Moore v. Sweet : Unjust Enrichment and Constructive Trusts

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I. Introduction[1]

The equitable principle that no one should profit from their own wrongful act is intuitive, and likely as well understood by laypeople as by jurists. The related equitable doctrine of unjust enrichment is similarly intuitive: it enables one person to lay claim to property in another's possession where there is no valid reason for that person to retain the property. The doctrine of unjust enrichment has specific application in estates litigation.

The Supreme Court of Canada's recent decision in *Moore v. Sweet*[2] provides meaningful clarification on the Canadian law of unjust enrichment and the equitable concept of constructive trusts. This paper will provide a general overview of the doctrine of unjust enrichment and constructive trusts and summarize the foundational cases leading up to the *Moore* decision. It will then briefly set out the Court's analysis in *Moore* and identify areas that require additional development, hopefully forming the basis for a practical discussion to follow.

II. Legal Concepts

A. The Doctrine of Unjust Enrichment

1) Unjust Enrichment as a Cause of Action

Unjust enrichment is a cause of action in which the plaintiff seeks a monetary or proprietary award on the basis that the defendant has been enriched at the plaintiff's expense, without a juristic reason.[3]

Since the doctrine of unjust enrichment was first introduced in Canada by Cartwright J. in *Deglman v. Guaranty Trust Co. of Canada*,[4] the Supreme Court of Canada has led the development of "a distinctly Canadian jurisprudence"[5] in this area of law. The Canadian doctrine of unjust enrichment has developed not only to permit plaintiffs to recover benefits conferred under, for example, "mistakes of fact or law; under compulsion; out of necessity; as a

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[1] This paper was written by Justin de Vries and Christina Papadopoulos (student-at-law) and edited by Gillian Fournie all of de VRIES LITIGATION LLP.

[2] *Moore v. Sweet*, 2018 SCC 52, 2018 CarswellOnt 19478 (S.C.C.) ("*Moore*").

[3] Brian A. Schnurr, *Estate Litigation* (2d ed.), looseleaf, vol. 2 (Toronto: Thomson Reuters, 2017) at 25-2.

[4] *Deglman v. Guaranty Trust Co. of Canada*, 1954 CarswellOnt 140, [1954] S.C.R. 725 at p. 734.

[5] Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, looseleaf, vol. 1 (Toronto: Canada Law Book, 2011) at 2-19.

result of ineffective transactions; or at the defendant's request,"[6] but also whenever the following three elements can be established:

1. An enrichment of, or benefit to, the defendant;

2. A corresponding deprivation or expense of the plaintiff; and

3. The absence of a juristic reason for the enrichment.[7]

2) Development of the Doctrine of Unjust Enrichment

The three elements underpinning the doctrine of unjust enrichment were first introduced in the Supreme Court of Canada's decision *Rathwell v. Rathwell*.[8] In this case, a wife claimed to be beneficially entitled to an interest in property held in her husband's name based on her financial contributions during their marriage. The wife's claim was successful and the decision was appealed to the Supreme Court. In his reasons dismissing the appeal, Dickson J. (as he then was) held:

> 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 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 a contract or disposition of law — for the enrichment.[9]

At the time, Dickson J. did not command a clear majority in *Rathwell* on this issue. While Ritchie and Pigeon JJ. generally concurred with Dickson J.'s conclusion, they limited their analysis to the application of the doctrine of resulting trust and did not find that "any determination as to the application of constructive trusts or unjust enrichment (was) necessary."[10] Martland J. went further by dissenting in part, finding that he did "not accept the application, in cases of this kind, of a doctrine of constructive trust as a means of preventing unjust enrichment."[11]

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[6] *Kerr v. Baranow*, 2011 SCC 10, 2011 CarswellBC 240 ("*Kerr*") at para. 31.

[7] *Becker v. Pettkus,* 1980 CarswellOnt 299, [1980] 2 S.C.R. 834 ("*Pettkus*") at 848 and *Kerr, supra* note 6 at para. 32.

[8] *Rathwell v. Rathwell*, 1978 CarswellSask 129, [1978] 2 S.C.R. 436 ("*Rathwell*").

[9] *Ibid.* at 455.

[10] *Ibid.* at 475.

[11] *Ibid.* at 471.

