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**RECOVERY OF THE INDIRECT PROFITS  
OF WRONGFUL KILLING: THE NEW  
CONSTRUCTIVE TRUST AND THE OLSON CASE**

John D. McCamus\*

The decision of Trainor J. of the British Columbia Supreme Court in *Rosenfeldt v. Olson* (1984), 20 E.T.R. 133, is boldly innovative. Having murdered 11 children, Clifford Olson agreed to provide incriminating information concerning the remains of his victims to the R.C.M.P. in exchange for the payment of money into a trust held for the benefit of his wife and child. No doubt legal advisors on both sides of this transaction had some reason to believe that its structure would, or at least might, prevent the application of the general principle that a person who wrongfully kills another will not be allowed to enjoy profit resulting from the act of killing. Nonetheless, the plaintiff parents of the victims pursued a claim based, in part, on this principle against Olson, his wife, and the two lawyers who assisted Olson in this matter, McNeney who agreed to act as trustee and Shantz, his defence counsel, who provided initial advice with respect to the structure of the transaction. Trainor J. ultimately held that the trust fund, at the time of its creation, became impressed with a constructive trust in favour of the plaintiffs in order to "remove it" from the wrongdoer Olson, from those collaborating with him, i.e., McNeney and Shantz, and from those whose claim is through him, i.e., his wife and their child.

Although the decision is indeed innovative, it is important to note as a preliminary matter that it draws on two bodies of doctrine that are marked by a history of creative decision-making. The first area is that surrounding the "wrongful killing" principle, i.e., the principle that one ought not be permitted to profit from wrongful killing. The second is the device of the constructive trust. In common law Canada and in the United States, the constructive trust has demonstrated a remarkable capacity for evolution and growth. Before turning to the specifics of the problem in Olson, it will be useful to elaborate on these points in a brief introductory fashion.

With the abolition of attainder and forfeiture of the property of criminals in the 19th century (in Canada see the Criminal Code, R.S.C. 1970, c. C-34, s. 5(1)(b)) Courts were confronted with a number of situations in which application of the ordinary rules of private law doctrine would appear to permit murderers to acquire benefits as a result of their crime which might not otherwise be available to them. Thus, the

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murderer may be entitled to a share in the victim's estate, either through the victim's will or on an intestacy. The murderer might be a beneficiary of an insurance policy written on the life of the deceased. In each of these situations, the Courts responded by holding that the murderer was unable to enjoy benefits of this kind. This required the Courts to refuse to apply the normal rules of contract or inheritance and, in the case of intestacy of course, to read a good deal into the provisions of intestacy statutes which are normally silent on this point. (See, e.g., *Re Johnson*, [1950] 1 W.W.R. 263, 57 Man. R. 438, [1950] 2 D.L.R. 69 (Man.)) What might be thought to be more difficult cases arise when the killing simply advances the enjoyment of an existing right as where a joint tenant murders the co-tenant and, through the right of survivorship, becomes entitled to the deceased's undivided share of the property in question. In an Ontario case of this kind, *Schobelt v. Barber*, [1967] 1 O.R. 349, 60 D.L.R. (2d) 519, Moorhouse J. rejected the argument that refusal to allow the murderer to take the entire property "would be a further penalty on the survivor who has been sentenced for the crime of which he has already been convicted . . . and a return to the principle of forfeiture which has been abolished by the Criminal Code . . ." at pp. 353-54. The device chosen by Moorhouse J. for "compelling the murderer to surrender the profits of his crime and thus (prevent) . . . his unjust enrichment" at pp. 354-55 was to allow the deceased's interest to pass at law but to impress it with a constructive trust requiring the survivor to hold the interest as constructive trustee for the benefit of the victim's heirs and devisees.

