

EQUITABLE CRIME AND CONSTRUCTIVE PUNISHMENT: DEEMED AND ACTUAL AGENCY GAINS IN CANADIAN LAW

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This article deals with the test for whether proprietary relief is warranted by way of constructive trust, as set out in Roy Goode's essay "Property and Unjust Enrichment" and later adopted by the Supreme Court of Canada in Soulos v. Korkontzilas. The article hones in on the second element of the Soulos test — the deemed agency gain — proposing that there cannot be a deemed agency gain where the wrong committed was not connected to an action authorized by the plaintiff. Therefore, the article proposes that deemed agency gains cannot exist in cases involving bribery or other corruption, and as such cannot be used to obtain a constructive trust in these cases, unless the specific act of corruption was in fact authorized by the plaintiff.

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I. INTRODUCTION

The constructive trust is a grab-bag variety of vehicle that provides proprietary remedies to plaintiffs where the court views its imposition to be appropriate. Commonly, this type of trust is created in response to correcting unjust enrichment or remedying situations in which a defendant committed a wrong and gained property as a result. In both situations, the trust gives the plaintiff a proprietary claim to assets that did belong or should have belonged to them.

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The leading case in Canada for determining whether proprietary relief is warranted by way of constructive trust is *Soulos v. Korkontzilas*.¹ Under *Soulos*, a plaintiff must prove: a cause of action; that their cause of action involves a civil wrong that supports disgorgement; and that disgorgement is available via constructive trust. To prove the latter, courts must use the four-part *Soulos* test. The Supreme Court based its development of that test on Roy Goode's 1991 essay "Property and Unjust Enrichment," which argued that proprietary relief should only be given in the form of a constructive trust to correct wrongs if certain criteria were met: (1) the defendant was under an equitable obligation with regard to the activities resulting in his obtaining the asset in question; (2) the defendant's acquisition of the asset resulted from agency, deemed or actual, by the defendant in breach of their equitable obligations to the plaintiff; (3) the plaintiff established a legitimate reason for proprietary relief; and (4) no circumstances or factors of the case would render imposition of such a trust unjust.² This test sets Canada apart from many other jurisdictions, such as England, where bribes a fiduciary receives in breach of their duty are generally held in trust for the person to whom that duty is owed.³

This article focuses on the second element of the *Soulos* test, the deemed or actual agency gain, and its origins, treatment in jurisprudence, alternative framing of the concept, issues with other academic analyses, and possible difficulties raised by its usage with regard to certain facts. Additionally, there has been debate for many years about the application of the terms "restitution" and "disgorgement" as they apply to the proprietary relief provided by the constructive trust. Recent jurisprudence has clarified the debate, resulting in implications for previously published academic interpretations of Goode's theory and the application of deemed and actual agency gains in real-world cases. By extension, this clarification impacts the ideas explored here.

Ultimately, this article proposes that the simplest way to articulate this concept is that there cannot be a deemed agency gain when the wrong being committed is or was not connected to an original action authorized, explicitly or implicitly, by the plaintiff. A further implication of this articulation is that a deemed agency gain cannot exist and therefore cannot be required as a matter of proof in certain cases, such as those concerning bribery, secret commissions, and other acts of corruption, to obtain a constructive trust, unless those bribes are somehow authorized by the wronged party.

II. ROY GOODE AND THE CONSTRUCTIVE TRUST

The concept of constructive trusts is not novel, but there is still some uncertainty that surrounds them. In particular, courts have long recognized that the list of situations in which it is appropriate to impose a constructive trust remains open. Constructive trusts are commonly imposed to correct unjust enrichment, but they can also be triggered by the commission of an indeterminate number of specific wrongs, such as equitable wrongs including breach of confidence and fiduciary duty, some proprietary torts such as conversion, and, rarely, for "exceptional" breaches of contract.⁴ In his essay, Goode explored the

¹ [1997] 2 SCR 217 [*Soulos*].

² Roy Goode, "Property and Unjust Enrichment" in Andrew Burrows, ed, *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 215, cited in *Soulos*, *ibid* at para 45.

³ *FHR European Ventures LLP v Cedar Capital Partners LLC*, [2014] UKSC 45; *Snepp v United States*, 444 US 507 (1980).

⁴ Robert Chambers, "Constructive Trusts in Canada" (1999) 37:1 *Alta L Rev* 173 at 177.

foundational principles of these two categories of constructive trusts and detailed what he believed should form the basis of the availability of the remedy — disgorgement by way of constructive trust — awarded to correct civil wrongs.

A. CONSTRUCTIVE TRUSTS PREMISED ON “TRUE” UNJUST ENRICHMENT

Goode recognized that constructive trusts are most commonly imposed to correct unjust enrichment, such as when an asset is transferred by the plaintiff to the defendant in such a way that the defendant either never had or lost the right to it, or the defendant’s assets are proceeds of property transferred that way, or the defendant intercepts money or property from a third party against whom the plaintiff had a direct right.⁵ Unjust enrichment illustrated in these scenarios always requires three elements: (1) an enrichment; (2) a corresponding deprivation; and (3) an absence of juristic reason for the defendant to keep the enrichment.

“True” unjust enrichment requires that the gain experienced by the defendant come from the plaintiff in a literal or material sense, not in a metaphorical or figurative one. The concept is generally limited to monetarily quantifiable benefits,⁶ and it is typically triggered by a transfer that fails to fulfill the plaintiff’s intended purpose. The purpose of constructive trusts premised on this kind of “true” unjust enrichment is to reverse transfers that legally had no reason to occur, such as mistaken double bill payments by a customer to a utility provider. Once it has been determined that property unjustifiably moved from one person to another, the court imposes a constructive trust to reverse the transfer by forcing the defendant to return exactly what was taken from the plaintiff, thereby awarding the plaintiff proprietary restitution — a literal “giving back” of the property.⁷

B. CONSTRUCTIVE TRUSTS PREMISED ON DEEMED AGENCY GAINS

Unjust enrichment alone does not adequately cover all scenarios in which a constructive trust ought to be imposed, but the use of the term was historically used broadly to refer to both reversible, legally unjustified transfers between two parties and wrongful gains.⁸ In exploring the second category of constructive trusts referable to wrongful gains, Goode proposed the idea that constructive trusts based on correcting wrongs committed by the defendant ought only to award the plaintiff proprietary relief if the plaintiff had some kind

⁵ Goode, *supra* note 2 at 225.

⁶ *Peel (Regional Municipality) v Canada; Peel (Regional Municipality) v Ontario*, [1992] 3 SCR 762.

