It is now over a decade since the Supreme Court of Canada brought the tools of unjust enrichment, as a cause of action, and the constructive trust, as a remedy, into play, in attempting to obtain a more just distribution of wealth accumulated during a marital, or marriage-like, relationship. The apparent power of these tools to cut through theoretical difficulties in the path of ordering a transfer of wealth seemingly belonging to one party, to the other party, made their employment for this purpose attractive. However, the courts have not paused to elaborate how they are solving some problems which unjust enrichment theory appears to raise, where the plaintiff is relying upon the supply of services to the other party to the relationship, or to dependants, as an indirect contribution to the wealth of the defendant. This article argues that the courts are evolving and employing evidentiary presumptions, borrowed by analogy from the classical resulting trust, to overcome theoretical difficulties in finding that a defendant has been unjustly enriched by receipt of the benefit of services, and that the courts are justified in so doing. It also suggests an approach to aid in quantifying unjust enrichment in this type of situation. However, it argues that the courts have yet to explain adequately the basis upon which they will award a proprietary remedy, or the criteria which they are employing in selecting particular property, out of all of the property of a defendant, as the corpus of a constructive trust, where the plaintiff relies on services to the defendant to establish the cause of action.

Il y a maintenant plus de dix ans que la Cour suprême du Canada utilise les instruments que sont l'enrichissement sans cause, comme cause de poursuites, et la fiducie par détermination de la loi, comme recours, pour essayer d'arriver à une distribution plus juste d'une fortune amassée au long de rapports conjugaux ou similaires.

L'usage de ces instruments à ces fins est attrayant parce qu'ils ont le pouvoir de surmonter les difficultés théoriques qui empêchent d'ordonner un transfert de fortune appartenant apparemment à l'une des parties pour la donner à l'autre. Les tribunaux n'ont pas pris le temps, cependant, d'expliquer comment ils arrivent à résoudre certains problèmes que semble soulever la théorie de l'enrichissement sans cause dans le cas où le plaignant dépend des services rendus à l'autre partie du couple ou à ses dépendants, comme contribution indirecte à la fortune du défendeur.

Dans cet article l'auteur soutient que les tribunaux évoluent et utilisent des présomptions en matière de preuve qui sont empruntées par analogie à la fiducie par déduction classique, ceci pour surmonter les difficultés théoriques et décider qu'un défendeur s'est enrichi sans cause en profitant de services rendus et que les tribunaux ont le droit de le faire. L'auteur suggère aussi une façon de faciliter
l'estimation du montant de l'enrichissement sans cause dans ce genre de situation. Il soutient, cependant, que les tribunaux n'ont toujours pas expliqué clairement la raison pour laquelle ils accordent un recours en biens ou les critères qu'ils utilisent pour sélectionner un certain bien parmi tous les acquis du défendeur comme corps d'une fiducie par détermination de la loi quand le plaignant dépend des services qu'il rend au défendeur pour l'établissement de la cause de ses poursuites.

Introduction

The doctrine of unjust enrichment is now familiar in Canadian jurisprudence. In recent years, it has appeared most frequently in cases involving disputes between persons who either have been married, or have co-habited in marriage-like arrangements. In the course of its development, it met resistance from those who feared that it would open the door to idiosyncratic judicial discretion, exercised according to the values held by the individual deciding the particular case.¹ Fears of disturbance of existing property rights in response to a sense of unconscionability, not elaborated by a body of rules which permit accurate prediction of the legal results which will flow from a particular course of conduct, go far back in equity's history. We need only recall Selden's jibe about deciding rights according to the length of the Chancellor's foot, and that was not the first of that ilk.² However, equity has not been deterred in the past by such concerns, where its custodians considered the need sufficiently great.

Nevertheless, although we may need to override such concerns, they are not trivial. In confronting the conundrum, "Quis custodiet ipsos custodes?", the law has always relied upon the integrity, knowledge and intelligence of its custodians in policing themselves. We may accept this as a necessarily sufficient answer, and still acknowledge that the answer risks violation of the maxim that justice must also appear to be done. The less our ability to articulate in advance the rules which will determine the results of the contest, the more we are forced to ask the public to accept on faith the rightness of the courts' decisions.


By what test is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.

² A commentator writing about the end of the 16th century said:

For on the one part it is thought as hard a thing to prescribe to Equitie any certaine bounds, as it is to make any one generall Law to be a meet measure of Justice in all particular cases. And on the other side it is said, that if it be not known beforehand in what cases the Chancellour will reach forth his helpe, and where not, then neither shall the subject bee assured how, or when he may possess his owne in peace, nor the Practizer in Law be able to inform his client what may become of his action.

The problems inherent in any attempt to untangle the economic situation of two people who have spent a significant portion of their lives together as a unit, rather than as persons dealing at arm’s length, lead to a peculiarly heavy reliance upon discretionary solutions. This makes it all the more important that the basis upon which the discretion is to be exercised be elaborated as much as is possible. Unfortunately, too many judgments in this area are written as if the findings that there has been an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of juristic reason for the enrichment, are independent facts in themselves, rather than conclusions to be reached from the consideration of facts found against a body of principle which gives legal relevance to those facts. This gives an unfortunately arbitrary appearance to many of the decisions.

This article will discuss the assumptions which I believe underlie the application, by the courts in common-law Canada, of unjust enrichment theory to property disputes which arise upon the termination of a marriage, or of a marriage-like relationship. The more these assumptions are patent, the more principled and the less idiosyncratic the judgments in the area will appear. Also, the more these assumptions are patent, the easier it will be to assess, in other areas in which unjust enrichment doctrine may be applied, how far the family property cases are of assistance in reaching a conclusion as to the presence of any of the necessary components of enrichment, deprivation, and “unjustness”. The article will also discuss why I submit that, although the Canadian “unjust enrichment” approach to the problem of “family property” disputes is based upon reasonable social assumptions, which evolve into evidentiary presumptions, the same cannot be said for our employment of the proprietary constructive trust as a remedy for any unjust enrichment found to exist. Here, our jurisprudence has yet to articulate an adequate theoretical basis for granting this remedy in property disputes between spouses or co-vivants whose relationship has terminated.

Our jurisprudence is attempting to address the problem that the infrastructure of our society creates a bias in the distribution of wealth which tends to allocate to one partner in a spousal or spouse-like relationship, usually the female, less of the wealth accumulated during the relationship than has been fairly earned by that partner’s contribution to the existence of that wealth. To attempt to correct this, a legislature may establish by statute some scheme for division of wealth between parties to a marriage or, if it wishes, to some less formal relationship. However, to the extent that courts in common law jurisdictions wish to approach such a socio-economic goal, a more evolutionary approach is required. From the passage of Married Women’s Property legislation, our society has asserted the autonomy of both partners to a marriage as far as their individual capital wealth was concerned, and, a fortiori, this has been true for more informal, “spouse-like” arrangements. When the time arrived that a significant segment of society challenged the fairness and propriety of the results flowing from
that autonomy in certain cases, the techniques of the common law required that any movement to change the results proceed along existing pathways, upgraded, if necessary, to take the traffic. Therefore, our highest courts have been careful to state explicitly that, as far as "judge-made" law is concerned, there is no power to shift the ownership of wealth between persons merely because of the marital relationship.  

An obvious pathway open to common law judges to attempt to correct this imbalance of wealth, without the aid of legislation, is to use the bifurcation of ownership into legal and equitable titles which results from the holding of property in trust. It is not the only possible pathway. For example, the defendant could be required to pay a sum of money, rather than be required to hold a particular asset, or some interest in it, as a trustee for the plaintiff. An obligation to pay money, however, must also arise out of something more than the mere existence of the personal relationship between the parties, for the same jurisprudential reasons. In the absence of an accepted, overall theory of restitution, no basis for imposing such an obligation to pay over money seemed available, absent legislation. The trust, for all of its problems, looked like the most promising concept.

The problems of finding a trust in a dispute between partners to a marital, or quasi-marital, relationship, over property accumulated by one, apparently to the exclusion of the other, are formidable. Either one "spouse" in possession of certain property must be found to have declared himself or herself a trustee for the other of an interest in that property, or one spouse must have received that property from another person on the understanding that he or she would hold that property for the benefit of the other spouse, or, finally, there must be something which has transpired, beyond the mere existence of the relationship, which entitles a court to say that the parties should be placed in the same position as if either of the first two events had taken place. As an additional problem, where the asset in dispute is land, in many jurisdictions there will be a Statute of Frauds or similar legislation, requiring some written evidence of the trust's creation, to be satisfied or in some manner avoided.

It is trite that there will seldom be an explicit declaration of trust or a conveyance into trust in marital or marriage-like relationships. The parties are unlikely to have turned their minds explicitly to such a notion, and, quite apart from any problems of proof of the existence of a trust of land in the face of Statute of Frauds provisions, the plaintiff seeking relief is likely to be driven to establishing facts which will put him or her in the same position, with respect to the asset whose beneficial ownership is in dispute, as if an explicit declaration of trust or conveyance into trust had in fact taken place.

I. The Resulting Trust as a Possible Tool

If the untitled plaintiff can establish that he or she supplied some or all of the purchase money which was used to acquire the disputed asset, the doctrine of resulting trusts, unless rebutted, will place the parties in the same position as if the defendant with title had received the asset on an express trust to hold an interest therein, proportionate to the plaintiff’s contribution to the total purchase price, on trust for the plaintiff. However, in the family property dispute cases, there will seldom be a direct payment of money from the untitled plaintiff to the vendor who conveyed the asset to the defendant, to invoke this doctrine in its traditional form, at least in the cases which reach litigation. Nevertheless, there is a temptation to reconstruct this doctrine to accommodate an argument that a plaintiff has made an indirect “contribution” to the acquisition of the asset.

Under the surface of this familiar doctrine, the resulting trust raised by the supply of purchase money, a number of legal procedures are at work. An examination of the components of this classical resulting trust doctrine can assist us to assess the propriety of extending the doctrine to include indirect contributions to the acquisition of the asset whose title is disputed.

In computer users’ language, this “purchasemoney” resulting trust resembles a “macro” or “batch file”. Once the initial code—supply of purchase money by one, title to the asset purchased taken by another—is keyed in, the doctrine automatically takes a series of steps:

(1) It raises an evidentiary presumption that the supplier of the purchase money did not intend to make a gift of the beneficial interest in that money, or the asset purchased with the money, to the recipient of the title to the asset.

If this presumption is not rebutted by the title-holder, then:

(2) It traces the purchase money paid to the vendor of the asset, into the asset which has been substituted for the money;

(3) It determines that the title-holder of the acquired property is obliged to make restitution to the supplier. In so doing, it automatically places the recipient of title in the same position as one who “freely accepts” the property. It does not matter whether the recipient actually knows of the supplier’s lack of donative intention. Thus,

4 Dyer v. Dyer (1788), 2 Cox 92, 30 E.R. 42.


6 In restitution theory, “free acceptance” is a term of art. Professor P. Birks defines it as that which occurs “where the defendant receives a benefit in circumstances in which he knows that it is not being offered gratuitously and in which, having an opportunity to reject, he none the less chooses to accept”; P. Birks, An Introduction to the Law of Restitution (1985), p. 104. Similar definitions are offered by Lord Goff of Chieveley and
the supplier of the purchase money need not point to any conduct of the recipient, beyond receipt of title, to justify equitable intervention.

(4) It determines that the appropriate remedy is proprietary, and is of an ownership, rather than of a security, or lien, nature.

(5) It determines the quantum of the proprietary remedy, that is, the proportion of the substituted asset which will be awarded to the payer.7

(6) It implements the remedy by imposing a trusteeship of the substituted asset, or of some undivided share in it, upon the titleholder, in favour of the supplier of the purchase-money.

The purchase-money resulting trust is really just a sub-set of the "remedial constructive trust", although it may have come into existence for its own historical reasons and without conscious affirmation of its membership in the wider class. If, to use a well-known American formulation, "a constructive trust is imposed where a person holding title to property is subject 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",8 the resulting trust raised by the supply of purchase-money fits comfortably into the definition.9 The titled defendant is clearly enriched at the expense of the plaintiff who supplied the purchase price, and the "unjustness" element, or, in its usual Canadian formulation, the "lack of juristic reason for the enrichment", is supplied by the fact that the plaintiff did not intend to confer such a benefit. The unjustness of the enrichment creates the duty to make restitution, and the accompanying, remedial, duty to hold as a trustee in the meantime. Thus, at the level of the pure purchase-money resulting trust, where it is actually money which is supplied by the plaintiff, a move from a "resulting trust" solution to a "remedial constructive trust based upon unjust enrichment" solution would be no conceptual change at all, only a semantic one.

G. Jones, The Law of Restitution (3d ed., 1986), p. 18, and by G.H. Fridman and J.G. McLeod, Restitution (1982), p. 417. The term is usually employed to establish unjust enrichment where the benefit is receipt of services. I submit that free acceptance will also preclude any possible defence of change of position as a result of an innocent receipt of the benefit conferred by the plaintiff. Therefore, the term is also used here where the benefit supplied is, originally, money.

7 The formula used in making this calculation is the formula employed in tracing against an innocent transferee, where that transferee's own assets have been blended with those of the transferor, i.e., pro rata to the respective contributions. See Birks, op. cit., footnote 6, p. 363.