The applications of the doctrine of unjust enrichment were expanded in *Becker v. Pettkus.*[12] In this case, the Supreme Court used the doctrine of unjust enrichment to compensate a common law spouse for efforts in the acquisition, maintenance, or preservation of an asset owned by the other spouse. Dickson J. held:

> ... there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and an absence of any juristic reason for the enrichment. This approach, its seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies ... Where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property, and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known about the reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[13]

Thus, in *Pettkus*, Dickson J. reformulated the principle of unjust enrichment into a tri-partite analysis; if all three elements are met, the defendant has been unjustly enriched and (subject to any defences raised by the defendant) the plaintiff is entitled to restitutionary relief.

In *Peter v. Beblow,*[14] the Supreme Court elaborated on the "absence of juristic reason" branch of the three-part test set out in *Pettkus*. In this case, a common law wife claimed to be beneficially entitled to an interest in the couple's home held in her husband's name (or, in the alternative, to monetary damages). The common law wife based her claim on the contributions she made in raising the children and maintaining the house during their 12 year relationship. McLachlin J. (as she then was), writing for the majority, held that the "juristic reason" test is flexible and that "the factors to be considered may vary with the situation before the court."[15] However, McLachlin J. held that in every case "the fundamental concern is the legitimate expectations of the parties."[16]

In *Kerr v. Baranow*,[17] the Supreme Court expanded on the existing law of unjust enrichment. Cromwell J. (writing for a unanimous court) held that the court generally takes a straightforward

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[12] *Pettkus*, *supra* note 7.

[13] *Ibid.* at 848-849.

[14] *Peter v. Beblow*, 1993 CarswellBC 1258, [1993] 1 S.C.R. 980 [*Peter*].

[15] *Peter, supra* note 14 at para. 9.

[16] *Ibid.* at para. 10.

[17] *Kerr, supra* note 6.

economic approach to the first two branches of the *Pettkus* framework.[18] With regards to the last branch of the test, "absence of juristic reason," Cromwell J. held it to mean "that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case."[19]

Cromwell J. then discussed the areas of the law he felt were in need of clarification. He held that a mutual conferral of benefits should:

> ... mainly be considered at the defence and remedy stages, but ... they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment ...[20]

With respect to the role of the parties' reasonable or legitimate expectations, Cromwell J. noted that this had a "critical" role to play at the second step of the juristic reason analysis, i.e. where the defendant seeks to establish a new case-specific or categorical juristic reason in support of the enrichment.[21] In this regard, he stressed that the expectations of *both* parties must be considered, and that the primary question for the court to address is whether the defendant's retention of the benefit in question is just.[22]

B. The Constructive Trust : Substantive Institution and Remedial Device

1) What is a Constructive Trust?

A constructive trust is a relationship created and imposed by operation of law, without regard to the parties' intent.[23]

Originally, Canadian courts framed the constructive trust as an institution, like the express trust, to be imposed upon parties who benefited from certain equitable wrongdoing and, in particular, breach of fiduciary duty.[24] However, in a series of Supreme Court decisions,[25] the application of

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[18] *Ibid.* at paras. 36-39.

[19] *Ibid.* at para. 40.

[20] *Ibid.* at para. 104.

[21] *Ibid.* at para. 122.

[22] *Ibid.* at para. 124.

[23] Eileen E. Gillese, *The Law of Trusts* (3rd ed.), (Toronto: Irwin Law, 2014) chapter 7 at 123.

[24] *Syncrude Canada Ltd. v. Hunter Engineering Co.,* 1989 CarswellBC 37, [1989] 1 S.C.R. 426 ("*Syncrude*"); *Soulos v. Korkontzilas,* 1997 CarswellOnt 1489, [1997] 2 S.C.R. 217 ("*Soulos*").

constructive trusts was expanded such that the constructive trust could be imposed as a general restitutionary proprietary remedy in most situations to prevent one party's unjust enrichment at the expense of another.[26] In this series of cases, whatever was wrongfully gained was treated as "trust" property, with the unjustly enriched party acting as "trustee" and the prejudiced party acting as "beneficiary."[27]

In determining whether to impose a remedial constructive trust on grounds of unjust enrichment, the courts follow a two-stage inquiry.[28] First, the court must find that an unjust enrichment has occurred. Second, the court must consider whether it is appropriate to remedy the unjust enrichment through the imposition of a constructive trust rather than through a personal remedy.