⁷ The imposition of a constructive trust in this scenario requires several steps. The plaintiff must first prove the elements of unjust enrichment. In response, the measure of relief granted is always restitution. This restitution may be either personal or proprietary, although it is typically personal, meaning the defendant becomes subject to a monetary debt. The plaintiff has the right to enforce the money judgment against the debtor but does not have any right to the defendant’s property. Canadian courts usually grant proprietary restitution in the form of a constructive trust, but Canadian jurisprudence has not yet determined a concrete test for doing so. Currently, it is sufficient for the plaintiff to prove two elements for proprietary restitution: first, that there is a close connection between the unjust enrichment and the asset retained by the defendant; and second, that personal relief would be “inadequate” or even merely or potentially “inconvenient” per *Moore v Sweet*, 2018 SCC 52.

⁸ This ambiguity was resolved in *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 [*Babstock*]. Although “unjust enrichment” is used to encapsulate both constructive trusts premised on unjust enrichment and wrongful gains — and used to award the same remedy, restitution, to address both scenarios — the Supreme Court of Canada has since clarified that the latter situation calls for the remedy of disgorgement rather than restitution, given that the defendant gives the plaintiff property received from a third party rather than from the plaintiff.

of entitlement to the property gained by the defendant. In doing so, Goode coined the term “deemed agency gains” and provided the foundation for the criteria used by the Supreme Court to develop the four-part test for what was then called proprietary restitution — now properly understood as disgorgement⁹ — in *Soulos*.¹⁰ He described this concept as the “gains which derive not from appropriation of property previously held by P but from activity undertaken by D for his own benefit which he was under an equitable duty, if he undertook it at all, to pursue for P, so that D in effect acted as P’s constructive agent and the resulting gains will be treated in equity as if they had in fact been procured for P.”¹¹

This line of reasoning meant plaintiffs could lay claim to profits the defendant incurred as a result of some improper action only if the defendant could plausibly have been said to be doing, or meant to be doing, that action for the plaintiff. It would be insufficient for the defendant simply to work for the plaintiff, or even to owe fiduciary duties to the plaintiff, if the profit-generating activity were not squarely in that sphere of effective action on behalf of the plaintiff. A defendant who owed an equitable duty of confidence to a plaintiff, for example, could not be said to owe that plaintiff any fraudulently incurred profits if their gains resulted from, say, scamming strangers through a bogus investment website.

In developing his theory, Goode sought to constrain the scope of constructive trusts, including those imposed to correct wrongs. He was concerned by the prospect of plaintiffs being awarded proprietary over personal relief too easily and frequently to the detriment of the wrongdoer’s creditors. Since these types of trusts are remedial and discretionary in nature, Goode’s fear was that the defendant’s creditors would lose out on assets the plaintiff did not inherently deserve, but received anyway due to a test that was not stringent enough. To counter this possibility, Goode said constructive trusts of most persuasions should require some form of “proprietary base”: some basis upon which the plaintiff could feasibly and reasonably lay claim to a beneficial interest in the defendant’s property. Originally drawn from cases involving unjust enrichment, this base would theoretically be uncontroversial because the plaintiff actually should own, or previously have owned, the material property in question.¹² The broad idea of the proprietary base allowing the plaintiff some claim to another’s property was extended to wrongful gains-based constructive trusts from the unjust enrichment-based trusts from which it was theorized via the importation of an agency-based connection — either actual or apparent, or “deemed.”¹³

The application of this idea is relatively clear in relation to situations involving unjust enrichment. Since unjust enrichment requires an enrichment, a corresponding deprivation, and an absence of juristic reason for the defendant to keep that enrichment, the requirement of a corresponding deprivation to the plaintiff generally makes it easy to determine when there is a proprietary base of the kind Goode discusses. In most cases of unjust enrichment, the defendant gained non-ephemeral property as a direct result of the plaintiff’s loss of that same property, such as in cases where the plaintiff accidentally transfers an asset to a

⁹ *Babstock, ibid.*

¹⁰ *Soulos, supra* note 1 at para 45.

¹¹ Goode, *supra* note 2 at 219 [footnotes omitted].

¹² *Ibid* at 226.

¹³ *Ibid* (Goode says, “[w]here D’s enrichment takes the forms of a deemed agency gain it is unnecessary to show a proprietary base for the remedial constructive trust” at 228).

defendant that was in fact the plaintiff's.¹⁴ The plaintiff simply owned that property and there is no justification for why it should be taken away, so there is a proprietary base.

The foundation for the plaintiff's claim is sometimes less obvious when it comes to constructive trusts based on wrongful gains. Often in unjust enrichment cases, the defendant clearly takes from the plaintiff something that belongs to them. For wrongful gains cases, though, the facts can make the circumstances qualifying an agency gain — particularly a *deemed* agency gain — less easily predictable. If the defendant is in a fiduciary relationship with the plaintiff, for instance, and commits a wrong involving property, how do we distinguish between wrongs that do allow the plaintiff to seize that property and those which bar the plaintiff from laying claim to the particular asset?

The answer to this question requires examination of the second element of the *Soulos* test — the agency gain — and its role in proprietary relief.

C. WHY DO AGENCY GAINS, DEEMED OR ACTUAL, SUPPORT PROPRIETARY RELIEF?

In Goode's opinion, agency gains — deemed or actual — support proprietary relief because of the impact removing a gain a defendant receives through an agency relationship has on that defendant's creditors. Giving a plaintiff *any* gain received by any person who has an equitable obligation to them, regardless of whether that gain is reasonably connected to the equitable obligation, would give the plaintiff an unjustified windfall. It would also prejudice the defendant's creditors, who would suffer from the removal of assets from the defendant's property because there would be fewer assets available to satisfy any debts in the event of default. In contrast, the defendant's creditors should not in theory suffer from the removal of assets that never should have been in the defendant's estate in the first place.

The defendant's gain must therefore be connected to an equitable obligation because “in the case of claims based on enrichment by a wrong ... such an obligation requires [the defendant] to subordinate his own interests to those of [the plaintiff] within the ambit of the obligation.”¹⁵ Since the beneficial interest of the asset then essentially belongs to the plaintiff, the defendant's creditors are not cheated of any property if that asset is given to the plaintiff as proprietary relief. Per Goode: Where P has a pre-existing restitutionary interest,

P's interest is not dependent on the court order, so that if P's claim for specific return is upheld the assets available for D's secured or bankruptcy creditors are not diminished in any way by the court order, whilst if P's claim is refused and he is required to be content with a money judgment his interest in the asset continues until such time as the judgment is satisfied, so that D's estate can only acquire the asset by paying its monetary value. Thus the economic effect of the court's decision to grant or refuse a real remedy is essentially neutral.¹⁶

¹⁴ In some cases, unjust enrichment does not require a proprietary base. In cohabitational cases such as *Pettikus v Becker*, [1980] 2 SCR 834 — in which one half of a couple provides services by raising the children, caring for the home, and performing other domestic duties rather than contributing property to the marriage — Canadian courts frequently impose constructive trusts without the presence of a proprietary base. Although the plaintiff gives services, the court returns property in response to the unjust enrichment, contrary to Goode's views.