9 Scott, ibid., s. 440, p. 141, gives the following rationale for the resulting trust which arises when purchase money is supplied by A, but title is taken in the name of B: "B would be unjustly enriched if he were permitted to retain the property when A never intended to give him a beneficial interest." See also Birks, op. cit., footnote 6, pp. 60-64.
However, if one moves from this pure form of purchase—money resulting trust, to the situations which more commonly breed the property litigation in marriage or marriage-like relationships, it becomes more difficult to justify the automatic employment of some or all of the individual steps which are the components of the resulting trust. An extension of the classical position to a situation where the purchase money supplied by the plaintiff must be traced through a joint bank account of the parties has caused no difficult problems. Extension to the case where the plaintiff has contributed directly to the repayment of principal on a mortgage is only slightly more difficult, but it does require something more than a simple tracing exercise. It requires some fictionalizing, in that a payment not made to acquire property is to be treated as if it had been so made, in order to invoke the resulting trust process. For the reasons given in Gissing v. Gissing by Lord Diplock, mortgage financing of real property acquisitions during marital relationships is so commonplace that the additional step is an obvious one, to be taken almost without comment.

However, once the deprivation upon which the plaintiff relies is not a parting with money to a vendor of specific property, or to a mortgagee who has financed its purchase, but rather the rendering of services for the defendant's benefit, or the payment of money to acquire for the defendant's benefit goods or services which were intended to be, and have been consumed—for example, groceries, or rental accommodation—the problems inherent in attempting to apply a resulting trust solution to assist the untitled plaintiff escalate significantly. Viewed as an exercise in remediying unjust enrichment, the questions which deprivations of this nature raise make us dubious of the justice of applying automatically, without further consideration, all of the steps in the process which culminates in the raising of a resulting trust. Therefore, we are unwilling to invoke the automatic process where we can rely only upon the supply of services or the expenditure of money for day to day expenses to trigger it.

Where the plaintiff has parted with money, for which the asset now in the defendant's hands has been substituted, any argument by the defendant that the deprivation has not led to his enrichment is precluded. If the money itself had been received by the defendant it would clearly be an "incontrovertible benefit". A defendant who denies that the asset which has been substituted for the money is of benefit to him or her, that is

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10 Jones v. Maynard, [1951] Ch. 572, [1951] 1 All E.R. 802 (Ch. D.); Rathwell v. Rathwell, supra, footnote 3.
11 Supra, footnote 5, at pp. 908-909 (A.C.), 793 (All E.R.).
12 A person is "incontrovertibly benefited" if he "has made thereby an immediate and realisable financial gain or has been saved an expense which he otherwise would necessarily have incurred"; Goff and Jones, op. cit., footnote 6, p. 19. See also Birks, op. cit., footnote 6, pp. 116 et seq. Professor Birks argues that a "merely factual necessity is sufficient" (p. 118), i.e., "[o]ne excludes unrealistic or fanciful possibilities" (p. 120) of the defendant doing without the benefit of the service received from the plaintiff.
who denies enrichment, could then be compelled to restore that asset to the plaintiff without thereby suffering loss. However, where the deprivation upon which the plaintiff relies is the supply of services, or the expenditure of money which is not represented by a substituted asset, then, for reasons familiar in unjust enrichment theory, it becomes open to the defendant to deny that the plaintiff’s deprivation has resulted in enrichment to him or her.13 Something more than the mere supply of the service must be proved to justify ordering restitution in these cases, even if we raise, in the plaintiff’s favour, a presumption of lack of donative intention.

Also, for tracing purposes, where the plaintiff has actually supplied purchase money, the path the wealth took from the plaintiff into a particular asset now in the hands of the defendant, and which the plaintiff claims should be substituted for the original money, as being the plaintiff’s property, is establishable with relative ease. Services performed directly upon the asset in dispute—re-roofing a house, for example—may be equally traceable, but services which do not in fact flow directly into the disputed asset require us to explain why, if a proprietary remedy is sought, one particular asset apparently owned by the defendant is to be singled out as the asset into which those services are traceable, and therefore, the property which is to be “restored” to the plaintiff as a surrogate for those services.

In a substantial number of the disputes between spouses or quasi-spouses over distribution of accumulated wealth on termination of the relationship, the untitled “spouse” can rely only upon contributions of services, including services purchased with earnings, to the other “spouse” and to dependants. In these cases, direct resort to the classical purchase-money resulting trust, with its automatic application of a series of steps leading to the creation of an equitable interest in particular property, is not available, for the reasons sketched in above. If such interest is to be raised in favour of the untitled partner, the courts must overcome these theoretical problems in some fashion.

Canadian courts developed our “unjust enrichment” based jurisprudence largely in reaction to what were perceived to be difficulties with the approach being taken by the courts in England to solve these problems. A detailed examination of the approach of the English courts is beyond the scope of this article.14 Briefly, in England, the problems which one

13 Professor Birks groups the arguments against finding enrichment in these circumstances under the label of “subjective devaluation”; Birks, op. cit., footnote 6, p. 109 et seq. These arguments will be sketched in the text accompanying footnotes 33-35, infra.

partner to a spouse-like arrangement faces in establishing an interest in property of the other partner, where there is no explicit enforceable bargain as to how title will be held, and where the untitled party cannot rely upon a direct money contribution to the acquisition cost of the disputed asset in order to raise a resulting trust, are resolved by recourse to the "common intention" of the parties as to how title to particular property will be held, if such can be established.

The means by which a "common intention" of the parties to a dispute operates to affect title have not been clearly spelled out by the English courts, notwithstanding an extensive body of case law. Although the courts have avoided referring to the "common intention" as a "contract", and at least one appellate judge and one commentator have suggested that a contractual solution is not open, references to "bargain", "agreement", and "mutual promises" keep slipping into judgments and these evoke the image of contract. The phrase may also cover the application of estoppel

15 See May L.J. in Burns v. Burns, [1984] Ch. 317, at pp. 334-335, [1984] 1 All E.R. 224, at p. 257 (C.A.) and C. Harpum, Adjusting Property Rights Between Unmarried Cohabitees (1982), 2 Oxford J. Leg. Studies 277, at p. 280, where he interprets the decision of the House of Lords in Gissing v. Gissing, supra, footnote 5, as rejecting any contractual solution in cases between spouses, and suggests that the analogy may hold good in cases between quasi-spouses.

16 For example, in Pettitt v. Pettitt, supra, footnote 3, at pp. 822 (A.C.), 413 (All E.R.), after referring to Balfour v. Balfour, [1919] 2 K.B. 571 (C.A.), Lord Diplock referred to the situation where spouses do perform their "mutual promises" to each other as a situation which could have legal consequences upon proprietary rights, although he considered these consequences to fall within the field of property, rather than contract law. In Gissing v. Gissing, supra, footnote 5, at pp. 904 (A.C.), 789 (All E.R.), Lord Diplock said that in previous cases, "the arguments and judgments have been directed to the question whether or not an agreement between the parties can be established on the available evidence. This approach ... is in most cases adequate, but is passes over the first stage in the analysis of the problem, viz., the role of the agreement itself in the creation of an equitable interest in property". Unfortunately for the coherent development of analysis in future cases, Lord Diplock then discussed the requirement that the entitled person's claim must be based on trust, particularly a "resulting, implied or constructive trust". This would be raised when the trustee, by words or conduct, had induced an act of self-detrimental reliance on the part of the beneficiary, in reliance on the induced belief that, by the performance of the act, a beneficial interest was being acquired. Lord Diplock never specifically returned to the "role of the agreement". His remarks here have a strong estoppel flavour, but they would also be a fair description of a situation where equity finds "part performance", to allow a contract concerning land to be enforced notwithstanding lack of writing, and then grants specific performance. In the most recent Court of Appeal decision, Grant v. Edwards, [1986] Ch. 638, at p. 651, [1986] 2 All E.R. 426, at p. 435 (C.A.), Mustill L.J. stated that the first step in raising a trust in favour of the untitled person was to consider "whether something happened between the parties in the nature of bargain, promise or tacit common intention ...". Among the possible "happenings" was "[a]n express but incomplete bargain, whereby the proprietor promises the claimant an interest ... on the basis that the claimant will do something in return"; ibid., at pp. 652 (Ch.), 435 (All E.R.). As the parties have not made explicit what the quid pro quo is to be, "[t]he court ... has to complete the bargain for them by means of implication, when it comes time to decide whether the
doctrine to create a proprietary interest in the successful plaintiff. At least one judge has suggested that the interest which is raised in favour of the plaintiff by "proprietary estoppel" is enforced by the imposition upon the estopped party of a constructive trust. The courts in England have not yet explored in any detail the possible link between the approach they have been taking in "quasi-matrimonial" property cases, and the extensively developed proprietary estoppel doctrine which they have worked out over the past two decades. However, a recent observation by the Vice-Chancellor suggests that such an investigation might be undertaken when a suitable occasion presents itself.

However the "common intention" translates itself into a holding that the apparently untitled "spouse" has a proprietary interest in some property of the other party, the existence and content of that intention must be established. The House of Lords, in Pettitt v. Pettitt, is now generally considered to have rejected the views of Lords Reid and Diplock, expressed in that case, that the courts could impute to the parties those arrangements about the distribution of the beneficial interest that reasonable persons in their positions would likely enter into, and then enforce those understandings to create an equitable interest in the untitled party. The conduct of the parties must be such that the court can determine that there was an actual...
common intention shared by the parties, at the time the disputed asset was acquired, as to how the beneficial interests would be distributed.  

The difficulty of the English "common intention" approach, whether founded on contract or estoppel, in the circumstances of most "spousal" relationships, is the risk to the credibility of the judicial process. Perhaps the imputation to the parties of an intention as to their respective property rights would have looked too much like the creation of a new common law of "family assets", upon which the courts did not consider it proper to embark. But, faced with the necessity of teasing out of the conduct of the parties evidence to prove an actual "common intention" or an actual representation as to title to property, the courts have engaged in some very strained "fact-finding", even though the results achieved probably satisfy contemporary social, ethical standards. It is this straining which led Canadian courts to attempt to avoid being placed in the position of searching for the "phantom intent", and to seek to escape from this necessity by embracing the doctrine of "unjust enrichment".

II. The "Unjust Enrichment" Approach of Canadian Jurisprudence

The resort by Canadian courts to the doctrine of unjust enrichment to escape from the problems seen in the "common intent" based constructive or resulting trusts is now a familiar story. However, restitution theory, applied to typical "family property" cases, raises some problems whose solution is not obvious. Conclusions that the defendant has been enriched, that the enrichment is sufficiently connected to a corresponding deprivation suffered by the plaintiff, and that there is no juristic reason for the enrichment, standing alone, tell us that, in the particular case, the court has overcome these problems to its own satisfaction. They do not, without more elaboration, tell us how it has done so.

In most cases in which one "spouse" is seeking a share of wealth, the title to which is in the hands of the other, the plaintiff is relying upon the supply of personal service and effort, both to constitute the deprivation and to create the enrichment. These "services" may consist of non-money contributions of services leading to the direct improvement of some particular property owned by the defendant, services rendered in connection with some entrepreneurial enterprise owned by the defendant, or services to the family unit. They may also include money contributions by the plaintiff, where the money cannot be traced into some specific asset now or ever owned by the defendant. However, the supply of services, as the basis for an unjust enrichment claim, raises problems at a basic level of restitution theory which have not yet been adequately addressed in the cases.

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One problem, with respect to the requirement of lack of "juristic reason" for the enrichment, arises from the proposition that a payment or transfer of services to the defendant which the plaintiff was under a legal obligation to supply to the defendant, is not a basis for finding an unjust enrichment of the defendant. It now appears that supplying "domestic" services in the operation of the household and the raising of children of the union, standing alone, can constitute a deprivation to the plaintiff and an enrichment to the defendant. Similarly, expenditures of money on supplies and services needed for day to day living—on groceries

23 Goff and Jones, op. cit., footnote 6, pp. 30-31.


The eligibility of "domestic" services as the basis for a "deprivation" of the plaintiff which can found an unjust enrichment claim has troubled some courts. Part of this problem may stem from Leatherdale v. Leatherdale, [1982] 2 S.C.R. 743, (1982), 142 D.L.R. (3d) 193. The case involved the application of The Family Law Reform Act, R.S.O. 1980, c. 152, s. 8. The court held that, in deciding whether to make an award, either in money or by awarding a share of an asset that was not a "family asset", for contributions of "work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property, other than family assets ...", the trial judge was "wrong in bringing into account the work of the wife in the home"; ibid., at pp. 752 (S.C.R.), 200 (D.L.R.), per Laskin C.J.C. The court quoted and approved a dictum of Arnup J.A. that "[a] wife is not entitled to an award under s. 8 simply because she has been a zealous wife and mother, freeing the husband for the pursuit of great income and assets which may become non-family assets”; Page v. Page (1980), 118 D.L.R. (3d) 57, at p. 60, 31 O.R. (2d) 136, at p. 140 (Ont. C.A.).

While, technically, Leatherdale v. Leatherdale may be distinguished from the "constructive trust" cases as a decision on a particular section of a statute, that section looked like a codification of the ingredients of the remedial constructive trust, and it was easy to assume that the reasoning would carry over into the non-statutory area. Indeed, there would appear to be more reason to exclude domestic services as a qualifying contribution in contests which did not invoke the Statute, because s. 8 concluded by directing the court to assess the contribution "without regard to the relationship of husband and wife, or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances".

