How Many Rights (or Wrongs) Make a Remedy? Substantive, Remedial and Unified Constructive Trusts

Stuart Hoegner*

Traditionally, the common law has employed two types of constructive trusts: (1) the substantive constructive trust, a remedy for breach of express trust or breach of fiduciary duty; and (2) the remedial constructive trust, a remedy for unjust enrichment. In recent years, however, the Canadian courts have subsumed the substantive constructive trust under the remedial constructive trust, which requires a finding of unjust enrichment.

The difficulty that arises under this new unified form of the remedial constructive trust is that traditional breach of duty claims that do not fall under the unjust-enrichment principle are now excluded from a constructive-trust remedy. Many of the traditional cases, however, may warrant the operation of a constructive trust, even if the wrong committed does not involve a detriment by subtraction to the plaintiff, as is required by the principle of unjust enrichment.

Changing the definition of unjust enrichment to include cases of enrichment by wrongdoing without a corresponding detriment by subtraction to the plaintiff would overly broaden and distort the concept of unjust enrichment. To preserve the integrity and clarity of the analysis in situations where a constructive trust is warranted, the courts should therefore return to the separation between the substantive and remedial constructive trusts.

Traditionnellement, la *common law* a reconnu deux types de fiducie judiciaire (ou fiducie par interprétation) : (1) la fiducie judiciaire *substantielle*, qui sert à remédier aux bris d'obligations fiduciaires et (2) la fiducie judiciaire *corrective*, qui sert à corriger un enrichissement injustifié. Au cours des dernières années, les tribunaux canadiens ont toutefois abandonné la distinction entre ces deux types de fiducie et ont soumis la fiducie judiciaire substantielle aux conditions de la fiducie judiciaire corrective, en exigeant qu'il y ait démonstration d'un enrichissement injustifié.

Cette théorie unitaire de la fiducie judiciaire soulève toutefois diverses difficultés. En effet, les bris d'obligation fiduciaire qui ne s'apparentent pas à un enrichissement injustifié ne donnent plus lieu à la création d'une fiducie judiciaire. Il semble toutefois opportun, dans un grand nombre de cas, d'imposer la création d'une telle fiducie même lorsque le demandeur ne peut démontrer qu'il a subi un appauvrissement corrélatif à l'enrichissement du défendeur.

Il est impossible d'étendre la définition de l'enrichissement injustifié afin d'inclure les cas où le demandeur ne souffre pas d'appauvrissement corrélatif. Cela aurait pour effet d'étendre indûment le domaine de l'enrichissement injustifié. Afin de préserver l'intégrité et la limpidité de la distinction établie entre les cas d'enrichissement injustifié et les cas de bris d'obligation fiduciaire, les tribunaux devraient donc à nouveau adopter la distinction traditionnelle entre la fiducie judiciaire substantielle et la fiducie judiciaire corrective.

* This note was written as part of a directed research project at the University of Toronto Faculty of Law under the supervision of Professor Jim Phillips, whom I wish to thank for his valuable guidance and suggestions. I also wish to thank the editors of the *McGill Law Journal* for their helpful comments. Any errors in the paper are, however, mine alone.

Revue de droit de McGill
To be cited as: (1997) 42 McGill L.J. 437
Mode de référence : (1997) 42 R.D. McGill 437

> *A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.*[1]
>
> Benjamin Cardozo

Introduction

The constructive trust appeared two-and-a-half centuries ago to redress breach of trust. Since then, the constructive trust has been used to discipline those who profit in breach of their fiduciary duties. The remedy is a strong incentive for fiduciaries not to breach their duties of loyalty and honesty to their beneficiaries. The constructive trust has also recently emerged as a response to unjust enrichment, even though unjust enrichment has traditionally been remedied with money restitution.[2] Few doubt the importance and propriety of the unjust-enrichment constructive trust, especially in cases where property is being divided after a long-term intimate relationship: should only one party retain the benefit of joint effort just because this person holds title to the property acquired or improved by the joint effort? The constructive trust gives the plaintiff in those cases a share of the property in order to correct the unjust enrichment.

Both forms of the constructive trust have now been unified by the Canadian courts under the banner of the "remedial" constructive trust based on unjust enrichment. That is, all of the situations giving rise to a constructive trust are now said to be captured by the unjust-enrichment principle. Part I traces this development from the origins of the constructive trust in English common law to its adoption as a remedial device for unjust enrichment. An exploration of how the Canadian courts formulated the "unified" constructive trust ends this part.

The unified conception raises serious issues about the theoretical basis for the constructive trust. How many conceptually distinct legal rights are there that give rise to the constructive-trust remedy? Consider Cardozo J.'s (as he then was) much-quoted statement in a Canadian context: how many different injustices will give rise to a constructive trust?[3] So long as we can agree on the result, does it matter what right we use to obtain it? These questions are examined in Part II, where I argue that the present definition of unjust enrichment is unable to accommodate the traditional breach-of-duty cases because the concept of corresponding detriment is limited to detriment by subtraction. Part II also speaks to the difficulties that result from expanding the idea of unjust enrichment. I argue that cramming the substantive-trust situations into the unjust-enrichment principle will result in confusion and distortion in constructive-

---

[1] *Beatty* v. *Guggenheim Exploration Co.*, 122 N.E. 378 at 380, 225 N.Y. 380 (Ct. App. 1919) [hereinafter *Beatty*].

[2] See *e.g. Deglman* v. *Guaranty Trust Co. and Constantineau*, [1954] S.C.R. 725, [1954] 3 D.L.R. 785.

[3] This question derives from Peter Birks' statement on Cardozo J.'s *dictum* in *Beatty*, *supra* note 1 (see P.B.H. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) at 64 ("All that needs to be underlined is that there are many injustices to be righted besides unjust enrichment.")).

trust doctrine. The solution proposed is the retention of the traditional distinction between constructive trusts based on unjust enrichment and constructive trusts based on breaches of duty. These causes of action should be kept separate and each should give rise to a constructive trust.

The history of the constructive trust is marked by opportunity. The Canadian courts decided to employ the constructive trust to assist those to whom fiduciary duties were owed; they then extended the remedy to redress unjust enrichment. There followed a unification of the constructive-trust doctrine under the principle of unjust enrichment. Now there is occasion to clarify the law and impose a more logical structure on the Canadian constructive trust by revisiting that unification.