¹⁵ Goode, *supra* note 2 at 229–30.

¹⁶ *Ibid* at 224 [footnotes omitted].

...

[W]here P has no pre-existing restitutionary interest the imposition of an unqualified constructive trust in his favour deprives D's creditors of an asset to which they could otherwise have had recourse, whilst the grant of a purely personal rather than a proprietary remedy to P leaves him and D's creditors neither better nor worse off than before.¹⁷

Goode described this criterion specifically in relation to deemed agency gains, but its reasoning applies to actual agency gains as well. The deemed agency gain is necessary in order to effectively connect it to the equitable obligation and avoid a windfall where it is not really warranted. This justification should survive if the relationship was in substance one of agency, regardless of what it was called in name — hence the inclusion of “deemed” agency relationships.

A windfall of sorts *is* justified when the plaintiff has a clear claim of ownership, either directly or via fiduciary obligations in an agency relationship, to the property. Although the plaintiff receives that which theoretically already belonged to them (and pays what it would have cost them to obtain that property), the constructive trust remedy entitles the plaintiff to priority over other creditors. Therefore, the asset must be one which the plaintiff would have acquired if the equitably obligated defendant had performed his duties properly. It cannot be one which the plaintiff could not and would not have obtained even if the defendant had behaved appropriately.¹⁸ In the latter case, the plaintiff would have no claim to the profits because there would be no circumstances under which the plaintiff could claim the property would have been his. Ultimately, this restriction to agency gains ensures that plaintiffs receive only the benefit of property which, had things been done on the straight and narrow, should and would have gone to them anyway — and thus any windfall ought to be theirs in principle. As Goode wrote,

[w]here D obtains from T money or property which T's duty is to pay or transfer to P, as where without P's authority D collects from T rent or other debts due from T to P, or procures from T the issue or assignment of a patent for what is P's invention, not D's, this deprives P of what is already his.¹⁹

To further eliminate harm to the defendant's creditors, Goode went on to state that any costs incurred by the defendant in deemed agency gains cases must be reimbursed by the plaintiff, but that this reimbursement does not impact the “measurement of P's proprietary interest in the asset of which he has been deprived.”²⁰ Agency gains already remove property that belongs to the plaintiff from the defendant's estate, but reimbursement goes one step further by neutralizing as much as possible any effect of the wrongdoing. By putting the defendant's estate in the same position it would have been in if the defendant had not committed any wrongful act, any basis for creditor complaints is removed. Goode explained,

[t]he position is quite different where D, in breach of an equitable obligation to P to act for P's interest rather [than] his own, obtains from T money or property to which P had no direct right against T. In this case D does not deprive P of that which P already owns; he is merely preventing P from obtaining a benefit that would

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 231.

¹⁹ *Ibid.* at 226.

²⁰ *Ibid.*

otherwise have come to him. T's obligee was D, not P, and only D could have enforced against T the contract under which the money was paid or the property transferred....To accord P proprietary protection in such a case is to give him that which he did not previously own and to remove from D's estate an asset which previously belonged to it.... [W]hat he now seeks is not restoration of his own property but the allocation of a particular asset or collection of assets of D to satisfaction of a claim for infringement of a right which is not [proprietary] but merely [personal]. Any constructive trust in such a case is necessarily remedial in character, and fairness to D's general creditors requires that any costs of acquisition incurred by D which P has been saved should be either reimbursed as a condition of a proprietary order or deducted in measuring the sum for which P is to be given restitution.²¹

The agency gain thus is a neutralizing factor. It tries to balance both the justified claims of plaintiffs who have been wronged by those who owed them equitable obligations and the unfair treatment of creditors who may suffer from the draining of the wrongdoers' estates. The solution Goode came up with was that plaintiffs' claims should be limited to those situations in which their obligors committed wrongful acts in the course of the fulfilment of their equitable obligations. This is separate and distinct from claims arising from unjust enrichment.

III. OTHER INTERPRETATIONS OF GOODE'S AGENCY GAIN THEORY

Alternative interpretations of Goode's proposition have been proffered in academia. In his case commentary "Constructive Trusts and the Deemed Agency Limitation,"²² Anthony Duggan asserted that Goode said constructive trusts based on wrongful conduct and deemed agency gains related to those based on unjust enrichment because they were functionally interested in the same thing — protecting creditors. Duggan said, "Goode argued ... the constructive trust remedy should depend on proof of unjust enrichment."²³ Duggan wrote that similar to true unjust enrichment, deemed agency gains also involved an enrichment of the defendant and a corresponding deprivation of the plaintiff. In his view, the enrichment is the "realized value of the commercial opportunity the defendant took from the plaintiff," less any expenditure by the defendant, and the deprivation takes the form of the "unrealized value of the opportunity."²⁴ He says the two cases are fundamentally similar, with the only difference being that

in the three primary cases of unjust enrichment, an unconditional constructive trust order will reverse the unjust enrichment, whereas in the deemed agency gains case, the constructive trust must be conditional on the plaintiff's undertaking to reimburse the defendant's outlay. An unconditional constructive trust order would give the plaintiff a windfall at the expense of the defendant's other creditors.²⁵

Duggan seems to claim that Goode intended for both deemed and actual agency gains to be a secondary subset of unjust enrichment cases, but with different framing. Instead of conceiving of the enrichment and corresponding deprivation as actual "hard" or tangible assets, Duggan describes them in ephemeral terms as *opportunities*. He then writes that this

²¹ *Ibid* [footnotes omitted].

²² Anthony Duggan, "Constructive Trusts and the Deemed Agency Limitation," Case Comment, (2005) 84:1 Can Bar Rev 151.

²³ *Ibid* at 152.

²⁴ *Ibid* at 153.

²⁵ *Ibid*.

ephemeral deprivation comes directly from the plaintiff, who suffers the loss of being unable to pursue the opportunity seized by the defendant. For several reasons, this interpretation of deemed agency gains is problematic.

First, unlike what Duggan proposes, there is no unjust enrichment in deemed agency gains cases. At its heart, unjust enrichment requires that the defendant's gain be taken directly from the plaintiff in a literal sense, meaning the plaintiff already had owned that property, full stop. That is not what occurs in cases like *Soulos* or *Lac Minerals Ltd. v. International Corona Resources Ltd.*,²⁶ despite Duggan's arguments. Contrary to the entire idea of unjust enrichment, the property in those cases never materially belonged to the plaintiff.