A separate source of the difficulty may lie in the influence of the refusal by the English courts to accept "housekeeping services", standing alone, as evidence upon which a finding of a "common intent" that the supplier of such services was to have a proprietary interest in some property of the other partner could be based. This traces back at least to an oft-quoted passage (see infra, footnote 45) from Lord Diplock's speech in Pettitt v. Pettitt, supra, footnote 3, at pp. 826 (A.C.), 416 (All E.R.), and was re-emphasized in Burns v. Burns, supra, footnote 15, particularly in the judgments of Fox L.J., at pp. 331 (Ch.), 254 (All E.R.), and May L.J., at pp. 342 (Ch.), 263 (All E.R.). The English courts have not considered that this type of contribution supports the necessary inference that the actual common intention has been formed. However, Canadian courts, in similar circumstances, do not purport to be acting upon the basis of any formulated common intention, at least as far as the establishment of unjust enrichment is concerned. The question whether such services can enrich the partner by facilitating saving addresses a very different issue.
and drycleaning, for instance—and which, by the very nature of the object of the expenditure, are not now represented by property into which the money can be traced, can constitute deprivation and confer enrichment. In *Sorochan v. Sorochan*, Dickson C.J.C., borrowing language from *Murray v. Roty*, held that there was "no juristic reason for the enrichment" because "Mary Sorochan was under no obligation, contractual or otherwise, to perform the work and services in the home and on the land". Given statutory changes to the law with respect to familial support obligations, the correctness of similar statements will not be self-evident in every case.

In 1973, the Ontario Court of Appeal, in the course of analyzing the basis upon which the rights of deserted spouses to possession of the matrimonial home would be determined, could say:28

That duty [of the spouses to live together] is coupled, as to the husband, with his duty to maintain his wife, including his duty to provide her with a home. There is no such duty on the part of a wife (apart from *The Divorce Act*, R.S.C. 1970, c. D-8).

In some provinces, the position of the wife has changed. For example, Ontario legislation now provides: "Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of so doing." A similar obligation rests on each parent with respect to children of the marriage, subject to the qualifications in the Act.30

What this extension to the "wife" of the legal obligation to provide support may denote in a relationship which is still continuing has yet to be explored judicially. Does a partner whose individual economic resources are sufficiently great to be able to afford to purchase "housekeeping" services on the market, or to hire another employee for the farm, without impairing the family unit's current standard of living, become one who has no "need"

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27 Supra, footnote 24, at pp. 46 (S.C.R.), 7 (D.L.R.).


29 Family Law Act, S.O. 1986, c. 4, s. 30. See also R.S.A. 1980, c. M-1, s. 3 (Alberta); R.S.M. 1987, c. F.20, s. 4(1) (Manitoba); S.N.B. 1980, c. F.22, s. 112 (New Brunswick); S. Newf. 1988, c. 260, s. 36 (Newfoundland); R.S.P.E.I. 1974, c. F.21, s. 16 (Prince Edward Island); Civil Code, article 445 (Quebec); R.S.Y. 1986, c. 63, s. 31 (Yukon).

30 Family Law Act, S.O. 1986, c. 4, s. 31. See also R.S.A. 1980, c. M-1, s. 2(2) (Alberta); R.S.B.C. 1979, c. 121, s. 56 (British Columbia); R.S.M. 1987, c. F.20, s. 12 (Manitoba); S.N.B. 1980, c. F.22, s. 113 (New Brunswick); S. Newf. 1988, c. 60, s. 37 (Newfoundland); R.S.P.E.I. 1974, c. F.21, s. 17 (Prince Edward Island); Civil Code, article 633 (Quebec); R.S.Y. 1986, c. 63, s. 32 (Yukon).

31 In Ontario, this term may, for these purposes, include some unmarried persons who are cohabiting in a conjugal relationship. Family Law Act, S.O. 1986, c. 4, ss. 1(1), 29. See also R.S.B.C. 1979, c. 121, s. 1 (British Columbia); R.S.M. 1987, c. F.20, s. 4(3) (Manitoba).
for that support? If so, this would remove any “obligation” element from such services, and make them eligible to form the basis of an unjust enrichment claim if the other requirements are met. If the “recipient” spouse could not afford to purchase such services without a family sacrifice of other aspects of the current standard of living, is the support then “needed”, hence caught by the statute, and, as a service rendered in satisfaction of a legal obligation, not eligible to support an unjust enrichment claim?

Consideration of these questions suggests to me that we could still arrive at a finding of “unjust enrichment”, even given a legal obligation resting on each “spouse” to contribute in some manner to the support of the other party, and of any children. If one party can save wealth, and the other cannot, we could assume that the savings, or some part of them, result from a contribution by the one without savings which exceeds any legal obligation to contribute to the support of the family unit. In such a case, the effect of an obligation to support may be only to reduce the amount by which the total benefit to the other party derived from the services or payments constitutes an unjust enrichment. Implicitly, a presumption along these lines may be developing, but its nature is not clear. However, something more than the observation that the untitled “spouse” has contributed, even contributed significantly, to the support of the family unit, including the other, titled, “spouse”, is logically necessary to establish unjust enrichment, where the general law may be imposing an obligation to supply such support.

A second theoretical problem is that neither at common law nor in equity will the expenditure of money or effort on improving the property of another, standing alone, support a claim for reimbursement, whether by way of a personal or a proprietary remedy. The same is true for any alleged conferral of benefit on another by supply of services. Even where the supplier can establish that a gift of the benefit of the service was not intended, but that it was rendered in the belief that compensation was being earned, there may be no enrichment. The law, protecting the interest of freedom of choice, ordinarily permits defendants to say that, whatever the services might be worth to others, they were not worth anything...


33 By “supply of services”, I intend to include situations where the supplier has not supplied services directly, but has purchased them with money. For example, the “supplier” may have paid day care fees, or purchased groceries which have been consumed. The latter example indicates that “services” is being given a broader meaning than it usually bears, to encompass the supply of physical goods, such as food or clothing, which are expected to be consumed within relatively short periods of time.
to them. Even if defendants would acknowledge receipt of a benefit, they may say that, if they had been aware of an obligation to pay for it, they would not have chosen to receive that particular benefit, but would have chosen something else. To grant restitution would permit plaintiffs unilaterally to re-adjust defendants' economic priorities. Also, it is not unjust for defendants to retain, even if there was enrichment, because, unlike a mistaken money payment, the services themselves cannot be restored. "The benefit of the service could not be rejected without refusing the property itself", as was said of the famous shoes which received the unrequested polishing.

Unjust enrichment theory does provide means of overcoming the theoretical problems which arise out of the policy of protection of freedom of choice. Assuming that the plaintiff can establish that the benefit of the services was not intended to be a gift, then if the services have been requested by the defendant, or if they have been "freely accepted", a case of unjust enrichment is made out. These additional facts make it unconscionable

35 Taylor v. Laird (1856), 25 L.J. Exch. 329, at p. 332, per Pollock C.B.
36 Supra, footnote 6.
37 However, this conclusion of the principal text writers has recently come under attack. See A.B. Burrows, Free Acceptance and the Law of Restitution (1988), 104 Law Q. Rev. 576; G. Mead, Free Acceptance: Some Further Considerations (1989), 105 Law Q. Rev. 460. The attack by Burrows challenges the argument of Birks, op. cit., footnote 6, that, in the case of services, "free acceptance" establishes both the "enrichment" and the "unjust retention" elements of the restitutionary claim. On the latter issue, Burrows' attack, supported by Mead, is directed at the proposition that, if the benefit of services is "freely accepted", a risk-taker, that is, a person who supplies an unrequested service in the hope that the recipient will pay for it, can obtain restitution if the defendant "freely accepts" the benefit of the service. The resolution of this dispute, one way or the other, does not affect the argument in this article. There is no argument between the above commentators that, where the services are conferred under a present mistake, rather than under an assumed risk that, if the services are rendered, the defendant will see fit to supply some form of compensation, retention of an enrichment resulting from the freely accepted receipt of the benefit of the service, assuming such enrichment can be established, is unjust. See Burrows, ibid., at p. 578.

In the "family property" situations which are addressed in the present article, I argue that the plaintiff should be treated as operating under a present mistake, i.e., that, in supplying the services which are now being relied upon to establish the claim, appropriate compensation is being earned. The argument is not that the claimant should be treated as providing the services on the assumption or expectation that, because the services were provided, the defendant would be moved to provide appropriate compensation in return.

On the question whether "free acceptance" overcomes the theoretical objections to treating the benefit of services as an enrichment of the defendant (see supra, footnote 34 and accompanying text), Burrows argues that a defendant might "freely accept" the benefit without establishing that he or she was thereby enriched. The defendant might be indifferent whether the service was conferred or not. The defendant might not have
for the defendant to deny that the service had value to him or her, and that restitution should be made. The plaintiff who relies upon “free acceptance” is really invoking the doctrine of acquiescence, to establish the claim.\textsuperscript{38} If the defendant went further than mere acquiescence in the receipt of the benefit of the services, and actually induced the plaintiff to embark upon the delivery of the services by some active representation, there is an \textit{a fortiori} case, which could invoke the developing line of proprietary estoppel cases which the English courts in particular have been working out. Indeed, the estoppel by representation cases and the acquiescence cases may now be seen as instances of the same doctrine at work.

In the matrimonial property cases, instances of specific active representation by the defendant as to the proprietary interests or other benefits to be enjoyed by the plaintiff are the less common. Where they do exist,\textsuperscript{39} a plaintiff might well have open a contractual route to relief, or a route based directly upon estoppel by representation, as well as a route through unjust enrichment doctrine.\textsuperscript{40} More often, however, the situation, as described considered the services as a detriment, eliciting protest or refusal, but also might not have devoted any resources to obtaining similar services from other sources, if the plaintiff had not supplied them. See Burrows, \textit{ibid.}, at pp. 579-580. Thus, only services which confer an “incontrovertible benefit” (see \textit{supra}, footnote 12) on the defendant can be treated as enriching the defendant.

Notwithstanding these arguments, I adopt the “free acceptance” approach to establishing enrichment by receipt of services. Canadian courts have accepted that domestic services, which lend themselves to the argument that the defendant might not have replaced them from other sources, at least at the level at which they were supplied by the plaintiff, do enrich by permitting savings. The references in Canadian judgments to the plaintiff’s reasonable expectations, and to the knowledge that the defendant had, or should have had, of these, suggest that Canadian courts are basing their approach on some acquiescence-based theory. To treat the benefit of such services as “incontrovertible” seems to require at least as elaborate a set of presumptions as does treating the defendant as a “free acceptor”.

\textsuperscript{38} “Free acceptance” is equated to acquiescence by Birks, \textit{op. cit.}, footnote 6, pp. 104, 277 \textit{et seq.}; by Goff and Jones, \textit{op. cit.}, footnote 6, p. 137 \textit{et seq.}; by G.B. Klippert, \textit{Unjust Enrichment} (1983), pp. 76-77.

\textsuperscript{39} For example, \textit{Grant v. Edwards}, \textit{supra}, footnote 16, where the defendant told the plaintiff that her name was not on the title because it would prejudice the plaintiff’s own matrimonial proceedings; \textit{Eves v. Eves}, [1975] 1 W.L.R. 1338, [1975] 3 All E.R. 768 (C.A.), where the defendant told the plaintiff that the title would have been put in their joint names if she had been 21; \textit{Crisp v. Banton}, \textit{supra}, footnote 24, where the plaintiff alleged that the defendant had told her that “her name would be on the house”, (there was no clear finding of fact on this issue); \textit{Gill v. Grant} (1988), 30 E.T.R. 255 (B.C.S.C.), where the defendant aunt “told the Gills that the house was theirs to do with as they pleased” (at p. 268). Any one of these situations might have been found to constitute a direct representation as to title, founding a proprietary estoppel. However, the cases did not proceed on this basis, at least overtly. The English cases used the representations as part of the basis for finding a “common intention” upon which the plaintiff relied, and the Canadian cases incorporated this evidence into their reasoning that an unjust enrichment existed.

\textsuperscript{40} The distinction may be important in a particular case. Both contract and proprietary estoppel doctrines operate outside the traditional limits of unjust enrichment theory, for
by the court, is one in which there is no active representation, as to title or otherwise, by the defendant, so that acquiescence alone must be relied upon to establish the "free acceptance", and thus, the unjust enrichment.

Ordinarily, to establish acquiescence, the plaintiff should establish knowledge, on the part of the defendant, that the services relied upon to constitute the enrichment and corresponding deprivation were not being conferred as a gift to the recipient, but were rendered in the mistaken belief that some form of compensation was being earned.\(^{41}\) In the typical case, the defendant will be aware of the fact of the rendering of the service. It is less likely that there will have been any explicit discussion of compensation to the plaintiff for those services, to bring home to the defendant the fact that the plaintiff is labouring under what, from the defendant's point of view, is a mistaken belief.

The cases tend to slide by a discussion of the requirements that, in some manner, the lack of donative intention, on the part of the plaintiff, in rendering the service, and the defendant's knowledge of the belief of the plaintiff that these services were earning the right to some form of compensation, must be established, with assertions to the effect that the plaintiff had a reasonable expectation of receiving an interest in the property in question, and that the defendant ought to have recognized this.\(^{42}\) Such a statement is really a conclusion that the services were rendered under a mistaken belief that the services were earning a right to compensation in some form, and that the defendant must be treated as being aware

the remedy to which the plaintiff is entitled is not necessarily limited by the amount by which the defendant has been enriched at the plaintiff's expense. If a contract can be discovered and enforced, plaintiffs will be entitled to protection of their expectation interest, either through specific performance or damages. With proprietary estoppel, the measure of protection is less clear. Sometimes, the courts seem to be protecting the full expectation interest engendered by the defendant's representations. However, if the test is that, after considering all the circumstances, the court "must decide what is the minimum equity to do justice to . . . [the plaintiff] having regard to the way in which she changed her position for the worse" (Pascoe v. Turner, [1979] 1 W.L.R. 431, at p. 438, [1979] 2 All E.R. 945, at p. 950 (C.A.), per Cumming-Bruce L.J.), then estoppel may sometimes lead to less than a full remedy for unfilled expectations.