I. The Development of the Constructive Trust and the Emergence of the Unified Constructive Trust

That the constructive trust has changed dramatically in both nature and scope since the 1726 English case of *Keech* v. *Sandford*[4] is axiomatic. What is often forgotten is that many of these changes, at least in Canada, have occurred only in the last twenty or so years.[5] This part outlines the development of the constructive trust from its English origins to its recent applications in Canadian law. I first examine the substantive constructive trust; the jurisprudence on breach of express trust and breach of fiduciary duty is considered under this heading. I then briefly outline the evolution and characteristics of the newer remedial constructive trust. Finally, I show that the development of the remedial constructive trust has culminated in the acceptance by the Canadian courts of only one form of constructive trust — the remedial constructive trust based on unjust enrichment (what I call the "unified" constructive trust).

A. Substantive Constructive Trust

The so-called "traditional Anglo-Canadian approach" characterizes the constructive trust as a substantive institution forcing a defendant to convey to the plaintiff property that already belongs to the plaintiff.[6] The substantive constructive trust is like other trusts inasmuch as it gives equitable title to property to the trust's beneficiary.[7] The constructive trust is, however, imposed by law and does not depend on the intent of the parties.[8] The administration of a constructive trust will likely create problems in

---

[4] 25 E.R. 223, Sel. Cas. t. King 61, 2 Eq. Cas. Abr. 741 [hereinafter *Keech*].

[5] See *e.g.* D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 349-57, 384-89 [hereinafter *Law of Trusts*]; *Rawluk* v. *Rawluk*, [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161 [hereinafter *Rawluk* cited to S.C.R.].

[6] See A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 4th ed. (Toronto: Carswell, 1992) at 377.

[7] See *ibid.* at 366. But see D.W.M. Waters, Case Comment (1975) 53 Can. Bar. Rev. 366 at 370; J.L. Dewar, "The Development of the Remedial Constructive Trust" (1982) 60 Can. Bar. Rev. 265 at 267-68; Oosterhoff & Gillese, *ibid.* at 371: "[A] constructive trust is not simply another type of trust. It is a totally different, *sui generis* concept, which bears no relation to the express trust."

[8] See *Law of Trusts*, *supra* note 5 at 377-78.

many cases,[9] so the general rule appears to be that "a constructive trustee does not have the same obligations as an express trustee, such as duties of management. The duty of a constructive trustee is simply to convey."[10] It is settled that the substantive constructive trust exists from the moment of the wrong to give the wronged party a beneficial interest in the trust property.[11]

Keech[12] is the starting point for the law of constructive trusts.[13] In *Keech*, an express trustee took a lease on a market after it could not be renewed for the trust's infant beneficiary. It was clear that the child could not have acquired the new lease and that the trustee had therefore acted innocently, not intending to deprive the beneficiary of money or an investment opportunity. The Lord Chancellor nevertheless found that the lease was held on constructive trust for the infant. King L.C. acknowledged that "[t]his may seem hard, that the trustee is the only person of all mankind who might not have the lease,"[14] but asserted that it was necessary to protect the beneficiary and compel the trustee's utmost loyalty and good faith. *Keech* is authority for the proposition that an express trustee must account for any property he receives because of his trusteeship or his control of trust property.[15] Breach of express trust will result in the imposition of constructive-trust machinery.

Keech can be contrasted with *Crocker and Croquip Ltd.* v. *Tornroos*.[16] Tornroos, Crocker and Dietrich each held an equal number of shares in a British Columbia company. They were the only owners. There was an agreement among the three that if one of them wanted to sell his holdings, the others had a right of first refusal on the shares. Tornroos died in 1936 and his will appointed his wife, Dietrich and Crocker as executors and trustees of his estate. Soon after, Dietrich died and his widow inherited his shares. While still a trustee for the Tornroos estate, Crocker bought the widow's shares for himself. After Crocker retired from the trust, the then trustees began an action for one-half of the shares that he bought from the widow. The trustees alleged breach of trust. Under the terms of Tornroos' will, the trust would not have been able

---

[9] In many cases, the courts will not allow the *cestui que trust* to manage the trust's affairs, for example where there is a breach of confidence in a commercial relationship: see *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 [hereinafter *Lac Minerals* cited to S.C.R.]. This case is discussed below. Where the breach of trust (or fiduciary duty) is innocent, the court may allow an express trustee to administer the trust and hold the profits on constructive trust for the beneficiary (see *Keech*, *supra* note 4).

[10] Oosterhoff & Gillese, *supra* note 6 at 371, citing R.H. Mandsley, "Constructive Trusts" (1977) 28 N. Ir. Legal Q. 123 at 124. See also Oosterhoff & Gillese, *ibid.* at 388.

[11] See Oosterhoff & Gillese, *ibid.* at 377-78, 380. See also *Atlas Cabinets & Furniture Ltd.* v. *National Trust Co.* (1990), 68 D.L.R. (4th) 161 at 173, 45 B.C.L.R. (2d) 99 (C.A.) [hereinafter *Atlas* cited to D.L.R.], *per* Lambert J.A. in *obiter dicta*: "If a substantive constructive trust is found to have arisen in that way then there is no discretion remaining in the court to refuse to declare the existence of the trust."

[12] *Supra* note 4.

[13] See Oosterhoff & Gillese, *supra* note 6 at 358; *Law of Trusts*, *supra* note 5 at 398.

[14] *Keech*, *supra* note 4 at 223.

[15] This is also the law in Canada (see *e.g. Krendel* v. *Frontwell Investments Ltd.*, [1967] 2 O.R. 579, 64 D.L.R. (2d) 471 (H.C.J.)).

