THE FOUNDATIONS OF RESTITUTION: A CANADIAN PERSPECTIVE

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The evolution of what we now call restitution from contract is a familiar story.[1] For a long time it was thought that the source of restitutionary recovery was implied contract; the possibility of implying a relationship akin to contract between the parties. No longer is this true in Canada, although the ghost of implied contract stalks the English courts.[2] Despite the wise words of Lord Atkin in *United Australia Ltd v Barclay's Bank Ltd*,[3] the clanking fetters can still occasionally frighten even the most stalwart English judge and the consequence of this is reluctance on the part of English judges to recognise any general doctrine of restitution or unjust enrichment. This is not surprising since any judicial basis for such doctrine seems to be lacking in England. Evidence of this is found in the speech of Lord Diplock in *Orakpo v Manson Investments*.[4] When faced with the argument that the equitable doctrine of subrogation could have a wide application Lord Diplock refused to accept such an extravagant approach.

> [T]here is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law. There are some circumstances in which the remedy takes the form of 'subrogation', but this expression embraces more than a single con-

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1. RM Jackson *The History of Quasi-Contract In English Law* (Cambridge: University Press, 1936); Lord Goff & G Jones *The Law of Restitution* Third Ed (London: Sweet & Maxwell, 1986) 3-12; P B Birks & J G McLeod "The Implied Contract Theory of Quasi-Contract" (1986) 6 Ox J Leg St 46.
2. For an explanation of restitution that seems to reinstate implied contract in the United States see R A Long "A Theory of Hypothetical Contract" (1986) 94 Yale LJ 415.
3. [1941] AC 1, 29.
4. [1978] AC 95.

> cept in English law. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances.... This makes particularly perilous any attempt to rely on analogy to justify applying to one set of circumstances which would otherwise result in unjust enrichment a remedy of subrogation which has been held to be available for that purpose in another and different set of circumstances.[5]

What Lord Diplock was expressing was the view that, where restitution is concerned, the courts are bound by history. They are not free to interpret the policy and purpose of the law in an imaginative, constructive way; they can only apply what has gone before.

In *BP Exploration Co (Libya) Ltd v Hunt (No 2)*[6] and in *Barclay's Bank Ltd v Simms, Sons and Cooke (Southern) Ltd*[7] Lord Goff endeavoured to give effect to a wider perspective, as he did in *British Steel Corporation v Cleveland Bridge Engineering Co Ltd* where the situation teetered on the see-saw of contract and restitution.

> Both parties confidently expected a formal contract to eventuate. In these circumstances to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution.[8]

Canadian judges are more likely to appreciate, approve and adopt this language than their English counterparts. To them the *Cleveland Bridge* situation is typical of restitutionary recovery.

Several additional instances may be categorised in which restitutionary claims are allowed where no actual contractual relations exist between the parties but denial of recovery would result in an unjust enrichment of the defendant at the expense of the plaintiff. These disparate claims may be, and often are, herded together into the broad, expandable holdall of quantum meruit.[9] The pur-

5. Ibid, 104.
6. [1983] 2 AC 352.
7. [1980] QB 677.
8. [1984] 1 All ER 504, 511.
9. Goff & Jones supra n 1, 137-144, 375-379, 380-384, 478-480.

pose of the law is not to reward but to compensate the plaintiff for his loss or expenditure of money, time or effort on behalf of the defendant. For historical, procedural reasons such claims could conveniently be dealt with by invocation of the fundamentally contractual notion of quantum meruit, a useful phrase designed to cope with situations where parties had not actually agreed upon a sum to be paid to the party providing services.

True quantum meruit is contractual in nature and origin. What we may call "false" or "constructive" quantum meruit resembles the contractual variety but applies where no contract can be found according to the strict rules of contract law, or, if it can be found, is not recognisable or enforceable in law.[10] Nevertheless the link is sufficiently observable to justify consideration of such cases as kith and kin to a normal contract situation. What chiefly distinguishes them is the lack of some vital element such as consideration, agreement or writing. In place of such ingredients the courts have sought for some other mark of distinction the presence of which can support a false or constructive quantum meruit action. About this there is debate. Some commentators have considered that the mark of such an action is "incontrovertible benefit".[11] Some courts have looked for either an express or implied promise or else acquiescence, a version of estoppel.[12] Generally speaking, estoppel cannot be the basis of a contract. However there may be situations in which estoppel, either at common law or in equity, can lead to the conclusion that there is a contract between the parties that may be enforced. The decision of the High Court of Australia in *Walton Stores Ltd v Maher*[13] shows that this can be so, although the different reasons given by the various members of the court make it less certain when, and on what grounds such a conclusion can be made. Whatever

10. *Morrison-Knudsen Co v British Columbia Hydro & Power Authority (No 2)* (1978) 85 DLR (3d) 186.
11. P B Birks *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) 109-132; Goff & Jones supra n 1, 19-22, 144-149; G Jones "Claims Arising out of Anticipated Contracts which do not Materialize" (1980) 18 UW Ont L Rev 447.
12. *Nicholson v St Denis* (1976) 57 DLR (3d) 699.
13. (1988) 164 CLR 387. Contra in Canada: *Re Tudale Explorations Ltd v Bruce* (1978) 20 OR (2d) 593; *Lawson v Utan Enterprises Ltd* (1979) 10 BCLR 163, 173-176; B J Reiter "Courts, Consideration and Common Sense" (1977) 27 UTLJ 439; S M Waddams *The Law of Contracts* First Ed (Toronto: Canadian Law Book, 1977) 130-131.

be the situation with respect to contract, however, estoppel can be the basis of a quantum meruit action that is restitutionary, not contractual. Thus the two potential foundations of a restitutionary action are benefit and reliance, rather than agreement.