When it comes to constructive trusts based on wrongs, on the other hand, there is no requirement that the "enrichment" (gain) received by the defendant comes from the plaintiff. The gain can and often does come from a third party. Because of the difference in the source of the gain, contrary to Duggan's commentary, there is no real corresponding deprivation between what is gained by the defendant and what is lost by the plaintiff because nothing is taken from the plaintiff. Duggan conflates moral and legal obligations by saying that since the defendant took an opportunity from the plaintiff to possibly own the property, the defendant took that property from the plaintiff in material terms as well. This does not make sense because the moral taking of the property does not carry over to the actual exchange of hard assets; the defendant does not take something the plaintiff actually owns by merely removing their chance at owning it. At the end of the day, in the case of constructive trusts based on wrongs and agency gains, the property does not come from the plaintiff's physical hands into the defendant's.

Duggan's assertion that wrongful gains constructive trusts are simply a variation of constructive trusts based on unjust enrichment lacks the fundamental ownership element and originating source requirements that define the plaintiff's loss in cases of true unjust enrichment. Ignoring these aspects eliminates the distinction between the two categories: by acting improperly, the wrongdoer always takes away the plaintiff's opportunity to obtain a gain or benefit for themselves. The distinction is one of semantics, but its absence causes confusion because the two categories are fundamentally different.²⁷

Similarly, considering Duggan's remarks regarding "unjust enrichment" in the context of *true* unjust enrichment, it also does not matter if the court declines to reference unjust enrichment when awarding constructive trusts to correct wrongful conduct. Duggan makes a distinction between the two situations. First, he says a lack of reference to unjust enrichment where a defendant obtains for himself contractual benefits from a third party that would have otherwise gone to the plaintiff would mean the court might decline to order reimbursement to the defendant. Second, he says that framing the same scenario in the context of unjust enrichment and deemed agency gains would automatically import the reimbursement obligation. That could potentially be the case if the remedy at stake was personal disgorgement, but the *Soulos* test for proprietary relief (disgorgement) does not consider judicial discretion. The mention of unjust enrichment has no bearing on whether or not *Soulos* and its reimbursement piece applies because if in substance the issue is

²⁶ [1989] 2 SCR 574 [*Lac Minerals*].

²⁷ Mitchell McInnes, "Misnomer: A Classic" (2004) 12 RLR 79.

proprietary relief, *Soulos* should be discussed. Further, Duggan's second distinction is inaccurate since, as previously discussed, unjust enrichment has nothing to do with constructive trusts based on wrongs. Duggan relies on *Boardman v. Phipps* for this proposition, but that case cannot be described by reference to unjust enrichment.²⁸ In that case, the House of Lords ordered proprietary disgorgement in response to gains the defendants obtained using information received from a trust for personal gain rather than solely for the trust's beneficiaries. Since disgorgement is not a remedy for unjust enrichment, nothing was taken from the plaintiff in that case, and as the case revolved around gains resulting from the commission of a wrong, there was no unjust enrichment. Further, it is uncertain whether the House of Lords even intended to award proprietary rather than personal relief in *Boardman*, and as a result that decision cannot be considered a definitive precedent with respect to proprietary relief in similar situations.

The bottom line is that deemed agency gains are separate from the concept of gains obtained from activities that are not related to any current or expected course of action — or gains resulting from actions the defendant should not have been undertaking in any circumstance, such as engaging in illegal activity or breaching contractual terms.²⁹ There is no consideration of unjust enrichment, the concept of a defendant's gains resulting directly from a plaintiff's loss, or judicial discretion. The purpose of the deemed agency gain restriction seems not to provide a foundation in *unjust enrichment* to bar courts from awarding constructive trusts to correct wrongs solely on a deterrence basis as Duggan says,³⁰ but rather to simply constrict the availability of the remedy for the good of unsecured creditors. Goode's theory is ultimately premised on whether or not the wrongful act falls within the sphere of the defendant's equitable obligations. If a defendant is engaged in some equitable obligation to the plaintiff and follows the duties of that position faithfully, in theory, the only benefits the plaintiff ought to be entitled to are those which the defendant does or would obtain in the course of the observation of those duties. If the defendant deviates from those duties by improperly performing them, the plaintiff should receive the tangible assets the defendant procured in connection with those duties. If the defendant simply does something wrong that falls outside the scope of the equitable obligation, the plaintiff is ostensibly not entitled to any gains acquired by the defendant through those activities.

For these reasons it is inaccurate to say, as Duggan does, that the "reversal of unjust enrichment is the only legitimate function of the constructive trust remedy," at least if "unjust enrichment" is taken to mean *true* unjust enrichment.³¹ Mental gymnastics might allow one to say that constructive trusts arising purely from the defendant's wrongful conduct toward the plaintiff still involve a form of enrichment, but even so, the source of that enrichment makes it distinct from the kind arising out of the plaintiff's deprivation of an asset by the defendant. In the latter case, no corresponding loss is required; instead, it is the wrongful conduct itself which requires the defendant to give up his gain. They are completely different.

²⁸ [1966] UKHL 2 [*Boardman*].

²⁹ Goode, *supra* note 2 at 230.

³⁰ Duggan, *supra* note 22 at 156.

³¹ *Ibid* at 153.

More likely than not, Duggan's commentary confused the concepts of proprietary restitution as a result of true unjust enrichment, which requires giving *back* to the plaintiff what they already had, with disgorgement associated with private wrongs, which forces the defendant to give *up* their improperly procured gains to the plaintiff.³² That said, this confusion was a common problem in — and as a result of — Canadian jurisprudence at the time of Duggan's writing. The proposition that unjust enrichment encompassed both true unjust enrichment and private wrongs (“unjust enrichment by wrongdoing”) and shared the same remedy was historically both supported and opposed by well-known scholars on all sides.³³ The debate in Canadian law was only recently resolved.³⁴

IV. RESTITUTION VERSUS DISGORGEMENT

Constructive trusts premised on unjust enrichment and wrongs-based constructive trusts differ, and so do their remedies. Relief from the latter is actually better described as disgorgement, rather than restitution, a point which was clarified by the Supreme Court of Canada in the 2020 decision *Babstock*.³⁵

Duggan did not have the benefit of *Babstock* when he wrote his commentary, but it likely would have helped clarify the confusion in his work. According to the Supreme Court,

restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies.... Each is distinct from the other: *disgorgement* requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while *restitution* is awarded in response to the causative event of unjust enrichment...where there is correspondence between the defendant's gain and the plaintiff's deprivation.³⁶

Babstock concerned breach of contract and largely discussed whether disgorgement broadly was warranted on the facts. Since disgorgement can be personal or proprietary, only after a court decides disgorgement is appropriate is it then necessary to consider *Soulos* and agency gains if what is awarded is *proprietary* disgorgement. The Supreme Court did not need to explain the matter of personal versus proprietary disgorgement further in this case as no disgorgement was awarded. The Supreme Court's explanation is relevant, however, to explain the inconsistencies in Duggan's opinion. Where “proprietary restitution” was previously used to describe all remedies involving constructive trusts whether they were rooted in true unjust enrichment or the commission of wrongs, it is clear that restitution is properly applied to situations in which the defendant must return the exact property the plaintiff lost, and disgorgement to situations where the defendant must give the property they have gotten to the plaintiff, even if that property did not come from the plaintiff. This clarification brought Canadian law into line with academic analysis of the issue.³⁷

³² McInnes, *supra* note 27 at 81.

