

resulting trust in circumstances in which the Company has a valid claim to any surplus in Plan assets.

**199** It is, therefore, unnecessary to address the argument of the Applicants that there is a presumption that the Plan members did not intend to gift their contributions to the Company and, accordingly, that there is a resulting trust in their favour of the Partial Windup Surplus attributable to their contributions.

#### Breach of London Life's Fiduciary and Other Obligations

**200** The fifth common issue in this proceeding is the question of whether London Life committed any breach of trust, breach of fiduciary duty or breach of its obligations of good faith, or breach of its statutory obligations in respect of members of the plaintiff class.

**201** The Applicants made a number of specific allegations of breach of obligations by London Life in making their submissions in respect of the issues already addressed in these reasons. These allegations have been addressed above. I am not aware of any other allegations of breaches of Company obligations that remain to be addressed other than the Company's alleged failure to pay the Partial Windup Surplus to the members of the plaintiff class.

**202** Accordingly, given the determinations above, I conclude that the answer to the fifth common issue is in the negative.

#### Conclusions

**203** Based upon the foregoing, the common issues in this proceeding are answered as follows:

1. Are the Plan assets, in particular the surplus assets, impressed with a trust in favour of the Plan members, former Plan members, and other beneficiaries?

No

2. What is the quantum of the Partial Windup Surplus?

Not Applicable

3. What is the entitlement of the members of the class to the Partial Windup Surplus or damages?

None

4. What is the appropriate method for calculating surplus entitlements or damages of the members of the class?

Not Applicable

5. Did London Life commit breaches of trust, breaches of fiduciary duty, or breaches of its employer obligation of good faith, or breaches of its statutory obligations in respect of members of the class?

No

6. Should the Court impose a constructive trust in favour of class members over the entire Partial Windup Surplus?

No

7. Should the Court impose a constructive trust in favour of class members in respect of that part of the Partial Windup Surplus attributable to special payments made by London Life?

No

8. Should the Court impose a resulting trust in favour of class members over the portion of the Partial Windup Surplus attributable to contributions made by members?

No

#### Costs

**204** The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Any such submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client.

H.J. WILTON-SIEGEL J.

cp/s/qlcct/qlvxw/qlced/qlhes/qlcas

**Tab 3**

*Case Name:*

**Ontario (Minister of Training, Colleges and Universities) v.  
Two Feathers Forest Products LP**

**Between**

**Her Majesty the Queen in Right of Ontario as Represented by  
the Minister of Training, Colleges and Universities, Applicant  
(Respondent), and**

**Two Feathers Forest Products LP, Pikangikum First Nation,  
Eagle Lake First Nation, 1670761 Ontario Inc., Wabigoon Lake  
Ojibway First Nation and Pricewaterhousecoopers Inc.,  
Respondents (Appellant)**

[2013] O.J. No. 4431

2013 ONCA 598

6 C.B.R. (6th) 129

368 D.L.R. (4th) 714

91 E.T.R. (3d) 167

117 O.R. (3d) 227

311 O.A.C. 147

2013 CarswellOnt 13601

Docket: C56138

Ontario Court of Appeal  
Toronto, Ontario

**K.N. Feldman, P.D. Lauwers and G.R. Strathy JJ.A.**

Heard: June 4, 2013.

Judgment: October 2, 2013.

(40 paras.)

*Wills, estates and trusts law -- Trusts -- Resulting trusts -- Creation -- Intention -- Appeal by Two Feathers Forest Products' receiver from application judge's decision finding grant monies respondent Minister advanced to Two Feathers were subject to a Quistclose trust for the Minister's benefit allowed - - Two Feathers was a First Nations limited partnership -- Grant monies advanced to Two Feathers were not spent before the partnership sought to dissolve and appoint an interim receiver -- Terms of funding*

*agreement showed parties did not intend Two Feathers would hold the funds in trust for the Minister and any unused funds constituted a debt owing to the Ministry rather than trust funds.*

Appeal by Two Feathers Forest Products' receiver from an application judge's decision finding grant monies the respondent Minister advanced to Two Feathers were subject to a Quistclose trust for the Minister's benefit. Two Feathers was a First Nations limited partnership. The Ministry entered into a detailed funding agreement with Two Feathers setting out the terms under which the Ministry granted funding for Two Feathers to provide on-the-job skills training to northern Ontario residents. The funding agreement restricted Two Feathers to using the funds only in accordance with that agreement. The grant monies were not spent before the partnership sought to dissolve and appoint an interim receiver. On the expiry of the funding agreement, Two Feathers was required to return any unused funds. In concluding the unspent funds were imposed with a trust, the application judge determined there was no intention Two Feathers would be able to freely dispose of the advanced funds and the parties intended to enter into a trust arrangement.

HELD: Appeal allowed. The monies were not subject to a Quistclose trust and were therefore available to be distributed in the receivership. The terms of the funding agreement showed the parties did not intend Two Feathers would hold the funds in trust for the Ministry. The funding agreement specifically provided any unused funds constituted a debt owing to the Ministry, not trust funds, and Two Feathers had significant freedom to use the majority of the funds. If the grant monies Two Feathers had not yet spent constituted a debt Two Feathers owed to the Ministry, Two Feathers could not hold the grant monies in trust for the Ministry. To be a debt, the funds belonged to the debtor Two Feathers. Until Two Feathers paid those funds back, it held them as a debt due to the Ministry, not in trust for the Ministry. Contrary to the conclusion the application judge reached, the majority of the monies were essentially at Two Feathers' free disposal.

**Statutes, Regulations and Rules Cited:**

Personal Property Security Act, R.S.O. 1990, c. P.10

**Appeal From:**

On appeal from the judgment of Justice John S. Fregeau of the Superior Court of Justice, dated September 24, 2012, with reasons reported at 2012 ONSC 5077.

**Counsel:**

Richard W. Schwartz, for the appellant.

Ronald E. Carr and Eric Wagner, for the respondent.

The judgment of the Court was delivered by

**K.N. FELDMAN J.A.:**--

**Introduction**

1 The issue in this case is whether grant monies that were advanced by the respondent, Ontario's Minister of Training Colleges and Universities (the "Ministry"), to a First Nations limited partnership in

northern Ontario, but not spent before the partnership sought to dissolve and appoint an interim receiver, were subject to a "*Quistclose* trust"<sup>1</sup> for the benefit of the Ministry. The application judge held that they were trust monies and that the receiver should therefore pay the monies to the Ministry. The receiver appeals. For the reasons that follow, I agree with the receiver that the monies are not subject to a *Quistclose* trust and are therefore available to be distributed in the receivership.

## Facts

2 Two Feathers Forest Products was a limited partnership consisting of three First Nations limited partners and a general partner. It was formed in 2007 to develop and operate two plants, a planer mill and manufacturing plant in Dryden, Ontario and a saw mill in Red Lake, Ontario. In 2010, Two Feathers applied to the Northern Training Partnership Fund, recently established by the respondent Ministry to support project-based skills training for northern Ontario residents, for a grant to provide skills training for Aboriginal and non-Aboriginal residents of northern Ontario in its two proposed plants.