The tension manifest in these cases between the need to give meaning to the statutory abolition of attainder and forfeiture on the one hand, and the understandable desire on the other to ensure that murderers do not profit from their wrongdoing has led to some rather fine distinctions and to rather creative analysis. *Schobelt* is a case in point. While Moorhouse J. was of the view that the imposition of the constructive trust in the fashion he prescribed was satisfactory, he felt that an outright refusal to allow the property of the deceased to pass to the murderer at law would be inconsistent with the statutory policy. It will occasion no surprise that decisions of this kind and this problem set more generally have attracted considerable attention in the law reviews. See, for example, T.G. Youdan, "Acquisition of Property by Killing" (1973), 89 L.Q.R. 235; T.K. Earnshaw and P.J. Pace, "Let the Hand Receiving it be Ever So Chaste" (1974), 37 M.L.R. 481; N.M. Tarnow, "Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates" (1980), 58 Can. Bar Rev. 582. The overwhelming impression one gathers from a reading of the case-law is that the Courts have been very

willing to develop novel approaches in order to ensure that killers are prevented from enjoying the profits of their crime that might otherwise accrue to them. In this sense, at least, *Olson* is consistent with tradition.

One final point should be made with respect to the case-law on wrongful killing. Many observers would see this area of the law as manifesting an even broader principle that wrongdoers are not permitted to profit by their wrongs at the expense of others. Such observers would see a family resemblance between the wrongful killing cases and the case-law on waiver of tort which permits the victim of a tort to recover the tortfeasor's profits, even where they exceed the victim's loss. (See, generally, J. Beatson, "The Nature of Waiver of Tort" (1979), 17 U.W.O. L. Rev. 1) The broader principle would also be said to be reflected in the principles allowing recovery of profits from faithless fiduciaries and a broad range of other situations in which equity intervenes to prevent those who engage in conduct equity views as wrongful from profiting thereby (such as the doctrines of undue influence, unconscionability, etc.). Indeed, recovery of the profits of wrongdoing is identified by restitution scholars as one of the great organizing themes of the law of restitution. Accordingly, modern restitution texts will include discussion of the wrongful killing cases, along with accounts of waiver of tort, fiduciary obligation and other forms of equitable wrongdoing. (See, for example, R. Goff and G. Jones, *The Law of Restitution* (2nd ed., 1978); G.H.L. Fridman and J. McLeod, *The Law of Restitution* (1982))

The other body of doctrine on which Trainor J. relied might be referred to as the new constructive trust. A full account of the development of the constructive trust would necessitate a brief history of the emergence of the modern law of restitution. For obvious reasons, this will not be attempted here, but it is possible to briefly advert to these developments. The most important development in that history was the publication, in 1937, of the Restatement of Restitution. The organizing thesis of the Restatement was that the law of quasi-contract and the law of constructive trust could usefully be brought together and analyzed together as a coherent body of doctrine presenting solutions to problems of unjust enrichment. The traditional ideas that quasi-contracts were, in some sense, real contracts and that constructive trusts were, similarly, real trusts created the false impression in each case that the obligation in question arose, in part at least, from express or implied consent. Clear thinking about these subjects would be enhanced, it was argued, if they were seen to consist of rules imposing obligations in order to prevent an unjust enrichment. In the case of constructive trust, it was to be

properly characterized, then, not as a substantive trust, but as a remedial device available in some cases of unjust enrichment.

For present purposes, it is sufficient to note that the Restatement's analysis has established a firm foothold in the Canadian and U.S. case-law on quasi-contract and constructive trust. In addition to works previously cited, see, generally, J.D. McCamus, "The Restitutionary Remedy of Constructive Trust", in *Special Lectures of the L.S.U.C.: New Developments in the Law of Remedies* (1981), p. 85; J.L. Dewar, "The Development of the Remedial Constructive Trust" (1982), *Can. Bar Rev.* 265; G. Klippert, *Unjust Enrichment* (1983). For an account of American law, see G. Palmer, *The Law of Restitution* (1978). Although the Restatement, as its title would suggest, was principally an attempt to restate and clarify existing doctrine, the promulgation of a clearer view of the nature of the obligations imposed in these cases has facilitated an extension of prior law to new factual situations. Thus, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, the Supreme Court of Canada not only adopted the Restatement's view of the remedial nature of the constructive trust, but applied it in a novel way to ensure that separating spouses fairly divided properties which were accumulated as a result of their joint effort. *Schobelt v. Barber*, referred to above, is another illustration of the willingness of Courts to adopt this device in new circumstances but, more generally, it should be noted that the principal difference between North American and English case-law on "wrongful killing", is the willingness of Canadian and U.S. Courts to use the constructive trust in this context in order to prevent unjust enrichment of the killer. Thus, in drawing on the resources of the new constructive trust in the Olson case, Trainor J. was working within an area of doctrine marked by an unusual degree of elasticity.