\(^{41}\) Willmott v. Barber (1880), 15 Ch. D. 96, at pp. 105-106 (Ch. D.). This case is best known for setting out the "five probanda" for invoking an estoppel by acquiescence where the person setting up the estoppel is mistaken as to her or his legal rights in the disputed property. The "fourth" of these requirements is that the person sought to be estopped must know of the other's mistaken belief. While this knowledge on the part of the defendant may not be required where the detrimental act of the plaintiff has been induced by some active representation by the defendant (see Taylors Fashions Ltd. v. Liverpool Victoria Trustees Ltd., [1982] Q.B. 133, [1981] 1 All E.R. 897 (Ch. D.)), it must be a requirement in the case of purely passive acquiescence. The unconscionability of conduct which justifies equitable intervention in such cases lies, not in contributing to the formation of the plaintiff's mistaken belief, or to the plaintiff's decision to embark on the detrimental course of conduct, but in knowingly allowing the plaintiff to suffer increased detriment as a result of the mistake, by failing to correct it.

\(^{42}\) E.g., Sorochan v. Sorochan, supra, footnote 24, at pp. 46 (S.C.R.), 12 (D.L.R.).
of the mistake at the time the services were rendered. It does not, of itself, explain why either of the two prongs of this finding, necessary to establish the acquiescence element of “free acceptance”, is true, or is being treated as if it were true.

A statement that the plaintiff expected some form of compensation is another way of saying that the plaintiff did not intend that the benefit of the services be a gift to the recipient. Since, on gratuitous transfers of property between spouses and quasi-spouses, we now raise a rebuttable presumption against donative intention, it seems possible to raise a similar presumption of lack of donative intent for services rendered, to assist the plaintiff in establishing unjust enrichment.

Intuitively, there does seem to be some difference between the inferences we draw on a transfer of property from one person to another, even when the parties are spouses, and those we draw when one person renders some service to another. In the former case, we may generalize that people ordinarily do not intend to divest themselves of property gratuitously, even in favour of conjugal partners. But we may be more prepared to assume that services, particularly services directly connected to the support of the family unit, unless they are of an extraordinary nature, are rendered without expectation of compensation from the other partner. Nevertheless, Canadian courts may well read the socio-economic relationships of our family structures as justifying the raising of a presumption, analogous to that raised by the resulting trust when there is a gratuitous transfer of property, that the services were not intended to be a gift to the other party to the relationship, but were rendered with the expectation of compensation. If that is the case, the courts should now say explicitly that they are bringing this presumption into the common law.

A presumption that services to one’s partner in a conjugal relationship, or to the dependants of that relationship, are given in expectation of compensation suggests, at first glance, a high degree of cynicism about the relationship. Doesn’t anyone do anything for “natural love and affection” anymore? This criticism has force in a “transaction by transaction” analysis. If A, living in a spousal or spouse-like relationship with B, in B’s house, renovates the kitchen, it seems unlikely that, absent an explicit agreement, either of the parties expected a bill to be rendered and paid when the

43 In Ontario, the common law presumption of advancement on transfers of property from husband to wife has been replaced by a presumption of resulting trust (except in the case of joint tenancies). Family Law Act, S.O. 1986, c. 4, s. 14. See also, Matrimonial Property Act, R.S.A. 1980, c. M-9, s. 36 (Alberta); Marital Property Act, S.N.B. 1980, c. M-11, s. 15 (New Brunswick); Family Law Act, S. Newf. 1988, c. 60, s. 61 (Newfoundland); Matrimonial Property Act, S.N.S. 1980, c. 9, s. 21 (Nova Scotia); Family Law Reform Act, R.S.P.E.I. 1974, c. F-2.1, s. 12 (Prince Edward Island); Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 50 (Saskatchewan); Family Property and Support Act, R.S.Y. 1986, c. 63, s. 7(2) (Yukon).

last paint was applied, whether to be paid in cash, or to be paid as a
credit towards an accumulating equitable interest in the house.\textsuperscript{45} However,
if one starts by observing the cumulative effect of all of the "transactions"
which occur during the relationship, it seems equally unlikely that the
parties to most committed relationships of a spousal nature would really
intend to have the wealth accumulation fairly attributable to all the efforts
of the parties to the relationship ending up entirely in the hands of one,
to the exclusion of the other.

As mentioned, in spousal situations, it will usually be obvious that
the defendant was aware of the fact that the service was being supplied.
This, combined with a presumption against gift, will establish a prima
facie case for restitution in some form, if we can establish why the defendant
should be treated as being aware, at the time of receipt of the benefit,
of the plaintiff's mistaken belief that compensation in some form was being
earned. To establish this requirement, we may be borrowing a further
step from the "macro" of the resulting trust, strictly so called, which arises
when a money contribution is made to the acquisition cost of property,
or when property is gratuitously transferred. That is, the recipient of the
benefit will automatically be treated as if the benefit has been "freely
accepted" by him or her, that is, with the knowledge that the benefit
was not conferred gratuitously, and with an opportunity to decline the
benefit. If this is so, an obligation to make restitution cannot be rebutted
by showing that the defendant was in fact unaware that some form of
economic compensation was expected by the plaintiff who supplied the
service. Only the initial presumption against gift would be subject to
challenge. Is such treatment of the recipient of the service justifiable?

Spousal relationships, and those "tantamount to spousal", encourage
reliance upon decency of behaviour—including decency of economic
behaviour—of the other partner, and hence a peculiar consequential
vulnerability if that reliance is disappointed. If the courts are to afford
a remedy in situations where that vulnerability has been exploited, they
must establish an evidentiary basis for their actions, on whatever theory
they are operating. Presumptions similar to those used in the "pure" resulting
trust cases, namely, a rebuttable presumption that services to the family
unit or to the business enterprise of the conjugal partner are rendered
in the belief that some economic recompense is being earned, and an
irrebuttable presumption that the other partner is aware of this intention
as the services are being rendered, afford as effective, open, and justifiable
a means of doing so as any.

\textsuperscript{45} Compare the well-known comment by Lord Diplock in \textit{Pettitt v. Pettitt}, supra,
footnote 3, at pp. 826 (A.C.), 416 (All E.R.): "If the husband likes to occupy his leisure
by laying a new lawn ... while the wife does the shopping, cooks the family dinner
or bathes the children, I ... find it quite impossible to impute to them ... any common
intention that these domestic activities ... are to have any effect upon the existing proprietary
rights in the family home ...".
Without evidentiary presumptions of the nature described above, a plaintiff will have to establish affirmatively his or her own expectation of some form of economic compensation for services rendered, and the defendant’s knowledge of this state of mind. Almost invariably, such proof will have to be inferred from an examination of the history of the relationship between the parties. A search for affirmative evidence upon which to base such inferences bears a discomfortingly close resemblance to a search for evidence upon which to base a finding of “common intention”. As our courts have indicated a disinclination to search for “phantom intent”, they might also be expected to avoid a search for phantom evidence of expectation of recompense, and phantom evidence of the defendant’s awareness of this expectation. The suggested presumptions avoid such an exercise. The suggested irrebuttable presumption that the recipient of the service is aware of the benefitor’s expectation of compensation precludes a denial of knowledge which would be too easy to make in the absence of strong affirmative evidence of the existence of such an expectation and of its communication to the defendant.

However, establishing the fact that the plaintiff expected some form of compensation for services rendered to the defendant, and that the defendant accepted the benefit of the services on that basis, leaves us the problem of quantifying the unjust enrichment, if any, which requires some restitutionary remedy.

Later in this article, I will express my concerns with respect to the use of the constructive trust, as a proprietary remedy, in adjusting imbalances of accumulated wealth between partners to conjugal relationships. Nevertheless, on the positive side, the instinct of the courts to think in terms of the constructive trust as a remedy in these “family” cases has some sound basis. Leaving aside the proprietary consequences of a holding that a constructive trust exists, the concept focuses our attention upon some existing, identifiable body of wealth—the “corpus”—both as the source of the restitution to which the plaintiff is entitled, and as a factor in the quantification of the value of what should be restored. In other words, thinking in terms of “constructive trust” as the appropriate remedy in “family” cases takes us to what Professor Birks has called the “second measure of restitution”, that is, “value surviving”,46 rather than the more common “first measure”, that is, “value received”. The “second measure” is particularly suited to the “family property” cases, where the deprivation to the plaintiff which is the source of the defendant’s enrichment is created by the supply of services.47

46 Birks, op. cit., footnote 6, pp. 75-76, 83-87, 358 et seq.
47 Professor Birks’ own argument does not encompass the “family property” situations with which this article is concerned, and I do not suggest that he would necessarily endorse the application of his analysis as is proposed here. Birks’ analysis of a claim based upon “value surviving” starts with identification of that value, through the established rules of tracing, in some specific asset of the defendant, rather than as a share of total wealth.
A difficulty in adopting a money remedy for unjust enrichment in these "indirect contributions" cases is that, instinctively, we are likely to think in terms of quantum meruit, which normally calls for Professor Birks' "first measure". In a case such as Deglman v. Guaranty Trust Co.,48 the relationship between the parties, aunt and nephew, was such that, once it was shown that the services in question were not being supplied gratuitously, we would expect that such services would simply be "bought and paid for". When the contract "price" could not be recovered for want of the required written evidence of the bargain, the restitutionary remedy entitled the nephew to that which the aunt "would have had to pay for [the services] on a purely business basis to any other person in the position of the respondent".49

However, in a spouse-like arrangement, this marketplace approach seems far removed from reality. In Chrispen v. Topham,50 the female cohabitant received, as a remedy for the enrichment conferred upon her "partner" by her services of a "housekeeping" nature, a minimum wage over the period, discounted by fifty per cent to account for the benefits she received from her own services. The relationship between the parties in Chrispen was of only a year's duration, and was unusually business-like, as spouse-like arrangements go. The court's approach might have been appropriate here. However, in the spousal or spouse-like relationships which are more in accord with our perceptions of "nuclear families", I submit that such an approach has no relation to expectation, reliance or enrichment. People normally do not enter into spousal arrangements expecting or relying upon receipt or payment of a market-valued quid pro quo for itemized services performed, akin to making a contract with a maid service or a plumber. As a measure of "enrichment" which should be restored, employment of a scale such as this can only afford even a crude approximation of the amount of any unjust enrichment if we offset benefits which flowed, during the same period, from the defendant to the plaintiff. Furthermore, in these "family service" cases, the plaintiff usually receives some of the benefit of the service personally. The untitled spouse who keeps the house in good repair is living in the house, and probably deriving as much benefit from the state of repair, as far as quality of life is concerned, as is the defendant who has title. The spouse whose pay has been expended at

49 Ibid., at pp. 729 (S.C.R.), 788 (D.L.R.), per Rand J.
the grocery store has eaten some of the purchases. This is not an argument against a finding of enrichment. It is, I submit, an argument against using a *quantum meruit* approach based upon what must be, at best, the crudest of guesses about the net difference in the market value of the exchanged services, to establish the amount of unjust enrichment to be remedied. The courts simply cannot create, retroactively, a notional ledger to record and value every service rendered by each party to the other, with an ultimate set-off of the respective *quantum meruit* claims and they should not risk their credibility by appearing to try, however worthy their motive. “Value surviving”, which, in this context, points to the wealth saved by the respective parties at the termination of the relationship, reduces the need for such calculations, and spares the court from switching from a “search for a phantom intent” to the equally futile invocation of a spectral accountant.

The traditional expression, “for better or for worse, for richer or for poorer”, even without its usual romantic association, probably encapsulates the unarticulated economic expectations and reliances of the majority of persons entering into spouse-like commitments to each other, as well as any phrase can do. Each party will contribute as he or she can to the various needs of the relationship. With respect to wealth generated during the relationship, choices will be made as to what portion will be consumed now, and what will be saved to enhance the parties’ ability to make economic choices in the future. Whether these choices turn out “better” or “worse” is expected to be a result of effort, skill and luck, not necessarily in that order. The expected return to each for his or her contributions is present participation in what is purchased with the portion of that wealth allocated to maintain the day to day lifestyle, and future participation in what can be purchased with any savings.

When the relationship terminates, the benefits received by each party as part of the daily lifestyle have been enjoyed, and are history. The costs of obtaining these benefits are now sunk costs. I submit that the court should assume that, unless an explicit agreement otherwise is proved, the parties neither contemplated nor relied upon a reconstruction of these costs and benefits, as they continued to make their individual contributions to the continuing relationship, and their individual withdrawals of benefit. But it seems plausible that, to the extent that they chose to defer consumption of their wealth, they did expect and rely upon participation in what their accumulated wealth would buy, when it came time to choose to make use of it. It is to this body of accumulated wealth that the “second measure” takes us immediately and directly.

Undistracted at this stage by the necessity of selecting particular property as the subject matter of a proprietary remedy, the courts could simply turn to an assessment of the wealth accumulated in the name of each party and, where there was a difference in favour of one of the parties, take that difference as a factor in deciding whether there has been unjust enrichment. Difficult areas for judicial judgment necessarily remain. The
defendant may still argue that there has been no direct or indirect contribution by the plaintiff to at least some components of the defendant’s accumulated wealth. Also, once the size of the total enrichment of the defendant has been established, the portion of that enrichment which is unjustly withheld from the plaintiff, and which ought to be the subject of a restitutionary judgment, must be determined.