There is a familiar ring about this. It calls to mind the views of Professor Atiyah on the nature of contract in modern times; views which emphasise the tortious aspects of contract, or the extent to which the law of torts and the law of contract are similar and intertwining, rather than distinct and separate.[14] An important difference lies in the distinction between compensation and reward. The latter is more appropriate to situations where agreement is the foundation of liability. Compensation is more indicative of the function and purpose of the law where non-contractual, quantum meruit, restitutionary liability is imposed. In this respect restitution has more in common with tort than with contract. But it is not the same. Tort deals with restoring injured parties to the position they were in originally; restitution with giving back to the plaintiff the equivalent of what has been transferred to, or for the benefit of the defendant. Such differences justify retention of the division between contract, tort and restitution. If one bears in mind the rationale of restitution, namely the prevention of unjust enrichment, or its retrospective reversal, the connection with contract and the gulf between restitution and tort become clear. One aim of contractual remedies is to rectify an unjust enrichment of the defendant by the plaintiff. Prior to 1963 English writers on restitution did not bring out these factors.[15] Goff and Jones changed this.[16]

It is all too easy to coagulate contract and restitution. Many cases revolve around a contractual or former contractual relationship between the parties. Others concern relationships that closely resemble or approximate contractual relationships. What could be more natural than to appropriate the language and ideology of contract

14. P S Atiyah "Contracts, Promises and the Law of Obligations" (1978) 94 LQR 193; P S Atiyah *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) 764-778; B Reiter & J Swan, "Contract as the Protection of Reasonable Expectations" in Reiter & Swan (eds) *Studies in the Law of Contract* (Toronto: Butterworths, 1980) 467; B Reiter "Contracts Torts, Relations and Reliance" ibid 238.
15. Although writers on contract, for example G C Cheshire & C H S Fifoot, included a chapter on quasi-contract and still do.
16. Goff & Jones supra n 1, ch 8, 10, 11.

for use in another context? And when to this already seductive enticement there is added the restitutionary function of the law of contract and contractual remedies, it is hardly surprising that the modern law of restitution seems to rest easily and comfortably under the aegis of contract rather than anything else. Fact situations that ultimately are resolved by the application of the principles of restitution may not precisely fit the normal rules of contract; but they can be made to fit even though, in order to achieve this, those boundaries have to be stretched in outlandish ways. The ideology of contract seems to be so well suited to provide an explanation of many instances of restitutionary recovery. Contract is based upon personal relationships. It involves inter-personal conduct. Restitution, in much the same way, arises from relationships of that kind. It is the fact that one person has interacted with another, perhaps through mistake, compulsion, or anticipation of agreement, that may bring about an obligation recognisable by the law.

There is another aspect to this familial relationship between contract and restitution. According to classical notions contract stems from agreement, but an agreement is nothing unless it amounts to an agreement that is recognised by the law as sufficient to constitute a contract.[17] In the same way certain acts do not result in the obligation to make restitution unless and until the law interprets them as giving rise to such an obligation. The law of restitution provides that acts which may not produce contractual liability are not totally without legal effect. Their effect is different. In place of a liability to compensate for consequential, foreseeable loss, there is a liability to recompense, reimburse or make restitution. Indeed a mistaken payor not only can recover what he has paid to the payee, he can also obtain the interest which the payment actually, or notionally, made while it was in the payee's hand.[18] This is restitution in the extreme. It is approximating to damages for loss resulting from the situation which was brought about by the relationship between the parties. On this basis, in a claim for restitution, the plaintiff is being restored to the position he was in originally, as in cases

17. G H Treitel *The Law of Contract* Sixth Ed (London: Stevens, 1983) 1-6. Cp N MacCormick "Law as Institutional Fact" (1974) 90 LQR 102, 103-108.
18. *Zaidan Group Ltd v Corporation of City of London* (1987) 58 OR (2d) 667.

of breach of contract or tort. If that is so, then the alleged juridical difference between contract and restitution may not be all that great.

It may have become fashionable to regard traditional classification of legal concepts and principles as being outmoded and lacking in utility, but there is still merit and purpose in attempting to differentiate one basis of liability from another.[19] However that differentiation is not always plain. In England, regardless of developments elsewhere, the definition of the line between contract and restitution is neither sharp nor clear.