If novelty, per se, is unexceptionable in these circumstances, we must nonetheless ask whether the extension of prior law in Olson is soundly based. A number of interesting issues arise. First, it must be asked whether, as a general matter, it is sensible to extend the application of the wrongful killing rule to what might be referred to as indirect or incidental benefits of the kind at issue here. More particularly, should payments made in aid of a criminal investigation be recoverable? Should the type of recovery allowed in Olson be extended to such items as royalties earned by the killer from books recounting his misdeeds? What was the significance, if any, of the fact that the moneys were settled in a trust for Olson's wife? Why is it that the parents should be considered entitled to make this particular claim? Each of these issues will be discussed in turn.

### Direct v. Indirect Benefits of Wrongful Killing

In all previous cases in which recovery on the basis of the wrongful killing principle has been allowed, the benefit accrued to the murderer was simply, or one might say directly, as a result of the killing. That is to say, on the basis of a pre-existing state of legal affairs, be it a will, insurance contract or a joint tenancy, the fact of the victim's death gave rise to the enjoyment of a benefit. In Olson, on the other hand, the commission of the crimes did, of course, provide the opportunity for securing the benefit in question, but it clearly resulted from subsequent conduct in the form of negotiations with the R.C.M.P. and the entering into of an agreement to establish a trust fund. Royalties would be another case in point. The crime provides the opportunity for profit but subsequent and different activity is required to actually generate the profit.

The extension of the rule to indirect profits of this kind might be attacked on a number of grounds. First, it might be suggested that the disabling of a criminal from generating profit by subsequent and different conduct conflicts with the policies underlying the abolition of attainder and forfeiture and, indeed, that the recovery of indirect profits more obviously conflicts with these policies than the recovery of direct profits. As a result of the crime, a civil incapacity to enter into subsequent arrangements of certain kinds is imposed.

On the contrary, however, it would appear that the recovery of indirect profits is no greater an incursion on the capacity of the criminal than the recovery of direct profits. It is not at all obvious that it is more offensive to strike down existing arrangements such as wills and insurance contracts than to prevent the criminal from exploiting, in a particular way, an opportunity for profit which arises only because of the criminal's wrongdoing. Indeed, it might be felt that a rule which attacks profits of the latter kind is more closely linked to the rationale of the wrongful killing rule than cases like *Schobelt v. Barber*.

Another objection to the extension to indirect benefits might be that the causal link between the killing and the profit is broken in such cases and that the chain of causation present in cases of direct profit is essential to the argument that recovery in such cases does not undermine the anti-forfeiture principle. Again, however, there is a persuasive argument to the contrary. In cases of direct benefit, it is not true that the killing is in some sense an independent cause of the profit. In each case there is a pre-existing legal arrangement or entitlement which is simply triggered by the

death of the victim. It is not essential to recovery in such cases that the killing be part of an elaborate scheme to acquire the benefit in question.

As a matter of general principle, then, there appears to be no reason for an absolute preclusion of the recovery of indirect benefits. When one considers the particular cases of payments made to secure incriminating evidence and royalties from autobiographical accounts of criminal wrongdoing, however, more particular objections to recovery emerge.