On the issue of lack of connection between contribution and enrichment, defendants may be expected to point to property which they brought into the relationship, and to value which has been added after the relationship terminated. Neither factor necessarily excludes the consideration of the wealth represented by any particular asset for remedial purposes.

If property with a total value of $x$ is brought into the relationship by a party, and by the termination of the relationship, the value of that party’s property has increased to $x + y$, at least the increase of $y$ seems to be enrichment in some way attributable to the relationship. The contributions of the other party, indirect though they may be, may have contributed to the ability of the other to acquire or maintain the additional wealth, on the reasoning inherent in cases such as *Pettkus v. Becker*[^51] and *Sorochan v. Sorochan.*[^52] The increase of $y$ should, on this basis, be brought into the calculations. Should the original $x$ of value also be brought in? The internal logic of the judgment in *Sorochan* requires an affirmative answer. Although Dickson C.J.C.’s holding, that contributions “relating to the preservation, maintenance or improvement of property”[^53] might suffice to justify a constructive trust, was made in the context of a discussion of the applicability of a proprietary remedy, it must apply necessarily to the establishment of the unjust enrichment which is to be remedied. The saving which the defendant is enabled to make as a result of not having to pay third parties for the services supplied by the plaintiff facilitates not only the accumulation of more wealth, but the maintenance of existing wealth in any form. This argument does not make the fact that a party brought wealth into the relationship irrelevant. However, I submit that this consideration is better taken into account when the court evaluates the proportionate contributions each party has made to the total enrichment.

Where the total amount of enrichment of one party has changed since the termination of the relationship, then, I submit, the increase or decrease may also be regarded as part of the enrichment subject to apportionment with the other party. To the extent that the change results from a change in market price of the vehicles which represented the wealth

[^51]: Supra, footnote 1.
[^52]: Supra, footnote 24.
[^53]: Ibid., at pp. 50 (S.C.R.), 10 (D.L.R.).
at termination, as in the case of the “home farm” in Rawluk v. Rawluk,\(^{54}\) or the tobacco acreage, in McDonald v. McDonald.\(^{55}\) I submit a sharing in the changes, “for better or for worse”, up to the time of notional liquidation through a judgment, accords with the expectations and reliances of most parties to such relationships. That wealth is likely to be regarded by both parties (prior to break-up) as the product of “our endeavours”. On the other hand, after termination of the relationship, reasonable parties would neither expect nor rely upon any sharing of any enrichment of the other created by the other’s efforts. Thus, for example, an enhancement of wealth created by improvements to land made by a defendant after separation should be excluded from the calculation of the “value surviving”.

Even if “value surviving” is accepted as the basic measure of total enrichment, the court will continue to face the difficult problem of weighing the respective contributions of the parties to the total net enrichment of the defendant. Legislatures can establish presumptions of equal contribution, but the courts have rejected that easier solution, in fashioning their own remedies for unjust enrichment in “family property” disputes. I cannot suggest any magic formula which will help here. All the court can do is establish the total amount by which each party has been enriched during the relationship, determine which portion of each party’s enrichment is fairly attributable to the contributions of the other, and from that base, establish which party should make restitution to the other. In so doing, special circumstances, such as wealth brought into the relationship by each of the parties, and transfers of wealth between the parties, by way of a gift,\(^{56}\) can be taken into account. But after all this is done, the court must determine, as best it can, whether, of the net enrichment identified in the hands of a party to the relationship, some specified proportion is attributable to the benefits conferred by the other party, and is therefore unjustly withheld from that other party. The use of the “second measure” to quantify the total enrichment does not assist the court in the necessarily quasi-intuitive task of establishing the proportions of the respective parties’ contributions to the wealth they accumulate. It does more accurately identify the enrichment to be apportioned.

Professor Birks has argued that the “second measure” of restitution does not require a proprietary remedy, but he acknowledged that support in the cases for this argument is found only “frailly”.\(^{57}\) Some evidence to support the use of this measure to quantify a personal remedy is now


\(^{57}\) Birks, op. cit., footnote 6, p. 87.
emerging in Canadian jurisprudence, in a few of the "family property" cases.

In *Everson v. Rich*, the court was faced with the task of determining the nature of the relationship between the parties involved. The relationship in question was a seven-year spouse-like arrangement between unmarried parties, during which a claim for a proprietary remedy against an acreage and residence, acquired about a year after the relationship commenced, was denied. The court could not find a sufficient nexus between the services rendered by the female plaintiff and the acquisition of the property. However, the Saskatchewan Court of Appeal did find that the defendant had been enriched by the plaintiff's services, which included not only "all the services of a wife", but also some considerable outside earnings, which had been expended on household expenses, and some work about the farm, such as caring for chickens. The court awarded monetary relief. Sherstobitoff J.A. said:

While ... monetary damages in such cases have traditionally been measured by the market price of domestic services, there is no reason why they cannot be measured as a suitable proportion of the increase in value of the assets of the person who has been unjustly enriched. It is at this point, assessment of damages, that one takes into account and values the benefits received by the ... [plaintiff] from the relationship. In this case, considering the value of the assets which each of the parties brought into the relationship; the value of the assets which each of the parties owned at the termination of the relationship; their respective contributions by way of services and money to the relationship; and the value of benefits received from the relationship by each of them, the ... [plaintiff] is entitled to damages in the amount of $10,000.

The court here is using the "second measure" as the basis for quantifying a personal remedy. I would quarrel with the court's approach only if it was treating a comparison of the respective "lifestyle" benefits conferred by each of the parties upon the other as a factor to be assessed in the calculation of the amount of unjust enrichment to be restored. As submitted above, the "second measure" should be regarded as freeing the court from this particular task by treating the portion of each party's contributions to the relationship that was consumed by the lifestyle enjoyed as a "sunk cost", concerning which neither party either expected or relied upon compensation, except through the medium of sharing of whatever could be saved.

A similar approach to quantification of a personal remedy had been taken in Manitoba a few months earlier in *Pirie v. Leslie*. On the termination of a nine-year relationship between an unmarried couple, the female petitioner was awarded a lump sum of $34,000, which was described

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58 Supra, footnote 44.
59 Surprisingly, although the decision of the Supreme Court of Canada in *Sorochan v. Sorochan*, supra, footnote 24, was referred to, the court did not discuss whether there was a sufficient contribution to the maintenance and retention of the property.
by the judge as "just marginally over a 20 percent interest in the property of the respondent",\textsuperscript{63} at the date of separation. It is clear, from a finding earlier in the judgment,\textsuperscript{64} that "the property" referred to here was not any one specific asset, but the net value of all of the respondent's assets. The court found a "clear link" between the petitioner's services, which were very similar to those described in \textit{Everson v. Rich},\textsuperscript{65} and the "property". "The contributions of the petitioner were substantial and have the requisite proprietary relationship through the significant enhancing of the respondent's financial position."\textsuperscript{66} Here, the court appears to be conflating the necessity for a linkage between the deprivation suffered by the plaintiff and the enrichment enjoyed by the defendant, required to establish an obligation to make restitution, and the necessity of finding a sufficient link between the contribution of the plaintiff and some particular asset of the defendant, required to justify a proprietary remedy against that asset. Nevertheless, the result is a personal judgment for money, assessed according to the "second measure".

The decision of the Alberta Court of Appeal in \textit{Boucher v. Koch}\textsuperscript{67} may be another case in which the same approach was taken, although the wording of the reasons for judgment creates some ambiguity in this regard. The unmarried parties had a twenty year relationship. During four months of each year, the parties worked in Edmonton. The remainder of the year was spent on a farm which the male partner to the relationship had owned before the relationship started. The "farm" was never fully developed as a farming operation, but the female assisted in such operations as were carried on, as well as performing "normal household duties". During the period of cohabitation, the real value of the land changed but little. Any change that occurred was due to inflation. At the termination of the relationship, the defendant male had the land, valued by the Court of Appeal at $50,000, and a bank account of $10,000. No other assets were referred to.

The trial judge "found ... [the plaintiff] entitled under a constructive trust for her efforts in contributing to the preservation of property held by Mr. Koch",\textsuperscript{68} and awarded $5,000. The Court of Appeal considered this amount "to be a small proportion of the total estate found to exist when one reviews the efforts made by Ms. Boucher over the period of time in question".\textsuperscript{69} It added its valuation of the land to the value of

\textsuperscript{63} \textit{Ibid.}, at p. 260.
\textsuperscript{64} \textit{Ibid.}, at p. 251.
\textsuperscript{65} \textit{Supra}, footnote 44.
\textsuperscript{68} \textit{Ibid.}, at p. 444.
\textsuperscript{69} \textit{Ibid.}, at p. 445.
the bank account, to obtain "an estate of $60,000 to which the constructive trust applies", and then asked: "What should be the proportion attributable to the efforts made by Ms. Boucher?" The court answered this question by increasing the award to $15,000.

This seems to have been another way of expressing the result of awarding to the plaintiff one-quarter of the wealth which survived in the defendant's hands at termination. The reasons suggest that the court was thinking in terms of proportions of the estate, rather than attempting to put a market value on services performed by the parties. What is less clear is whether the court was actually awarding a proprietary remedy, in the form of either an ownership or lien interest, or whether it was using the phrase, "constructive trust", to refer to a personal, money judgment imposed to remedy an unjust enrichment.

A few cases do not establish the argument that, in cases where a relationship "tantamount to spousal" is found to have existed between the parties, the "value surviving" measure of enrichment should be adopted, although they strengthen it. But the courts in these cases have sensed that the enrichment enjoyed by a defendant at the plaintiff's expense in these family property cases cannot be located easily in one particular asset, to the exclusion of the others. In the particular cases, the courts could not find such a linkage at all. They have also sensed that, in the relationships they were considering, restitution required, not the payment of a servant's salary, but the establishment of a partner's share of the assets saved.

Whether the relationship between the parties in a particular case is closer to the "spousal relationship", characterized by a high degree of vulnerability of each party to lack of decency of behaviour by the other, or to an "arm's length" relationship, will be a difficult factual question for our courts. It is the former characterization which, I submit, should lead the courts to use the "value surviving" measure of enrichment. Where the relationship is more arm's length, as in Deglm v. The Guaranty Trust Company, or, perhaps, Chrispen v. Topham, the ordinary quantum meruit assessment, based upon the market value of the services supplied, seems more appropriate, even though this may involve the extremely difficult task of calculating a set-off for benefits flowing to the plaintiff from the defendant. In an annotation to Pettkus v. Becker, Professor McLeod commented:
Not all couples living together should fall within the scope of the decision, but only those whose long-standing relationship has generated the trust and lack of formality which surrounds married couples. The search for this boundary may prove to be the most difficult legacy of the decision.

Professor McLeod was not addressing the problem of the appropriate measure of enrichment, but his remarks are appropriate in this context.

III. The Choice of Remedy

In Sorohan v. Sorohan, the Supreme Court of Canada reminded us that “constructive trust” and “unjust enrichment” are not synonymous expressions. The constructive trust is one remedy which may be found appropriate when a finding of unjust enrichment is made. As this proprietary remedy, unlike a mere money judgment, may give a preference to a plaintiff over other creditors of the defendant or, as in Rawluk v. Rawluk, may cause a readjustment in the financial positions of spouses as they enter upon a statutory redistribution of wealth upon marriage breakup, the reasons for choosing such a remedy should be articulated as fully as possible. Certainly present treatment of restitutionary theory in Anglo-Canadian legal writing treats proprietary remedies as the exceptional cases, not as the general rule.

The Supreme Court of Canada, in Sorohan v. Sorohan, was sensitive to the need for justification of a proprietary remedy. Although the analysis was carried, at best, no further at that time than the court felt necessary to resolve that case, the court did protect the special status of the remedy by reaffirming the need for a “clear link between the contribution and the disputed asset”. Why are the courts insisting on a “clear link” between specific property and the contribution, or deprivation, of the defendant, as a condition of granting a proprietary remedy? At the most general level, the answer may be that courts have usually adjusted the rights and wrongs between the parties with a judgment for payment of money. A money payment remedy makes the unsuccessful defendant a judgment debtor of the plaintiff. The law ordinarily does not give a judgment creditor priority over any other creditor. Where the law departs from this policy, it has a reason for doing so. For example, the defendant may have entered into a specifically enforceable contract to convey specific property to the plaintiff, which causes Equity to regard that property as the property of the plaintiff from the time of the contract. Or, property in the defendant’s hands at insolvency may be identified as property which was originally that of the plaintiff, or as substitute property into which that original property has been traced, and concerning which the plaintiff

76 Supra, footnote 24.
77 Supra, footnote 54.
78 Supra, footnote 24.
79 Ibid., at pp. 48 (S.C.R.), 8 (D.L.R.).
should be treated as never having parted with the beneficial ownership. More exceptionally, the defendant may have acquired the disputed property with his or her own resources, but by some misuse of a pre-existing fiduciary relationship, which justifies the court in treating the property as if it had been acquired on the plaintiff's behalf. In insisting on the "clear link" to specific property, the Supreme Court of Canada is affirming that a conclusion that unjust enrichment exists does not, of itself, constitute a sufficient reason for departing from the law's usual policy of refusing to a successful suitor any special preference over other obligees of the defendant. The "link" must provide the additional factor which leads the court to treat an interest in property whose title is in the defendant as if it were the plaintiff's property.

However, in the "family property" cases, the theoretical basis for the establishment of the necessary link, or "nexus", between the deprivation suffered by the plaintiff and specific property which represents the defendant's enrichment, or some of it, is far from clear. Whether the basis for the linkage is "causal connection" between deprivation suffered by the claimant, and acquisition or maintenance of that property by the defendant, or "reasonable expectation", if, as some have suggested, these are alternative grounds, the expressions currently used to describe what the court is seeking raise, rather than answer, questions as to when an in rem remedy is to be awarded, and as to the selection of the property to which it is to be applied.