Some of the factors to be taken into account in considering whether to award a monetary amount rather than a constructive trust are: the relative value of the claim to the value of the property; whether the defendant can satisfy a monetary award without resorting to a sale of the property; whether the plaintiff has any special attachment to the property; and whether any hardship would result to the defendant by granting a proprietary interest in the property to the plaintiff.[29]

2) Development of Remedy of Constructive Trust

Pettkus represented a paradigm shift away from the court's previous view of the "common intention resulting trust" to a more flexible approach which coupled unjust enrichment with the remedy of constructive trusts.[30] Dickson J. (as he then was), writing for the majority in that decision, held: "the principle of unjust enrichment lies at the heart of the constructive trust."[31] From then on, the coupling of the doctrine of unjust enrichment and the remedial constructive

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[25] *Rathwell, supra* note 8; *Pettkus, supra* note 7; *Sorochan v. Sorochan,* 1986 CarswellAlta 143, [1986] 2 S.C.R. 38 ("*Sorochan*"); *Syncrude, supra* note 24; *Lac Minerals Ltd. v. International Corona Resources Ltd.,* 1989 CarswellOnt 126, [1989] 2 S.C.R. 574 ("*Lac Minerals*"); *Rawluk v. Rawluk,* 1990 CarswellOnt 217, [1990] 1 S.C.R. 70; *Peter, supra* note 14.

[26] *Pettkus, supra* note 7.

[27] *PIPSC v. Canada (Attorney General),* 2012 CarswellOnt 15718, 2012 SCC 71 ("*PIPSC*"); Donovan W.M. Waters, *Waters Law of Trusts in Canada* (4th ed.), (Toronto: Carswell, 2012) chapter 11.

[28] *Sorochan, supra* note 25; *Syncrude, supra* note 24; *Lac Minerals, supra* note 25; *Soulos, supra* note 24.

[29] *Lavigne v. Templeton* 2000 CarswellMan 485, 2000 MBQB 148.

[30] *Kerr, supra* note 6 at para. 23.

[31] *Pettkus*, *supra* note 7 at para. 39.

trust became broadly accepted and this new flexible approach became the appropriate lens through which to view property and financial disputes in domestic situations.

In *Lac Minerals Ltd. v. International Corona Resources Ltd.,*[32] the Supreme Court added clarity to the principles established in *Pettkus*. In this case, the Court held that although the principle of unjust enrichment lies at the heart of the constructive trust, the constructive trust *does not* lie at the heart of the law of restitution.[33] Thus, a valid restitutionary claim, such as a claim of unjust enrichment, must first be established. Only then can a court award either a proprietary remedy like a constructive trust or a personal remedy such as a monetary award.[34]

Building upon the previous cases, *Peter v. Beblow*[35] elaborated on the conditions which make a constructive trust the appropriate remedy once unjust enrichment has been established. If there is a causal connection between the deprivation suffered and the property at issue, and monetary compensation would be inadequate, then the court will impose a remedial constructive trust upon the property. Otherwise, the remedy will be an award of monetary compensation. McLachlin J. (as she then was) held:

> Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact that the claimant's effort have given her a special link to the property in which case a constructive trust arises ... I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed.[36]

In *Soulos v. Korkontzilas*,[37] the Supreme Court further considered situations that may give rise to a constructive trust remedy. In referring to the categories in which a constructive trust may be appropriate, McLachlin J. (as she then was) held as follows:

> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation ... Within these two broad categories, there is room for the law of

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[32] *Lac Minerals, supra* note 25.

[33] *Ibid.* at para. 72.

[34] *Ibid.* at paras. 71- 72.

[35] *Peter, supra* note 14.

[36] *Peter, supra* note 14 at 650.

[37] *Soulos, supra* note 24.

> constructive trust to develop and for greater precision to be attained, as time and experience may dictate.[38]

The Supreme Court then imposed a four-part test for granting a constructive trust, founded on the umbrella concept of "good conscience":

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.[39]

These four factors supplement but do not replace the requirements established by *Peter*, *Lac Minerals*, and *Pettkus*. Accordingly, a plaintiff must also demonstrate:

1. That a personal remedy would be inadequate; and

2. That the plaintiff's contribution is linked or causally connected to the property over which a constructive trust is claimed.[40]

When a court determines that a remedial constructive trust is an appropriate remedy, it will be imposed proportionate to the extent of the plaintiff's contribution to the acquisition, preservation, maintenance or improvement of the property.[41]

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[38] *Ibid.* at para. 43.