[16] [1957] S.C.R. 151, 7 D.L.R. (2d) 104 [hereinafter *Tornroos* cited to S.C.R.].

to purchase the shares anyway because they were too speculative and were not "trustee investments".[17] Kellock J. concluded: "The fact that the Tornroos estate could not be a buyer was not due to anything for which the appellant Crocker, by reason of any act or default of his, as trustee, was responsible."[18] This result appears to contradict *Keech*: express trustees may take opportunities for themselves when the trust cannot take advantage of them. Perhaps the difficulty is not as great as it seems. The important principle is that express trustees are liable as constructive trustees for property received by breaching the express trust; *Tornroos* illustrates that it is not always clear what will be considered a breach of trust — a different point that does not concern us here.[19]

Breach of fiduciary duty may give rise to a constructive trust for the same sorts of reasons breach of express trust does, although the fiduciary duty does not involve the holding of trust property. As with express trusts, the law has traditionally taken the view that because of the value we ascribe to the fiduciary relationship, it is important to have a powerful prophylactic device at hand to discourage breaches of fiduciary duty.[20] A fiduciary duty is a duty of utmost loyalty:

> The common idea is that of trust, in its more colloquial meaning of placing confidence in, and reliance upon, the honest performance of some task or undertaking. ... What is involved where fiduciaries are concerned entails something more positive than not making mistakes or behaving carelessly or indifferently; it refers to doing whatever is necessary in the circumstances to ensure that the interests of the person relying on the fiduciary are pursued with vigour and at the expense of all else to the best endeavour of the one on whom reliance is placed. Honesty is the key, not simply care.[21]

It is incontrovertible that in principle the constructive trust is available as a remedy for breach of fiduciary duty; by preventing and, where necessary, redressing breach of fiduciary duty, the constructive trust promotes the fiduciary's loyalty.

The English House of Lords has repeatedly held that breach of fiduciary duty may give rise to a constructive trust. In *Boardman* v. *Phipps*,[22] a solicitor and a trust beneficiary each held themselves out as agents of the trustees. They had no authority to act on the trust's behalf. Through this agency they obtained information which helped them to buy shares for themselves in a company — a company in which the trust already held an interest. Even though they were able to better manage the company than previous management, resulting in a profit to the trust (and to themselves), the House of Lords decided that this was a breach of fiduciary duty. The solicitor and

---

[17] *Ibid.* at 153, 155.

[18] *Ibid.* at 159.

[19] See *Law of Trusts*, *supra* note 5 at 398.

[20] See *e.g. Attorney-General for Hong Kong* v. *Reid*, [1994] 1 A.C. 324, 1 All E.R. 1 at 4-5 (P.C.) [hereinafter *Reid* cited to All E.R.].

[21] G.H.L. Fridman, *Restitution*, 2d ed. (Toronto: Carswell, 1992) at 370-71. See generally E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1; *Frame* v. *Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81.

[22] (1966), [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.) [hereinafter *Boardman*].

the beneficiary would never have received the information had it not been for their close relationship with the trust. The two would therefore never have profited on this investment had they not exploited their positions as fiduciaries. The remedy was a constructive trust composed of the profits made by the two defendants on the scheme.

The English courts are also willing to impose a substantive constructive trust where a fiduciary accepts bribes in breach of his duty.[23] This is illustrated by the recent case of *Attorney General for Hong Kong* v. *Reid*.[24] Reid was the director of public prosecutions in Hong Kong. He took bribes to obstruct the prosecution of certain criminals and was subsequently convicted under an anti-corruption ordinance. In the meantime, Reid used the bribes to buy New Zealand properties. The court decided that Reid had held the bribes on constructive trust for the Crown as soon as he had received them. This was the corollary of the court's clear conclusion that Reid accepted the bribes in breach of his fiduciary duty to the Crown.[25] That the Crown lost nothing over the bribes was irrelevant;[26] what mattered was Reid's gain through the exploitation of his position. Since the bribes were trust property, and not just a debt owed by Reid, the Crown *qua* beneficiary could trace them into the New Zealand properties. The Crown's right *in rem* also meant that Reid could not keep any surplus of value of the properties over the bribes, and that he was bound to make good any shortfall if the properties were worth less than the bribes. Where a fiduciary breaches his duty by accepting a bribe, and the bribe can be traced into other property, the constructive trust will be available to remedy the breach even where there is no prior link between the beneficiary and the property.

B. Remedial Constructive Trust

The substantive constructive trust is not the only form of constructive trust that has appeared in Canada. In fact, much of the discussion about the constructive trust in

---

[23] This has not always been the case. In *Lister & Co.* v. *Stubbs* (1890), 45 Ch.D. 1, [1886-90] All E.R. Rep. 797 (C.A.) [hereinafter *Lister*], the defendant Stubbs was paid secret commissions in his capacity as the plaintiff's (Lister's) agent for buying inventory. Stubbs used a large portion of these bribes to buy property. When Lister found out about the payments, it sought to recover from Stubbs by tracing the commissions into the property. The court held that the secret payments could be recovered. Since the money never belonged to Lister — the money was paid by the vendor directly to Stubbs — the relationship between Stubbs and Lister was that of debtor and creditor, respectively, and not that of trustee and beneficiary.

This approach is consistent with the more recent English decision in *Reading* v. *Attorney-General*, [1951] A.C. 507 (H.L.) [hereinafter *Reading*]. Reading was a sergeant in the British Army in Egypt in the mid-1940s. He was bribed by smugglers to accompany a truck around Cairo. He was dressed in uniform, which ensured that the truck would not be inspected. Reading was successfully court-martialled. The House of Lords held that the Crown should recover the monies paid to Reading in breach of his fiduciary duty. The restitution was a money damage award, not a constructive trust.

These cases have been effectively overturned by *Reid*, *supra* note 20.

[24] *Ibid.*

[25] See *ibid.* at 4.

[26] While the Crown's conviction rate or reputation may have suffered, it did not suffer a "subtractive" wrong (see text below, accompanying notes 52-58).

this country in the last two decades has concerned the remedial, or unjust-enrichment, constructive trust. A detailed recapitulation of the development and application of the Canadian remedial constructive trust is not my objective here. That story is well-known to most readers and is, at any rate, told well elsewhere.[27] I therefore want to offer only a brief look at why the remedial constructive trust developed and succinctly review the criteria for unjust enrichment enunciated in *Pettkus* v. *Becker*.[28] This short review is necessary to set the stage for the Supreme Court's adoption of the unified constructive trust, which is discussed in more detail below.