The attitude of the law is to be found in the language of the courts, not in the writings of commentators. Goff and Jones, for example, speaking of the growth of unjust enrichment, or the development of a general restitutionary right, state that "the cases provide good evidence that this growth is in fact taking place and will continue".[20] The cases they cite in support[21] are for the most part English decisions which involve settled but specific instances of recovery, for example, money paid under a mistake of fact, frustration or quantum meruit. They do not refer to decisions outside England, where, in fact, greater development and growth have occurred. They continue:

> In our view the case law is now sufficiently mature for the courts to recognise a generalised right of restitution. Indeed there are decisions, including those of the House of Lords,[22] which can best be explained on the simple ground that the court considered that the plaintiff should succeed because the defendant had been unjustly enriched.[23]

Perhaps such an explanation of those cases could be given. It is questionable, however, whether such was the explanation given by the court itself as a reason or justification for the decision in the cases. Such decisions savour more of an attempt to achieve a rough and ready justice than to conform to any principle previously

19. Birks supra n 11, 28-48.
20. Supra n 1, 15.
21. *Craven-Ellis v Canons Ltd* [1936] 2 KB 403; *Morgan v Ashcroft* [1938] 1 KB 49; *Fibrosa, Spolka Akcyja v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Larner v London City Council* [1949] 2 KB 682; *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; *Shamia v Joory* [1958] 1 QB 448; *Kiriri Cotton Co v Dewani* [1960] AC 192; *Greenwood v Bennett* [1973] 1 QB 195; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra n 6; *Barclay's Bank Ltd v W J Simms, Sons and Cooke (Southern) Ltd* supra n 7.
22. Namely, *Thurstan v Nottingham Permanent Benefit Building Society* [1903] AC 6; *Sinclair v Brougham* [1914] AC 398; and cases on "waiver of tort".
23. Supra n 1, 15.

acknowledged to exist, or pronounced by the court as the basis for a decision by a process of deduction from earlier cases. The case law is just as consistent with the view that the law of contract, tort, property, or equity can be extended so as to provide a remedy as with the view that they evidence and support a "generalised restitutionary right". Professor Birks aligns restitution with compensation and punishment.[24] To him restitution is not an event, a fact or composite set of facts giving rise to legal consequences. It denotes a response. Hence it differs from contract, tort and trust. The proper term to align with contract and tort is "unjust enrichment". These three are "causative events".[25] Professor Birks is trying to show that, in terms of legal categories (that is, bases of liability), the line is to be drawn between contract, tort and unjust enrichment, not between contract, tort and restitution. The problem is that both "restitution" and "unjust enrichment" are ambiguous. Admittedly restitution can mean, as Professor Birks indicates, the reaction of a court to an instance of unjust enrichment. I suggest, however, that by metonymy it has come to denote the cause of action as well as, if not instead of, what Professor Birks terms a response. Unjust enrichment can mean a causative event that triggers the response of restitution. Lord Diplock may have used the term "unjust enrichment" in that sense in the *Orakpo* case.[26] But Dickson J used it differently in *Rathwell v Rathwell* when he said:

> The constructive trust amounts to a third head of obligation, quite distinct from contract and tort, in which the Court subjects 'a person holding title to property...to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it'.[27]

In the subsequent case of *Pettkus v Becker*[28] the same judge said that the principle of unjust enrichment lies at the heart of the constructive trust. These remarks indicate that unjust enrichment is being employed to denote the underlying reason for invoking a particular doctrine of the law, in this instance, the constructive trust. The "alignment", to use Professor Birks' term, that is occurring here is between contract, tort and trust (namely constructive trust), not,

24. Birks supra n 11, 9-10.
25. Ibid, 26.
26. Supra n 4.
27. (1978) 83 DLR (3d) 289, 305.
28. (1981) 117 DLR (3d) 257, 273.

as Professor Birks suggests, between contract, tort and unjust enrichment.

Perhaps a more acceptable alignment would be as follows: agreement (as providing the basis for contract), wrongdoing (as underlying liability in tort) and unjust enrichment (as justifying restitution). This emphasises the grounding motives for considering a fact situation as coming within the ambit of a particular category of legal obligation. Restitution, in the sense of a category of legal obligation, not as the consequence of the enforcement of such obligation, is thus founded upon the idea or principle of unjust enrichment. This in turn emerges from the conferment on the defendant of a benefit to which there is no entitlement, making it therefore an unjust benefit, and the impoverishment of the plaintiff as a consequence of his action with respect to the defendant. "Wrongdoing" on the part of the defendant, in the tortious sense, is irrelevant. Benefit and its counterpart impoverishment are the key concepts. In this lies a possible distinction from cases of contract,[29] but such is not necessarily the case. Some contractual situations involve benefit to the defendant, for example, when goods are delivered to a defendant but not paid for by him. By way of contrast some restitutionary situations, although seemingly based on benefit, do not involve any true benefit conferred on the defendant. *Estok v Heguy*[30] is an illustration of this. The analysis and discussion of "benefit" for the purposes of the United Kingdom Law Reform (Frustrated Contracts) Act 1943 conducted by Goff J in the *BP Exploration* case[31] reveal how artificial a concept it is. It is as artificial as "contract" or "tort". Our notions of contract, tort or restitution are not naturalistic, they are constructs of the law, intended to serve certain ends or policies. There is no inherent reason for making any distinctions between contract, tort and restitution other than those

29. Compare the distinction drawn by the Ontario Court of Appeal in *Maghun v Richardson Securities of Canada Ltd* (1987) 58 OR (2d) 1, between breach of contract and breach of fiduciary duty on the part of a contractually appointed agent. This difference resulted in a distinction between damages for breach of contract (which would have included speculative profits) and damages for breach of fiduciary duty which only included actual loss suffered by the principal, the beneficiary of the duty.