[39] *Ibid.* at para. 45.

[40] *Moore, supra* note 2 at para. 91.

[41] *Ibid.*

III. The Supreme Court Decision in *Moore v. Sweet*

Facts:

During the marriage of Lawrence Moore (the deceased) and his ex-wife, Michelle, the deceased purchased a term life insurance policy with a coverage amount of $250,000. Michelle was designated as the revocable beneficiary. After the couple separated, they entered into an oral agreement whereby Michelle agreed to pay all of the policy premiums and, in exchange, the deceased would maintain Michelle as the designated beneficiary.

Michelle continued paying the premiums on the insurance policy. However, unbeknownst to Michelle, Lawrence changed the beneficiary designation to his new common-law wife, Risa Sweet. In addition, the deceased made the new designation irrevocable.

The deceased passed away on June 20, 2013. His estate had no significant assets.

The insurance proceeds were paid to Risa according to the new beneficiary designation. Michelle, who had paid approximately $7,000 in policy premiums since separation, commenced an application regarding her entitlement to the $250,000 policy proceeds.

Procedural History:

The application judge, Wilton-Siegel J. of the Ontario Superior Court of Justice, ruled that if Risa were to receive the proceeds of the policy, she would be unjustly enriched at Michelle's expense. Based on this finding of unjust enrichment, Wilton-Siegel J. impressed the proceeds with a constructive trust in Michelle's favour.

The Court of Appeal allowed Risa's appeal and set aside the judgment of the application judge. The Court ordered that Michelle be reimbursed the premiums she had paid (approximately $7,000) and allowed Risa to keep the balance of the policy. Michelle appealed.

Issue:

Côté J. enumerated the issues on appeal as follows:

I. Has Michelle made out a claim of unjust enrichment by establishing:

   a. Risa's enrichment and her own corresponding deprivation; and

   b. the absence of any juristic reason for Risa's enrichment at Michelle's expense?

II. If so, is a constructive trust the appropriate remedy?

Decision:

The majority at the Supreme Court ruled in favour of Michelle and awarded her the insurance money pursuant to a constructive trust.

Reasons:

1) The Oral Contract Supports Unjust Enrichment

In upholding Michelle's agreement with the deceased, the Supreme Court referred to both principles of equity and the common law of contracts. Writing for the majority, Côté J. held that, in this case, there was a contract between the Michelle and the deceased that she would receive the proceeds of the insurance policy in exchange for paying the premiums:

> At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.[42]
>
> To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the *full* value of the insurance payout …[43]

Relying on the contract, the majority held that Michelle would suffer a deprivation and that Risa would obtain a corresponding, unjustified, enrichment.

2) The Beneficiary Designation Under the Insurance Act

Since the deceased was the owner of the insurance policy, the *Insurance Act*[44] explicitly allows him to designate Risa as the beneficiary. However, the majority of the Court held that, having ceded his right to appoint a beneficiary by contract, equity prevented him from being considered an owner who has the right to designate a new beneficiary. Since the *Insurance Act* did not contemplate this possibility, its provisions regarding beneficiary designations did not constitute a juristic reason to give the proceeds to Risa:

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[42] *Moore, supra* note 2 at para 46.

[43] *Ibid.* at para 47.

[44] *Insurance Act*, RSO 1990, c. I.8.

> … no part of the *Insurance Act* operates with the necessary "irresistible clearness" to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary.[45]

IV. Redefining the Doctrine of Unjust Enrichment in Estates Litigation

The Supreme Court's decision in *Moore* re-examines the principle of unjust enrichment in estates litigation, more specifically in the context of entitlement to life insurance proceeds. As disputes about separation agreements and insurance proceeds are common, this decision will have wide-ranging impact in estate disputes.

In *Richardson Estate v. Mew*,[46] the deceased entered into a separation agreement with his first wife. The contract provided that he would maintain an insurance policy of $100,000 on his life, with his wife named as beneficiary for the first year (to the end of his child care obligations). The deceased remarried and told his second wife that he would designate her as the beneficiary at the end of his commitment under the separation agreement. However, the deceased failed to change the beneficiary designation after his obligation to name his first wife came to an end.