The remedial constructive trust allows the courts to give a proprietary equitable remedy in cases where there is no pre-existing special relationship between the parties. The remedial constructive trust relies on unjust enrichment as the underlying cause of action.[29] A majority of the Supreme Court held in *Rawluk* v. *Rawluk*[30] that the constructive trust arises at the date at which the unjust enrichment first occurred,[31] but at least one appellate court has more recently stated that the remedial constructive trust comes into being when the judicial order declaring the trust is made.[32] The remedial constructive trustee's obligation is to convey the property; there are no active duties of management.[33]

The origin of the remedial constructive trust must be understood primarily as a judicial response to the perceived inequity of property division in marriage breakdown. These outcomes were generated by the application of the resulting trust.[34] Throughout the 1960s and 1970s, the resulting trust was increasingly seen as giving rise to unfair results in family law cases: "Given modern social conditions, where very often both parties are working to improve the economic position of the family unit, it became apparent to the courts that an application of the traditional rules did not necessarily produce a just result between them."[35] By the early 1970s, several courts were looking for new equitable tools to address the shortcomings of the resulting trust.[36] The Supreme Court, however, continued to faithfully apply the resulting-trust doctrine to property-division cases.

---

[27] See *e.g. Law of Trusts*, *supra* note 5 at 299-427.

[28] [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 [hereinafter *Pettkus* cited to S.C.R.].

[29] See *ibid.* at 847; *Rawluk*, *supra* note 5 at 86; D.W.M. Waters, "The Constructive Trust in Evolution: Substantive *and* Remedial" (1990-91) 10 Est. & Tr. J. 334 at 362, 375-82 [hereinafter "The Constructive Trust in Evolution"]. Compare M.M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alta. L. Rev. 407 at 415-18.

[30] *Ibid.*

[31] See *ibid.* at 91-92.

[32] See *Atlas*, *supra* note 11 at 173. According to Lambert J.A., this is what distinguishes the remedial from the substantive constructive trust. See generally Oosterhoff & Gillese, *supra* note 6 at 380-85.

[33] See Oosterhoff & Gillese, *ibid.* at 371, 388.

[34] On the resulting trust generally, see *Law of Trusts*, *supra* note 5, c. 10.

[35] Dewar, *supra* note 7 at 291. See also *Law of Trusts*, *ibid.* at 346.

[36] See *e.g. Trueman* v. *Trueman* (1971), 18 D.L.R. (3d) 109, 2 W.W.R. 688 (Alta C.A.); *Hussey* v. *Palmer*, [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (C.A.).

The Supreme Court's posture changed in 1980 with the decision in *Pettkus*,[37] which is the most important Canadian decision on the remedial constructive trust. Mr. Pettkus and Ms. Becker lived together in a common-law relationship from 1955 to 1974, save for a brief separation in 1972. During the cohabitation, Pettkus built up a successful bee-keeping business and purchased property for that business. Becker, through labour and earnings, contributed substantially to this business and the land acquisition; at various times she paid for rent, expenses and renovations. This helped Pettkus buy the first farm by freeing up his funds for that purpose. Becker worked extensively in the bee-keeping business. The monies to buy more business properties came largely from business income and partially from Becker's direct contributions. When Becker left Pettkus, she took a car and $2,600 in cash.

The Court granted Becker a one-half proprietary interest in all of the lands owned by Pettkus and in the bee-keeping business. Three members writing two opinions would have found for Becker based on a resulting trust.[38] Dickson J. (as he then was), writing for the rest of the Court, said that Pettkus held one-half of the beneficial interest in the business and the lands on a constructive trust for Becker. The majority he led drew attention to the fact that the trial judge found no common intention between the parties and that this finding was not disturbed by the Ontario Court of Appeal.[39] Dickson J. stated unequivocally that "[t]he principle of unjust enrichment is at the heart of the constructive trust."[40] There must be three things to make out a claim for unjust enrichment: an enrichment; a corresponding deprivation; and an absence of any juristic reason for the enrichment.[41] On the facts, the respondent satisfied the first two conditions; Pettkus was enriched by the benefit of Ms. Becker's unpaid labour while she was said to have received nothing in return. As for the third requirement, Dickson J. held that

> where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely aecepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[42]

---

[37] *Supra* note 28.

[38] See *ibid.* at 859, 864. See generally *Law of Trusts*, *supra* note 5 at 356.

[39] See *Pettkus*, *ibid.* at 847.

[40] *Ibid.*

[41] See *ibid.* at 848.

[42] *Ibid.* at 849. *Contra* S. Gardner, "Rethinking Family Property" (1993) 109 L.Q. Rev. 263 at 269-72, and especially at 271-72:

> Mr. Pettkus' attitude to sharing his property with Miss Becker was consistently negative. Dickson J. accepts this finding ... Is it then tenable for him to assert that Miss Becker continued to believe that her efforts would be recompensed, and that Mr. Pettkus knew or should have known this? Mr. Pettkus' negative attitude to sharing was clearly evinced throughout the relationship, and Miss Becker was surely aware of it. In continuing to work in that awareness she must have been acting, if not out of a spirit of generosity, then at least with no expectation of recompense. And even if she did harbour such an expectation, Mr. Pettkus could say that having made his position suffi-

We have seen that the constructive trust has changed significantly since *Keech*. The substantive trust has become a response not just to breach of express trust, but also to breach of fiduciary duty. The remedial constructive trust has emerged only in the last two decades in Canada as an important method of allocating property fairly between parties when intimate relationships break down. The courts have also pushed the development of the remedial constructive trust to impose a unifying principle on *all* constructive trusts: the principle of unjust enrichment. We should now address this last proposition.

C. Unified Constructive Trust

The modern Canadian constructive trust can be characterized by two ideas: there is only one form of constructive trust and that form of trust is based on the principle of unjust enrichment. These two ideas find expression in the phrase "remedial constructive trust". That is, the substantive-constructive-trust situations have been subsumed under the principle of unjust enrichment and the remedial constructive trust. The remedial constructive trust is a unified constructive trust. This appears to be what Dickson J. meant by his imperative: "The principle of unjust enrichment lies at the heart of the constructive trust."[43]

In *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*,[44] a majority of the Supreme Court held that there must be an unjust enrichment to give rise to a constructive trust, even where the facts evidence a breach of confidence. In *LAC Minerals*, International Corona Resources Ltd. ("Corona") owned several mining claims in northern Ontario. Corona had geological reports indicating that there were extensive gold deposits in the claims and in the adjoining property (the "Williams property"). Some of this information was communicated to the public. LAC Minerals Ltd. ("LAC") entered into negotiations with Corona with a view to a joint venture. Over the course of these negotiations, Corona gave LAC information (*e.g.*, details of Corona's pursuit of the Williams property and more complete assay results) that was not public knowledge. Corona made an offer to Williams. LAC subsequently made an offer to Williams to acquire the property for itself while it was still negotiating with Corona. Corona learned of LAC's offer to Williams for the first time when Corona made a written offer. Williams ultimately accepted LAC's offer. Negotiations then broke off and Corona began the action alleging breach of duty and breach of confidence and claiming a constructive trust over the Williams property. At trial,[45] LAC was found liable under both heads of claim and the remedy ordered was a constructive trust sub-

---

> ciently clear, he was reasonably unaware of that expectation and reasonably thought she must have been acting gratuitously.