3 The application was accepted and a detailed written agreement for the advance of the funds was executed, effective February 14, 2011 (the "funding agreement"). In September, 2011, after the Ministry had advanced a total of \$1,895,870.00 under the funding agreement in three instalments, one in March, one in May and one in July, two of the limited partners applied to dissolve Two Feathers. The appellant was appointed interim receiver and manager in October, 2011.

4 The appellant traced the funds that had been advanced by the Ministry and found that \$1,580,000.00 was paid to the third limited partner, Wabigoon Lake Forest Products LP (WLFP). From those funds, \$563,911.25 had been used to purchase a planer mill. The balance was intended to be used to lease premises for the mill but was still in the hands of WLFP. Ultimately those monies were returned to the appellant pending the disposition of this court application.

5 The application judge found that the Ministry had satisfied the onus to prove that the original grant funds were impressed with a trust, known as a *Quistclose* Trust, in the hands of Two Feathers and the funds were therefore now being held by the interim receiver for the benefit of the Ministry.

6 To make that finding, the application judge examined the provisions of the funding agreement in detail. The funds were to be used only for the purpose of carrying out the project. The project is defined in Article 1.2 of the funding agreement to mean the undertaking as set out in Schedule "A".<sup>2</sup> In addition to a requirement that it implement on-the-job training, the project is defined in the funding agreement with reference to Two Feathers' proposal to the Ministry (the "proposal"). The proposal describes a specialized lumber manufacturing and export business where skills training would take place. It sets out specified amounts of proposed funding in three categories. The request was for \$160,920 and \$288,080 for on-the-job and classroom training, respectively. The larger portion of the funding, \$3,026,000, was designated for "[o]ther," which it further describes as "[c]lassroom and equipment lease."<sup>3</sup>

7 The funding agreement restricted Two Feathers to using the funds only in accordance with that agreement. Two Feathers had to segregate any funds not immediately required into an interest-bearing account, and the amount of any interest earned would be deducted from any further funds advanced under the funding agreement. The Ministry was not obliged to advance the funds unless it was satisfied with the progress of the project. It could also terminate the funding agreement on 30 days' notice and demand return of any unused funds still in the possession or under the control of Two Feathers. Similarly, if the Ministry considered that Two Feathers breached the agreement, it could demand repayment of any remaining funds. Likewise, on the expiry of the funding agreement, Two Feathers was required to return any unused funds. In respect of the repayment or return of funds already advanced, Article 17 provides that monies owing to the Ministry by Two Feathers "shall be deemed to be a debt due and owing to" the Ministry.

8 The application judge concluded, based on his review of the entire funding agreement, that the funds advanced and not yet spent by Two Feathers were held subject to a *Quistclose* trust for the benefit of the Ministry and must be returned to the Ministry by the interim receiver. He based his conclusion on the following findings: 1) There was no intention that Two Feathers would be able to freely dispose of the advanced funds; rather, the funds were to be used only for the specific purpose of carrying out the project. To that end, the Ministry had the ability and the mechanisms to ensure that the funds were used only for that purpose and to have the funds returned if they were not being so used. 2) The three certainties of a trust, certainty of intention, certainty of subject-matter and certainty of object, had been established on a balance of probabilities. The object of the trust was the on-the-job skills training to be provided in the project.

## Analysis

### A. HISTORY OF THE *QUISTCLOSE* TRUST

9 The genesis of the concept of the "*Quistclose* trust" was the House of Lords' decision in *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1970] A.C. 567. In that case, the trust arose in the following way: Rolls Razor was a client of Barclays Bank that was in financial difficulties and had exceeded its allowed overdraft at the bank by a significant margin. In order to try to recover financially, Rolls Razor found a lender who agreed to lend it one million pounds but on the condition that Rolls Razor obtain funds from another source to pay its shareholders the dividend of GBP 209,719 8s. 6d, which it had already declared and which was to be paid within a short time. Quistclose became that source, agreeing to lend Rolls Razor the sum necessary to pay the dividend, on the condition that the funds would be used only for that purpose and that they would be held in a special account, newly opened for that purpose, until the dividend was paid.

10 One of the directors of Rolls Razor then made an oral agreement with its bank manager at Barclays, confirmed by the letter that Rolls Razor later sent to the bank with Quistclose's cheque. They agreed that the cheque was to be deposited into a special account and was to be used only to pay the declared dividend. Unfortunately, the company was unable to raise the further funds it needed to remain in business, and decided to voluntarily liquidate. Contrary to the agreement that the Quistclose loan would only be used to pay the shareholders' dividend, the bank then set off the balance in the special account against part of the debit balance owed to it.

11 Quistclose sued the bank for return of the funds. Lord Wilberforce explained that in order for Quistclose to be able to claim the funds from the bank, it had to meet two requirements. First, it had to establish that the funds were impressed with a trust in its favour if the funds were not used to pay the dividend, and second, that "the bank had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them" (at p. 579).

12 Lord Wilberforce had no trouble finding that the mutual intention of Rolls Razor, the borrower, and Quistclose, the lender, was that the funds were to be used only to pay the declared dividend and were not to form part of the assets of Rolls Razor. He concluded that a necessary consequence of their mutual intention was that if the dividend could not be paid, then the funds were to be returned to Quistclose. He stated that it had long been recognized that this type of arrangement created a fiduciary obligation to hold the funds in trust:

That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years (at p. 580).

13 He referred to five historical cases, at pp. 580-81, all of which involved monies loaned for the purpose of paying a specific group of the borrower's creditors in order to stave off bankruptcy: *Toovey v. Milne*, 106 E.R. 514, (1819), 2 B. & A. 683; *Edwards v. Glyn*, 121 E.R. 12, (1859), 2 E. and E. 29; *In re Rogers, Ex parte Holland and Hannen* (1891), 8 Morr. B.C. 243; *In re Drucker (No. 1)*, [1902] 2 K.B. 237; *In re Hooley, Ex parte Trustee*, [1915] H.B.R. 181.

14 Turning to the notice issue, Lord Wilberforce was satisfied that the bank had notice that the monies were provided by a third person as a loan, and were to be used only to pay the dividend. This information was sufficient to constitute notice of the trust. Therefore, the bank could not claim the money for its own benefit: at p. 582.

15 The *Quistclose* trust concept was originally drawn by Lord Wilberforce with narrowly defined parameters in the *Barclays Bank* decision. In particular, the fiduciary relationship arose where money was lent in emergent circumstances to allow a debtor to pay a certain creditor or group of its creditors in order to keep the debtor in business. If the funds could not be used for that purpose, then the funds were returned to the lender. Those parameters were, however, significantly broadened some thirty years later, when the House of Lords found a *Quistclose* trust arose in *Twinsectra Ltd. v. Yardley and others*, [2002] 2 A.C. 164.

16 In that case, Twinsectra agreed to lend GBP 1 million to Y for the purpose of purchasing property, but on three conditions: 1) that Y's solicitor undertake to hold the funds until they were used by Y to purchase property; 2) that Y's solicitor undertake that the funds would only be used for that purpose; and 3) that Y's solicitor would guarantee repayment of the loan. When Y's solicitor would not give the guarantee, Y found another solicitor who agreed to give the undertakings and the guarantee. However, that solicitor essentially ignored his undertaking and paid the money over to Y's solicitor who allowed Y to use the money freely and not to purchase property. The loan was not repaid and the solicitor who gave the guarantee went bankrupt. In the action against Y's solicitor, one of the issues was whether Y's solicitor could be held responsible as a party to a breach of trust. As a threshold matter, therefore, the House of Lords first had to determine whether the circumstances of the loan gave rise to a *Quistclose* trust.

