

# **A Problematique : Engineering the Constructive Trust in Quebec — Structural Tension in the Development of *In Rem* Restitution for Unjust Enrichment**

---

Michael McAULEY\*

<b>I. INTRODUCTION</b> .....	79
<b>A. Summary of the Law of Fiduciary Duty.</b> .....	79
<b>B. Summary of the Law on Unjust Enrichment</b> .....	80
<b>II. REAL RESTITUTION</b> .....	81
<b>Summary of the Law of Restitution of Prestations</b> .....	81
<b>III. REMEDY OF TRUST LAW</b> .....	82
<b>Summary of the Law of Trusts</b> .....	82
<b>IV. CREATION OF A NEW QUEBEC TRUST PARADIGM</b> .....	83
<b>Advent of a Quebec Remedial Constructive Trust</b> .....	84
<b>V. OTHER REMEDIAL MEASURES</b> .....	85
<b>Summary of These Remedies</b> .....	85

---

\* McMaster Gervais, Montreal, Quebec.



Notions of fiduciary duty vary within the Western world. Some jurisdictions have an embryonic understanding of the relationship between self-dealing and unjust enrichment. Other jurisdictions are metafiduciary with a sophisticated template for analyzing the interplay of good faith, good conscience and contractual certainty in the private law.<sup>1</sup> It is not irresponsible to assert that there is a common approach to breach of fiduciary duty in the Canadian common law and civil law traditions. The conceptual underpinning for unjust enrichment does not differ so greatly. In this regard, Quebec has partially codified the law of fiduciary obligations within its provisions on persons and property and has also provided an initial codification for unjust enrichment as a source of obligation. The principles expounded in the codified law of fiduciaries most certainly extend to business and commerce in general.

#### **A. Summary of the Law of Fiduciary Duty**

Fiduciary duty first appears in the Book on Persons where the obligations of directors are set out at articles 321 *et seq.* C.C.Q. Importantly, a director is referred to as a mandatary or agent. Accordingly, there is an immediate and direct referral to the law on administration of property of others, the true repository of rules on fiduciary obligations. The director must act prudently, diligently, honestly, and loyally. Neither co-mingling nor profitable employment of confidential information, as between the director and the corporate body, are allowed. Conflicts of interest are to be avoided; declarations of personal interest and potential conflicts are subject to recording. There is a general duty to disclose correctly and immediately any interests in common with the legal person and any proposed transactions.

The principal provisions, however, are found in the Book on Property where, at articles 1308-1318, the Code duplicates, in large measure and in an uneconomic manner, the rules against self-dealing, failure to disclose, and conflict of interest that initially were introduced for directors of legal persons.

---

1. Canada is one such jurisdiction. For a recent and concise survey of the Canadian common law approach to the subject matter of this problematique, see Lionel D. Smith's case comment on *Soulos v. Korkontzilas* [1997] 2. S.C.R. 217. L.D. Smith, "Constructive Trusts — Unjust Enrichment — Breach of Fiduciary Obligation : *Soulos v.s Korkontzilas*" (1997) 76 Can. Bar Rev. 539.

Although the provisions on administration of property were designed to deal with express trustees, liquidators, depositaries, agents and mortgage creditors in possession, *inter alios*, the initial article (art. 1299) provides that any person charged with the administration of property assumes the office of administrator. Furthermore, the rules apply to every kind of administration. Is there a *numerus clausus* (i.e. a closed set) of administrative offices or is there scope for judicial and doctrinal extension? Is the existence of fiduciary duty dependent on formal and separate patrimonial identities?

Finally, it is arguably axiomatic that the fiduciary duties posited in the provisions on administration of property apply, in both their explicit and implicit contexts, to the entirety of obligations, that is to say, if the introductory provisions of Book Five (Obligations) on the nature and objects of prestations are credible statements.

## B. Summary of the Law on Unjust Enrichment

Now codified, unjust enrichment has a relatively long history in Quebec. The legislator "stabilized" the law in 1994 on the basis set out in the Supreme Court of Canada decision of *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*<sup>2</sup> The case is additionally noteworthy for the statement, oft' forgotten or unknown, that the Civil Code does not contain the whole of the law.