The question whether any "causal connection" to particular property exists has been described as "a question of fact to be found in the circumstances of the particular case." The fact to be determined is whether the plaintiff's contribution to the acquisition or maintenance of particular property is "sufficiently substantial and direct" to entitle the plaintiff to an interest. The difficulty with this explanation is that "causal connection" is a conclusion to be reached from facts, not an independent fact in itself. I am reminded of a comment of Lord Romer who, in a different context, was discussing the problem of uncertainty of concept:

For how is it to be ascertained whether a man is of the Jewish faith? The Court of Appeal answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence,

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... I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words, “of the Jewish faith”. Until I know that I do not know to what the evidence is to be directed.

Similarly, to what is evidence of “causal connection”, or “clear proprietary relationship”\textsuperscript{84} to be directed?

The difficulty in explaining why a particular asset was selected, out of all of the defendant’s assets, as the subject of a proprietary remedy is one that does not arise under the “common intention” approach of the courts in England. There, at least in theory, it is the parties to the relationship who select the property in issue. The “common intention” which the court concludes exists invariably turns out to be a common intention regarding the title to particular property. The Canadian approach, looking elsewhere than to the “common intention” of the parties for the basis of judicial intervention, must cope with the fact that unjust enrichment created by receipt of the benefit of services, which enables a defendant to avoid expense and thus accumulate and maintain wealth, seeps throughout all of the assets of the defendant.

It would be comforting if we could find our basis for awarding a proprietary remedy against particular property in doctrines already well-developed by the courts. Two doctrines which come to mind in this connection are tracing and proprietary estoppel. Can we rely upon either of these to give more definition to that “clear proprietary relationship” which is said to be the “primary”\textsuperscript{85} requirement for the proprietary remedy for unjust enrichment?

\textbf{IV. Can the Nexus be Established through Tracing Concepts?}

Tracing in Equity involves following an existing right in some property which, in the eyes of Equity, the plaintiff has never transferred to the defendant, into the defendant’s hands, where it may still be located in some other form of wealth into which it has been transformed. As mentioned, the traditional purchase-money resulting trust performs the tracing operation automatically. However, when the “property” to be followed consists of services and indirect expenditure, a “tracing” operation is wholly fictional. It requires a process of reification, at least in the case of services, to create something which can be regarded as the plaintiff’s property, to be traced. Furthermore, it involves an arbitrary identification of the destination, with respect to the property selected as the subject matter of the remedial judgment. The enrichment, in all of these cases where the plaintiff’s services or money spent on current expenses are relied upon to establish the plaintiff’s case, is derived from a saving of expenditure which, it is assumed, the defendant would otherwise have made. To justify a proprietary remedy against a particular asset on the basis of tracing theory, we must then

\textsuperscript{84} Sorochan v. Sorochan, supra, footnote 24, at pp. 50 (S.C.R.), 10 (D.L.R.).

\textsuperscript{85} Ibid.
assume that the savings which the defendant was thereby enabled to make were channelled into the asset which will be made the *corpus* of the constructive trust, by facilitating the acquisition or maintenance of that asset. The difficulty is that, if during the relevant period, the defendant possessed other assets, beyond those designated as subject to a constructive trust in the plaintiff's favour, acquisition or maintenance of these other assets would be equally facilitated. Targeting only some portion of the defendant spouse's assets as the subject of a proprietary remedy appears to be arbitrary, unless we can identify some other factor which justifies the court in cutting out this particular asset from the totality of the accumulated wealth of the defendant to which the plaintiff might, with equal force, be treated as having made some contribution.

For example, in *Rawluk v. Rawluk*, the plaintiff wife sought a declaration that the defendant husband held an undivided interest in two properties, the “home farm” (including an adjacent parcel used in connection with a farm machinery business) and a ten acre parcel referred to as the “Sharon property”, in trust for her. The marriage had endured for about thirty years. In addition to raising three children, the wife actively participated in the farming operations and in a farm machinery business operated by the husband. The court awarded to the wife the requested half-interest in the “home farm”, on the basis of a constructive trust, but denied such relief with respect to the “Sharon property”. As to this, the trial judge said:

> I accept the wife’s testimony that she really had very little to do with the Sharon property and consider that property to be in a very different category from the matrimonial home farm and adjacent machinery lot, both of which were integral parts of the farming and farm machinery operation and therefore decline to make the requested declaration with regard to the Sharon property.

The factual difference underlying the two results, then, was that the services rendered by the plaintiff, which enriched the defendant, were physically performed on, or in connection with an activity located on one parcel of land, and not on the other. With respect to the “home farm”, the factor of production supplied by the plaintiff, labour, was combined with, at least, the factor of capital, supplied by the defendant, to generate wealth. Approaching the cases from this point of view, I am tempted to abstract the “linkage” requirement to the proposition that where a defendant “spouse” has been unjustly enriched at the expense of a plaintiff “spouse”, the plaintiff will be entitled to a proprietary remedy against property of the defendant where that property has been combined with capital or labour supplied by the plaintiff, to generate wealth for the defendant. It is not necessary that the services be supplied in connection with some entrepreneurial enterprise of the defendant. The matrimonial home can be regarded as an “enterprise” for this purpose and, although courts have,

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86 *Supra*, footnote 54.

to date, been cautious about finding an "unjust enrichment" constructive trust of an interest in the property constituting the home solely on the basis of familial services, it has been done.\textsuperscript{88}

A "causal connection" of this nature, then, supplies an additional factor which can be used to select some specific asset of the defendant as the subject of a proprietary remedy. Whether this type of "connection" to the asset justifies the result intellectually is another matter.

Continuing with \textit{Rawluk v. Rawluk}\textsuperscript{89} as an example, the "Sharon property" was acquired by the defendant in 1966, about a decade after the marriage took place. There is nothing in the reports that enables a reader to conclude that the husband's ability to acquire and maintain this property was any more or any less enhanced by the benefits he received from the plaintiff's efforts with respect to the business and home management than was his ability to acquire and maintain the "home farm" realty upon which his household and business happened to be located, and where the bulk of the plaintiff's services were perforce supplied.

In \textit{Rawluk v. Rawluk},\textsuperscript{90} the practical issue which was resolved by the imposition of a constructive trust was whether the plaintiff could participate in an extraordinary increase in the value of the "home farm" between the valuation date established by the statute and the date of trial. The holding that the plaintiff was entitled to an equitable proprietary interest in that "home farm" by reason of an unjust enrichment based constructive trust enabled the plaintiff to share in that gain. However, suppose it had been the "Sharon property" which had seen the extraordinary gain in the same period. By saving the defendant expenditure, the plaintiff's efforts would have made a similar contribution to the wealth of the defendant, which in turn must have assisted him to acquire and maintain that "Sharon property". Yet, on the basis of the court's judgment, the plaintiff could not have participated in that gain. "Tracing" concepts do not explain why the plaintiff's deprivation should result in participation in an extraordinary change in value of one parcel, but not the other.

Therefore, I submit that, where plaintiffs are relying upon the supply of services, whether to enterprises of the defendants or to the family unit, which enrich defendants by freeing them from expenditures which they would otherwise have to make in order to secure similar benefits, and thus facilitate accumulation of wealth, traditional tracing theory will not explain selection of particular assets as the subject of a proprietary remedy.\textsuperscript{91} If a proprietary remedy against particular assets is to be justified, we must look elsewhere for the basis for the justification.

\textsuperscript{88} See \textit{supra}, footnote 24.
\textsuperscript{89} \textit{Supra}, footnote 54.
\textsuperscript{90} \textit{Ibid}.
\textsuperscript{91} See also Litman, loc. cit., footnote 80, at p. 458.
V. Can the Nexus be Established through Estoppel Concepts?

In English jurisprudence, the use of estoppel to create interests in property enforceable against the defendant owner is well-developed. The requirement that an estoppel can be raised only on a representation of existing fact, and not on a representation of future conduct, has withered away. The Court of Appeal appears to have brought together the cases involving active representations, and those involving passive representations, or acquiescence, into a powerful, if still rather vaguely defined tool to prevent defendants from denying to plaintiffs some right over an interest in the defendant's property which, in some fashion, the defendant had induced the plaintiff to rely upon obtaining. The interest created in the plaintiff by the estoppel is effective, not only as a shield against an attempt by the defendant to use the defendant's apparent titular rights to oust the plaintiff or refuse promised access, but also against third parties claiming through the defendant who might assert similar rights.  

As the English courts have developed estoppel doctrine, they have moved to an emphasis on unconscionability as the principle underlying the remedy. The court seeks to determine:  

...whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

Without use of the actual word, there is a strong suggestion of estoppel in the leading Canadian "family property" cases. In Pettkus v. Becker, Dickson J. said:

...I hold 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 accepts benefits conferred by the first person where he knows or ought to know of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

Although, in its context, this passage is directed at the establishment of unjust enrichment generally, rather than the establishment of grounds for a proprietary remedy against particular property, it also lays the groundwork for the proprietary remedy. It is "the expectation of receiving an interest in property" which makes it appropriate to consider the proprietary remedy.

The fact that a person has an expectation of receiving some benefit from another, or indeed, the fact that a person has acted self-detrimentally

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94 Supra, footnote 1, at pp. 849 (S.C.R.), 274 (D.L.R.).
in reliance upon such an expectation, does not, of itself, make it unconscionable for that other person to deny fulfilment of that expectation. The defendant must bear sufficient responsibility for the detrimental consequences to the plaintiff that it becomes unconscionable for that defendant to deny the plaintiff’s expectations.

If all that the defendant has done to incur this responsibility is to accept a benefit passively, then traditional acquiescence theory would require that the defendant be aware, or be taken to be aware, that the benefit was not being conferred gratuitously, but with a mistaken expectation of compensation in the form of some proprietary interest. It is the deliberate failure to speak out and warn off the mistaken plaintiff before harm is suffered, or unnecessarily increased, which creates the unconscionability, and consequently, the estoppel which remedies the unconscionability.

In the family property cases, the plaintiff’s proprietary expectations, and the defendant’s knowledge of them, are usually underanalyzed. Often, one is not sure whether the court has found some actual proof of the existence of the expectation, and some signal of the existence of that expectation that the defendant ought to have recognized, or whether the judgment is proceeding on the basis of some general presumption that parties to spouse-type relationships will expect a proprietary reward for services rendered, and that parties receiving such services should know this.

In Sorochan v. Sorochan, the court referred to a request which the plaintiff had made to the defendant that part of the land be transferred into her name, and to an earlier request to her to bar her ‘dower on a division of lands between the defendant and his brother, as communicating the plaintiff’s expectation to the defendant. I find it difficult to believe that the granting or withholding of a proprietary remedy in Sorochan turned on “signals” such as this, and that the plaintiff would have failed to establish a case for proprietary relief in their absence. But either answer to the question whether the decision to grant proprietary relief in Sorochan did turn on such signals raises its own further perplexities.

If the courts do not require some communication to the defendant as to the plaintiff’s expectations with respect to particular property, we face the problem of how the selection of the property is to be made. In the absence of some active representation by the defendant which induces the plaintiff to look to some particular property, that is, where the case against the defendant rests solely upon passive acquiescence, plaintiffs relying upon indirect contributions through supply of services to found their claim would be selecting the property against which the remedy will be afforded.

95 Supra, footnote 41.
96 Supra, footnote 24.
97 Ibid., at pp. 46 (S.C.R.), 7 (D.L.R.).
The "expectations" which induce the activity relied upon by plaintiffs to establish the "deprivation" and "enrichment" elements of the cause of action, and to justify the proprietary remedy, are unilaterally generated by the plaintiffs. The only control over the identity of the property self-selected for the proprietary remedy lies in the requirement that the expectation be "reasonable". An expectation engendered by an active representation by the defendant will surely meet this test, but again, what of the "passive" situations? Are we evolving a convention, which is on its way to becoming a rule, that it is reasonable for a "spouse" to expect a proprietary interest in property standing in the name of the other "spouse", in certain circumstances, and that all "spouses" ought to know this? For example, are we developing a conventional proprietary expectation that a "spouse" whose services have been combined with capital property (including the home) of the other "spouse" to generate wealth, will receive an interest in that property commensurate with the "unjust enrichment" which the titled "spouse" has received?

If, to justify a proprietary remedy, we do require some special signal of expectation to alert the person with the apparent title to the fact that the plaintiff's services are being supplied in the belief that some proprietary interest in particular property is being earned, then the evidence which establishes the existence of that expectation and the reason why the defendant should be aware of it will identify the property as it establishes the basis for the estoppel.

However, where the estoppel is based upon passive acquiescence, that is, upon failure to avoid harm by warning the mistaken provider of the services of the mistake, Sorochan v. Sorochan in its result suggests a further problem. The result of that case suggests that the title-holder cannot establish a defence to a proprietary claim merely by warning the plaintiff that the expectation of receipt of an interest in some property of the defendant is ill-founded. In Sorochan, the plaintiff's request for conveyance into her name of an interest in the property was refused by the defendant. After

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98 The Manitoba Court of Appeal appears to consider that these elements must be proved affirmatively. A claim for constructive trust based on supply of services was refused on grounds, inter alia, that there was no evidence of a reasonable expectation of receipt of a proprietary interest, and no circumstances from which knowledge of that expectation on the part of the defendant could be inferred; Kshywiecki v. Kunka Estate, [1986] 3 W.W.R. 472, at pp. 473 and 426, 21 E.T.R. 229, at pp. 234 and 237, 39 Man. R. (2d) 8, at pp. 11 and 13, 50 R.F.L. (2d) 421, at pp. 424 and 427 (Man. C.A.). The British Columbia Court of Appeal seems to have taken the same position in Doell v. Beck (1989), 35 E.T.R. 185, at p. 190: "the evidence . . . does not support any reasonable expectation on [the plaintiff's] part of receiving an interest in the business or property of the respondents", per Cumming J.A. See also Stanish v. Parasz (1989), 35 E.T.R. 227 (Man. Q.B.).