17 Both Lord Hoffmann and Lord Millett wrote on the issue. Lord Hoffmann stated that the trust and its terms were found in the undertaking contained in the first two conditions of the loan. Y was not free to dispose of the money as he wished but only to purchase property. The effect of the undertaking was that the money remained Twinsectra's until it was used to buy property. Therefore, the solicitor who held the money held it in trust for the lender, Twinsectra, subject to a power to apply it as a loan to Y in accordance with the terms of the undertaking. Whether the subject funds were "at the free disposal" of the recipient is one of the essential identifying elements of a *Quistclose* trust.

18 Lord Hoffmann addressed the two problems that the trial judge believed prevented him from finding a *Quistclose* trust in the circumstances. The first was that the terms of the undertaking were too vague -- no particular property was identified. Dealing with this point, Lord Hoffmann agreed that the undertaking was an unusual one: Twinsectra was not seeking any security over the property to be purchased, so that there was nothing to prevent Y from subsequently mortgaging the property and using the money for whatever he wished. Lord Hoffmann's response was that as long as a court could say whether the money was used for the described purpose, then the purpose was not too vague and not void for uncertainty.

19 The second objection was that Twinsectra did not intend to create a trust based on the undertakings because its security was the solicitor's guarantee. To that Lord Hoffmann responded that the lender's intention was irrelevant:



Whether a trust was created and what were its terms must depend upon the construction of the undertaking (at para. 17).

20 Lord Millett's main focus was to properly characterize the operation of the *Quistclose* trust under trust principles by conducting an analysis of the locus of the legal and beneficial interest in the trust property.<sup>4</sup> He concluded that the monies are always held on a resulting trust for the lender who never parts with the entire beneficial interest in them and that it is the lender who is the person who can enforce the trust. He rejected the theory that anyone but the lender can enforce the trust, including the persons who are the primary objects of the trust, such as a subgroup of the borrower's creditors. In the context of that analysis, he addressed the question whether a *Quistclose* trust's primary purpose must be to benefit a subset of identified creditors as in the *Barclays Bank* case itself. He rejected that premise, referring to cases where his characterization of the purpose of the loan was not to benefit a group of people but to purchase equipment or to enable a bank to meet a run and where only the lender could oversee its enforcement. He concluded that, as in the *Twinsectra* circumstances, a *Quistclose* trust "must be able to accommodate gifts and loans for an abstract purpose" (at para. 89).

21 Lord Millett also reviewed the three certainties required for a trust: certainty of intention, of subject-matter and of objects, at paras. 71, 101. On the issue of the significance of certainty of the objects of the trust, Lord Millett agreed with Lord Hoffmann, pointing out as well that if the objects were not sufficiently certain, the result in law is that the monies revert back to the lender under a resulting trust -- the same result as when the purpose cannot be carried out. (para. 101)

22 One could conclude that after *Twinsectra*, any time monies are advanced on an undertaking to use the monies only for a stated purpose, which can be an abstract purpose, then regardless of the subjective intention of the person providing the funds and of the nature of the purpose, there is a resulting trust for the lender. This represents a significant expansion of the *Quistclose* trust, which had been narrowly described in the *Barclays Bank* case.

23 As I have concluded that the requirements for a *Quistclose* trust have not been met in this case, I do not need to decide to what extent that expansion should be adopted in Ontario. However, when that decision does have to be made, the court will have to consider a number of commercial consequences, one of the most significant of which is the potential effect on the creditors of the borrower (or grantee) of the subject funds. For example, as in this case, where funds are advanced to a business with no registration under the *Personal Property Security Act*, R.S.O. 1990, c. P-10, creditors will have no notice, and in many cases no knowledge, that they are dealing with a debtor whose money is subject to a trust and not available to general creditors.<sup>5</sup>

## B. WAS THERE A *QUISTCLOSE* TRUST IN THIS CASE?

24 The House of Lords authorities are clear that on the issue of the intention to create a trust, it is not the subjective intention of the lender (here the grantor) but the intention of the two parties, discerned from the terms of the loan (here the grant). As Lord Millett put it:

A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them (*Twinsectra*, at para. 71).

25 The application judge came to the factual conclusion -- based on all of the terms of the funding agreement that had the effect of a) limiting Two Feathers' use of the funds, and b) providing that the unused funds be returned to the Ministry -- that Two Feathers did not receive the funds for its free

disposal but only for the purpose of carrying out the project. He then followed with the legal conclusion that: "Viewed objectively, I am satisfied that the parties intended to enter into a trust arrangement."

26 However, a close examination of the terms of the funding agreement shows that the parties did not intend that Two Feathers would hold the funds in trust for the Ministry. In particular, the funding agreement specifically provides that any unused funds constitute a debt owing to the Ministry, not trust funds, and that Two Feathers had significant freedom to use the majority of the funds. As a result, in my view, the application judge erred in law in finding that the funds were held on a *Quistclose* trust.

27 First, the funding agreement specifically identifies the nature of the relationship between the parties respecting the funds while they are in the hands of Two Feathers but not yet expended -- the critical time -- as one not of trust, but of debtor/creditor. Article 17.1 provides that any monies under the funding agreement that the recipient, Two Feathers, owes to the Ministry "shall be deemed to be a debt due and owing to the Ministry by the Recipient".

28 If the grant monies that Two Feathers has not yet spent constitute a debt that Two Feathers owes to the Ministry, they cannot be held by Two Feathers on trust for the Ministry. While the courts in a number of the *Quistclose* trust cases state that it is not necessary for the parties to use the word "trust" when creating their agreement, no court has said that when the parties have explicitly characterized their legal relationship in one way, the court will override their agreement and characterize it another way.

29 To be clear, there was an argument made in *Barclays Bank* that because the transaction between Quistclose and Rolls Razor was one of loan creating the legal obligation of debt, that excluded the implication of a trust, enforceable in equity. The House of Lords rejected that argument. The loan only arose once the funds were used for the designated purpose - until that time, the funds were held by the borrower on trust for the lender, and did not become the property of the borrower:

There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose ...: when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt (*Barclays Bank*, at p. 581).

30 In this case, the transaction is one of grant, not loan. However, before the funds are actually expended for the purposes of the grant, or if they are left over and not needed for the agreed purposes, the parties agreed that they constituted, not a trust, but a debt owed by Two Feathers to the Ministry. To be a debt, the property in the funds belongs to the debtor, i.e., to Two Feathers, unlike a trust where only the legal title is held by the trustee, with the beneficial title in the trust beneficiary.

31 The application judge stated that

[t]he fact that the word "trust" does not appear in the agreement, and that Article 17 of the agreement stipulates that monies owing to [the Ministry] by Two Feathers "shall be deemed to be a debt due and owing to ..." [the Ministry] is not, in my opinion, determinative of the intention of the parties as to whether the funds were to be at the free disposal of Two Feathers once advanced by [the Ministry].