#### Payments in Aid of Investigation

The principal objection to the granting of recovery of the payment made in Olson is that a rule which permits such recovery has the effect of disabling law enforcement officials from using this particular device as an aid to investigation in the future. If one accepts, as did Trainor J., that the case against Olson was otherwise rather "thin" and its successful prosecution was therefore unlikely, it is not at all obvious that it would be in the public interest to refuse to barter with a criminal in this fashion. Certainly, it may be seriously questioned whether it would not be more desirable to leave the difficult policy choice to senior law enforcement officials and the political process rather than the judiciary. In Olson, the payment was ultimately approved by the Attorney General of British Columbia and, indeed, it was Trainor J.'s view that his handling of the matter was beyond reproach (Reasons, p. 136). The decision to make the payment was obviously a difficult one, involving a balancing of a number of policy considerations. Where the decision has been made responsibly and at a high and politically accountable level, there is much to be said for a judicial reluctance to intervene in such a way as to virtually preclude the exercise of such discretion in the future.

Further, it should be noted that the potential scope of the Olson decision is considerable. As Trainor J. indicated, "Experience has shown that it is often necessary in order to secure evidence and to solve crimes for peace officers to protect or assist witnesses or their dependents by providing maintenance, relocation and other expenses, change of identities and safe accommodation" (Reasons, p. 137). Many of these "witnesses" will, of course, be participants in the crime in question who may or may not have exchanged their willingness to testify for an immunity from prosecution. All such recipients are potentially within the scope of the new rule. If one assumes, as Trainor J. does, that the Crown must be permitted to confer benefits of this kind on wrongdoers, how is one to distinguish from these benefits, payments of the kind made in the Olson case?

Trainor J. attempted to distinguish permissible conferrals such as maintenance and relocation costs from the Olson payment in the following fashion. "The line drawn over the years is that a wrongdoer should not benefit from his crime. There is a rule of public policy, said to be an integral part of our law, which precludes a person benefitting from his own crime" (Reasons, p. 138). This appears to be an attempt to distinguish "profits" in some sense from benefits which merely insulate the wrongdoer from the negative consequences that would otherwise flow from his detection or from his known willingness to testify at the trials of others, i.e., from benefits which, in some sense, merely preserve the status quo.

The suggested distinction is not entirely convincing. The provision of these "necessaries" may be much more valuable to the recipient than a lump sum payment and, indeed, a much more expensive matter for the Crown. Further, to the extent that maintenance costs are supplied in the form of what is in effect a salary, any savings generated would appear to be indistinguishable from the payment made in the Olson case.

No doubt some would view a general attack on the ability of the Crown to provide benefits of this kind to criminal wrongdoers as desirable. There may be some feeling that the provision of such benefits will too easily become a substitute for more effective investigation by the Crown. This, however, is a problem inherent in the general use of paid informants and is not peculiar to the case of informants who are also participants in a crime. We appear to be satisfied, as a general matter, to allow law enforcement officials a discretion to determine when the use of paid informants is an investigative device that must be used in the particular case. Certainly the Supreme Court of Canada is supportive of the use of informers. See, e.g., *Bissaillon v. Keable*, [1983] 2 S.C.R. 60, 4 Admin. L.R. 205, 37 C.R. (3d) 289, 7 C.C.C. (3d) 385, 2 D.L.R. (4th) 193. There would be no reason to have less confidence in the exercise of this discretion in dealings with participants.

Nor would it be realistic to oppose payments to participants on the ground that a practice of this kind might create an incentive to criminal misconduct. There is, however, a chilling passage in the Olson judgment in which Trainor J. describes an attempt by Olson, at an early point in the investigation of the killings, to be hired by the R.C.M.P. as an informant at a salary of \$3,000 per month. The R.C.M.P. denied the request. Later that same day, Olson murdered another child (Reasons, p. 139). Perhaps it is possible that there are individuals so disturbed they might commit crimes with a view to providing a demand for their services as informants, or in order to provide an opportunity to secure

other kinds of benefits. As a more general matter, however, the circumstances in which such benefits can be negotiated are so rare and precarious that it seems unlikely that the occasional conferral of such benefits would create any meaningful incentive to criminal conduct.