30. (1963) 40 DLR (2d) 88, followed in *T & E Development Ltd v Hoornaert* (1977) 78 DLR (3d) 606, criticised by G Jones "Restitutionary Claims for Services Rendered" (1977) 93 LQR 273, 293-294.

31. Supra n 6.

which may be derived from history or convenience.

The major difference between contract and restitution is that in contract promises as yet unfulfilled may be the basis for liability; in restitution there can be no liability until something has actually gone from the plaintiff to, or for the benefit of, the defendant. Even in this respect the difference is not as great as appears at first blush. In an executory situation it could be said that the promisor has conferred some benefit upon the promisee, in that the latter can now, at least in theory, organise his affairs on the basis of the promise extracted from the promisor, that is, in reliance upon the latter's keeping faith. Moreover, in some instances of what is now comprehended within the scope of restitution, the plaintiff has not personally conferred any benefit directly or indirectly upon the plaintiff. This is the case where the defendant has used some knowledge or opportunity to make a profit for himself and is later required to disgorge that profit.[32]

There is a certain degree of affinity between some instances of liability founded on restitution or unjust enrichment and some instances of liability supposedly founded upon contract. There is a pull towards the pole of contract such that the alleged distinctions between contract and restitution may not always be sufficient to counteract the strength of that polar attraction. However in recent Canadian cases a different polar attraction is evident. These decisions suggest that there may be a different rationale for present and future instances of restitutionary recovery, namely the trust and in particular the doctrine of constructive trusts, the use of which, I suggest, puts the law of restitution in a different light.

There are some obvious examples of equitable influence on and infiltrations into the common law of quasi-contract. The use of subrogation to enable a party to a contract of loan, which is beyond power, to recover some, if not all, the money lent from the borrower, is one.[33] The House of Lords would not invoke this use of

32. Eg *Boardman v Phipps* [1967] 2 AC 46; *Canadian Aero-Services Ltd v O'Malley* (1974) 40 DLR (3d) 371.

33. *Re Cork & Youghal Railway* (1869) LR 4 Ch App 748; *Blackburn Benefit Building Society v Cunliffe Bankes & Co* (1882) 22 Ch D 61; *Baroness Wenlock v River Dee Co Ltd* (1887) 19 QBD 155; *Re Wrexham, Mold & Connah's Quay Railway Co* [1899] 1 Ch 440; *Re Cleadon Trust* [1939] Ch 286; Goff & Jones supra n 1 551-567; Birks supra n 11, 93-98.

subrogation in the *Orakpo* case.[34] The illegality of the transaction could not be outflanked by recourse to equitable principles that were employed in a different context where illegality was not involved. A Canadian judge, however, was perfectly willing to invoke subrogation by analogy where an agent entered into a contract on behalf of his principal when he lacked any kind of authority to do so.[35] The equitable doctrine was utilised so as to prevent injustice from occurring and a good faith lender of money precluded from getting back his money. In another instance[36] another Canadian judge was not even concerned with the niceties or technicalities of the beyond power doctrine and the use of equitable subrogation to permit recovery. She was willing to grant the plaintiff's action to recover money passed over under such a contract on the broad basis that even though the borrower's acts were void if they went beyond its statutory authority (as contained in the Ontario Credit Unions Act 1960), "the lender itself can sue, as a promise to repay will be imputed to the borrower who is unjustly enriched".[37] Instead of a contractual basis for recovery, not recognisable since the lender was incompetent to enter into such a contract, the loan was demandable and enforceable "if it is an account for money lent". This all sounds like contract (or quasi-contract, if the misuse of contract is deemed too blatant in these circumstances). But it also sounds suspiciously like an invocation of equitable principles akin to those which underlie the use of subrogation in the beyond power cases, that to disallow recovery would be to permit an unjust enrichment, which would be against equity and natural justice. The idea of treating the situation as one to which "account" would be applicable has overtones of property rights,[38] acceptance of which could well operate to oust the otherwise governing principle of beyond power contracts.

Another illustration of this tendency is the doctrine of tracing.[39]

34. Supra n 4.
35. *Hazelwood v West Coast Securities Ltd* (1974) 49 DLR (3d) 46; cp *Bannatyne v D & C MacIver* [1906] 1 KB 103; *Reversion Fund & Insurance Co Ltd v Maison Cosway Ltd* [1913] 1 KB 364; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246.
36. *Caledonia Community Credit Union Ltd v Haldimand Feed Mill Ltd* (1974) 45 DLR (3d) 676.
37. Ibid, 676, per Van Camp J.
38. Compare Goff & Jones supra n 1, 568.
39. Goff & Jones supra n 1, 63-77; Birks supra n 11, 358-375.