32 I agree with the application judge that agreeing that monies owed back to the Ministry are deemed to be a debt does not determine whether they are at the free disposal of Two Feathers. However, the effect of this characterization of the granted funds that have to be returned to the Ministry if they are not spent or needed for the project, is that until Two Feathers pays those funds back, it holds them as a debt due to the Ministry, not in trust for the Ministry. To override the express agreement of the parties, that

any funds owed back to the Ministry under the agreement constitute a debt and for the court instead to imply a trust, would be contrary to the "cardinal rule" of interpreting written commercial contracts that the parties "have intended what they said": *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, at para. 24; *Venture Capital USA Inc. v. Yorkton Securities Inc.* (2005), 75 O.R. (3d) 325 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 334, at para. 26.

**33** The second error is the application judge's conclusion that the funds were not at the free disposal of Two Feathers, and it arises from an examination of Schedule "B" to the funding agreement. Schedule "B" is the budget that governs the actual spending requirement for the grant funds. It covers the three fiscal years of the term of the agreement, 2010-2011, 2011-2012 and 2012-2013. As discussed above, of the sum of \$3,535,000, the total maximum amount to be granted, only \$449,000, was to be spent on on-the-job and in-class training costs, while the vast majority of the funds, \$3,026,000, are designated only as "other" in Schedule "B". In the proposal, the "other" funds were described as being for "[c]lassroom and equipment lease".

**34** Since specific funds are designated in Schedule "B" for the actual costs of training, which was the purpose of the grant from the Ministry, the vast majority of the "other" funds appear to be available over the term of the funding agreement to set up the business more generally, including lease and equipment costs for the whole business.

**35** As a result, although the funding agreement requires that Two Feathers spend the grant money on the project, in fact, the budget in Schedule "B" gives Two Feathers significant discretion to spend the largest part of those monies. Contrary to the conclusion reached by the application judge, those monies were essentially "at the free disposal" of Two Feathers.

**36** Finally, the circumstances of the grant transaction in this case do not have many of the characteristics that caused a trust to be found in either of the two seminal cases. It was not a situation where the limited partnership needed immediate funding to stave off bankruptcy; the funds were not needed to make a specific payment, whether to a group of creditors or to make a specific purchase; instead, they were obtained as a basic source of business funding for a long-term project.

**37** Nor were the funds advanced based on a short or quickly drawn contractual arrangement; instead, they were the subject of a detailed government-approved funding agreement, fully executed by both parties that prescribed all aspects of the funding relationship between them. It is difficult to see the basis for implying a trust where a sophisticated party, such as a provincial ministry, provides funding by means of a commercial agreement in which its contractual rights and remedies are carefully and extensively defined.

**38** This court has not yet applied the *Quistclose* trust concept.<sup>6</sup> However, the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. (Re)*, 2011 BCCA 180, 17 B.C.L.R. (5th) 60, recently reversed a decision of a motion judge, [2010] B.C.J. No. 535, that had implied a *Quistclose* trust in circumstances where funds were loaned to be used for a general, long-term purpose, as in this case. There, funds were advanced by a debtor-in-possession lender in the context of a *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, order "[t]o facilitate further construction of [a] golf course and development of [a series of] home lots and source an irrigation solution for the golf course": at para. 56. In rejecting the implication of a *Quistclose* trust for a number of reasons, the British Columbia Court of Appeal stated:

In short, although it is obvious that Cliffs agreed as a matter of contract that the funds would be used for the general purpose stated, I disagree that this restriction gives rise to any inference of an intention on the part of both parties ... to create the specialized vehicle that is a *Quistclose* trust ... (at para. 69).

39 To summarize my analysis, the Ministry entered into a detailed funding agreement with Two Feathers setting out the terms under which the Ministry granted funding for Two Feathers to provide on-the-job skills training to residents of northern Ontario. Although the funds provided were intended to be used only for the purpose described in the funding agreement, there is no basis to infer a mutual intention that the funds were to be held on trust for the Ministry. To the contrary, under the budget attached to the funding agreement, the recipient, Two Feathers, had significant discretion to spend the majority of the funds as long as it was for the general purpose stated, as in the *Cliffs Over Maple Bay* case. And most importantly, Article 17 of the funding agreement defines the relationship between the parties with respect to any funds that have to be returned to the Ministry under the agreement as a debt, not a trust.

### Conclusion

40 In my view, the application judge erred in law in concluding that in these circumstances, the court could imply a *Quistclose* trust. I would therefore allow the appeal, set aside the order of the application judge and dismiss the application with costs, fixed at \$15,000.00, inclusive of disbursements and HST.

K.N. FELDMAN J.A.

P.D. LAUWERS J.A.:-- I agree.

G.R. STRATHY J.A.:-- I agree.

1 *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1970] A.C. 567.

2 Schedule "A" is comprised of the following "Project Description":

"Background. The purpose of the Project is to provide support to project-based skills training to help Aboriginal and non-Aboriginal Northern Ontarians participate in and benefit from emerging economic development opportunities. The Province of Ontario announced this new initiative under the project of 'Jobs and Growth in Northern Ontario'.

Objective. The objective of this initiative is to help Aboriginal and non-Aboriginal Northern Ontarians

- \* [A]ttain workplace skills and sustain employment in the resource related sectors of mining, energy and greener economy, forestry, environment, bio-economy, tourism and agriculture by providing employers in Northern Ontario with skilled workers for current and future needs.
- \* Develop innovative collaborations and models of delivery that are tailored to specific circumstances and needs of the community.
- \* [E]nhance and add value to resources, programs and services already available in the community.

The Recipient shall carry out the Project in accordance with the Proposal.

The Ministry shall provide up to 75% of the overall eligible costs of approved projects. Project partners will provide a minimum of 25% of the overall funding of approved projects. The Ministry funding shall not exceed \$15,000 per participant for each year of the Project.

On-the-Job Component. The Recipient shall ensure that the Project has an on-the-job component, including as part of a pre-apprenticeship type program must comply with all applicable legislation and regulations. The on-the-job component of a pre-apprenticeship type, must be trade-appropriate and based on the current Apprenticeship Training Standard or Schedule of Training.

The Recipient shall ensure participants and employers comply with all applicable legislation and regulations as well as the current Apprenticeship Training Standard or Schedule of Training.

The Recipient shall ensure where projects delivering the Level 1 Apprenticeship In-School Curriculum Standard are an approved Apprenticeship Training Delivery Agent for the trade including delivery format and for that location. Participants who successfully complete all of the requirements of Level 1 will be given credit for this level of training.

Apprenticeship Training Delivery Agents are required to issue participants who successfully complete Level 1 will be provided the same documentation given to registered apprentices (e.g. transcript). Project participants must meet the same requirements as registered apprentices to pass level 1.

In compulsory or restricted trades, Level 1 must be taught by a journey person with a current Certification of Qualification in that trade.

Performance Targets. The Recipient shall meet [a series of] performance targets ..."