In short, the holding in Olson, insofar as it constrains the ability of the Crown to utilize the provision of benefits as an investigative device, may be undesirable on policy grounds. Perhaps one could identify lump sum payments to participants as especially offensive, and therefore recoverable. The preferable view, it is submitted, is that the ability of the Crown to utilize this device, at least in cases where its use has the approval of the senior law officer of the Crown, should not be undermined by a general rule permitting subsequent recovery of the payment. This is not to say, however, that there may not be some attraction to a rule which would permit recovery where the circumstances or amount of the payment are such as to shock the conscience of the Court. It might indeed be helpful to the Crown to bargain in the shadow of such a rule. In the particular case of payments to witnesses, the Crown is constrained to make reasonable arrangements, of course, by the need to avoid any impression that the witness has been bribed. See *Palmer v. R.*, [1980] 1 S.C.R. 759, 14 C.R. (3d) 22, 17 C.R. (3d) 34, 50 C.C.C. (2d) 194, 106 D.L.R. (3D) 212 at 228 (sub nom. *R. v. Palmer*), 30 N.R. 181 (S.C.C.). A more general rule of the kind suggested would impose a similar constraint on payments to criminals who will not be testifying. Further, it might well be desirable to permit the Crown itself to assert a more generalized cause of action in cases of this kind. We will return to this point below.

#### Royalties.

Lump sum payments of the kind made in Olson are, of course, likely to be rare. A more obvious target of a rule permitting the recovery of indirect profits would be royalties and other compensation earned by criminals for the publication of personal accounts of their misdeeds. In Olson itself, reference is made by Trainor J. to legal costs absorbed in the negotiation of a publication agreement. There does not appear to be any principled basis set forth in the Olson analysis that would preclude recovery of indirect profits of this kind.

In the United States, the understandable concern felt by many at the prospect of handsome profits of this kind has led to the enactment of statutes in a number of states that make available to victims the money earned by criminals from the re-enactment of their crimes, whether through the writing and

publication of a book or through any other medium of communication or entertainment. (See, generally, S. Clark, "The Son-of-Sam Laws: When the Lunatic, the Criminal, the Poet are of Imagination All Compact" (1983), St. Louis U.L.J. 207.) The Olson case might very well be taken to establish a common law basis for similar claims and again, therefore, it must be asked whether a recovery of this kind is soundly based in public policy.

It will occasion no surprise that some observers are of the view that the U.S. statutory schemes are of dubious constitutional validity. One would expect that a statute which removes incentives to the publication of views would be vulnerable on First Amendment grounds. Nonetheless, there does not yet appear to have been a successful constitutional challenge to any of the U.S. statutes. No doubt a Canadian statute would be subject to similar scrutiny under the Canadian Charter of Rights and Freedoms.

Leaving aside the technical question of the constitutionality of such statutes and the question of the impact of unconstitutionality upon the capacity of the Courts to permit analagous relief at common law, it is obvious that a persuasive argument can be made against recovery of this kind on policy grounds. As a general matter, the publication of such works is desirable for a number of reasons. They may communicate ideas and information to the public that will inform debate on important questions. They may provide information that law enforcement agencies and criminologists would find useful in combatting or studying crime. They may have the effect of discouraging others from engaging in criminal conduct. They may have literary or other artistic or cultural value. The process of creation may have a rehabilitative effect on their authors. The fact that any particular work fails to accomplish any or all of these objectives is not a reason for discouraging publication of the entire genre. Accordingly, a rule which removes any incentive for publication may be thought undesirable on policy grounds. It may be answered that there are other motivations for creating works of this kind, and that the removal of financial incentives will therefore not seriously restrict the flow of this sort of material. No doubt this might be true in many cases, but as a general matter, it seems likely that the motivation of personal profit must play an important role in encouraging the production of such works. Nonetheless, as the enactment of legislation in the United States indicates, there is considerable public sentiment against allowing profits of this kind.

