither court explained the basis for the doubt apart from the lack of a mention of *Soulos* in the decisions under review.

[272] Second, I would distinguish *Ladner* itself on two bases. The case proceeded under the rubric of wrongful act, which has a detailed set of elements according to *Soulos* that do not apply to the unjust enrichment rubric. Further, the proprietary connection between the new and old insurance policies that was missing in Ladner was very much present in this case between the policy and the payment of the premiums by the respondent.

[273] Finally, in light of the limits I discussed earlier, I do not share the *Ladner* court's underlying concern that constructive trusts would become unmanageable.

> [274] Equity asks a pertinent question in the difficult dilemma posed in the disappointed beneficiary cases: which of the two claimants has the superior claim to the life insurance proceeds? Equity's answer, all things being equal, is to assist the one with the superior right in equity, as McKinlay J. pointed out in *Shannon*. In this case, that is the respondent, as the application judge found.
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> **(3) Conclusion on Unjust Enrichment**
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> [275] In my view, the application judge did not err in finding that the respondent's deprivation consisted of the life insurance proceeds. He also did not err in finding that the deceased's irrevocable designation in the appellant's favour under s. 191 of the *Insurance Act*, given his prior oral agreement with the respondent, did not provide a juristic reason to oust the availability of a constructive trust over the life insurance proceeds, despite the *Richardson Estate* decision.
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> [276] But I would go further and add that, to the extent that they fit awkwardly under the rubric of unjust enrichment, the disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* – circumstances where the availability of a trust has previously been recognized – and the fourth route – where good conscience otherwise demands it, quite independent of unjust enrichment.

Moore v. Sweet will be a very important decision when it is heard and decided by the Supreme Court of Canada. What divided the majority and dissent in the Court of Appeal goes to the heart of the developing jurisdiction in unjust enrichment and how to approach the development of the remedial constructive trust outside of wrongs and straight-forward unjust enrichment claims. The difficulty, however, may be that the state of the record does not provide adequately to enable one to base the outcome on the nature of the oral agreement between the deceased and the separated spouse. Regardless, it will be interesting to see whether the Supreme Court of Canada sees fit to provide controlling criteria to the use of constructive trusts outside controlling categories.

THE REMEDIAL CONSTRUCTIVE TRUST

Equitable Wrongs (Breach of Confidence)

The constructive trust has been ordered traditionally as a response to equitable wrong-doing.

The jurisdiction in confidence its modern form is a flexible and *sui generis* jurisdiction that is exercised based on principles of conscience and good faith, and the interest in maintaining confidentiality is balanced with other appropriate public interests in appropriate circumstances.

There are two broad requirements:

First, the information must be regarded as protectable subject-matter in the sense of being *objectively confidential*. Confidentiality for these purposes is usually found through such negative factors as the information in question is not vague or trivial or useless (though it need not be novel), and is not within the public domain (in the sense of not being generally known, available or accessible to those who would find it relevant though it need not be more than '"relatively secret'"). Regardless of the wide variance in language used, most cases consistently approach objective confidentiality as a requirement that is not especially onerous, consistent with protection being framed as an *in personam* obligation rather than an *in rem* entitlement.

Second, the information in question must be disclosed in circumstances disclosing an express or implicit undertaking to respect confidentiality. The existence of an implied obligation, obviously the more difficult scenario, is determined by an objective evaluation of the circumstances of the disclosure to determine whether an obligation was imported thereby – - that is, that the confidant knew that the information was impressed with an obligation of confidentiality when disclosed to him or her, or, ought to have known that an obligation was implicit as would have any '"reasonable person'" or person of '"average intelligence and honesty'". The simplest scenario is one whereby the confider discloses to the confidant for a limited purpose; both the existence and content of the duty can be easily determined. Other usual circumstances are those such that arise from the nature of the relationship between the parties, co-operative commercial ventures, commercial negotiations over new inventions, and through industry convention; indeed the question is really one more of fact than law, but proceeds from a consensual disclosure by the confider in the usual case.

International Corona Resources Ltd. v. Lac Minerals Ltd.
[1989] 2 S.C.R. 574

One mining company disclosed results of soil testing to another mining company, on the understanding that the two would be entering into a joint venture for the development of the property in the region. Instead, the second mining company bought the property in the region, and effectively excluded the first company from the venture. What separated the majority and dissent was the view that the constructive trusts was available as a remedy; **here the nature of the remedy ordered was proprietary notwithstanding that the subject-matter itself had no proprietary character**.

LaForest J (for the majority):

142 **Having established that Lac breached a duty of confidence owed to Corona, the existence of a fiduciary relationship is only relevant if the remedies for a breach of a fiduciary obligation differ from those available for a breach of confidence. In my view, the remedies available to one head of claim are available to the other, so that provided a constructive trust is an appropriate remedy for the breach of confidence in this case, finding a fiduciary duty is not strictly necessary…**

Remedy

182 The appropriate remedy in this case cannot be divorced from the findings of fact made by the courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of Lac in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy. Both courts below awarded the Williams property to Corona on payment to Lac of the value to Corona of the improvements Lac had made to the property. The trial judge dealt only with the remedy available for a breach of a fiduciary duty, but the Court of Appeal would have awarded the same remedy on the claim for breach of confidence, even though it was of the view that it was artificial and difficult to consider the relief available for that claim on the hypothesis that there was no fiduciary obligation.

183 **The issue then is this. If it is established that one party, (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.**

184 In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by Lac, Corona would have acquired the property. In Air Canada v. British Columbia, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." [Emphasis added.] In my view the fact that Corona never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, An Introduction to the Law of

Restitution, at pp. 133-39. Lac has therefore been enriched at the expense of Corona.