Whether tracing is permitted at common law or by equity the nature and function of the remedy is the same: to ensure that the plaintiff recovers the money which was his, but found its way into the hands of the defendant, without having to rely on the uncertainties of an action in personam and the risk of the defendant's bankrupty. Tracing may be employed with respect to recognise money or that into which the money has been turned, such as a house, as still belonging to the plaintiff, despite the acquisition of title to the money, or its product, by the defendant.[40] The vital difference between common law and equitable tracing is found in the situation when the claimant's property, or its product, are no longer identifiable. Hence the comparative disutility of common law tracing, the limitations of which have been overcome by the importation of a fiduciary relationship between the relevant parties so as to enable equity to achieve what the common law could not.[41] If such a relationship is necessary courts will be prepared to discover it lurking in the circumstances, or to invent it to serve the purpose. In *Goodbody v Bank of Montreal*[42] an Ontario High Court judge held that someone who acquired stolen share warrants knowing that they had been stolen, or otherwise obtained in a fraudulent manner, was in a fiduciary relationship with the original owners of the share warrants so that tracing could be invoked to provide them with a remedy. There may indeed be no limitation on the situations giving rise to such a relationship if the reason to find or create that relationship is to permit some form of restitution to a deprived owner as against the current possessor of money or property (as long as the latter cannot establish that in good faith, in ignorance of the truth, and for value, he came into such possession). In such instances there is no question of contract, whether real or imaginary. Courts are making use of the law of trusts to achieve a successful reparation. *Sinclair v Brougham*[43] and *Re Diplock*[44] are the progenitors of this ap-

40. *Simpson-Sears Ltd v Fraser* (1974) 54 DLR (3d) 225.
41. *Deeks-LaFarge Ltd v Milne* (1973) 38 DLR (3d) 448.
42. (1974) 47 DLR (3d) 335. Compare more recently *Lennox Industries (Canada) Ltd v The Queen* (1987) 34 DLR (4th) 297 where stolen money was considered subject to a constructive trust, the thief being the trustee.
43. Supra n 22.
44. [1948] Ch 465.

proach. But the courts do not seem too fussy over the niceties of those judgments. As long as the situation comes within the spirit of those decisions it may matter little that they are not strictly within their letter.

What appears to be at work here is the desire to give full rein to the concept of restitution, perhaps in the sense in which that term is used in Professor Birks' alignment, by calling into service whatever principles of law come most readily to hand and seem to fit the situation. In this respect Canadian courts are doing nothing but what was done by the House of Lords more than seventy years ago in *Sinclair v Brougham*. If authority is needed for such an approach it can be found, whether in the precise language of their Lordships or in the underlying judicial philosophy their speeches enshrine. Nor can the courts in Canada be criticised for this. They have been indoctrinated with the idea that restitution is equitable in nature, not entirely a matter of strict precedent, and the observance of common law doctrines such as quasi-contract or quantum meruit. If ever there were a paradigm instance of suum cuique tribuere this must be the one. "The categories of restitution are not closed", as one Canadian judge said.[45] If the situation does not precisely fit under one of the historically recognised circumstances where a quasi-contractual action would lie, that does not matter, as long as some form of property right can be asserted and given effect to by the use of equitable concepts such as the trust.

Perhaps the most far-reaching instance of such an approach is to be found in cases dealing with claims by women who have been cohabiting with a man, under a valid marriage, a marriage that turns out to be invalid or without any marriage at all, for a share in the wealth accumulated by the man in question over the years as a result of a woman's participation in the man's business affairs.[46] More than thirty years ago, in *Deglman v Guaranty Trust Co and Constantineau*[47] the Supreme Court of Canada recognised that there could be a quantum meruit claim where services were rendered under an unenforceable contract. Since then such claims have been

45. Morden J in *James More & Sons v University of Ottawa* (1974) 49 DLR (3d) 666, 676.
46. For a comparable English case see *Greasley v Cooke* [1980] 1 WLR 1306; *Re Basham* [1987] 1 All ER 405.
47. [1954] SCR 725.

upheld many times, as long as the relevant requirements were met. These consist of a promise or undertaking to reward the provider of the services, the actual provision of such services, and services not of a sexual nature but related to the conduct of the promisor's business or the maintenance of his house, farm or general well-being.[48] No such claim was argued, and would certainly not have been entertained by the English court, in *Re Gonin*,[49] while, in Canada it might well have been the basis for recovery. In such instances, as in others of a more commercial character,[50] Canadian courts have endeavoured to set out a doctrine that has many resemblances to the law of contract but is not contractual in nature for the simple reason that some essential ingredient of contract is absent. Other decisions have moved away from the analogy of contract and have put the woman's claim upon a more proprietary basis, by making use of the doctrine of constructive trust. Yet the rationale of such decisions is very much the same as those, such as the *Deglman* case,[51] in which quantum meruit has been the formal basis of an action. In all such instances the reason why the court intervenes and grants relief is because the plaintiff has conferred a benefit upon the defendant in circumstances in which it would be unjust to allow the latter to retain such benefit without compensating the plaintiff. It is not viewed as compensation or reward however. It is looked upon as making restitution for everything that the plaintiff has done, by an expenditure of effort if not of money, the consequence of which has been the enrichment of the defendant. Restitution is the aim, but compensation appears to be the result. Now if compensation is intended the appropriate form of remedy is by an action in contract. By hypothesis however, this is impossible; there