See also Gardner, *ibid.* at 274: "There is a strong argument, then, that these two leading decisions [*Pettkus*, *ibid.* and *Sorochan* v. *Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1], whilst doctrinally quite satisfactory, are founded on highly dubious findings of fact."

[43] *Pettkus*, *ibid.* at 847.

[44] *Supra* note 9.

[45] *LAC Minerals Ltd.* v. *International Corona Resources Ltd.* (1986), 53 O.R. (2d) 737, 25 D.L.R. (4th) 504 (S.C.), aff'd (1987), 62 O.R. (2d) 1, 44 D.L.R. (4th) 592 (C.A.).

ject to a lien in LAC's favour for the cost of the improvements and the amount paid to Williams. There was also to be an accounting to Corona of the profits earned by LAC on the property.

The Supreme Court unanimously held that there was a breach of confidence. A majority of the court (Lamer, Sopinka, and McIntyre JJ.) held that there was no breach of fiduciary duty.[46] A differently constituted majority (Lamer, La Forest, and Wilson JJ.) held that the appropriate remedy was a constructive trust.

Unlike the breach-of-fiduciary-duty cases discussed earlier, Corona's detriment was important for the remedy question. What counted in *Boardman* and *Reid*, for example, was the breach of duty and the profiteering because of the breach; any detriment was irrelevant. In *LAC Minerals*, however, far from being merely a way to calculate damages, unjust enrichment was at the basis of the remedy. La Forest J., in the majority on the question of remedy, stated:

> 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.
>
> 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.[47]

In other words, the success of a claim for breach of confidence or breach of fiduciary duty depends on whether the defendant has been unjustly enriched; a breach of duty without an unjust enrichment is not sufficient. A successful claim must show some connection between breach of fiduciary duty, unjust enrichment, and the constructive trust remedy.

In the same year *LAC Minerals* was decided, the Supreme Court reaffirmed in *Hunter Engineering Co.* v. *Syncrude*[48] that Canadian law would recognize only one form of constructive trust. That case concerned liability for design faults in gearboxes supplied to a synthetic oil plant, Syncrude. One of the suppliers was a U.S. firm, Hunter Engineering. Syncrude subsequently contracted with a company (Hunter Machinery (Canada) Ltd.) that passed itself off as the Canadian subsidiary of Hunter

---

[46] Although the remedy is based on breach of confidence and not breach of fiduciary duty, *LAC Minerals* is informative as a breach of fiduciary duty case for two reasons. First, a bare majority of the court decided that there was no breach of fiduciary duty in this case. Two justices (La Forest and Wilson JJ.) of five agreed that there was a breach of fiduciary duty. Both lower courts, moreover, found that LAC had breached a fiduciary duty to Corona. Second, the Supreme Court would have given the same remedy if a fiduciary duty had been found (*Lac Minerals*, *supra* note 9 at 616 and 618). The case is included here because it demonstrates the congruence of the substantive and remedial constructive trusts. See generally D.W.M. Waters, Case Comment on *LAC Minerals Ltd.* v. *International Corona Resources Ltd.* (1990) 69 Can. Bar. Rev. 455 [hereinafter Case Comment on *LAC Minerals*].

[47] *LAC Minerals*, *ibid.* at 669.

[48] [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321 [hereinafter *Hunter* cited to S.C.R.].

Engineering. Hunter Engineering discovered the deception and commenced a "passing off" action against Hunter Machinery. Syncrude then set up a trust fund from which subcontractors were to be paid; the remainder of the trust-fund monies were to go to the winner of the Hunter litigation.

The part of the judgment that is of interest to the argument being developed deals with entitlement to the trust fund. In the majority on this point, Dickson C.J. asserted not only that the remedial constructive trust was the sole constructive trust available, but also that unjust enrichment could be used to explain the historical instances of the substantive constructive trust:

> The constructive trust has existed for over two hundred years *as an equitable remedy for certain forms of unjust enrichment.* In its earliest form, the constructive trust was used to provide a remedy to claimants alleging that others had made profits at their expense. Where the claimant could show the existence of a fiduciary relationship between the claimant and the person taking advantage of the claimant, the courts were receptive. ... In *Pettkus* v. *Becker*, [this] Court moved to an approach more in line with restitutionary principles by explicitly recognizing constructive trust as one of the remedies for unjust enrichment.[49]

A plaintiff must therefore demonstrate an unjust enrichment of the defendant in order to succeed. Dickson C.J. decided in *Hunter* that the unjust-enrichment claim was not made out by Hunter Engineering and that the monies should be returned to Syncrude.

In a thoughtful article that appeared in 1988, the year before *LAC Minerals* and *Hunter* were decided by the Supreme Court, Moe Litman stated that

> there are two, and possibly three conceptual models of the constructive trust. The first is the familiar institutional constructive trust ... The second is the restitutionary constructive trust which operates as a remedy for unjust enrichment. The third is the remedial constructive trust which operates as a remedy for wrongs which are broader in concept than unjust enrichment.[50]

Since 1989, *LAC Minerals* and *Hunter* stand for the proposition that there is only one conceptual model for the Canadian constructive trust: a remedy for unjust enrichment.[51]

---

[49] *Ibid.* at 471 [emphasis added; references omitted].

[50] Litman, *supra* note 29 at 415.

[51] Since *LAC Minerals* and *Hunter*, at least one member of the Supreme Court has said that the point is undecided. In *Rawluk*, McLachlin J., in dissent, stated: "Because the facts in the present case involve allegations of unjust enrichment (and thus the type of trust used to remedy unjust enrichment), it is not necessary for the purpose of this appeal to decide if other types of constructive trusts have been abolished" (*Rawluk*, *supra* note 5 at 103; see also Madame Justice B.M. McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993) 37 at 48). With respect, and notwithstanding McLachlin J.'s *obiter dicta*, the issue was decided the year before *Rawluk*: to succeed, a claim for a constructive trust has to be founded on unjust enrichment as a cause of action.