An intermediate solution that might satisfactorily reconcile the conflicting interests in encouraging publication and removing profits would be to permit criminals to enjoy

modest rewards for activity of this kind. Thus, a statutory scheme could set a maximum on the level of compensation to be enjoyed from these projects. Such a provision might buttress the statute from constitutional attack although, no doubt, it would also bring with it a number of difficulties of definition and implementation. A similar approach could be taken at common law by allowing recovery only of profits that are in excess of the level of compensation normally available to published authors or, perhaps, a reasonable quantum meruit for the service rendered in creating the work. In the absence of a solution of this kind, it may be that the preferable solution is to deny victims the right to pursue these profits with a constructive trust and leave them to assert such other civil remedies as may be available against the criminal author.

### **The Significance of the Trust**

An interesting issue which surfaced in Olson was whether the payment of the moneys into a trust fund for the benefit of Olson's wife and child would preclude application of the wrongful killing principle. Obviously, it was the view of Olson's counsel that this might be the case. Clearly, Trainor J. was troubled by this point as well, as it attracted much attention in his reasons for judgment.

It is important to note the narrowness of the holding in Olson on this point. It was Trainor J.'s view that the circumstances and manner of the creation of the trust were not such as to support an argument of this kind on behalf of the defendants. More particularly, the fact that at the time of its creation, Olson and his lawyer were making certain arrangements for the disposition of some portion of the trust moneys, together with the fact that Olson obviously influenced subsequent use of the moneys, led Trainor J. to conclude that the fund was not established in such a way as to place the moneys beyond his dominion and control.

It was thus unnecessary for Trainor J. to determine what the effect of the trust would have been if it had been properly created and implemented. Nonetheless, he ultimately concluded that the device would likely be unsuccessful on the ground that any payment to the killer's wife "would likely be found to be a benefit to him" (Reasons, p. 163).

Certainly, there is much force to the view that payments to Olson's wife would constitute a benefit to him. An underlying reason for this, not mentioned by Trainor J., is that Olson was, of course, subject to a legal obligation to provide support to his wife and child. Accordingly, payments to them for this purpose would partially discharge this obligation of his. In restitutionary terms, discharge of another's obligation is

normally considered to be a benefit to that other person. The fact that Olson has benefitted, however, should not settle the question of his wife's liability. The fact that he has benefitted might well ground a claim in restitution against him. If Mrs. Olson is to be required to repay the moneys received, it must be because she is affected by an equitable duty to restore the moneys which is, in a sense, derivative of the equitable duty that Olson himself would have had, had he received the funds. As a donee, indeed a donee with knowledge of the circumstances in which the fund was created, she could be in no better position in equity than her husband. Indeed, Trainor J. appears to appreciate this point and relies on authority for the proposition that in cases of equitable wrongdoing, the duty to restore benefits cannot be evaded by placing them in the hands of innocent third parties (Reasons, pp. 162-63).

What is less certain, however, is the source of Olson's equitable duty to restore the fund. Although there is a suggestion by Trainor J. that the original transaction might be unconscionable, this might be a difficult point to sustain. Surely the equitable duty arises, if at all, because of the application of the wrongful killing principle and a determination by the Court that it is appropriate to make the remedial devices of equity available to the plaintiff. Once it is accepted that such a duty arises, the liability of Mrs. Olson (and other recipients of the trust moneys other than bona fide purchasers for value without notice) follows without difficulty. The creation of a trust fund, therefore, should not be considered an absolute bar to relief.

It is conceivable, however, that the Courts might consider the creation of such funds relevant for the following reason. It has been argued above that in the case of investigative payments, at least, Courts should be reluctant to undermine the ability of the Crown to employ payments of this kind to assist investigations or prosecutions by permitting victims or others to recover as a general rule. It was further suggested, however, that there might well be some advantage to a rule which permitted the Courts to intervene where the amount or circumstances of the payment shocked the conscience of the Court. Presumably, the creation of a trust fund for the benefit of innocent third parties might be considered an appropriate factor to take into account in determining whether or not the arrangement in question does in fact shock the conscience of the Court.