³³ *Ibid* at 82 (Peter Birks reneged on his support for the quadration thesis — that unjust enrichment and restitution perfectly overlap — in favour of making a distinction between what is effectively “true” unjust enrichment and “unjust enrichment by wrongdoing”; Andrew Burrows preferred the quadration thesis).

³⁴ *Babstock*, *supra* note 8.

³⁵ *Ibid*.

³⁶ *Ibid* at para 24 [citations omitted].

³⁷ Mysty S Clapton, “Gain-Based Remedies for Knowing Assistance: Ensuring Assistants do not Profit From Their Wrongs” (2008) 45:4 *Alta L Rev* 989 at 992–93.

Difficulties in Duggan's writing can be resolved somewhat if his commentary is adapted to the lens of proper distinction between restitution and disgorgement. Putting Duggan's proposition that constructive trusts should depend on proof of unjust enrichment aside, his opinion that the similarity between constructive trusts based on unjust enrichment and those based on wrongs is unjust enrichment due to their remedies (both involving restitution) can instead be altered to say the *distinction* lies in their remedies (restitution versus disgorgement). There is no need to twist the meaning of "deprivation" to include incorporeal opportunities the defendant ethically stole from the plaintiff because there is no need to consider whether the plaintiff had any corresponding losses. The defendant's gain can come from a third party, and the plaintiff can compel the defendant to give up that gain by virtue of an agency connection under the *Soulos* test. Since many of the issues in Duggan's commentary stem from his attempts to reconcile true unjust enrichment and gains obtained by way of private wrongs, the distinction between disgorgement and restitution does away with the need to make most of those justifications.

V. CURRENT JUDICIAL TREATMENT OF DEEMED AND ACTUAL AGENCY GAINS

This article has dealt largely with the intentions and interpretations behind Goode's theory of deemed and actual agency gains as well as the differences between proprietary disgorgement and restitution so far. That said, the theoretical basis of deemed and actual agency gains with respect to proprietary disgorgement is one thing, while the way the concept has been treated by courts in practice is another.

A complete discussion of the issue requires mentioning that a few key cases preceded the development and incorporation of Goode's deemed agency gain theory into Canadian law — namely, *Lister & Co. v. Stubbs*, *Attorney General for Hong Kong v. Reid*, and *Lac Minerals*.³⁸

The English Court of Appeal decision *Lister* limited the plaintiff to personal restitution for the amount of a bribe received by the defendant. Goode wrote about the decision with approval: since the defendant should not have accepted the bribe in the first place, it was not an asset the defendant could have ever received on behalf of the plaintiff as part of any kind of duty or obligation.³⁹

The Privy Council in *Reid*, however, opted not to follow the decision in *Lister* on the basis of policy, reasoning that allowing fiduciaries to profit from their own wrongdoing would encourage breaches of fiduciary duty. Reid, a prosecutor for the Hong Kong government and then-Acting Director of Public Prosecutions, was in a fiduciary relationship with his employer and took bribes from criminals in return for promises not to prosecute them. Reid then used that money to buy land in New Zealand, and the Hong Kong government argued a proprietary claim to the land. In contrast to the Privy Council's decision, a strict application of Goode's theory (and today's four-part *Soulos* test) would have barred the Hong Kong government from being awarded proprietary disgorgement of Reid's property because the bribes did not come from the government; they came from criminals. Furthermore, the bribes

³⁸ *Lister & Co v Stubbs* (1890), 45 Ch 1 (CA) [*Lister*]; *Attorney-General for Hong Kong v Reid*, [1994] 1 NZLR 1 (PC) [*Reid*]; *Lac Minerals*, *supra* note 26.

³⁹ Goode, *supra* note 2 at 231.

were not accepted by Reid in the course of any sort of apparent or actual agency relationship with the government. He was accepting the bribe not for the government, but rather for himself.

In *Lac Minerals*, while the Supreme Court of Canada incorrectly wrote that unjust enrichment lies at the heart of the constructive trust, the majority ruled — consistent with Goode’s theory — that the defendant must hold the site of a large gold deposit under constructive trust for the plaintiff, who suffered from the defendant’s breach of confidence. In this case, Corona, a smaller mining company, disclosed secret information about a large gold deposit in northern Ontario to Lac Minerals, a larger mining company, as part of an agreement that the two groups would enter into a joint venture after the purchase of this property. Lac Minerals, of course, betrayed Corona and bought the property out from the original owner with the intent of keeping it for itself. The Supreme Court awarded a constructive trust on the basis that although the property did not come from the plaintiff, the plaintiff would have purchased it regardless. What the Supreme Court likely meant to say was that “unjust enrichment” at the time was occasionally used to refer to private wrongs, and so “unjust enrichment” here was not the real justification for the trust — instead, it was the equitable wrong of breach of confidence that supported the Supreme Court’s remedy. Although the decision unfortunately confused the ideas of unjust enrichment and private wrongs, the Supreme Court ultimately came to the correct conclusion.

Then came *Soulos*. The Supreme Court majority in *Soulos* agreed that a constructive trust may be appropriate even without an established loss; instead, the constructive trust could be imposed to punish wrongful conduct and uphold the integrity of trust relationships.⁴⁰ *Soulos* involved a realtor who was tasked with finding the perfect real estate investment opportunity for his client; when the realtor found that opportunity, he chose to deceptively and secretly arrange the purchase of the building for himself instead.

Based on Goode’s essay, the Supreme Court decided the imposition of a constructive trust resulting from a wrongful act required that (1) the defendant was under an equitable obligation with regard to the activities resulting in his obtaining the asset in question; (2) the defendant’s acquisition of the asset resulted from agency, deemed or actual, by the defendant in breach of their equitable obligations to the plaintiff; (3) the plaintiff established a legitimate reason for proprietary relief; and (4) no circumstances or factors of the case would render imposition of such a trust unjust.⁴¹ Although Justice McLachlin described possible situations where wrongful gains justifying a constructive trust might arise as ones where there was a breach of a “trust-like duty,” or “like breaches of fiduciary duty,” or “where property is obtained by mistake, by fraud or by other wrongs,”⁴² the Supreme Court did not provide further explanation of the deemed or actual agency gain element in its test beyond their brief reference to Goode’s paper. At trial, the judge relied on the principle that “[a]greement between principal and agent may be implied in a case where each has conducted himself towards the other in such a way that it is reasonable for that other to infer

⁴⁰ *Soulos*, *supra* note 1 at para 14.

⁴¹ *Ibid* at para 45.