48. *Arding v Buckton* (1956) 6 DLR (2d) 586; *Re Reid* (1964) 46 DLR (2d) 32; *Thompson v Guaranty Trust of Canada* (1973) 39 DLR (3d) 478; *Ross v Ross* (1973) 33 DLR (2d) 351; *Re Spears* (1974) 52 DLR (3d) 146; *Hink v Lhenen* (1974) 52 DLR (3d) 301. Such instances are not confined to the situation where the provider of the services was a cohabiting woman; G H L Fridman & J G McLeod *Restitution* (Toronto: Carswell Co, 1982) 454-457.

49. [1979] Ch 16. This case is mentioned neither by Goff & Jones supra n 1 nor by Birks supra n 11, which absence seems to endorse the point I am making.

50. Eg *Reeve v Abraham* (1957) 22 WWR 429; *Norda Woodwork & Interiors Ltd v Scotia Centre Ltd* (1980) 109 DLR (3d) 736; *Ledoux v Inkman* [1976] 3 WWR 430; *Daniel v O'Leary* (1976) 14 NBR (2d) 564; *Republic Resources Ltd v Ballem* [1982] 1 WWR 692; *Davis v Liveley* (1980) 40 NSR (2d) 123.

51. Supra n 47.

is no contract, nor can one be discovered or constructed. These are not situations which the common law notion of quasi-contract accommodates. Instead of contract there is recourse to property; but property too is an inappropriate juridical category. The claimant owns nothing, and never did. It is hardly surprising therefore, that, given the climate of the times and the lead provided by such situations as those previously mentioned, at least some Canadian judges should look to the law of trusts for a means whereby to prevent what would otherwise be considered by them to be an unjust enrichment.

The first suggestion that something might be achieved by the law of restitution is to be found in the dissenting judgment of Laskin J in *Murdoch v Murdoch*.[52] In order to give Mrs Murdoch an undivided one-half interest in the property, cattle and other assets owned by Mr Murdoch, Laskin J resorted to the constructive trust, founded upon contributions made by the wife to the acquisition of the property in issue. "What has emerged from the recent cases as the law", he said citing English decisions,[53] "is that if contributions are established, they supply the basis for a beneficial interest without the necessity of proving in addition an agreement, and that the contributions may be indirect or take the form of physical labour".[54] Earlier he stated that a court with equitable jurisdiction was on solid ground in translating into money's worth a contribution of labour by one spouse to the acquisition of property taken in the name of the other, especially when such labour was not simply housekeeping, which might be said to be merely a reflection of the marriage bond.

> It is unnecessary in such a situation to invoke present-day thinking as to the co-equality of the spouses to support an apportionment in favour of the wife. It can be grounded on known principles whose adaptability has, in other situations, been certified by this Court.[55]

At this point Laskin J made specific reference to the *Deglman*

52. (1974) 41 DLR (3d) 367.
53. Namely, *Hazell v Hazell* [1972] 1 All ER 923; *Re Cummins* [1971] 3 All ER 782. Note also his reference earlier to *Hargrave v Newton* [1971] 3 All ER 866 and *Hussey v Palmer* [1972] 3 All ER 744 as instances of the constructive trust as the basis of the plaintiff's success.
54. Supra n 52, 389 per Laskin J.
55. Ibid, 385.

case.[56] This concerned a promise to give a house by will to the plaintiff in return for the plaintiff's provision of certain services to the deceased (whose will failed to leave the house to the plaintiff). Because of the Statute of Frauds the plaintiff had no claim to the house. Instead he was allowed a quantum meruit action founded upon the broad principle of restitution culled by the Supreme Court of Canada from the speech of Lord Wright in the *Fibrosa* case.[57] This assuredly was an epoch-making decision. It opened the way for restitutionary recovery in many situations. In all of them, however, the relationship between the parties was very much akin to that arising from a contract, although contract was an inappropriate frame of reference for the action for various different reasons, such as lack of writing, lack of consideration or failure to reach agreement. In *Murdoch*, Laskin J made use of this development in a totally novel and different way, and in an altogether different context. In place of an action in personam for money based upon the provision of services in consequence of a (non-contractual) promise to reward or compensate the plaintiff, Laskin J was prepared to create a trust, giving the wife a more solid entitlement to property legally owned by another, her husband. It is not surprising that, in 1973, this did not appeal to the majority of the Supreme Court of Canada.