3 The details of the proposal are in Schedule "F" of the funding agreement.

4 Lord Millett embarked on his analysis to resolve the question of which party could enforce performance of a *Quistclose* trust: at paras. 77-100. This issue is significant because non-charitable purpose trusts may be invalid at common law if there is no party with standing to enforce performance of the trustee's obligations -- since an abstract purpose cannot come to court. The Alberta Court of Queen's Bench invalidated a similar trust on this basis in *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2004 ABQB 389, 29 Alta. L.R. (4th) 269, though the decision was reversed on appeal on other grounds: 2006 ABCA 337, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 9.

5 See also concerns raised in: Michael G. Bridge et al., "Formalism, Functionalism, and Understanding the Law of Secured Transactions" (1999) 44 McGill L.J. 567, at pp. 610-614 ("Security and Trust").

6 A number of Ontario trial level decisions have implied *Quistclose* trusts. These may be divided into four categories. First, two decisions accepted the *Quistclose* trust principle, but refused to apply it in the circumstances: *Del Grande v. McLeery* (1998), 24 E.T.R. (2d) 30 (Ont. Gen. Div.), aff'd (2000), 31 E.T.R. (2d) 50 (Ont. C.A.); *Niedner Ltd. v. Lloyds Bank of Canada* (1990), 74 O.R. (2d) 574 (H.C.). Second, two decisions are consistent with the long line of authority cited in *Barclays Bank* in which a trust was implied with respect to a payment for a specific debt: *Ling v. Chinavision Canada Corp.* (1992), 10 O.R. (3d) 79 (Gen. Div.); *Continental Bank of Canada v. Boekamp Manufacturing Inc.*, [1990] O.J. No. 1043 (H.C.). Third, a series of decisions implied a *Quistclose* trust, but with some ambiguity as to how much the case turned on the *Quistclose* trust analysis: *Cummings Estate v. Peopledge HR Services Inc.*, 2013 ONSC 2781; *Teperman v. Teperman*, [2000] O.J. No. 4133 (S.C.); *Triax Resource Ltd. Partnership v. Research Capital Corp.* (1999), 96 O.T.C. 290 (S.C.); *Smith v. Gold Key Construction Ltd.*, [1993] O.J. No. 157 (Gen. Div.); *Abulyha v. Montemurro*, [1984] O.J. No. 962 (H.C.). Finally, two decisions prior to *Twinsectra* extended the *Quistclose* trust concept beyond a payment to discharge a specified debt: *Ontario (Securities Commission) v. Consortium Construction Inc.* (1993), 1 C.C.L.S. 117 (Ont. Gen. Div.); *Gignac, Sutts v. National Bank of Canada* (1987), 5 C.B.R. (4th) 44 (Ont. H.C.).

**Tab 4**

*Indexed as:*  
**Kerr v. Baranow**

**Margaret Patricia Kerr, Appellant;**  
v.  
**Nelson Dennis Baranow, Respondent.**  
And  
**Michele Vanasse, Appellant;**  
v.  
**David Seguin, Respondent.**

[2011] 1 S.C.R. 269

[2011] 1 R.C.S. 269

[2011] S.C.J. No. 10

[2011] A.C.S. no 10

2011 SCC 10

File Nos.: 33157, 33358.

Supreme Court of Canada

Heard: April 21, 2010;  
Judgment: February 18, 2011.

**Present: McLachlin C.J. and Binnie, LeBel, Abella, Charron,  
Rothstein and Cromwell JJ.**

(221 paras.)

**Appeal From:**

ON APPEAL FROM THE COURTS OF APPEAL FOR BRITISH COLUMBIA AND ONTARIO

*Catchwords:*

*Family law -- Common law spouses -- Property -- Unjust enrichment -- Monetary remedy -- Whether monetary remedy restricted to quantum meruit award -- Whether evidence of joint family venture should be considered in conferring remedy -- Whether mutual benefit conferral and reasonable expectations of parties should be considered in assessing award.*

*Family law -- Common law spouses -- Property -- Resulting trust -- Whether evidence of common intention should be considered in context of resulting trust -- Whether resulting trust principles apply to*



*property or monetary award in resolution of domestic cases.*

*Family law -- Common law spouses -- Support -- Parties separating after living together for more than 25 years -- Female partner commencing proceedings for a share of property and support -- Whether support should be payable from date of trial or date on which proceedings commenced.*

### Summary:

In the *Kerr* appeal, K and B, a couple in their late 60s separated after a common law relationship of more [page270] than 25 years. They both had worked through much of that time and each had contributed in various ways to their mutual welfare. K claimed support and a share of property in B's name based on resulting trust and unjust enrichment principles. B counterclaimed that K had been unjustly enriched by his housekeeping and personal assistance services provided after K suffered a debilitating stroke. The trial judge awarded K \$315,000, a third of the value of the home in B's name that they had shared, both by way of resulting trust and unjust enrichment, based on his conclusion that K had provided \$60,000 worth of equity and assets at the beginning of their relationship. He also awarded K \$1,739 per month in spousal support effective the date she commenced proceedings. The Court of Appeal concluded that K did not make a financial contribution to the acquisition or improvement of B's property that was the basis for her award at trial, and dismissed her property claims. A new trial was ordered for B's counterclaim. The Court of Appeal further held that the commencement date of the spousal support should be the date of trial.

In the *Vanasse* appeal, it was agreed that S was unjustly enriched by the contributions of his partner, V, during their 12-year common law relationship. For the first four years of cohabitation, both parties pursued their respective careers. In 1997, V took a leave of absence from her employment and the couple moved to Halifax so that S could pursue a business opportunity. Over the next three and a half years, their children were born and V stayed at home to care for them and performed the domestic labour. S worked long hours and travelled extensively for business. In 1998, S stepped down as CEO of the business and the family returned to Ottawa where they bought a home in joint names. In 2000, S received approximately \$11 million for his shares in the business and from that time, until their separation in 2005, he participated more with the domestic chores. The trial judge found no unjust enrichment for the first and last periods of their cohabitation, but held that S had been unjustly enriched at V's expense during the period in which the children were born. V was entitled to half of the value of the wealth S accumulated during the period of unjust enrichment, less her interest in the home and RRSPs in her name. The court of appeal set aside this award and directed that the proper approach to valuation was a *quantum meruit* calculation in which the value each [page271] party received from the other was assessed and set off.

*Held:* In *Kerr*, the appeal on the spousal support issue should be allowed and the order of the trial judge should be restored. The appeal from the order dismissing K's unjust enrichment claim should also be allowed and a new trial ordered. The appeal from the order dismissing K's claim in resulting trust should be dismissed. The order for a new hearing of B's counterclaim should be affirmed.

*Held:* In *Vanasse*, the appeal should be allowed and the order of the trial judge restored.

These appeals require the resolution of five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. The second issue is whether the monetary remedy for a successful unjust enrichment claim must always be assessed on a *quantum meruit* basis. The third area relates to mutual benefit conferral in the context of an unjust enrichment claim and when this should be taken into account. The fourth concerns the role the parties' reasonable expectations play in the unjust enrichment analysis. Finally, in the *Kerr* appeal, this Court must also decide the effective

date of the commencement of spousal support.