⁴² *Serhan (Estate Trustee) v Johnson & Johnson* (2004), 72 OR (3d) 296 (Sup Ct) at para 41 [*Serhan*].

from that conduct consent to the agency relationship,⁴³ but this was not recited in the Supreme Court's decision.

Many courts post-*Soulos* have simply glossed over the issue of what precisely constitutes a deemed agency gain in their reasons, even if they come to the correct result regarding the ultimate imposition (or lack thereof) of a constructive trust.⁴⁴ In *Huang v. Li*, the Court dismissed the deemed or actual agency gains requirement because the asset "did not result from the plaintiff's activities."⁴⁵ Of course, this is not the whole story — a deemed agency gain does not necessarily have to come *from* the plaintiff's activities. It must result from the defendant's activities which in turn must have been done *for* the plaintiff.

Another example comes from the Ontario Supreme Court's decision in *Sutton Group Professional Realty Inc. v. Stone*, in which the Court dismisses the second element of the *Soulos* test with the assertion that because none of the defendants stood in a fiduciary relationship with the plaintiff, there was no possibility of an agency gain.⁴⁶ However, although the Court was correct in saying there was no such relationship, a defendant can still owe an equitable obligation to a plaintiff without being in a fiduciary relationship with them, à la *Lac Minerals*. The key is whether there is an agency relationship, deemed or actual, giving rise to fiduciary obligations by implication. Simply glancing over the facts of a case to see whether there is an actual fiduciary relationship is arguably not sufficient.

Canadian appellate and lower courts have difficulties with the deemed agency gain when they do choose to engage more comprehensively with its meaning. There has been confusion over judicial interpretation of the scope, character, and application of the deemed agency gain. The Court in *Ontario (Real Estate & Business Brokers Act, Director) v. NRS Mississauga Inc.* incorporated tracing principles into this specific criterion where the *Soulos* test makes no mention of tracing rules; that does not mean tracing does not apply in these situations at all, but it does mean that the deemed agency gain itself is a separate consideration from tracing.⁴⁷

Other courts have opined that the application of the deemed agency gain in *Soulos* should be viewed with an eye to the specific arrangements between the parties in that case.⁴⁸ In *Serhan*, the Court wrote that the agency gains condition was meant to reflect the particular facts of *Soulos* rather than limiting the applicability of the constructive trust remedy to agency activities generally — although the Supreme Court in *Soulos* made no mention of this.⁴⁹ The Court of Appeal in *NAIT Academic Staff Association v. NAIT* seemingly could have characterized its remedy as a resulting trust, but chose to adopt the lower Court's label of constructive trust.⁵⁰ The lower Court jumped through several hoops to find a deemed or actual agency relationship sufficient to support a wrongful gains constructive trust in its

⁴³ FMB Reynolds, *Bowstead on Agency*, 15th ed (London, UK: Sweet & Maxwell, 1985) at 42, cited in *Soulos v Korkontzilas* (1991), 4 OR (3d) 51 (Gen Div) at 65.

⁴⁴ *Terra Energy Ltd v Kilborn Engineering Alberta Ltd*, 1999 ABCA 72; *Hollinger Inc (Re)*, 2013 ONSC 5431; *Schwarzkopf v McLaughlin*, 2008 BCSC 730; *Drucker, Inc v Hong*, 2011 BCSC 905; *Sunwing Airlines Inc v Mora*, 2021 ONSC 6179.

⁴⁵ 2018 BCSC 1937 at para 14.

⁴⁶ 2010 ONSC 4040.

⁴⁷ [2003] 64 OR (3d) 97 (CA).

⁴⁸ *Serhan*, *supra* note 42 at para 42.

⁴⁹ *Ibid.*

⁵⁰ 2004 ABCA 42 at para 4 [*NAIT*].

decision; the lower Court also referred to constructive trusts based on unjust enrichment without clarifying which approach it chose to pursue. The appellate Court did not clarify this matter in its own decision.⁵¹

In *ICBC v. Lo*, the lower and appellate Courts awarded a wrongful gains-based constructive trust without analyzing the four steps of the *Soulos* test.⁵² One of the defendants was an employee of ICBC, a British Columbia motor vehicle insurance company, and participated in a breach of trust by issuing fraudulent driver's licences in exchange for bribes from clients. She was enabled by a second defendant. The lower Court awarded a constructive trust to force the first defendant to disgorge the bribes she had received but declined to extend the trust to those amounts received by the second defendant in knowing assistance. This proprietary disgorgement was awarded without reference to agency gains despite the fact that it was the disgorgement of bribe money as a result of wrongdoing — *Soulos* was not cited in the decision.⁵³ The Court of Appeal did opt to extend the trust and premised the second defendant's knowing participation in the first's breach of trust as "provid[ing] the foundation for the constructive trust remedies."⁵⁴ The Court relied on Justice McLachlin's explanation of "good conscience" as the foundation of a broader approach to constructive trusts as justification for its decision but did not discuss *Soulos* or agency gains for the purpose of grounding proprietary disgorgement.⁵⁵

Some courts have exhibited a strong understanding of the underlying reasoning behind the agency gain. The British Columbia Court of Appeal in *Ladner v. Wolfson* included the use of "soft" assets the defendant received from a third party but should have procured for the plaintiff as an example of a means by which a defendant could obtain deemed agency gains, avoiding conflating the use of soft assets to obtain a hard asset from the provision of soft assets like services resulting in claims to tangible property.⁵⁶ The Court committed to the classic distinctions between unjust enrichment and wrongful gains constructive trusts, ultimately stating that there must be a "link between [the defendant's] duty-breaching activities and the assets to which P lays claim" and affirmed that proof of enrichment is not necessary to justify the imposition of a constructive trust.⁵⁷ The Court contrasted its conclusion to the one in *Kerr v. Baranow*, wherein the Supreme Court stated that constructive trusts imposed to correct unjust enrichment require a "clear proprietary relationship" connecting the contributions to the property.⁵⁸

⁵¹ However, given the clarification recently regarding restitution and disgorgement, it is likely the lower Court intended to prove a wrongful gains constructive trust in this case. The decision involved the demutualization of a mutual company with whom NAIT had a policy benefitting its staff; NAIT kept the proceeds of the sale of the shares it was issued as part of the demutualization for itself instead of distributing the profits to its staff policyholders. The gain NAIT received did not come from its staff; it came from the mutual company. Since disgorgement is the remedy for constructive trusts based on wrongful gains and restitution is the remedy for constructive trusts based on unjust enrichment, only one of those options now makes sense in the context of this case. Ultimately, the Court of Appeal adjusted the lower Court's remedy and placed limits on it, essentially stating that NAIT staff were not entitled to the entire payout; they were only able to receive an amount proportionate to their contributions. This meant the Court settled on what was effectively a resulting trust, but decided not to alter its label from that of a constructive trust.

⁵² 2006 BCCA 584 [*ICBC*].