### **Are the Parents Entitled to Assert the Claim?**

Another interesting feature of the Olson decision is that the ultimate award was made in favour of the parents of the

victims. The basis for their entitlement as opposed to that of other conceivable claimants is not at all clear. Trainor J. attempted to support this aspect of his decision in the following manner (Reasons, p. 164):

"The reasons underlying the establishment of the fund were that it would likely result in the conviction of a mass murderer, that it would bring to a conclusion a lengthy and expensive investigation, that there would be a lessening of public anxiety and that the finality would bring some solace to the parents of the murdered children. That describes the character of the fund and directs its future use."

This is an ingenious approach to the problem of linking the claim of the parents to the fund. Although it is true that the original payment was motivated by a number of purposes, only one - the bringing of solace to the parents - has not yet been accomplished. No doubt the outrage and grief of the parents may well have been intensified by the establishment of the fund and its dismantling might well bring some small comfort. It must be asked, however, whether there are not other potential plaintiffs whose claims appear to be as strong or stronger than those of the parents. We will consider the possible claims of the Crown, the victims and other creditors.

#### The Crown

At first impression, it might appear that the Crown has a more compelling claim to the fund. The Crown, after all, paid the money into the trust. If, as is the case, the most compelling unjust enrichment claim arises where unjust benefit is found to be at the expense of the plaintiff, it is only the Crown that can directly link the corpus of the trust to a direct and precisely equivalent financial cost to itself. Perhaps it is not entirely clear that such a claim would lie on existing principles. The transaction entered into with Olson and his lawyers might appear to be vulnerable either on grounds of coercion, broadly construed, or illegality. The former seems an unlikely basis for setting a transaction aside. Notwithstanding the gradual expansion of doctrines of compulsion and unconscionability in Canadian law, it would be surprising if the Crown were to be characterized as having entered so carefully considered a transaction on what is essentially an involuntary or uninformed basis. There is obviously a strong argument to the effect that the agreement is unenforceable on illegality grounds and yet, would all agreements to pay informers be unenforceable on illegality grounds? If not, why would they be

so when entered into with a participant? This question takes us back to a number of the considerations already discussed with respect to the desirability of permitting the Crown to make arrangements of this kind. Nonetheless, if we assume, as seems likely, that such agreements would be held unenforceable, it is a distinct and further question whether any payments made by the Crown would be recoverable on restitutionary grounds. Unless the Crown were found to be *in pari delicto* with respect to the illegality of the transaction, the Crown would presumably be able to recover payments made. For the sake of argument, then, let us assume that the law enforcement agency making payments of this kind would be entitled to recover them.

In Olson, of course, the R.C.M.P. chose not to seek recovery because "it (did) not want to appear to go back on its word" (Reasons, p. 161). Should the failure of the R.C.M.P. to assert its (perhaps higher) claim stand in the way of the lesser claim of the parents? Again, we confront the question, considered above, of the desirability of permitting the Crown to make effective arrangements of this kind. It is sufficient at this point to note that one could defend, on policy grounds, a rule which prevented third parties (such as victims and their parents) from disrupting such arrangements but, at the same time, allowed the Crown to set aside such transactions and recover payments made. On the other hand, if one assumes, as was argued above, that the Courts should exercise an overriding discretion to strike down arrangements which they find unacceptable, it may well be that the law enforcement agency in question will feel that it must abide by the arrangement and accordingly, it is not an unattractive solution to expose the criminal wrongdoer to the claims (and the underlying outrage) of the victims and their families.