For unmarried persons in domestic relationships in most common law provinces, judge-made law is the only option for addressing the property consequences of the breakdown of those relationships. The main legal mechanisms available have been the resulting trust and the action in unjust enrichment. Resulting trusts arise from gratuitous transfers in two types of situations: the transfer of property from one partner to the other without consideration, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. The underlying legal principle is that contributions to the acquisition of a property, which were not reflected in the legal title, might nonetheless give rise to a property interest. In Canada, added to this underlying notion was the idea that a resulting trust could arise based solely on the "common intention" of the parties that the non-owner partner was intended to have an interest. This theory is doctrinally unsound, however, and should [page272] have no continuing role in the resolution of domestic property disputes. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, parties have increasingly turned to the law of unjust enrichment and the remedial constructive trust. Since the decision in *Pettkus v. Becker*, the law of unjust enrichment has provided a much less artificial, more comprehensive and more principled basis to address claims for the distribution of assets on the breakdown of domestic relationships. It permits recovery whenever the plaintiff can establish three elements: an enrichment of the defendant by the plaintiff, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. This Court has taken a straightforward economic approach to the elements of enrichment and corresponding deprivation. The plaintiff must show that he or she has given a tangible benefit to the defendant that the defendant received and retained. Further, the enrichment must correspond to a deprivation that the plaintiff has suffered. Importantly, provision of domestic services may support a claim for unjust enrichment. The absence of a juristic reason for the enrichment means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff. This third element also provides for due consideration of the autonomy of the parties, their legitimate expectations and the right to order their affairs by contract.

There are two steps to the juristic reason analysis. First, the established categories of juristic reason must be considered, which could include benefits conferred by way of gift or pursuant to a legal obligation. In their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether particular enrichments are unjust.

The object of the remedy for unjust enrichment is to require the defendant to reverse the unjustified enrichment and may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In most cases, a monetary award will be sufficient to remedy the unjust enrichment but two issues raise difficulties in determining appropriate compensation. Where there has been a mutual conferral of benefits, it is often difficult for the court to retroactively value every service rendered by each party to the other. While the value of domestic services is not questioned, it would be unjust to only consider the contributions of one party. A second [page273] difficulty is whether a monetary award must invariably be calculated on a *quantum meruit*, "value received" or "fee-for-services" basis or whether that monetary relief may be assessed more flexibly, on a "value survived basis" by reference to the overall increase in the couple's wealth during the relationship. In some cases, a proprietary remedy may be required. Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, and that a monetary award would be insufficient, a share of the property proportionate to the claimant's contribution can be impressed with a constructive trust in his or her favour.

Three areas in the law of unjust enrichment require clarification. Once the choice has been made to award a monetary remedy, the question is how to quantify it. If a monetary remedy must invariably be

quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or to order a monetary remedy calculated on a *quantum meruit* basis. This dichotomy of remedial choice should be rejected, however, as the value survived measure is a perfectly plausible alternative to the constructive trust. Restricting the money remedy to a fee-for-service calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. The basis of all domestic unjust enrichment claims do not fit into only two categories -- those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. Where the contributions of both parties over time have resulted in an accumulation of wealth, the unjust enrichment occurs when one party retains a disproportionate share of the assets that are the product of their joint efforts following the breakdown of their relationship. The required link between the contributions and a specific property may not exist but there may clearly be a link between the joint efforts of the parties and the accumulation of wealth. While the law of unjust enrichment does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one party to share in the other's property, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. Second, the remedial dichotomy is inconsistent with the inherent flexibility of unjust enrichment and with the Court's approach to equitable [page274] remedies. Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development requires recourse to a number of different sorts of remedies depending on the circumstances. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial strait-jacket. What is essential is that there must be a link between the contribution and the accumulation of wealth. Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation. Third, the remedial dichotomy ignores the historical basis of *quantum meruit* claims. Finally, a remedial dichotomy is not mandated, as has been suggested, by the Court's judgment in *Peter v. Beblow*.

Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture" to which both partners have contributed, the monetary remedy should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. Where the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". The law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances". To be entitled to a monetary remedy on a value-survived basis, the claimant must show both that there was a joint family venture and a link between his or her contributions and the accumulation of wealth.

To determine whether the parties have, in fact, been engaged in a joint family venture, the particular circumstances of each particular relationship must be taken into account. This is a question of fact and must [page275] be assessed by having regard to all of the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family. The pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent to which the parties have formed a true partnership and jointly worked towards important mutual goals. The use of parties' funds entirely for family purposes or where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities and enabling him or her to pursue activities in the paid workforce, may also indicate a pooling of resources. The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they have engaged in a joint family venture. The actual

intentions of the parties, either express or inferred from their conduct, must be given considerable weight. Their conduct may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture, but may also conversely negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Another consideration is whether and to what extent the parties have given priority to the family in their decision making, and whether there has been detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. This may occur where one party leaves the workforce for a period of time to raise children; relocates for the benefit of the other party's career; foregoes career or educational advancement for the benefit of the family or relationship; or accepts underemployment in order to balance the financial and domestic needs of the family unit.

The unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits. When the appropriate remedy is a money award based on a fee-for-services provided approach, the fact that the defendant has also provided services to the claimant should mainly be considered at the defence and remedy stages of the analysis but may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of a juristic reason for the enrichment. However, given that the purpose of the juristic reason [page276] step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose. Otherwise, the mutual exchange of benefits should be taken into account only after the three elements of an unjust enrichment claim have been established.

Claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. It is then open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations. Mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step of the juristic reason analysis. In some cases, the fact that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit that does not fall within the existing categories. The question is whether the parties' mutual expectations show that retention of the benefits is just.

In the *Vanasse* appeal, although not labelling it as such, the trial judge found that there was a joint family venture and that there was a link between V's contribution to it and the substantial accumulation of wealth that the family achieved. She made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of S's substantial contributions. Her findings of fact and analysis indicate that the unjust enrichment of S at the expense of V ought to be characterized as the retention by S of a disproportionate share of the wealth generated from a joint family venture. Several factors suggested that, throughout their relationship, the parties were working collaboratively towards common goals. They made important decisions keeping the overall welfare of the family at the forefront. It was through their joint efforts that they were able to raise a young family and acquire wealth. S could not have made the efforts he did to build up the company but for V's assumption of the domestic responsibilities. Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together, a further indicator [page277] that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. There was also evidence of economic integration as their house was registered jointly and they had a joint bank account. Their words and actions indicated that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and

the benefit of their children. There is a strong inference from the factual findings that, to S's knowledge, V relied on the relationship to her detriment. She left her career, gave up her own income, and moved away from her family and friends. V then stayed home and cared for their two small children. During the period of the unjust enrichment, V was responsible for a disproportionate share of the domestic labour. There was a clear link between V's contribution and the accumulation of wealth. The trial judge took a realistic and practical view of the evidence and took into account S's non-financial contributions and periods during which V's contributions were not disproportionate to S and her judgment should be restored.

The Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment in *Kerr* and in ordering a new hearing on B's counterclaim. On the basis of the unsatisfactory record at trial, which includes findings of fact tainted by clear error, K's unjust enrichment claim should not have been dismissed but a new trial ordered. The Court of Appeal erred in assessing B's contributions as part of the juristic reason analysis and prematurely truncated K's *prima facie* case of unjust enrichment. The family -- property approach is rejected, and for K to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that B has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. With regard to B's counterclaim, there was evidence that he made very significant contributions to K's welfare such that his counterclaim cannot simply be dismissed. The trial judge also referred to various other monetary and non-monetary contributions which K made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the [page278] contributions made by B. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Further, the Court of Appeal ought not to have set aside the trial judge's order for spousal support in favour of K effective on the date she had commenced proceedings. It is clear that K was in need of support from B at the date she started her proceedings and remained so at the time of trial. K should not have been faulted for not bringing an interim application in seeking support for the period in question. She suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with B. B had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

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**considered:** *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795; *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231;  
**referred to:** *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, 30 E.R. 42; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Gissing v. Gissing*, [1970] 2 All E.R. 780; *Pettitt v. Pettitt*, [1970] A.C. 777; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737; *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Bell v. Bailey* (2001), 203 D.L.R. (4) 589; *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4) 26; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44; *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273; *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40; *Herman v. Smith* (1984), 42 R.F.L. (2d) 154; *Clarke v. Clarke*, [1990] 2 S.C.R. 795; *Cadbury Schweppes Inc. v. FBI [page279] Foods Ltd.*, [1999] 1 S.C.R. 142; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575; *Birmingham v. Ferguson*, 2004

CanLII 4764; *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54; *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5) 100; *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382; *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169; *Thomas v. Fenton*, 2006 BCCA 299, 269 D.L.R. (4) 376; *Giles v. McEwan* (1896), 11 Man. R. 150; *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112; *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601; *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254.

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### History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Tysoe and Smith JJ.A.), 2009 BCCA 111, 93 B.C.L.R. (4) 201, 266 B.C.A.C. 298, [2009] 9 W.W.R. 285, 66 R.F.L. (6) 1, [2009] B.C.J. No. 474 (QL), 2009 CarswellBC 642, reversing in part a decision of Romilly J., 2007 BCSC 1863, 47 R.F.L. (6) 103, [2007] B.C.J. No. 2737 (QL), 2007 CarswellBC 3047. Appeal allowed in part.

APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Juriansz and Epstein JJ.A.), 2009 ONCA 595, 252 O.A.C. 218, 96 O.R. (3d) 321, [2009] O.J. No. 3211 (QL), 2009 CarswellOnt 4407, reversing a decision of Blishen J., 2008 CanLII 35922, [2008] O.J. No. 2832 (QL), 2008 CarswellOnt 4265. Appeal allowed.

### Counsel:

*Armand A. Petronio* and *Geoffrey B. Gomery*, for the appellant Margaret Kerr.

*Susan G. Label* and *Marie-France Major*, for the respondent Nelson Baranow.

*John E. Johnson*, for the appellant Michele Vanasse.

*H. Hunter Phillips*, for the respondent David Seguin.

[page281]

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The judgment of the Court was delivered by

**CROMWELL J.:-**

#### I. Introduction

1 In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses,

comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

2 In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention" of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

3 As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust. In order to successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment. [page282] This claim has become the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships. However, various issues continue to create controversy, and these two appeals, argued consecutively, provide the Court with the opportunity to address them.

4 In the *Kerr* appeal, a couple in their late 60s separated after a common law relationship of more than 25 years. Both had worked through much of that time and each had contributed in various ways to their mutual welfare. Ms. Kerr claimed support and a share of property held in her partner's name based on resulting trust and unjust enrichment principles. The trial judge awarded her one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims (2007 BCSC 1863, 47 R.F.L. (6th) 103). He did not address, other than in passing, Mr. Baranow's counterclaim that Ms. Kerr had been unjustly enriched at his expense. The judge also ordered substantial monthly support for Ms. Kerr pursuant to statute, effective as of the date she applied to the court for relief. However, the resulting trust and unjust enrichment conclusions of the trial judge were set aside by the British Columbia Court of Appeal (2009 BCCA 111, 93 B.C.L.R. (4th) 201). Both lower courts addressed the role of the parties' common intention and reasonable expectations. The appeal to this Court raises the questions of the role of resulting trust law in these types of disputes, as well as how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations play in that analysis. This Court is also called upon to decide whether the award of spousal support should be effective as of the date of application, as found by the trial judge, the date the trial began, as ordered by the Court of Appeal, or some other date.

[page283]

5 In the *Vanasse* appeal, the central problem is how to quantify a monetary award for unjust enrichment. It is agreed that Mr. Seguin was unjustly enriched by the contributions of his partner, Ms. Vanasse; the two lived in a common law relationship for about 12 years and had two children together during this time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth was due to Ms. Vanasse's efforts as an equal contributor to the family venture (2008 CanLII 35922). The Court of Appeal set aside this finding and, while ordering a new trial, directed that the proper approach to valuation was to place a monetary value on the services provided by Ms. Vanasse to the family, taking due account of Mr. Seguin's own contributions by way of



set-off ( 2009 ONCA 595, 252 O.A.C. 218). In short, the Court of Appeal held that Ms. Vanasse should be treated as an unpaid employee, not a co-venturer. The appeal to this Court challenges this conclusion.

6 These appeals require us to resolve five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. In my view, it is time to recognize that the "common intention" approach to resulting trust has no further role to play in the resolution of property claims by domestic partners on the breakdown of their relationship.

7 The second issue concerns the nature of the money remedy for a successful unjust enrichment claim. Some courts take the view that if the claimant's contribution cannot be linked to specific property, a money remedy must always be assessed on a fee-for-services basis. Other courts have taken a more flexible approach. In my view, where both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result, [page284] have accumulated assets, the money remedy for unjust enrichment should reflect that reality. The money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.

8 The third area requiring clarification relates to mutual benefit conferral. Many domestic relationships involve the mutual conferral of benefits, in the sense that each contributes in various ways to the welfare of the other. The question is how and at what point in the unjust enrichment analysis should this mutual conferral of benefits be taken into account? For reasons I will develop below, this issue should, with a small exception, be addressed at the defence and remedy stage.

9 Fourth, there is the question of what role the parties' reasonable or legitimate expectations play in the unjust enrichment analysis. My view is that they have a limited role, and must be considered in relation to whether there is a juristic reason for the enrichment.

10 Finally, there is the issue of the appropriate date for the commencement of spousal support. In my respectful view, the Court of Appeal erred in setting aside the trial judge's selection of the date of application in the circumstances of the *Kerr* appeal.

11 I will first address the law of resulting trusts as it applies to the breakdown of a marriage-like relationship. Next, I will turn to the law of unjust enrichment in this context. Finally, I will address the specific issues raised in the two appeals.

## II. Resulting Trusts

12 The resulting trust played an important role in the early years of the Court's jurisprudence relating to property rights following the breakdown of [page285] intimate personal relationships. This is not surprising; it had been settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, "results" to the person who advances the purchase money; *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, 30 E.R. 42, at p. 43. The resulting trust, therefore, seemed a promising vehicle to address claims that one party's contribution to the acquisition of property was not reflected in the legal title.