*The theory of unjustified enrichment is no longer open to debate; discussion relates only to its theoretical basis and to the conditions of application. Finally, legislative support for this theory can be found, if necessary, [...] Such support can also be found in an extrapolation from the numerous provisions of the Civil Code, that are only special applications of it. The Civil Code does not contain the whole of civil law. It is based on principles that are not all expressed there, which it is up to case law and doctrine to develop [...].*

The prevailing view, to which the legislator may be inimical, is that the current formulation of the law on unjust enrichment is not fossilized but serves as the basis for further doctrinal and jurisprudential restructuring to satisfy contemporary notions of enrichment and impoverishment.

The law is neatly set out at articles 1493 to 1496 C.C.Q.<sup>3</sup> The opening article provides that "[a] person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for his correlative impoverishment, if there is no justification for the enrichment or the impoverishment." The apparent sanction is an indemnification, a codal cueword used to mean damages. *Quaeritur*, is this indemnification extended, as of right, to a real remedy now that the law of restitution has been comprehensively reassessed and reorganized? Is this so notwithstanding the fact that

---

2. [1977] 2 S.C.R. 67.

3. Is this law, let alone its codal expression, "open-textured"? On the "style of expression" of the Code, see J.E.C. Brierley, "The Renewal of Quebec's Distinct Legal Culture : The New Civil Code of Québec" (1992) 42 U.T. L.J. 484 at 491-492.

no textual invitation to refer to the law of restitution is provided under articles 1493 to 1496 C.C.Q.?

## II. REAL RESTITUTION

In the context of an express desire to confer proprietary relief for a breach of fiduciary duty where unjust enrichment is adjudged, the provisions of restitution of prestations are useful. These same provisions allegedly also give rise to a skeletal law of tracing for instances where property is alienated from the trust fund in breach of the terms of trust. The possibility of tracing as a real remedy is currently untested in Quebec. However, real performance and execution of obligations are, of course, not unknown to the civil law. Nonetheless, they suffer from a prohibition to extend specific performance beyond an itemized list of obligations and are hampered by the conceptual divorce of obligations from property and by the separation of personal rights from real rights. Some iconoclasm is surely permissible now that it is admitted that *in rem* rights do not constitute the only juridically recognized patrimonial entitlements and interests.<sup>4</sup>

### Summary of the Law of Restitution of Prestations

The law of restitution of prestations is set out at articles 1699 to 1706 of the Code. A prestation is the object of an obligation under which the debtor must do or not do something.

Article 1699 provides that "[r]estitution of prestations takes place where a person is bound by law to return to another person the property he has received, either unlawfully or by error, or under a juridical act which is subsequently annulled or under which the obligations become impossible to perform by reason of superior force". If restitution cannot be made in kind, it may be made by equivalence. When the Code says that restitution takes place when a person is bound *by law* to return property, the Code is obviously referring to textual instructions mandating restitution. For example, where payments that are not due are made in error, restitution of these payments is made according to the rules of restitution (art. 1492 C.C.Q.). The provisions on unjust enrichment do not contain a reference to restitution of prestations. Can it be said, therefore, that restitution takes place in all cases where there is a breach of legal duty and that this restitution is made in kind? There are other codal authorizations to use the provisions on restitution, for example, where a contract is null and void or where a contract is resolved or resiliated. When the Code was being drafted, the Board of Notaries recommended that restitution of prestations not be confined to the limited list of situations set out in article 1699, that is to say, the Board asserted that the examples of the opening article on restitution were illustrative and not exhaustive. The legislator was equivocal in its response to the Board of Notaries' recommendation. It is interesting to note that some commentators believe that all possible instances for restitution have indeed been set out at article 1699 C.C.Q. Noteworthy also is the second paragraph of article 1699 which

---

4. R. Macdonald, "Reconceiving the Symbols of Property : Universalities, Interests, and Other Heresies" (1994) 39 McGill L.J. 761.

states that "[t]he court may, exceptionally, refuse restitution where it would have the effect of according an *undue advantage* to one party [...]" Surely this undue advantage (avantage indu) is precisely the subject matter of unjust enrichment (enrichissement injustifié).