The constructive trust is at an important point in its development in Canadian law. We have seen that the doctrine has changed considerably since its inception in English common law. In particular, the appearance of the remedial constructive trust has added a new dimension: instead of being confined to substantive breach-of-duty cases, the constructive trust is now instrumental in remedying unjust enrichment. But Canadian courts have not simply continued to develop the remedial constructive trust alongside its substantive cousin. The courts have used the former to replace the latter, enshrining the principle of unjust enrichment as a *sine qua non* for the remedy of constructive trust. There are problems with this unified conception of the constructive trust — problems that are not without solutions.

II. The Unified Constructive Trust: Problems and Solutions

Briefly, the "unified" constructive trust cannot apply to the traditional breach-of-duty cases because the concept of corresponding detriment is limited to detriment by subtraction; in many of the traditional cases, while there is a wrong, there is no subtraction *per se* from the plaintiff. The concept of unjust enrichment should not, however, be broadened to include non-subtractive wrongs, since this would import confusion and uncertainty into the doctrine. To preserve the integrity of the analysis in situations where a constructive trust is warranted, the courts should therefore return to the separation between substantive and remedial constructive trusts.

To make out a claim in unjust enrichment, the defendant's benefit must correspond to the plaintiff's detriment.[52] A corresponding detriment is what identifies the plaintiff as *the* party who can recover from the defendant because of the unjust enrichment.[53] At the heart of the concept of corresponding detriment is the idea of subtraction.[54] The defendant's enrichment corresponds to something given up by the plaintiff. A straightforward example is money; where the defendant receives money unjustly from the plaintiff, the plaintiff can sue for restitution of that money.[55] The defendant's gain is the plaintiff's loss. Similarly, services conferred by the plaintiff on the defendant are "subtractions" from the plaintiff; the plaintiff's (often physical) effort is expended to do something for the defendant. Once again, the defendant's gain is directly linked to the plaintiff's expense.

In all of the leading Canadian constructive-trust cases since *Pettkus*, the facts clearly show that the three elements of unjust enrichment are met. Specifically, in addition to the injustice that must be present, each case demonstrates a detriment by subtraction to the plaintiff corresponding to the defendant's gain. Becker worked long hours in the operation of her and Pettkus's bee-keeping business, performed all manner of household services, paid from her own money for things such as rent and food, and contributed to the purchase of property. Her detriments were subtractions from

---

[52] See *Pettkus*, *supra* note 28 at 848; *Rathwell* v. *Rathwell*, [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289; Litman, *supra* note 29 at 418-24.

[53] See Birks, *supra* note 3 at 132.

[54] See *ibid.* at 42 for a discussion of "subtraction".

[55] See *e.g. Kelly* v. *Solari* (1841), 9 M. & W. 54, 152 E.R. 24.

her in the form of money payments and services. This detriment resulted in Pettkus's enrichment (retention of the business and properties after the breakdown of the relationship). Similarly, in *Sorochan* v. *Sorochan*,[56] a wife laboured on the farm owned by her husband for forty-two years, raising their children, providing domestic services, and often assuming sole responsibility for the farm chores. It seems obvious that these subtractions from her constituted a detriment and that those detriments resulted in her husband's enrichment, since they preserved, maintained and improved the property owned by the husband.[57] The detriment requirement was also met in *LAC Minerals*. While Corona gave up nothing to LAC directly, LAC used confidential information to take the Williams property for itself. The court assumed that Corona would have received the property but for LAC's actions, so this interceptive subtraction amounted to a detriment to Corona resulting in LAC's corresponding enrichment.

The unjust-enrichment principle cannot, however, accommodate the traditional substantive-constructive-trust situations because there is no detriment by subtraction in those cases. In *Reid*, for example, the criminals bribed the prosecutor. The Crown lost nothing, at least not in the sense that it paid money to Reid, performed services for him, or that Reid took a benefit that was certainly or even probably destined for the Crown; there was no reason for the criminals to pay bribes to the Crown — it was Reid specifically who was intended to receive the monies. Reid clearly profited from the wrong, but there was no detriment by subtraction to the Crown in the case.

The same point can be made about *Keech*. The trustee took the market lease for himself, and was therefore enriched. There was, however, no detriment to the beneficiary. In fact, the trustee took the lease only *after* the lessor had made it clear that he would not lease to the trust. It was impossible for the beneficiary to suffer a subtractive detriment; the beneficiary did not have the market lease, and could never possibly get it. Especially in *Keech*, therefore, there was no unjust enrichment in the sense of taking something from the infant. Since there was no detriment by subtraction, unjust enrichment cannot explain why the constructive trust was imposed in these cases.

This does not dispose of the matter. If wrongs do not fit the definition of detriment, is the definition deficient? Can the traditional cases be accommodated in an expanded notion of unjust enrichment? Some think so. Donovan Waters, for example, is of this opinion.[58] He agrees that the only kind of trust available in Canada is the remedial constructive trust.[59] In his view, moreover, the traditional constructive-trust fact scenarios can be explained by this new trust. He discerns in Dickson J.'s judgment in *Pettkus* an intention to connect the old substantive and new remedial constructive trusts via the idea of unjust enrichment:[60]

---

[56] *Supra* note 42.

[57] See *ibid.* at 50.

[58] See "The Constructive Trust in Evolution", *supra* note 29 at 342. See generally D.W.M. Waters, *The Constructive Trust: The Case for a New Approach in English Law* (London: Athlone Press, 1964).

[59] See "The Constructive Trust in Evolution", *ibid.*

[60] See *ibid.* at 378.

> There is no desire on the part of the courts to oust existing criteria for the determination of unjust enrichment where those criteria exist. Restitution can be brought about either by the application of existing criteria or alternatively by the application of the *Pettkus* v. *Becker* three elements. If by *either of these approaches* unjust enrichment is established on the facts, then the court determines what is the appropriate remedy.[61]

Apparently, therefore, there are two ways of determining whether or not there is an unjust enrichment on particular facts. The first is through the application of the three-pronged test in *Pettkus*. The second is through "existing criteria". What exactly is meant by "existing criteria" is unclear, but it appears that Waters means the "injustice" in each of the traditional situations.[62] Unjust enrichment, in this view, *can* accommodate the breaches of duty in *Keech*, *Boardman*, and *Reid*; the breach of duty and the profiteering suffice to make the enrichment unjust, without the requirement of a corresponding detriment.