⁵³ *ICBC v. Dragon Driving School*, 2005 BCSC 1093.

⁵⁴ *ICBC*, *supra* note 52 at para 61.

⁵⁵ *Ibid* at paras 54–57, 59.

⁵⁶ 2011 BCCA 370 at para 49.

⁵⁷ *Ibid* at paras 49, 52, citing Goode, *supra* note 2 at 239.

⁵⁸ 2011 SCC 10 at para 51.

The one thing courts do seem to echo uniformly is that the application of the deemed agency gain and the *Soulos* test in general is highly fact-specific. In *Siemens v. Howard*, the Court noted that an assessment of implied agency turns on the facts of the case.⁵⁹ In *Brookfield Bridge Lending Fund Inc. v. Karl Oil and Gas Ltd.*, the Court agreed that the question of whether there was a deemed or actual agency gain required the establishment of a “factual connection” between any breach and the property in dispute.⁶⁰ Additionally, as mentioned above, though aspects of the Court’s statement in *Serhan* were debatable, the decision did acknowledge the importance of facts when it comes to assessing the agency gains element in proprietary disgorgement cases.⁶¹

Ultimately, the concept of the deemed agency gain seems to be one that courts have not concretely or definitively parsed out. There continues to be some obscurity with regard to how a deemed agency gain is defined, what kind of reasoning is required to dismiss or affirm such a gain, and sometimes whether it should be addressed at all.

VI. A SIMPLER ARTICULATION

Despite confusion or vagueness in lower level decisions, the Supreme Court’s deemed or actual agency gains requirement remains in its original form. The concept is well-articulated and comprehensible when one reads the background of Goode’s development of the agency gain and how it relates to constructive trusts. For the casual reader, however, existing explanations are accurate, but complex and verbose. The various conclusions found in existing case law do not assist in easing this conundrum.

The central confusion in explaining the concept of the deemed or actual agency gain is that it is sometimes unclear if something is or is not a deemed agency gain. Actual agency gains are often much clearer; they generally entail clear agency relationships that are familiar and established, like solicitor-client, director-company, and other formal arrangements where an agent is explicitly retained. Deemed agency gains, on the other hand, can be difficult to conceptualize right away. When it comes to the situation in *Reid*, for instance, one can easily mistake that case as one in which deemed agency gains arose. Consider the outcome if one mistook the concept of the deemed agency gain thusly: “Deemed agency gains go to the plaintiff only if the situation is such that if the defendant were to acquire the property, the defendant ought to have acquired the property not for himself, but on behalf of the plaintiff.” If that is the line of thinking, then in *Reid*, the defendant was the employee of the plaintiff; he owed the government of Hong Kong a duty not to accept bribes as part of his work as a state prosecutor. Does that then mean that as a prosecutor, the bribes he accepted in his role as a state agent should have gone to his employer? The answer, of course, is no, but although his acceptance of the bribes ultimately could not and cannot be seen as a deemed agency gain under the *Soulos* test, it is easy to see how the line between deemed agency gains and gains unconnected to any kind of agency at all can become muddled without a simpler, less verbose explanation.

⁵⁹ 2018 BCCA 197 at para 15.

⁶⁰ 2009 ABCA 99 at para 32.

⁶¹ *Serhan*, *supra* note 42 at paras 40–42.

My proposition is that the simplest way to describe this concept is that there cannot be a deemed agency gain when the wrong being committed is or was not connected to an original action authorized, explicitly or implicitly, by the plaintiff. This articulation also has effects on the existence, and thus necessity, of deemed agency gains as a matter of proof when it comes to gaining constructive trusts in particular circumstances, such as those that involve unauthorized bribes — since the bribes are presumably unauthorized by the plaintiff, these situations cannot involve deemed agency gains.

The real estate agent in *Soulos* purchased the property that he originally was supposed to source for the intended purchaser, the plaintiff. The plaintiff expressly authorized the defendant to find the property but not to then go back on his word and arrange to have it bought for himself. To do so was a breach of fiduciary duty since the realtor had been hired as the plaintiff's agent. The key is that the search itself was allowed by the plaintiff, and thus the improper purchase and retention of the property could be considered an agency gain. Since there was a clear agency relationship importing fiduciary obligations in this case, there is less confusion to be had over the determination of whether or not there was a deemed agency gain. However, it still stands that there was an activity permitted by the plaintiff from which the defendant agent's wrongdoing directly flowed.

Similarly, in *Lac Minerals*, since the defendant obtained the mining property through knowledge the plaintiff had disclosed in confidence under the guise of the agreed-upon joint venture, the defendant committed a wrong sufficiently connected to the originally-permitted activity (the joint venture) when it opted to retain the property for itself post-purchase. The plaintiff originally authorized the defendant to purchase the property but did not authorize that the defendant subsequently renege and keep the entirety of the property. Since the purchase of the property itself was authorized, the defendant's purchase combined with its related wrongdoing could be considered a deemed agency gain.

This proposition is arguably better illustrated when analyzed against cases in which there was found *not* to be an agency gain (or in which a strict application of the four-part *Soulos* test would have found there was no such gain). *Reid* also involved the acceptance of bribes. While *Reid* was a prosecutor employed by the government, regardless of the duties he owed to his employer, his bribery did not stem directly from any activity that was authorized by the government. His job and the duty he was permitted to undertake was the prosecution of criminals. His acceptance of the bribes was diametrically counter to this; in exchange for bribes, he was deliberately promising *not* to prosecute and *not* to perform his authorized duties. *Lister*, which also involved the acceptance of bribes, is similar for the same reasons. This proposition can be applied to more modern wrongful gains cases in comparable ways. In *ICBC*, the plaintiff motor vehicle insurance company allowed its employee, one of the defendants, to issue driver's licences, but this fact pattern is similar to *Reid* — the employee was not permitted to take bribes. That fact axes the possibility of a deemed agency gain. Conversely, although the court in *NAIT* arguably did not properly label its proprietary remedy, if one continues with the granting of a constructive trust in this case, it could be argued that there is no such bar to that remedy under this proposition: the alleged wrong committed — the retention by *NAIT* of proceeds generated from the sale of a mutual company's shares received as a result of demutualization — was connected to the registration

of a group life and long-term disability insurance plan for NAIT's employees with that mutual company, which was an action originally authorized by NAIT employees.⁶²

Although it does not by itself constitute a complete positive test for determining deemed agency gains in all cases, this proposition does assist in weeding out those situations in which there are *no* deemed agency gains. Once an equitable obligation on the part of the defendant has been established — assuming there is no actual agency relationship to which the gains can be easily tied — it is much easier to then examine whether the defendant procured their gains in a way that was connected to an action originally authorized by the plaintiff. Used in concert with the particulars of each case to see if the defendant in fact was supposed to procure those gains for the plaintiff, this proposition brings some clarity to the second element of the *Soulos* test. It can work as a potential secondary backstop to check if deemed agency gains exist.