More generally, if one accepts the proposition that criminal wrongdoers should be deprived of incidental profits, it will be necessary to recognize the claims of third parties. In many cases, as in the case of book royalties, the supplier of the profit may have no claim whatsoever against the wrongdoer, quite apart from any inclination to enforce it. Moreover, it is not an unprecedented phenomenon in the general area of the recovery of profits of wrongdoing for claims to be brought by plaintiffs who cannot be said to have sustained a loss which is equivalent to the defendant's gain. This is clearly so in the context of waiver of tort and fiduciary duty cases (see the discussions in Goff and Jones, *op. cit.*, *supra*, and Palmer, *op. cit.*, *supra*.) Indeed, from a case like *Reading v. A.G.*, [1951] A.C. 507, one gains the impression that in cases of this kind, the Courts will be rather creative in articulating the basis for providing a nexus between

a plaintiff who has suffered no loss and a defendant who has profitted from criminal activity. In Reading, a British non-commissioned officer resident in Egypt who obtained moneys in return for providing illicit services to Egyptians who were, simply stated, defrauding Egyptian authorities, was required to disgorge his ill-gotten gains to the British Crown.

#### Victims

As has been indicated above, in the previous case-law on wrongful killing, the claimants have normally been the victims themselves or, rather, their estates. Obviously the victims have a much stronger claim than the parents, and there would appear to be no reason to depart from past practice in this regard on the facts of the Olson case. This may be viewed as a merely technical objection to the manner in which the Olson claim has been pleaded, inasmuch as it seems likely that many of the victims would not have testamentary capacity and, in any event, claims on behalf of the children could appropriately be brought by the parents with the ultimate result that recovery would enure to the benefit of the parents. Nonetheless, as between the parents and the victims, it would seem that the latter have the stronger claim and, indeed, if the victims or their representatives did not wish to pursue a particular claim, it is not at all obvious that the parents should be entitled to pursue independent relief.

#### Other Creditors

The effect of imposing a constructive trust on the defendants is, of course, to create a priority for the plaintiff class. This appears not to have been clearly understood by Trainor J. inasmuch as the penultimate paragraph in his judgment seems to suggest that it might be possible for other claimants to come forward and assert rights against the recaptured trust fund. One possible claim to bring against the defendants in Olson would have been a creditors' suit, in which the plaintiffs would attempt to recover assets of the debtor, i.e. Olson, and restore them to the debtor so that they are available not only to the plaintiff creditors but to creditors as a class more generally. For a brief discussion of creditors' suits, see J.D. McCamus, "The Self-Serving Intermeddler and the Law of Restitution" (1978), 16 Osgoode Hall L.J. 515. In such a case, other creditors would indeed share the bounty. Those who did so could be required to bear a portion of the cost of the original litigation. This was not, however, the nature of the claim brought in the Olson case. The parents sought to assert a theory of obligation giving rise to the

constructive trust which, again, would create a priority for them over other creditors.

The remaining question, then, is whether a basis for such a priority can be successfully articulated. The decision in Schobelt v. Barber does not offer direct assistance. Perhaps the imposition of the constructive trust on the Schobelt facts rests, in part at least, on the fact that the profit acquired by the criminal is proprietary in nature. It may well be that the reason for giving what is, in effect, a priority to the victim's estate in these cases rests also on a belief that the injury of the victim and his or her devisees is rather different from the losses of the general run of creditors and ought to be given more favourable treatment. Certainly, if the priority affected by the constructive trust remedy is to be utilized in this context, its justification must rest on considerations of this kind.

#### **Conclusion**

The problems inherent in the claim brought by the parents in the Olson case are as intriguing as the solutions proposed by Trainor J. in his reasons for judgment. It has been argued above that recovery of what have been referred to here as indirect profits of wrongful killing should be potentially recoverable as a matter of general principle. As well, it has been argued that in the case of both payments of the kind made in the Olson case and other kinds of indirect profits such as royalties from book publishing, there are serious considerations weighing against a principle which would allow recovery of all such profits. Finally, it has been suggested that either or both of the victims themselves or the R.C.M.P. would appear to be more suitable plaintiffs than the parents of the victim, although it was further suggested that on the particular facts of the Olson case this might be considered to be an objection of a rather technical and unmeritorious nature as far as the standing of the parents is concerned.

No doubt some observers will see the decision in Olson as further support for the proposition that "hard cases make bad law". Another view is possible, however, as I have attempted to demonstrate. It may well be that the Olson decision will be seen to have opened a new and very interesting chapter in the long history of the evolution of the wrongful killing principle.