This view of unjust enrichment is, with respect, unhelpful. I believe that the definition of unjust enrichment should be anchored to the three-step *Pettkus* test. The broader definition of unjust enrichment as comprising only an injustice and an enrichment is not helpful because it introduces confusion into the constructive-trust doctrine. Confining unjust enrichment to situations including a corresponding detriment ensures that the legal right is specified in the cause of action. If we say, for instance, that the plaintiff mistakenly paid money, we know that the detriment is what connects him with the defendant: the defendant's gain is the plaintiff's loss. Conversely, if we say that the defendant accepted bribes to betray his trust, the wrong seems to be what connects the two parties. In *Reid*, there was no connection between the Crown and the money, except that the money had been earned by the wrong.[63] Lumping both types of cases under a single principle makes for a broad cause of action — a cause of action that tells us little by itself. We must have more information: are we dealing with unjust enrichment because of a wrong, because of a subtraction, or because of both? The corollary result of such a broad definition of unjust enrichment is that the principle is more amorphous. What "injustice" will give rise to a claim for unjust enrichment? The principle should be expressed more precisely to make it more determinate. Such "specialization"[64] in language is to be employed wherever possible. Here it is possible because, before the "unified" remedial constructive trust appeared, both breach of duty and unjust enrichment by subtraction were recognized as independent causes of action that gave rise to a constructive trust.

To ensure doctrinal clarity in unjust enrichment and the constructive trust, it is imperative that we confine the principle of unjust enrichment to cases of corresponding detriment. The principle is specific; it refers only to the analytically distinct case of enrichment by subtraction, as opposed to enrichment by wrongdoing. Litman rightly emphasizes the importance of assigning causes of action to the conceptually

---

[61] *Ibid.* at 380 [emphasis added]. Compare *Hunter*, *supra* note 48 at 471.

[62] See "The Constructive Trust in Evolution", *ibid.* at 378.

[63] See Birks, *supra* note 3 at 41.

[64] *Ibid.* at 42.

correct "legal pigeon-hole".[65] The same can be said for correctly assigning elements to particular causes of action. Conceptually distinct elements should be kept apart. The link between the parties in a subtraction case is conceptually distinct from the link between the parties in a breach of duty case. In the former case, the plaintiff suffers a detriment; in the latter, the link is the defendant's wrongdoing. The cases should therefore be considered differently, rather than being crammed into a broader definition of unjust enrichment. It is true that "[l]aw without theme or purpose cannot develop as quickly, clearly and coherently as law which has a raison d'être."[66] At the same time, imposing a theme ("unjust enrichment") on specific and separate rights is artificial; such a state of affairs is not conducive to the clarity and coherent development of legal doctrine.

Some might consider this to be a concern with form over substance. That is, if we know what remedy we want, whether we get it with a narrower or broader conception of unjust enrichment (and, accordingly, with or without a separate wrong-based constructive trust) seems to be neither here nor there. An argument about the breadth of a concept like unjust enrichment, however, is a concern with the substance of the law.[67] The breadth of a cause of action dictates who can recover. If we say that all constructive trusts are based on unjust enrichment, then recovery depends on how we define unjust enrichment. If the "injustice" of an action is what counts, then what counts as an injustice? While the clarity of the cause of action may be a question of form, reconsidering the breadth of the principle of unjust enrichment is surely a question of substance.

One possible response to the problem of having only one form of constructive trust is to remove the traditional cases from the doctrine of constructive trust. That is, if it is true that detriment by subtraction is a prerequisite for a constructive trust, and a particular cause of action demonstrates no detriment, then it follows that the constructive trust has no business addressing that cause of action. The constructive trust, however, should not be confined to unjust-enrichment-by-subtraction cases, thus ignoring the traditional breach-of-trust and fiduciary-duty cases. The fiduciary relationship has emerged as an important way of imposing a high degree of trust, loyalty, and honesty[68] on the fiduciary in appropriate cases. There must be disincentives to keep fiduciaries from breaching their duties. The imposition of a constructive trust ensures that the fiduciary cannot profit from his wrong:

> When a bribe [for example] is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property

---

[65] Litman, *supra* note 29 at 411.

[66] *Ibid.* at 413.

[67] See Oosterhoff & Gillese, *supra* note 6 at 372 ("Unjust enrichment is a concept of substantive law which imposes liability upon one person to make restitution to another" [referring to *Restatement of Restitution* §1 (1936)]).

[68] See Fridman, *supra* note 21 at 370-71.

> increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.[69]

More importantly, the imposition of the constructive trust protects the beneficiary from an insolvent fiduciary. If the fiduciary declares bankruptcy, the beneficiary should be able to get all of his property, or as much of it as possible, from the fiduciary before other creditors are satisfied.[70]

Our courts should not be loath to award a constructive trust in a breach-of-duty case with facts similar to *Reid*, for example. If the jurisprudence is followed faithfully, however, the courts have some very delicate manoeuvring ahead if they want to base a constructive trust on unjust enrichment where there is no detriment to one of the parties. They will have to acknowledge either that the *Pettkus* test is not the only test of unjust enrichment, and that unjust enrichment is somehow broader than is presently thought or, more likely, that something like a breach of duty amounts to a detriment within the meaning of *Pettkus*. The first option will reduce the specificity and clarity

---

[69] *Reid, supra* note 20 at 5, Lord Templeman. It is true that money restitution can be used to redress the breach of duty without the use of a constructive trust; the court could trace the value of the bribes into particular property and then order that that dollar value be paid out by the defendant. This would convert the defendant into a mere debtor to the plaintiff, as in *Lister, supra* note 23.

There are two problems with this approach. First, the equitable doctrine of tracing would seem to be available only where there is a trust present. Second, it may be convenient in the appropriate case to simply convey the property itself (instead of having the property liquidated and then the proceeds divided); this was the case in *LAC Minerals, supra* note 9, in which Corona wanted the gold mine and not a money payment from LAC. A constructive trust can obtain this result, but money restitution cannot.