VII. SHOULD CANADIAN JURISPRUDENCE EVEN HAVE A DEEMED OR ACTUAL AGENCY GAINS LIMITATION?

As previously discussed, in *Reid* a strict application of the *Soulos* test with its agency gains requirement would have found there was no deemed agency gain and no unjust enrichment, as was found in *Lister*. The Privy Council, however, intentionally chose to diverge from *Lister* and award a constructive trust on the basis that, first, fiduciaries should not be able to profit off of breaches of duty or other wrongdoing; and second, constructive trusts based on wrongs serve a deterrence function and thus do not require proof of “true” unjust enrichment.

Although Goode and possibly the Supreme Court in *Soulos* would have expressed disapproval of the Privy Council's decision, it is worth considering the fact that as the legal test for proprietary disgorgement stands, fiduciaries could theoretically commit breaches of duty and make off with their ill-gotten gains in certain situations so long as their breach was not per se connected to their duty to the plaintiff. Although the fiduciary could be held liable for personal disgorgement, this remedy would be undesirable for the plaintiff if the defendant has too many creditors. Proprietary remedies are generally far more attractive for plaintiffs because it allows the plaintiff to avoid fighting for assets against other creditors entirely.

My proposition above also does not solve this policy conundrum — it is a flaw in the concept of the deemed agency gain itself. Under the current test, a third party rogue who deceptively steals from a trust by lying to the trustee and then uses the stolen trust property in ways that lead to exorbitant wealth could pocket their profits to the detriment of the beneficiaries. The profits would not be considered an actual agency gain because the rogue has no fiduciary duty to the trust. They also would not come under the category of deemed agency gains because the rogue's actions did not stem from any previously authorized activity by the plaintiff, the wronged beneficiaries of the trust — the beneficiaries did not permit the release of the trust property to the rogue in the first place. Unable to satisfy the *Soulos* test, the beneficiaries would be left only with personal disgorgement, a far less

⁶² *NAIT*, *supra* note 50 at para 1.

desirable outcome from the plaintiffs' point of view than proprietary disgorgement.⁶³ At the end of the day, there is no distinction in *Soulos* between situations involving bribery and situations involving breach of fiduciary duty.

It is important to remember that the deemed and actual agency gains requirement was conceived primarily out of Goode's concern for unsecured creditors of wrongdoers forced to give up their gains too frequently or easily. This is a valid misgiving and one which it would be logical to keep in place for situations like *Soulos*, wherein a contracted agent (or person in a similar position of agency acting on behalf of the plaintiff) deceived their obligee and calculatedly did the very opposite activity for which they were retained. Plaintiffs should have no claim to profits borne out of random activities unconnected with them — Goode's fears would be actualized if plaintiffs could simply foreclose on any gain incurred by someone who owes any kind of equitable obligation to them regardless of how that gain was obtained. That said, leaving the door completely closed to *all* scenarios limits the ability of the law to respond flexibly to scenarios in which it would be unjust or unfair to the plaintiff to forego proprietary disgorgement and where there would be legitimate policy reasons for doing so. There must be a balance between limiting the sphere of plaintiff claims and discouraging scenarios involving serious fraud and deception by fiduciaries beyond the type found in *Soulos*. It does not serve the public that wrongdoers presently can escape liability if their wrongful behaviour was *somewhat* (or even significantly), but not *sufficiently*, related to the plaintiff.

One possible way to avoid this issue, were it to come up in the courts, would be to distinguish between situations like *Soulos* involving breach of contract or other equitable wrongs and those centring around bribes, secret commissions, and other forms of corruption that cannot be tied to the sphere of a fiduciary's duty. Although it would require a massaging of the *Soulos* test — likely by removing the deemed and actual agency gains requirement entirely — it could better address the select scenarios in which it would be unjust to allow the wrongdoer to benefit from their offences to the detriment of society.

The Supreme Court in Canada has not yet had to grapple with this proposition, but this hypothetical scenario exposes the weakness in the current *Soulos* test and, specifically, the agency gains criterion. Although the absence of a constructive trust does not leave situations involving wrongful gains beyond the scope of this test completely without recourse since, as previously mentioned, a fiduciary who has committed this type of wrong must still account for their profits to the applicable beneficiaries, who would then have a personal right to recover the full value of the wrongful gain, this right would not rank above the claims of the fiduciary's other creditors and is therefore often less desirable than proprietary remedies.⁶⁴

⁶³ Other alternatives exist but are still not as desirable as proprietary disgorgement under *Soulos*, *supra* note 1. Instead, the third party could be sued in knowing assistance, knowing receipt, or the *vindicatio*; in this scenario, knowing assistance would be impossible since the fiduciary did not act dishonestly. Even if knowing assistance was available and the plaintiff chose to pursue proprietary disgorgement, it is not immediately evident how the deemed agency gain element would be satisfied — even though the prohibition against assisting in a breach of trust underlying the equitable tort of knowing assistance would constitute the requisite equitable obligation. Although knowing receipt would be possible, the plaintiff would be limited to personal restitution. Finally, for the beneficiary to exercise the *vindicatio* and successfully recover the property itself, the third party must have stolen and traceably retained the trust property.

⁶⁴ *Lister*, *supra* note 38.

VIII. CONCLUSION

Canadian law now recognizes definitively that there is a distinction between constructive trusts triggered by true unjust enrichment with the remedy of proprietary restitution and those imposed to correct wrongful gains through the remedy of proprietary disgorgement. The *Soulos* test, of course, applies to the latter. This distinction has significant impacts for previous academic interpretations of the theory underpinning the test and course—corrects the conflation of unjust enrichment with gains resulting from wrongful conduct.

Soulos's second element in particular still raises some level of confusion when it comes to its judicial treatment, as courts have not yet determined a unified approach to analyzing this specific element. Goode's theory continues to ground the foundation of agency gains, and an examination of his reasoning behind the importance of this requirement provides guidance for what must be considered in evaluating this component. However, in light of the uncertainty that is often imported when assessing whether or not a deemed agency gain exists, a simpler proposition — that there cannot be a deemed agency gain when the wrong being committed is or was not connected to an original action authorized, explicitly or implicitly, by the plaintiff — may bring some clarity when used together with the facts of each case to determine whether the defendant was bound to procure their gain for the plaintiff.

Even given additional clarity and even if Canadian jurisprudence comes to a consistent understanding in applying the agency gains requirement, Canadian courts still have challenges that they may have to wrestle with in terms of reconciling the agency gains element with legitimate policy concerns related to fiduciaries profiting from breaches of duty. Clarification on whether the current test can be adapted to these situations by the Supreme Court of Canada would improve the ability of this area of law to respond fairly to different kinds of wrongdoing and strengthen the applicability of proprietary disgorgement overall.

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