99 Supra, footnote 24.

100 Ibid., at pp. 46 (S.C.R.), 7 (D.L.R.). However, in Pettkus v. Becker, supra, footnote 1, there is a passage pointing in the opposite direction: "There is no evidence to indicate
that time, the plaintiff could not assert that any expectation of a proprietary interest in the property in question was being induced in any way—actively or passively—by the defendant. It is difficult to conceive of what more the defendant could have done to disabuse her of her belief.

What the defendant has done after the refusal is to continue to accept the benefit of the services relied upon to establish the enrichment, and of course, the plaintiff has continued to suffer the corresponding detriment by continuing to deliver similar services. The difference, after the refusal, is that the detriment is suffered with the plaintiff’s eyes open to the fact that the defendant is not prepared to compensate her by a transfer of a capital interest in his property.

If the issue were only as to the existence of unjust enrichment, and not also whether a proprietary remedy should be awarded for any unjust enrichment found to exist, a plaintiff faced with an explicit denial of intention to compensate, or to share ownership in an asset, might argue that, in a spousal relationship, a continuation of the supply of benefits after such an overt refusal is still not “voluntary”, in the sense that bars restitution.

The very nature of the relationship makes it practically impossible to withdraw the services without seriously endangering the relationship which, at least in the case of true spouses, is one for which the law has displayed a special tenderness. Lord Scarman has described the “classic case of duress” as “the victim’s intentional submission arising from the realization that there is no other practical choice open to him”.101 Lord Scarman continued: “This is the thread of principle which links the early law of duress (threat to life and limb) with later developments when the law came also to recognize as duress first the threat to property and now the threat to a man’s business or trade.”102 At first sight, it appears fanciful to suggest that the principle may be further extended into the area of family property in situations where a defendant has done nothing, and may never have consciously thought anything, which could be regarded as a “threat” to the plaintiff. Although an overt threat is possible, it seems more likely that, if the plaintiff does feel constrained to continue to supply the services after the defendant has communicated a refusal to compensate, it is because the plaintiff is unwilling to run the self-appraised risk of losing from the deterioration of the relationship more than is to be gained by withdrawing the services. The risk may also extend to potential loss to dependants of the parties, a powerful additional constraint on the plaintiff’s freedom of choice. I submit that the courts should regard such an appraisal as reasonable, in all true spousal cases, and in those “quasi-spousal” cases where the

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102 Ibid.
relationship is adjudged to have reached a degree of commitment between the parties which makes the plaintiff highly vulnerable to economic and emotional damage on termination of the relationship. In such cases, to treat the plaintiff’s “election” to continue to supply the benefits as “voluntary” may be to require of such a plaintiff far more than “the ordinary degree of firmness which the law requires all to exert”. A court would be justified in refusing to hold that continuation of the supply of the services, after knowledge that the recipient spouse did not intend to compensate by any form of present or future transfer of wealth, was evidence of intention of the plaintiff to make a gift of the services, sufficient to rebut the presumption against gift which, as has been argued, should ordinarily exist with respect to such services.

While an argument along the above lines might establish the unjustness of the defendant’s enrichment even after an express “warning off” of the plaintiff, it does not assist in explaining why the defendant should be estopped from asserting title to particular property. Where only passive acquiescence on the defendant’s part can be pointed to as the basis of an alleged estoppel, then, if a signal to the defendant as to the existence of a belief that an interest in particular property is being earned cannot be warded off by an explicit refusal to convey the expected interest, as Sorohan v. Sorohan seems to suggest, the defendant’s conduct plays no role in the selection of the property to be impressed with the trust. Again, the only control over the choice of property targeted by the plaintiff’s expectations is “reasonableness”.

Estoppel theory, then, provides a recognized and credible theoretical base for the award of a proprietary remedy in the family property cases where the expectation upon which the plaintiff has acted in supplying the services has been induced by an actual representation by the defendant as to attainment by the plaintiff of an interest in particular property. It provides a similar base where the evidence establishes that the plaintiff did have a belief that an interest in property was being earned by the provision of the services relied upon, and that such belief was made patent to the defendant, so long as defendants can avoid the estoppel by warning plaintiffs that their belief that an interest in property is being earned by the supply of services is wrong. Although one can find examples in the cases where there is evidence of actual representations or of actual communication to the defendant of a plaintiff’s belief that a property interest was being earned, I suspect that the number of cases in which a “spouse”

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103 Skeate v. Beale (1841), 11 Ad. & E. 983, at p. 990, 113 E.R. 688, at p. 690 (Q.B.), per Lord Denman C.J.
104 See supra, footnotes 43-45, and accompanying text.
105 Supra, footnote 24.
106 See supra, footnotes 99 and 100, and accompanying text.
107 See supra, footnote 39, for some possible examples.
will be found to have been unjustly enriched by the contributions of services of the other, and which will also provide credible evidence of such representations or of the existence and notice to the defendant of the plaintiff’s expectations, will be relatively few. In the absence of credible evidence of such representations, or of the existence and communication of an actually existing belief on the plaintiff’s part, reliance upon estoppel theory to justify a proprietary remedy against particular property distorts the estoppel concept beyond recognition. We would then be resorting to some kind of conventional, or presumed, “reasonable expectations” of receipt of an interest in property of the partner to the relationship, with a corresponding conventional, or presumed, appreciation on the part of titled partners that such expectations would be held. In those circumstances, the “representation” or “acquiescence” upon which an estoppel must be founded would not consist of anything the defendant had done or failed to do beyond entering into a relationship “tantamount to spousal” with the plaintiff, and continuing to participate in it. Therefore, I submit that, in most of the cases where a “spouse” has established that the other party to the relationship has been unjustly enriched by receipt of the benefit of the plaintiff’s services, estoppel will not supply an adequate basis for awarding a proprietary remedy.

VI. Establishing the Nexus through the “Just and Equitable” Test
Where neither traditional tracing theory nor proprietary estoppel theory nor actual agreement between the parties provides satisfactory grounds for selecting particular property of the defendant as the subject matter of a proprietary remedy which is being awarded, we appear to be acknowledging and giving effect to the argument of Goff and Jones that a “restitutionary proprietary claim may be granted, even though the plaintiff’s assets can no longer be identified through the application of equity’s traditional rules, if it may be just and equitable so to do”.108

A “just and equitable” test, standing alone and unsupported by expressed reasons why one result is more just than another, appears visceral rather than cerebral. Any reasons offered should establish “justice and equity” in the context of the issue which makes the nature of the remedy important.109 If there is no applicable statutory scheme for allocating wealth on termination of a spousal relationship, a proprietary remedy is of importance only insofar as a deficiency of assets available in the hands of the enriched defendant to satisfy a restitutionary claim exists, or at least is contemplated as a real possibility. In such a case, the claimant seeks to obtain priority in the distribution of assets still in the hands of the defendant (or of some

108 Goff and Jones, op. cit., footnote 6, p. 63.
I do not countenance the view that a proprietary remedy can be imposed whenever it is “just” to do so, unless further guidance can be given as to what those situations may be.
trustee or receiver standing in his shoes), or to claim an asset previously transferred by the defendant to a third party. If there is a statutory scheme for division of wealth which applies to the relationship, then the granting of a proprietary remedy may also modify the distribution of wealth which the scheme, standing alone, would effect between the parties.

The selection of the property, if any, to be "linked" to the contributions relied upon by the plaintiff to establish the "deprivation" element of an unjust enrichment claim, to form the subject matter of a constructive trust, will obviously be a very important control over the extent to which the untitled "spouse" will enjoy an advantage over other creditors, if that is the context which makes the proprietary remedy important. Similarly, if the issue is possible modification of a distribution of wealth, on termination of a relationship, from that which a statutory scheme, standing alone, would provide, the selection of the subject matter for the remedy is a control over the degree of modification. Where contract, or traditional tracing or estoppel theory are not governing the selection process, the task becomes one of attempting to demonstrate the "justice and equity" of any particular selection, not only with respect to the issue of whether any priority should be given at all, or any modification of the distribution under a statutory scheme permitted, but also with respect to the amount of special protection or of modification to be afforded.

In the generalized unjust enrichment situations, that is, those where the unjust enrichment which is identified does not arise from a discrete transaction or series of transactions, but is rather the result of savings made possible by being a net recipient of the benefit of services rendered by the claimant over the course of a conjugal relationship, expressions such as "justice and equity" or "fairness" do not offer any self-evident guidance to the solution of the problem of why a beneficial interest in a particular asset of the defendant, or indeed, in any assets, should be awarded to the plaintiff "spouse" rather than be made available for creditors generally. Nor, where the proprietary remedy is sought in order to achieve a different distribution of wealth as between spouses on termination of the relationship, from that which a statute alone would provide, does such a test explain the selection of particular property to achieve a particular result.

Where the issue is one of competition with other creditors, the equities to be examined in considering the award of the proprietary remedy are those between the claiming "spouse" who has demonstrated that the defendant spouse has been unjustly enriched, and other creditors of the defendant, not those between the spouses. In considering these equities, we note immediately that the law has had no difficulty in holding that beneficiaries under other trusts raised by implication of law, in particular, for present purposes, the resulting trust, are entitled to priority for their claims. I have argued above that, in these cases where the deprivation element upon which the plaintiff relies is the supply of services, the court should be, and is, employing a presumption against gift similar to that
used to raise the resulting trust. Does it follow, then, that the spouse who has supplied services to enrich a now insolvent partner should enjoy an analogous priority?

Professor Litman asks:¹¹⁰

Why should the contributor of property or money have automatic trust status under the Bankruptcy Act as the beneficiary of a resulting trust and the contributor of labour to the building of a house in the bankrupt estate not have the same priority? Why should the framing of a case under the fictitious doctrine of the common intention resulting trust give the trust beneficiary an advantage over the remedial constructive trust beneficiary whose substantive claim is the same?

Clearly, Professor Litman sees no reason for any difference. However, the issue is important enough for another look.

Persons who advance credit to another, without taking security on specific assets of the borrower, accept the risk that their ability to recoup through legal process, should this become necessary, may be imperilled by the borrower’s ability to deal with her or his unencumbered assets, and to pledge further her or his own credit. Thus, if the borrower conveys away an asset or agrees to convey it away in circumstances admitting of specific performance, thereby raising an equitable title in the buyer, the unsecured creditor has assumed this risk. Similarly, the unsecured creditor must assume the risk that the debtor will, explicitly or tacitly, make some representation that another will enjoy some interest in his or her property, and set in motion the establishment of a proprietary estoppel that will translate itself into what is in effect an involuntary conveyance of some interest in the property. Also, the creditor is not entitled to expect that property of third parties, which has come into the hands of the debtor under circumstances where the debtor is not intended to have beneficial title to that property, will be available to satisfy the debtor’s obligations. But all of these cases arise out of quite specific and identifiable transactions with the debtor. Such transactions permit specific identification of the amount and nature of the property that will be withheld from the creditors on the basis that, at the relevant time, it is not the property of the debtor. However, in the typical “family property” case, where the plaintiff is relying upon indirect contributions to the defendant’s acquisition or maintenance of assets, through the supply of services, there are no discrete transactions to analyze. The fact and amount of unjust enrichment, and the property to be selected to remedy it, can only be determined after a retroactive writing up, and then an analysis, of the notional books of account of a couple’s lifetime together.

The real question to be asked when deciding whether to award any proprietary remedy in these “indirect” contribution cases is, do we want to make all creditors assume the risk that a debtor, who is in a relationship “tantamount to spousal”, or who may subsequently enter upon one, will

¹¹⁰ Litman, _loc. cit._, footnote 80, at p. 465.
be found, on a termination of that relationship, to have gained unjustly, at the expense of the partner to the relationship? A consideration, I submit, is that in the spousal property situations where the unjust enrichment conclusion is reached after an examination of the whole economic contributions of each party, in money or money's worth, to the relationship itself, it is not clear that creditors will usually receive an unjust windfall, at the expense of the claimant spouse, if the claimant is not granted priority. As we assess the elements which go into the finding of "unjust enrichment" in these indirect contribution cases, we must remember that the parties to the relationship have been expending wealth to maintain their style of living, be it high or modest. The fact that wealth was transferred into the relationship from outside creditors may well have assisted both parties to the spousal relationship to maintain such standard of living as they did, and also to acquire or maintain the property over the title to which they are now disputing between themselves. To ask a court to add the task of evaluating this factor into the decision as to whether to grant a proprietary remedy in these indirect contribution cases is a formidable request. But if this factor is not disentangled, then it does not seem unjust for a creditor to say to the "deprived" spouse, "Yes, perhaps I benefitted from your contribution to the debtor's wealth, in that there may now be more wealth available to be divided up among those entitled. But you benefitted from the fact that my credit was available. That credit may have improved your lifestyle or assisted in the accumulation of the wealth of which you are now claiming a share. Even if it didn't, it gave the chance of improvement both in the current standard of living and accumulation of wealth, and if that improvement had manifested itself, you would have either enjoyed the benefit, or be claiming it now. Therefore, even if you are entitled to restitution, you should share any deficiency with me."