Since the object of restitution of prestations is to put the parties in their original state of affairs, it shares, together with the provisions on unjust enrichment, a distinct distaste for any contractual arrangement for which there is no justification. It does not seem convincing to deprive an impoverished litigant from restitution *in specie* where possible. Ministerial glosses to the text of article 1699 as set forth in the Code's Commentaries are not binding on the courts. If they were binding, the entire Code would be static, nay gridlocked.

### III. REMEDY OF TRUST LAW

The Quebec law of trusts, recently reformed, is a law of express trusts. Although the intention to create a trust may be deduced from non-formal words or actions, indeed virtually implied from the circumstances, the trust so created is the traditional settlement. The law of trusts, therefore, deals with charitable, protective, private family, private purpose, pension, investment and other express trusts, but does not deal with the resulting or constructive trust. Indeed, there is a codal prohibition to the judicial construction of trusts except in fields specifically and legislatively authorized (e.g. alimentary pensions). Nonetheless, by its very prohibition, the Civil Code acknowledges that the judicially imposed trust is an appropriate and elsewhere existing field of legal enquiry.

#### Summary of the Law of Trusts

The law of trusts is codified.<sup>5</sup> It forms part of the Book on Property. Some twenty-nine (29) articles purport to define its nature, determine its kinds, and regulate its administration. There are extracodal references to trusts. There are also provisions applicable to the trust in the articles on administration of the property of others and in the Code's book on conflicts of law. However, the structure defined by articles 1260 to 1298 is admittedly the only true Quebec trust.

A trust is a juridical act and not a contract. Under a trust a settlor transfers property from his patrimony to another independent patrimony that he constitutes and that he appropriates to a particular purpose. The trustee undertakes to hold and administer the property in this patrimony. The settlor, trustee and the beneficiary have no real rights in this so-called patrimony by appropriation.

---

5. For the history of the Quebec trust prior to the current codification, see M. Cantin Cumyn, "L'origine de la fiducie québécoise" in Quebec Research Centre of Private and Comparative Law, ed., *Mélanges Paul-André Crépeau* (Montreal : Editions Yvon Blais, 1997) at 199. For the *magister's* study of the gratuitous trust as part of Quebec's existing fiduciary envelope, see J.E.C. Brierley, "The Gratuitous Trust : A New Liberality in Quebec Law", in Quebec Research Centre of Private and Comparative Law, ed., *Mélanges Paul-André Crépeau* (Montreal : Editions Yvon Blais, 1997) at 119.

Article 1262 C.C.Q. provides that a trust is established by onerous or gratuitous title. The article also provides that a trust may be established by operation of law. Where authorized by law, a trust may also be established by judgment.

There is no authorization under law that a trust can be established by judgment in matters of unjust enrichment or, indeed, restitution of prestations. There is, moreover, an apparent impossibility on technical grounds. Even if there were an authorization, would the trust so established involve any transfer of property, any appropriation or any acceptance by the trustee? Furthermore, one would have thought that the purpose of a trust in unjust enrichment matters is to bring back the property into the aggrieved and impoverished party's hands and not to retain the property in an autonomous and distinct patrimony.

Finally, although proprietary relief reaches well beyond real rights and encompasses all entitlements, interests and powers, the Code instructs that settlors, trustees and beneficiaries have no *in rem* rights. Is this conducive to the establishment of a constructive trust or an institution similar to it?

The solution may well be the establishment of a trust on a basis other than the formal trust sketched at articles 1260 to 1298 of the Code.<sup>6</sup> In this way, a constructive trust for an unjust enrichment matter might follow a common law model the restatement of which will not be found in the law of trusts but rather will be found in the law of restitution. Similarly, if a constructive trust borrows from the general remedies and context of the law of obligations and the law of administration of property, there would be no need for separate patrimonies or for the express or implied transfer of property. The Quebec constructive trust would be a type of judicial agency. Other judicially noted and sanctioned amphibians include (1) hybrid *mortis causa* and *inter vivos* marriage contract donations and (2) usufructs and substitutions.