Five years later, in 1978, in *Rathwell v Rathwell*[58] Laskin, now Chief Justice, attracted to his view not only Spence J, one of the participants in the majority *Murdoch* decision, but also Dickson J, who had become a member of the Court since *Murdoch*. Mrs Rathwell succeeded where Mrs Murdoch failed, but the court was not unanimous. Four judges would have denied her any share in the real and personal property owned by her husband on the separation of the spouses. Ritchie and Pigeon JJ, who formed part of the majority in her favour, acceded to her claim on the basis of the doctrine of the resulting trust (not the notion of restitution). Laskin CJ, Spence and Dickson JJ dealt with the situation by invoking constructive trust, that is, restitution. In Dickson J's words:

56. Supra n 47.
57. Supra n 21, 61-67.
58. Supra n 27.

> As a matter of principle, the Court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as contract or disposition of law — for the enrichment.[59]

This judgment, which must be considered in light of the fact that six of the nine members of the court did not favour it, endorses and elaborates the original view of Laskin J in *Murdoch*. It reveals the attitude that labour must always be compensated or rewarded if that labour confers a benefit on another in the absence of some valid legal reason for denying such recovery. Such would be the case, as Dickson J points out, in reference to the decision in *Peter Kiewit Sons v Eakins Construction Ltd*,[60] if the parties have agreed that the one holding legal title is to take beneficially. In that case the plaintiffs' claim for extra remuneration for work done on a contract previously agreed between the parties failed. There was no contractual basis for such claim since the original contract was not frustrated by the discovery that it would entail more work than the plaintiff had envisaged and nor was there any consideration for any promise to pay more. Nor was there a restitutionary basis for a claim since it could not be proved that the plaintiffs had performed the extra work under some form of compulsion or duress that might entitle a court to invoke restitutionary principles founded upon the cases in which money extracted by duress or compulsion could be recovered. Instead the majority of the Supreme Court held that it was part of the original contract that the plaintiffs would complete the agreed task, whatever the additional work or cost involved, for the originally agreed upon price. Hence this labour was not the sort that Dickson J had in mind in his judgment in the *Rathwell* case.

That decision and *Murdoch* concerned the claims of married women to the property of their husbands. In *Pettkus v Becker*[61] the Supreme Court was faced with a claim by a woman not married to the man in question. She had cohabited with him for many years and helped build up his business as a keeper of bees and producer

59. Ibid, 306.
60. [1960] SCR 361.
61. Supra n 28.

of honey, a business that over the years had expanded and profited. Miss Becker succeeded. Again several members of the court decided in her favour on the basis of resulting trust. However six judges now concurred in the view that the doctrine of constructive trust could be applied. Dickson J was not only joined by Laskin CJ, as might have been expected, but carried with him four judges who had not been on the court when *Murdoch* and *Rathwell* were decided. In this case the connection between the plaintiff's claim and the law of restitution was made even more blatant, if that were possible, than in the earlier ones. Dickson J made quite plain the nature of the court's jurisdiction and the rationale for using the constructive trust as a method of permitting restitution:

> 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....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....
>
> ...[T]here are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach...is supported by general principles of equity that have been fashioned by the Courts for centuries....
>
> The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another....It is not enough for the Court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evidence that the redemption of the benefit would be 'unjust' in the circumstances of the case.[62]

Dickson J had little difficulty in proving the injustice that would follow were restitution not permitted on the facts of this case.

Finally in *Sorochan v Sorochan*,[63] in 1986, the entire Supreme Court, under the Chief Justiceship of Dickson, applied this to another instance of a man and woman cohabiting without entering into a marriage. As a result the woman was held entitled to an interest in one of the quarter sections of a farm, title to which was in the man. Again Dickson CJ applied the three requirements first mentioned in *Rathwell* and repeated in *Pettkus v Becker*. In this

62. Ibid, 273-274.
63. (1986) 29 DLR (4th) 1.

case, however, the Chief Justice said that the constructive trust constituted one important judicial means of remedying unjust enrichment, and referred to other remedies, such as monetary damages, as being available to rectify such situations.[64] The issue was when was the constructive trust an appropriate remedy. After discussing the question of causal connection between the deprivation and the acquisition of the property in question, Dickson CJ referred to "the need to retain flexibility in applying the constructive trust". In his view:

> ...[T]he constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of the property may also suffice. What remains primary is whether or not the services rendered have a 'clear proprietary relationship'....When such a connection is present proprietary relief may be appropriate. Such an approach will help to ensure equitable and fair relief in the myriad of familial circumstances and situations where unjust enrichment occurs.[65]

In *Sorochan*, therefore, the view of Laskin J in *Murdoch* finally triumphed. Moreover it has come to be applicable not only to cases where the labour has helped to acquire the property in issue but where such labour has only served to enable the legal owner to keep the property and make it better and more valuable. One might have thought that at least in such cases the kind of remedy available to the plaintiff in the *Deglman* case[66] was more suitable and logical. The language of Dickson CJ in the *Sorochan* case indicates that the scope of the law of trusts, that is, of proprietary remedies, is now much wider than ever before, either in England or Canada. To put this another way, a right to restitutionary recovery or relief which started life as an action akin to an action for breach of contract has become, at least in some circumstances, an action providing for an in rem remedy.[67]

64. Ibid, 7.
65. Ibid, 10.
66. Supra n 47.
67. It has now been used in cases under the Ontario Family Law Act 1986 to give a spouse a claim to the value of a professional qualification or license to practise; *Caratun v Caratun* (1987) 43 DLR (4th) 398. Compare also the application of the doctrine of constructive trust under that Act in *Rawluk v Rawluk* (1986) 55 OR (2d) 704, affirmed (1988) 61 OR (2d) 637.