After the deceased was diagnosed with Alzheimer disease, his second wife paid the premiums on the policy to keep it in good standing. Upon his death, the second wife claimed that the proceeds should be paid to her, and not the first wife, on the basis of unjust enrichment.

The Ontario Court of Appeal held that while the first wife may have been *enriched*, there was no corresponding *deprivation* to the second wife. Moreover, the Court held that there was a juristic reason that allowed the first wife to retain the enrichment – the contract of insurance.[47] In this case, the second wife might have a theoretical claim against the deceased's estate for the premiums that she paid; 'theoretical' because she inherited the estate.

The Court then looked at the separation agreement and found that, while it contained a standard clause renouncing all claims against the other's estate, it was well recognized that insurance contracts are unaffected where the policy continues to designate the former spouse as beneficiary upon death. Accordingly, the Court held that the designation in a life insurance

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[45] *Moore, supra* note 2 at para 70.

[46] *Richardson Estate v. Mew,* 2009 CarswellOnt 2576, 2009 ONCA 403 ("*Richardson Estate*").

[47] *Ibid.* at para. 61.

policy is “normally unassailable” and that the change of marital status did not change the validity of the designation.[48]

In reaching its decision, the court in *Moore* distinguished *Richardson Estate* on the following grounds: (i) in *Richardson Estate,* the deceased lacked any contractual obligation to his second spouse to change the beneficiary designation on the life insurance policy; (ii) there was no impediment to the deceased in *Richardson Estate* to designate a new beneficiary, such as the oral agreement that existed in *Moore*; and (iii) the first wife in *Moore* made much more robust contributions to the life insurance policy by way of premiums than her counterpart in *Richardson Estate*.

Nevertheless, the Supreme Court in *Moore* takes a more expansive view of *deprivation* than the courts had in the past and lays waste to the notion that beneficiary designations, even irrevocable ones, are “unassailable.” In *Moore*, it was not merely that the first wife made payments on the policy (which was also the case in *Richardson Estate*), there was an oral agreement between her and the deceased that she would receive the proceeds after his death. It was on this point that the Court held that the entitlement to a remedy arose. As Côté J. held for the majority: “[a]t the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.”[49]

In reaching its decision in *Moore,* the Court found that the designation of the second wife as irrevocable beneficiary under ss. 190(1) and 191(1) of *Insurance Act* did not supersede the first wife’s contractual right to receive the proceeds of the policy. Côté J. held:

> Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. As this Court explained in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.), at p. 90, the “legislature is presumed not to depart from prevailing law ‘without expressing its intentions to do so with irresistible clearness’” … while the *Insurance Act* provides the mechanism by which beneficiaries can be designated and therefore become statutorily entitled to receive policy proceeds, no part of the *Insurance Act* operates with the necessary “irresistible clearness” to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary.[50]

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[48] *Ibid.* at para. 55.

[49] *Moore, supra* note 2 at para 46.

[50] *Ibid.* at para 70.

Thus, after *Moore*, courts may no longer consider irrevocable beneficiary designations under the *Insurance Act* as a "juristic reason" for the enrichment. This finding directly impacts how *Richardson Estate*, and similar cases dealing with insurance proceeds and unjust enrichment, should now be viewed.

V. The Pass on "Good Conscience" Constructive Trust

Since *Soulos,* academics have debated whether under the umbrella principle of "good conscience" constructive trust is limited to the two categories of wrongful conduct and unjust enrichment, or whether those two categories are but two examples of the types of situations where a remedial constructive trust can be awarded. Having already raised the issue of the scope of good conscience constructive trusts in the course of argument before the Ontario Court of Appeal, *Moore* presented the Supreme Court with the opportunity to take a pass on this matter.