#### IV. CREATION OF A NEW QUEBEC TRUST PARADIGM

Astonishingly, the Quebec trust is not the appropriate environment for the development of the constructive trust. Indeed, the architecture of current Quebec trust law does not provide a desirable structure. It is better, perhaps, to look at the law of obligations and the general principles of execution of judgments in order to encourage the introduction of a constructive trust. The law of obligations is traditionally more permissive and inventive than the law of property within the rigid framework of which the new Quebec law of trusts operates.

---

6. Accomplished by extensive appropriation of ideas from other trust jurisdictions. See P.E. Graham, "Evolution of Quebec Trust Law : Common Law Influence seen from 1962 to 1992 is Likely to Continue in Relation to the Civil Code of Quebec" (1994) 96 R. du N. 474.

### Advent of a Quebec Remedial Constructive Trust

The nature and purpose of the constructive trust in the common law is apparently controverted. There are substantive or institutional constructive trusts that render property subject to an express trust or transform persons into trustees. There are also remedial constructive trusts that treat the property as if it were trust property and require restitution or reconveyance.

It is not likely, given the express prohibition of the Code with respect to the establishment of a trust by judgment, that a court will be able to deem a transfer of property to a patrimony that the settlor has deemed to have appropriated and that a trustee has deemed to have accepted. This surfeit of deeming is far too toxic. What then of the remedial constructive trust?

And now the *logos spermatikos*. The Quebec remedial constructive trust will borrow from the Code's articles on agency and administration of the property of others. It will be an implied contract or arrangement where the trustee represents the impoverished party and is required to ensure the patrimonial protection of this party and the administration of his property. It will be a special mandate that will extend to all matters that may ordinarily be inferred therefrom. The mandate will terminate and the restitution of the property to the impoverished party will occur according to the terms of the judgment.

There is, therefore, a structural tension between the law of property and the law of obligations. The law of property strangely discouraging the establishment of novel real remedies and the law of obligations permissive of them. The constructive trust born of the law of obligations would be a type of innominate administration not codally sanctioned in any conventionally defined way but existing as an extension of the general principles set forth in Books Four and Five remodeled to render more meaty the provisions on unjust enrichment.

The first battleground for testing the constructive trust will most certainly be the arena of matrimonial property especially on account of the importance of the family patrimony provisions of the Code. The Quebec legislator borrowed heavily, albeit roughly, from common law in Canada in the conceptual engineering. What was not imported by this discrete reception was one of the procedural remedies to ensure compliance.<sup>7</sup>

---

7. On the family patrimony, see N. Kasirer, "Couvrez cette communauté que je ne saurais voir : Equity and Fault in the Division of Quebec's Family Patrimony" (1994) 25 R.G.D. 569, and by the same author, "Testing the Origins of the Family Patrimony in Everyday Law" (1995) 36 C. de D. 795. The embryo of the trust as a device to secure payment of alimentary awards can be found in the Civil Code at article 591 and at sections 3 and 4 of *An Act to facilitate the payment of support*, R.S.Q., c. P-2.2. See also *Droit de la Famille* – 2282, [1995] R.D.F. 677.



## V. OTHER REMEDIAL MEASURES

The objective of this report has been to examine proprietary remedies to unjust enrichment not expressly identified by the Code that are open to judicial invention yet safe from judicial mischief.

### Summary of These Remedies

Apart from the constructive trust, mandate or agency itself could be judicially reworked. Prior to the 1994 recodification, a not insignificant number of learned authorities were of the opinion that the trustee was the agent of the beneficiary. The beneficiary was the principal and held title. Legal ownership was vested in the beneficiary. This did not sit well with the Supreme Court of Canada which in the early 1980s held that the trustee was vested with a *sui generis* ownership.<sup>8</sup> Some of the thinking that led authorities to believe that the trust was a type of mandate could be remarshalled into service for the Quebec constructive trust. In this way, the Quebec constructive trust will be pioneered on the basis of ideas erstwhile discarded.

---

8. *Royal Trust Company v. Tucker*, [1982] 1 S.C.R. 250.