Although no mention is made of fiduciary relationships in the cases just discussed, the courts appear to be treating the spouses or cohabiting parties as though they were in the position of fiduciary and beneficiary.[68] In the same way courts in Canada, following the example and lead of courts in England,[69] have considered that those who use their position to make a profit or benefit for themselves when the opportunity to do so belonged to another are in the situation of fiduciaries.[70] All they acquire in consequence of their abuse of their position must be disgorged, in whole or in part depending upon the view taken of the good faith and honesty of the fiduciary. This may not be trust stricto sensu: it is uncommonly close to it. Decisions about the use of confidential information,[71] admittedly also not dealt with by the application of trust principles, nevertheless have a trust flavour about them. At any rate, when restitution is required in such cases it is not on any basis of contract, whether actual, constructive, imputed, implied or otherwise. Restitution is ordered, if at all, on the ground that the situation calls for denial of the unjust enrichment of the confidante at the expense of the party transmitting the confidential information. It is as though equity regarded the information as the property of the latter. Its unauthorised, not contracted-for use by the confidante leads to an award of damages, since proprietary remedies are inappropriate, though the basis of such an award is the proprietary or quasi-proprietary rights of the one who entrusts the confidante with the confidential information.[72]

There might be some symmetry about the attitude of the law if it were possible to differentiate cases where the relationship was not one approximating to a trust in which an award of money, in the form of an action in personam, was the consequence, from those where the relationship was a trust or akin to a trust, wherein a

68. Compare the attitude of the Ontario Court of Appeal towards principal and agent in *Maghun v Richardson Securities of Canada Ltd* supra n 29.
69. *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Reading v R* [1951] AC 507; *Boardman v Phipps* supra n 32.
70. *Canadian Aero-Services Ltd v O'Malley* supra n 33; *Abbey Glen Property Co v Stumberg* (1978) 85 DLR (3d) 35.
71. Goff & Jones supra n 1, ch 35.
72. But the Ontario Court of Appeal did award a proprietary remedy in such an instance in *International Corona Resources Ltd v Lac Minerals Ltd* (1988) 44 DLR (4th) 592.

remedy in rem would follow. This is not the position. Courts in Canada have moved from the original position in *Deglman* to that adopted in *Sorochan*. In contrast, where abuse of a confidential position, or an office of trust is involved, the appropriate remedy is an award of money not, as Dickson CJ appears to suggest in *Sorochan*, as damages, but by way of restitution of a benefit obtained at the other party's expense. It is not a remedy in rem. The distinction between common law quasi-contract and "the equity of restitution" is becoming blurred.[73]

Nothing conclusive and final may be said to have occurred as yet. In England the dominant view remains that there are situations where, at common law, recovery is allowed despite the absence of a contract, the commission of a tort, or the lack of any legal property in what is claimed. Some of those situations closely resemble circumstances in which an onlooker would tend to feel instinctively that there ought to be a valid, enforceable contract between the parties allowing for relief on the part of the aggrieved plaintiff. Others involve equitable property claims that call for proof of some kind of trust, in a strict or extended sense, existing between the parties. The line between these two categories is perhaps not as distinct or clear as it may have been in former times. It is too soon, however, to suggest that in England there may come about a gradual takeover of the domain of restitution by some general equitable theory that enables a court to invoke something akin to proprietary or trust principles to the resolution of a disputed claim. In Canada, however, the equitable nature of restitution has become more prominent and pronounced, such that, although much of the law of restitution is common law in origin, in the strict sense of that expression, the modern law of restitution is becoming more and more capable of being looked upon as an adjunct of equity, and in particular the law of trusts, than as an offshoot of the law of contract. This may be a distortion of history; but it could be justified on grounds of necessity, if not by the inner logic of the law.

Restitution, whichever alignment be appropriate, seems more

73. Compare the granting of the remedy of tracing in cases of mistaken payments of money; *Chase Manhatten Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105; Birks supra n 11, 377-379, 383-384; Goff & Jones supra n 1, 114-116.

rooted in the idea of conscience than in the notion of agreement. Just as trusts emanated from the operative principle that a person could not be permitted to act unconscionably, whatever the strict position under the common law, so the law of restitution appears, in Canada, if not England, to be founded upon the view that to retain a benefit unjustly obtained is unconscionable and should not be allowed. Against that background it is not a matter for surprise to find that courts are taking the stance that it is in equitable principles, closely allied to those which underlie and justify the application of the law of trusts as it has been extended over the centuries, that the courts will discover not only the remedies that are available to a person who rightly claims restitution but also the basic principles upon which a claim may be founded.