185 That enrichment is also unjust, or unjustified, so that the plaintiff is entitled to a remedy. There is, in the words of Dickson J. in Pettkus v. Becker, [1980] 2 S.C.R. 834, at p. 848, an "absence of any juristic reason for the enrichment". The determination that the enrichment is "unjust" does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief. Restitution is a distinct body of law governed by its own developing system of rules. **Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate. It is not every case of such a breach of duty, however, that will attract recovery based on the gain of the defendant at the plaintiff's expense. Indeed this has long been recognized by the courts.** In In re Coomber, [1911] 1 Ch. 723, at pp. 728-29, Fletcher Moulton L.J. said:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.

186 In breach of confidence cases as well, there is considerable flexibility in remedy. Injunctions preventing the continued use of the confidential information are commonly awarded. Obviously that remedy would be of no use in this case where the total benefit accrues to the defendant through a single misuse of information. An account of profits is also often available. Indeed in both courts below an account of profits to the date of transfer of the mine was awarded. Usually an accounting is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense. Occasionally, as in this case, the measures coincide. In a case quite relevant here, this Court unanimously imposed a constructive trust over property obtained from the misuse of confidential information: Pre-Cam Exploration & Development Ltd. v. McTavish, [1966] S.C.R. 551. More recently, a compensatory remedy has been introduced into the law of confidential relations. Thus in Seager v. Copydex, Ltd. (No. 2), [1969] 2 All E.R. 718 (C.A.), an inquiry was directed concerning

the market value of the information between a willing buyer and a willing seller. The defendant had unconsciously plagiarized the plaintiff's design. In those circumstances it would obviously have been unjust to exclude the defendant from the market when there was room for more than one participant.

187 **I noted earlier that the jurisdictional base for the law of confidence is a matter of some dispute. In the case at bar however, it is not suggested that either the contractual or property origins of the doctrine can be used to found the remedy. Thus while there can be considerable remedial flexibility for such claims, it was not argued that the Court may not have jurisdiction to award damages as compensation and not merely in lieu of an injunction in the exercise of its equitable jurisdiction**, and since I am of the view that a constructive trust is in any event the appropriate remedy, I need not consider the question of jurisdiction further.

188 In view of this remedial flexibility, detailed consideration must be given to the reasons a remedy measured by Lac's gain at Corona's expense is more appropriate than a remedy compensating the plaintiff for the loss suffered. In this case, the Court of Appeal found that if compensatory damages were to be awarded, those damages in fact equalled the value of the property. This was premised on the finding that but for Lac's breach, Corona would have acquired the property. Neither at this point nor any other did either of the courts below find Corona would only acquire one half or less of the Williams property. While I agree that, if they could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures, even if they would not, a restitutionary measure would be appropriate.

189 **The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources.** The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary. If by breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset. **In the present case, it is true that had negotiations been concluded, Lac could also have acquired an interest in the Corona land, but that is only an expectation and not a certainty. Had Corona acquired the Williams property, as they would have but for Lac's breach, it seems probable that negotiations with Lac would have resulted in a concluded agreement. However, if Lac, during the negotiations, breached a duty of confidence owed to Corona, it seems certain that Corona would have broken off negotiations and Lac would be left with**

nothing. In such circumstances, many business people, weighing the risks, would breach the obligation and acquire the asset. This does nothing for the preservation of the institution of good faith bargaining or relationships of trust and confidence. The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect. The elements of a claim in unjust enrichment having been made out, I have found no reason why the imposition of a restitutionary remedy should not be granted.

Per Sopinka J (dissenting on the issue of remedy):

Constructive Trust or Damages

73 The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected. See Gurry, Breach of Confidence, at pp. 25-26, and Goff and Jones, The Law of Restitution (3rd ed. 1986), at pp. 664-67.

74 This multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy. See Nichrotherm Electrical Co. v. Percy, [1957] R.P.C. 207, at pp. 213-14; Gurry, op. cit., at pp. 26-27; and Goff and Jones, op. cit., at pp. 664-65. A constructive trust is ordinarily reserved for those situations where a right of property is recognized. As stated by the learned authors of Goff and Jones, op. cit., at p. 673:

> In restitution, a constructive trust should be imposed if it is just to grant the plaintiff the additional benefits which flow from the recognition of a right of property.

Although confidential information has some of the characteristics of property, its foothold as such is tenuous (see Goff and Jones, op. cit., at p. 665). I agree in this regard with the statement of Lord Evershed in Nichrotherm Electrical Co. v. Percy, supra, at p. 209, that:

> ... a man who thinks of a mechanical conception and then communicates it to others for the purpose of their [page616] working out means of carrying it into effect does not, because the idea was his (assuming that it was), get proprietary rights equivalent to those of a patentee. Apart from such rights as may flow from the fact, for example, of the idea being of a secret process communicated in confidence or from some contract of partnership or agency or the like which he may enter into with his collaborator, the originator of the idea gets no proprietary rights out of the mere circumstance that he first thought of it.

75 As a result, **there is virtually no support in the cases for the imposition of a constructive trust over property acquired as a result of the use of confidential information. In stating that such a remedy is possible, the Court of Appeal referred to Goff and Jones, op. cit., at pp. 659-74. The discussion of proprietary claims commences at p. 673 with the statement which I have quoted above and thereafter all references to constructive trust pertain to an accounting of profits. No reference is made to any case in which a constructive trust is imposed on property acquired as a result of the use of confidential information.**