Lauwers J.A., writing a dissent opinion in the Court of Appeal decision, held that *Soulos* supports the proposition that there are four situations where a good conscience constructive trust may be imposed: (i) to address unjust enrichment; (ii) to address wrongful acts or wrongful gain; (iii) in circumstances where its availability has long been recognized; and (iv) where good conscience requires it.[51] Lauwers J.A.'s interpretation of *Soulos* led him to conclude that:

> disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* — circumstances where the availability of a trust has previously been recognized — and the fourth route — "where good conscience otherwise demands it, quite independent of unjust enrichment.[52]

When *Moore* came before the Supreme Court, the majority of the Court adopted Lauwers J.A.'s reasoning and found that the second wife had been unjustly enriched. However, the Supreme Court did not share Lauwers J.A. view that *Moore* should be decided as a matter of a "fourth category" of good conscience. Rather, the Court held that a constructive trust could be imposed in this case as a remedy for unjust enrichment.

While stating that "justice and fairness are at the core of the dispute between the first and second wife, both of whom are innocent parties,"[53] and that the case was one of "unusual

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[51] *Moore v. Sweet*, 2017 ONCA 182, 2017 CarswellOnt 2958 (C.A.) at para. 186, reversed 2018 CarswellOnt 19478 (S.C.C.).
[52] *Ibid.* at para. 276.
[53] *Moore, supra* note 2 at para. 39.

circumstances," the majority of the Supreme Court nonetheless concluded that the unjust enrichment framework was the appropriate mechanism to achieve the right result, leaving the questions surrounding the *Soulos* constructive trust "for another day."[54]

The crux of the dispute in *Moore* is that both the first and second wife were promised the insurance proceeds by the deceased. As a result, both have some claim against the deceased and his estate. However, given that his estate was insolvent, both parties were left to claim against each other for the insurance proceeds.

The circumstances of *Moore* mirror those in *Soulos:* in both cases, a third party's duplicity misled two innocent parties. In *Soulos,* rather than stretch unjust enrichment beyond its reasonable parameters, the Court developed a new test that allowed aggrieved parties to apply for a constructive trust under the umbrella of "good conscience" where there was a breach of an equitable duty by the defendant or a third party. Accordingly, it is tempting to think that the four-part framework established by the Supreme Court in *Soulos* could have addressed the inherent unfairness of *Moore* where, for the Court's minority, enrichment did not allow for a just result.[55]

One cannot help but think a different, more holistic analytical approach should have been taken to reach a just and fair resolution between the parties, rather than the more constrained and rigid approach of unjust enrichment. Nevertheless, the Court in *Moore* decided not to take the opportunity to develop a new test or expand on the concept of "good conscience" in scenarios where the two claimants are largely innocent and the litigation arose due to the actions of a rogue third party. As a result, the question for practitioners remains: if the claim does not fall squarely within unjust enrichment or wrongful conduct, can the claimant nonetheless get a constructive trust based on "good conscience"? If so, what is the scope of "good conscience"?

VI. Considerations for Estate Practitioners

Moore v. Sweet represents a significant evolution of Canadian law in the area of insurance, estates, contracts, construction of statutes, and damages. For estate practitioners, the decision reinforces the importance of prudent estate planning, especially in circumstances where there has been a relationship breakdown.

For the purpose of unjust enrichment and constructive trust, practitioners should keep in mind, among others, the following points:

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[54] *Ibid.* at para. 95.
[55] *Ibid.* at para. 111.

1. The doctrine of unjust enrichment is flexible in nature and continues to evolving.

2. Constructive trusts are not the default remedy for unjust enrichment claims. Rather, they are the exception to the default of a personal, monetary remedy.

3. In advancing a claim for unjust enrichment, both litigants may bear the burden of proof of different element of the claim.

4. Separation agreements may conflict with insurance designations: verify both.

5. The insurance contract's compliance with the *Insurance Act* may not be determinative: other factors may come into play in determining the beneficiary's ultimate entitlement to the proceeds.

VII. Concluding Remarks

Since it was first introduced in Canadian law in *Rathwell* and *Pettkus*, the doctrines of unjust enrichment and constructive trust have seen many revisions and refinements. Given that evolution and flexibility are innate characteristics of equitable principles in particular, the continued development and renewal of these concepts is essential to their relevancy in our legal landscape.

Moore v. Sweet reminds lawyers that these principles are not fixed: they remain flexible concepts. Unjust enrichment in particular is a valuable tool in a litigator's arsenal. However, the *Moore* judgement also left certain questions unanswered, particularly in the area of good conscience constructive trusts. As a result, practitioners with vision and creativity will continue to play a role in the development of the law of unjust enrichment and constructive trusts.