Unless we resolve the policy issue which a proprietary remedy for generalized unjust enrichment raises with respect to competition on insolvency in favour of untiited "spouses", a proprietary remedy against any property is not justified where such competition is the practical reason for seeking that remedy. If we do decide that "justice and equity" require that "spouses" who have enriched their partners by these indirect contributions should, on the partner's insolvency, receive some priority over other obligees, we still have the problem of explaining why some particular property pointed to by the plaintiff is the appropriate one to choose to protect the plaintiff's interest, if we are to use a constructive trust over particular property for the purpose. As mentioned previously, the choice of the property to be subjected to the trust controls the answer to the further question, "How much priority should be given?"

The problem of how we select a particular asset could be avoided by choosing to create a trust of some interest in all of the assets of the defendant, or at least, of all those which could be said to have been acquired
or maintained with the help of the plaintiff's services, or to impose a lien or charge against all such assets. In my submission, if the policy choice is to be made in favour of granting a preference to the deprived “spouse” in cases of generalized unjust enrichment, either of these would be preferable proprietary remedies, in indirect contribution cases, to the proprietary remedy generally assumed in the case-law to date, the constructive trust of a particular asset. Not only would such remedies avoid a selection process that is dubious, but they would bring the policy issue posed by the award of a proprietary remedy to the centre of the stage, where it should be. If an ownership remedy over particular property is granted, there is a temptation to regard the priority which flows from it as a by-product of a remedy which the court arrived at, on the basis of other cases imposing constructive trusts, for reasons seemingly independent of the practical consequences of granting it. However, the proprietary remedy is granted to give effect to a pre-determined right of the plaintiff to enjoy a preference over other obligees of the defendant. The preference is not a fortuitous by-product of the remedy.

A similar problem of selection exists where the proprietary ownership remedy is sought in order to modify the distribution of wealth between the parties that a statutory scheme for distribution of wealth on termination of a relationship would otherwise direct. At least with respect to the Ontario legislation, the Supreme Court of Canada, in Rawluk v. Rawluk,\(^{111}\) has held that we may employ the remedial constructive trust in order to adjust the property holdings of the respective spouses from an apparent position to a true position, before applying the statutory formula. However, in the Supreme Court of Canada, the appellant, the defendant in the action, conceded that, apart from the issue raised by the existence of the Ontario legislation, the case was a proper one for the raising of a constructive trust in favour of the plaintiff wife, as found by the courts below.\(^{112}\) Therefore, the court did not canvass the question of why the contributions of the plaintiff were sufficiently linked to the property against which the remedy was imposed, and not to other property of the defendant husband against which it had been sought, and refused.

Whatever the reason for seeking a constructive trust, or “ownership” remedy, I submit that “causal connection” to any particular property of the partner is easy to establish, when the claimant relies upon indirect contributions which have enriched the defendant by permitting additional savings. What is difficult, in such cases, is to explain why particular property is excluded from the proprietary remedy, due to lack of sufficient “causal connection”, particularly now that a contribution to maintenance of property acquired before the relationship commenced will support the remedy. If we identify all of the defendant’s property as the subject of a proprietary ownership remedy, we come perilously close to inventing a doctrine of

\(^{111}\) *Supra*, footnote 54.

“family assets”, which the courts have already said is beyond their competence. If we select only some items of the defendant's property, then, in the absence of recourse to established tracing theory, or to agreements or representations which pinpoint particular property, a “justice and equity” or “fairness” explanation of the selection exposes the courts to an appearance of arbitrariness, as does an unelaborated conclusion that the connection between the contributions and the particular property is “sufficient”.

Reference by the courts to the “reasonable expectations” of the plaintiff seems to protect the process from the arbitrary appearance which resort to “causal connection” alone may invoke in indirect contribution situations. The “expectations” mark off the subject matter of the remedy from other property of the defendant, the acquisition or maintenance of which also was facilitated by the permitted savings. I submit that, rather than “causal connection” and “reasonable expectation” being alternative paths to a constructive trust remedy, they must necessarily operate together if that remedy is to be appropriate and credible in indirect contribution cases.

As was discussed above while considering the appropriateness of resorting to estoppel theory to pinpoint the subject property, the existence of an expectation, in some circumstances, and its “reasonableness”, may be a conventional conclusion on its way to becoming an established presumption. The courts have not yet made it clear whether a plaintiff must lead evidence of the existence of some specific expectation of proprietary entitlement and of its communication to the defendant. The same considerations appear to apply to the plaintiff’s evidentiary problems in this connection as apply to the establishment of the plaintiff’s expectation of compensation for the services rendered, and the defendant’s knowledge thereof, in proving that there is an unjust enrichment to be remedied. If the parties to this intimate relationship are unlikely to be explicit with each other as to their expectations of some material quid pro quo for their contributions to the relationship, they are even less likely to communicate the particular form they expect that quid pro quo to take. Unless the proprietary remedy is to be restricted to a narrow class of cases where positive evidence of the existence of a proprietary expectation, and of the defendant’s knowledge of that expectation, is available, the existence of these necessary components of the plaintiff’s case must be inferred from the details of the parties’ lives together. Previously in this article, the difficulty of maintaining credibility of the judicial process, when attempting to extract from the same kind of evidence the necessary proof of an actual “common intent”, was referred to. The problem seems equally present if affirmative evidence of expectation of an interest in particular property is to be required, in order to obtain a proprietary remedy for unjust enrichment. Assuming

113 See supra, footnote 80, and accompanying text.
114 See the discussion of the evidentiary questions raised by the “expectation” test in Farquhar, loc. cit., footnote 80; and see also, supra, footnote 98.
that it has made the policy decision to give the advantage of a proprietary remedy to spouses who can only rely upon indirect contributions of services to establish the deprivation element of the claim, the court is likely to be confronted by an unpalatable choice. It may have to choose between denying the benefit of such policy for lack of sufficient direct evidence of the required expectation, or appearing to have discovered the existence of the necessary expectation, and of its communication to the defendant, by a process of apocalyptic revelation.

Where there is no affirmative evidence of actual agreement or representation as to title to ground a proprietary remedy in indirect contribution cases, a court which wishes to grant that remedy can avoid such an unpalatable choice by openly recognizing conventional expectations as to sharing of interests in particular property. If, as I have suggested previously, the courts are in the process of developing such conventions, and continue to do so, they will really be imputing to the parties to the relationship those expectations which reasonable persons in such a relationship would form, and expect the other partner to hold, if they had thought about it. This does not differ appreciably, if at all, from the imputation of a common intent which Lords Reid and Diplock wished to employ to justify a proprietary remedy in similar cases in English jurisprudence, in their speeches in Pettitt v. Pettitt. Their views did not prevail in their own jurisdiction against the majority's requirement of proof of actual intent, but they may have triumphed in Canada after all.

I have suggested that one test for "reasonableness" of a plaintiff's expectations which seems to run through many of the cases, although never made explicit, is that, where the benefit of services supplied by the plaintiff has combined with specific property of the defendant, as factors of production, to enhance the defendant's wealth, it is reasonable to expect to receive a capital interest in that property. As a corollary, the defendant should be aware of the expectation in such circumstances. If this is the test, or at least a test of reasonableness in this connection, I must leave it to others to explain why this particular combination of factors justifies the practical consequences of the proprietary remedy, while other contributions by the plaintiff which, logically, must also unjustly enrich the defendant, do not. Whether or not this is the test, or one of the tests, the courts should elucidate what is the theoretical basis which gives legal significance to the facts which, in any particular case, establish the required "causal connection" to property "A", but deny it to property "B". Family

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115 Supra, footnote 3.

116 In Rathwell v. Rathwell, supra, footnote 3, at pp. 452-453 (S.C.R.), 304 (D.L.R.), Dickson J. quoted the following passage from Lord Reid's speech in Pettitt v. Pettitt, supra, footnote 3: "... you ask what reasonable people in the shoes of the spouses would have agreed if they had directed their minds to the question of what claim the contributing spouse ought to have." Dickson J. then commented: "This is a sensible solution and I would adopt it."
property litigation is costly enough, in money and stress, to require something more than "justice and equity", or "fairness", as an explanation of the basis upon which a particular remedy will be made available.

Conclusion

Canadian courts, in employing unjust enrichment as the theoretical basis for readjusting wealth holdings between partners in conjugal relationships on the termination of such relationships, are not engaged in "palm-tree" justice. Perhaps the courts may be faulted for delay in filling in the details of the theoretical basis upon which they are arriving at a conclusion that unjust enrichment exists, in cases where the deprivation relied upon by the plaintiff is the supply of services which can only indirectly assist in the acquisition or maintenance of wealth by the other party. Nevertheless, I submit that a principled basis does exist.

In the "family" situations, our courts should reach out to the resulting trust to borrow some components of that doctrine. We should presume, rebuttably, that any benefits, be they in money or service rendered, conferred upon the partner in the relationship, are not given gratuitously, but in the belief that compensation in some form is being earned. We should then place the partner who receives the benefit in the position of one who is aware of the expectation of compensation at the time the benefit is received, and in a position to refuse it, whether or not this is true in fact. These presumptions enable us to establish the benefit of the services as enriching, and also to establish that, if there is a net enrichment of the defendant, then, to the extent that it is found to have been created at the plaintiff's expense, retention of that net enrichment will be unjust. Practicality drives us to employment of these presumptions. There is no more likelihood of discovering credible evidence of the parties' actual mental state with respect to compensation than there is of finding credible evidence of an actual "common intent" to share title, in the interaction between partners to spousal or spouse-like relationships. Yet, intuitively, it seems unlikely that the party supplying services to the other over the course of the relationship intended to exclude herself or himself from any material wealth to which such services might contribute.

Even given these presumptions, actual enrichment of the defendant must be established. Contributions almost never flow only in one direction. An attempt to value the respective contributions, and set them off against each other to arrive at a balance due, immediately confronts the fact that the ledger necessary to carry out such a process has never existed, and was never intended to exist. However, comparison of the contributions of the respective parties, in some manner, is necessary, not only to establish the amount of entitlement to restitution, but to establish entitlement at all. The court should proceed to assess the accumulated wealth of each of the parties when the relationship terminates, and use this "value surviving" as its starting place. This will provide some basis for determining whether
the contributions of either party to the other, and to dependants, have exceeded any legal obligation to supply support which the jurisdiction may impose. More fundamentally, I submit that such a starting place accords with the expectations which parties to most such relationships would disclose if the ubiquitous “officious bystander” could cross-examine them.

At this point, the court must make a rough estimate of the state of the parties’ fictional ledger referred to above. In a sense, of course, this brings quantum meruit in by the back door. In the absence of legislation, imposing equal or some other designated basis for sharing, this cannot be avoided. But the crude weighing of the comparative value of the total contribution of each party to the “value surviving” of the total efforts of both parties is done to estimate shares in the accumulation of wealth, not to calculate past wages owed and unpaid.

However, our jurisprudence has not successfully articulated a compelling theoretical basis for awarding a proprietary remedy for unjust enrichment in “family property” situations, in cases where there is neither actual agreement nor active representation as to the interest which the untitled partner will receive, and where there is no direct contribution to the acquisition cost of the property. I have argued that, in the absence of those factors, a policy basis for creating priority on insolvency has not been explained, and is not self-evident. Even if the policy choice in favour of a proprietary remedy for generalized unjust enrichment is justified in respect of this issue, there is still a problem if the remedy is to be a constructive trust. The necessary “clear proprietary link” to a particular asset of the defendant, in the indirect contribution cases, is not identifiable upon tracing principles, and usually not identifiable upon estoppel principles. The “link” must be forged on some other basis. The cases to date suggest that the proprietary expectations of the plaintiff will form that basis.

If the connection to particular property targeted as the subject matter of the remedy arises from expectations of the untitled partner which induce delivery of the services relied upon as “deprivation”, we still require clarification as to whether the court must be able to find the existence of such expectations without the aid of a presumption. We also need to know whether the defendant can avoid successfully the proprietary remedy by disabusing the plaintiff of any mistaken belief that an interest in the defendant’s property is being earned in return for the services.

The dislike, shown by our courts, of reliance upon attempted proof of “phantom” states of mind, the common lack of reference in the cases to explicit evidence of expectation of obtaining an interest in particular property, and the unlikelihood of such evidence actually existing, in “family” relationships, suggest to me that, in circumstances where the court finds it reasonable to do so, the expectation, held by the untitled partner, of sharing in particular property, and the knowledge of that expectation by the other, are being presumed. If so, the nature of the presumption and of the circumstances which will raise it should be more clearly described.
In my submission, if the policy issues raised by the award of a proprietary ownership remedy, in cases where a finding of unjust enrichment is based upon indirect contributions to the acquisition or maintenance of wealth by the defendant in domestic relationships, are resolved in favour of granting this remedy, then some evidentiary presumption as to the proprietary expectations of the parties is in practice necessary. Otherwise, the majority of untitled “spouses” will not obtain the protection which the policy is designed to afford to them.

If the unjust enrichment approach to the just allocation of accumulated wealth of the partners in spousal or “tantamount to spousal” relationships does require the set of presumptions described here, or something like them, then the utility of the “family” cases in affording guidance in other types of cases is extremely limited. These cases have affirmed conclusively the validity of a general doctrine of unjust enrichment as a part of Canadian common law, if this was ever in doubt after Deglman v. Guaranty Trust Co. But, as the doctrine is sought to be applied in any other class of case, the underpinnings for the necessary conclusions of enrichment, corresponding deprivation, and lack of juristic reason for the enrichment, will have to be analyzed anew.

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117 Supra, footnote 48.