This reasoning can also apply to unjust enrichment by subtraction. That is, we could just as easily say that the constructive trust is unavailable in unjust enrichment by subtraction cases because money restitution is available. I believe, for reasons already given, that such an approach is unsatisfactory.

[70] The *Bankruptcy Act*, R.S.C. 1985, c. B-3, s. 67(a) declares: "The property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person ..." It is by no means clear, however, that the constructive trust is a "trust" for the purposes of this section. In *British Columbia* v. *Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 59 D.L.R. (4th) 726 [hereinafter *Henfrey* cited to S.C.R.], the court was concerned with whether a statutorily-deemed trust was a trust for the purposes of this section (then s. 47(a) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3). The majority held that it was not a trust — that allowing the withdrawal from property of such a trust under a federal statute would be an infringement of the federal government's exclusive jurisdiction over bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. In the course of her judgment, McLachlin J. said that the provision in the *Bankruptcy Act* is "confined to trusts arising under general principles of law" (*Henfrey*, *ibid.* at 34). Before *Henfrey*, it was held that the remedial constructive trust did not count as a trust within the meaning of s. 67(a) (see *Bedard* v. *Schell*, [1987] 4 W.W.R. 699, 59 Sask. R. 71 (Sask. Q.B.)). Since *Henfrey*, one lower court judge has assumed, in *obiter dicta*, that the constructive trust *does* count as a trust for determining property of the bankrupt (see *Abraham* v. *Coopers & Lybrand Ltd.* (1993), 13 O.R. (3d) 649, 20 C.B.R. (3d) 257 (Gen. Div.), Wilson J.).

I conclude on this point that it is entirely possible that a constructive trust award *will* result in the withdrawal of the beneficiary's property from the defendant's pool of property when the defendant is a bankrupt.

of the principle by moving us to a higher level of generality. The second option will simply distort the principle outright, something which is to be avoided in all areas of the law.

A third option is to retain the substantive constructive trust. That is, we should recast the constructive-trust doctrine in Canada to recognize that this remedy can be *either* substantive or remedial or both in character. As a substantive institution, it can be applied where there is no detriment by subtraction. As a remedial device, it can continue to do the important work of remedying unjust enrichment in both the family- and commercial-law contexts. It is also possible, as the minority found in *LAC Minerals*, that the constructive trust can arise from both a breach of fiduciary duty and an unjust enrichment occurring together.[71]

Reintroducing the substantive constructive trust will preserve the integrity of the constructive-trust analysis in both the remedial and substantive cases. Instead of using an overly general or even distorted principle of unjust enrichment, we will be able to link more clearly the remedy with the cause of action. In cases without detriment to one party, the substantive constructive trust will match the facts with the juridical response: the constructive trust is associated with a breach of duty. As a corollary, limiting the remedial constructive trust to detriment by subtraction makes unjust enrichment more meaningful. That is, if we say that unjust enrichment is at issue, we do not have to ask whether we mean unjust enrichment by subtraction or unjust enrichment through breach of duty: we know immediately that the issue is enrichment, corresponding detriment, and lack of juristic reason.

Renewed use of the substantive trust should also allow for a clear path of expansion in the scope of the constructive trust. The categories of fiduciaries, for example, are never closed.[72] Where the circumstances warrant, the courts will find a fiduciary relationship. The substantive constructive trust, attached to breach of duty, has room to grow. I do not mean to endorse an expansion in the substantive-constructive-trust doctrine itself, such as having the constructive trust become available to redress fraud. My point is only that since the constructive trust is available when there is a breach of fiduciary duty, and since the categories of fiduciary duty are still open, the substantive constructive trust can potentially apply to new and different facts *so long as* those facts amount to breach of a fiduciary relationship. Such growth could be accommodated in an expanded remedial constructive trust but, again, only with the added cost of an increasingly distorted or non-specific notion of detriment. Re-adopting the substantive constructive trust can, by contrast, preserve the integrity of the analysis in all of the constructive-trust cases. Where there is a breach of some duty in a new relationship that amounts to a breach of fiduciary duty, the substantive constructive trust can focus on the link between the parties to the cause of action in a clear and logical

---

[71] Litman, *supra* note 29 at 417, puts it this way: "[T]hough not all cases in which improper profits are earned by fiduciaries can be viewed as giving rise to an unjust enrichment constructive trust, in some instances this is possible."

[72] See *Guerin* v. *R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321; Fridman, *supra* note 21 at 369; Case Comment on *LAC Minerals*, *supra* note 46 at 455-56.

fashion. Unjust enrichment simply would not apply; it is the wrong committed that would give rise to the remedy.

It is true that returning to the distinction between substantive and remedial constructive trusts means giving up the theoretical elegance of grouping constructive trusts under one "unifying theme".[73] Square pegs should not be knocked into round holes, however.[74] The issue is balance; we have to decide between two competing objectives. I submit that the law should favour clarity and logic over theoretical tidiness.

Conclusion

The Canadian constructive trust has been employed as an equitable response both to breaches of duty and, more recently, to unjust enrichment. The courts chose to unify the different causes of action giving rise to a constructive trust under the principle of unjust enrichment. If constructive-trust doctrine is to become both clear and logical, I believe that the theory of the unified constructive trust needs to be reconsidered. Canadian courts should now take the opportunity to step back and re-examine the constructive trust to sort out exactly which causes of action are being remedied in different cases. I believe that they will discover that the constructive trust can be imposed for conceptually different reasons, namely as a response to unjust enrichment by subtraction or as a remedy for breach of trust or fiduciary duty. This categorization of legal rights is achieved by returning to the distinction between substantive and remedial constructive trusts. Re-asserting this distinction will promote the clarity that is needed in the doctrine. Choices — about whether to continue on the present course or to start on a new one — will inevitably be made by the courts. If doctrinal certainty and logic are valued by the courts, then I believe that the argument for striking out on a new path in the area of constructive trusts is persuasive.

---

[73] Litman, *supra* note 29 at 416.

[74] Patrick Parkinson uses this metaphor to refer to problems in applying unjust enrichment to family-law cases (see P. Parkinson, "Beyond *Pettkus* v. *Becker*: Quantifying Relief for Unjust Enrichment" (1993) 43 U.T.L.J. 217 at 224).