13 The resulting trust jurisprudence in domestic property cases developed into what has been called "a purely Canadian invention", the "common intention" resulting trust: A. H. Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at p. 642. While this vehicle has largely been eclipsed by the law of unjust enrichment since the decision of the Court in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, claims based on the "common intention" resulting trust continue to be advanced. In the *Kerr* appeal, for example, the trial judge justified the imposition of a resulting trust, in part, on the basis that the parties had a common intention that Mr. Baranow would hold title to the property by way of a

resulting trust for Ms. Kerr. The Court of Appeal, while reversing the trial judge's finding of fact on this point, implicitly accepted the ongoing vitality of the common intention resulting trust.

**14** However promising this common intention resulting trust approach looked at the beginning, doctrinal and practical problems soon became apparent and have been the subject of comment by the Court and scholars: see, e.g., *Pettkus*, at pp. 842-43; Oosterhoff, at pp. 641-47; D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005) ("*Waters*"), at pp. 430-35; J. Mee, *The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), at pp. 39-43; T. G. Youdan, "Resulting and Constructive Trusts", in *Special Lectures of the Law Society of Upper [page286] Canada 1993 - Family Law: Roles, Fairness and Equality* (1994), 169, at pp. 172-74.

**15** In this Court, since *Pettkus*, the common intention resulting trust remains intact but unused. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust. To explain why, I must first put the question in the context of some basic principles about resulting trusts.

**16** That task is not as easy as it should be; there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points: see, e.g., *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at pp. 449-50; *Waters'*, at pp. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11th ed. 2009), at p. 67. However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters'*, at p. 21.

**17** Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in [page287] the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

**18** The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (emphasis added).

**19** As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds that property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

**20** The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example,

in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement - that is, a presumption that the grantor intended to make a gift - rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to [page288] grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

21 That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423. Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

22 This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, *per* Dickson J. (as he then was); p. 474, *per* Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that "[a] resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another and where there is evidence of a common intention that the property was to be shared by both parties" (emphasis added).

[page289]

23 The Court's development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-43. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Pettkus v. Becker* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

24 This, in my view, is as it should be, and the time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases. I say this for four reasons.

25 First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that counts. As Professor Waters puts it, "In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention" (*Waters'*, at p. 431). The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution

made by the claimant was not in the form of property or closely linked to its acquisition. The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with [page290] that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property: *Waters'*, at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: "... a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property": p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

**26** There are problems beyond these doctrinal issues. A second difficulty with the common intention resulting trust is that the notion of common intention may be highly artificial, particularly in domestic cases. The search for common intention may easily become "a mere vehicle or formula" for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties. Dickson J. in *Pettkus* noted the artificiality and undue malleability of the common intention approach: at pp. 843-44.

**27** Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting [page291] trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt*, [1970] A.C. 777, and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters'*, at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

**28** Finally, as the development of the law since *Pettkus* has shown, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.

**29** I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch* and *Rathwell*, [page292] no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the

existence in fact of common intention.

### III. Unjust Enrichment

#### A. *Introduction*

30 The law of unjust enrichment has been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. In a series of decisions, the Court has developed a sturdy framework within which to address these claims. However, a number of doctrinal and practical issues require further attention. I will first briefly set out the existing framework, then articulate the issues that in my view require further attention, and finally propose the ways in which they should be addressed.

#### B. *The Legal Framework for Unjust Enrichment Claims*

31 At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see, generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed. 2007), c. 4-11, 17 and 19-26.

[page293]

32 Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.

33 The application of unjust enrichment principles to claims by domestic partners was resisted until the Court's 1980 decision in *Pettkus*. In applying unjust enrichment principles to domestic claims, however, the Court has been clear that there is and should be no separate line of authority for "family" cases developed within the law of unjust enrichment. Rather, concern for clarity and doctrinal integrity mandate that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases" (*Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 997).

34 Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. The Court in *Peter* was unanimously of the view that the courts "should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases" (p. 997, *per* McLachlin J. (as she then was); see also p. 1023, *per* Cory J.). Thus, while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.

[page294]

35 It will be helpful to review, briefly, the current state of the law with respect to each of the elements of an unjust enrichment claim and note the particular issues in relation to each that arise in claims by domestic partners.

### C. *The Elements of an Unjust Enrichment Claim*

#### (1) Enrichment and Corresponding Deprivation

36 The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

37 The Court has taken a straightforward economic approach to the first two elements - enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 31.

38 For the first requirement - enrichment - the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

39 Turning to the second element - a *corresponding* deprivation - the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to [page295] establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

#### (2) Absence of Juristic Reason

40 The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp. 990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due

consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract" (*Peel*, at p. 803).

42 A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After [page296] some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection" (*Peter*, at pp. 989-95, *per* McLachlin J., and pp. 1012-16, *per* Cory J.).

43 In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

First, the plaintiff must show that no juristic reason from an established category exists to deny recovery... . The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory [page297] obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

44 Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

45 Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in [page298] *Peter* rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 61.)

### (3) Remedy

46 Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

#### (a) *Monetary Award*

47 The first remedy to consider is always a monetary award (*Peter*, at pp. 987 and 999). In most cases, it will be sufficient to remedy the unjust enrichment. However, calculation of such an award is far from straightforward. Two issues have given rise to disagreement and difficulty in domestic unjust enrichment claims.

48 First, the fact that many domestic claims of unjust enrichment arise out of relationships in which there has been a mutual conferral of benefits gives rise to difficulties in determining what will constitute adequate compensation. While the value of domestic services is not questioned (*Peter*; *Sorochan*), it is unjust to pay attention only to the contributions of one party in assessing an appropriate remedy. This is not only an important issue of principle; in practice, it is enormously difficult for the parties and the court to "create, retroactively, a notional ledger to record and value every service rendered by each party to the other" (R. E. Scane, [page299] "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 *Can. Bar Rev.* 260, at p. 281). This gives rise to the practical problem that one scholar has aptly referred to as "duelling *quantum meruit*" (J. D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?", in J. W. Neyers, M. McInnes and S. G. A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

49 A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly - in effect, on a value survived basis - by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108, at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also *Matrimonial Property Law*



in *Canada* (loose-leaf), vol. 1, by J. G. McLeod and A. A. Mamo, eds., at pp. 40.78-40.79.

(b) *Proprietary Award*

**50** The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial [page300] feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

**51** As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

**52** The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant [page301] the plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.).

**53** The extent of the constructive trust interest should be proportionate to the claimant's contributions. Where the contributions are unequal, the shares will be unequal (*Pettkus*, at pp. 852-53; *Rathwell*, at p. 448; *Peter*, at pp. 998-99). As Dickson J. put it in *Rathwell*, "The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions" (p. 454).

D. *Areas Needing Clarification*

**54** While the law of unjust enrichment sets out a sturdy legal framework within which to address claims by domestic partners, three areas continue to generate controversy and require clarification. As mentioned earlier, these are as follows: the approach to the assessment of a monetary award for a successful unjust enrichment claim, how and where to address the mutual benefit problem, and the role of the parties' reasonable or legitimate expectations. I will address these in turn.

E. *Is a Monetary Award Restricted to Quantum Meruit?*

(1) Introduction

**55** As noted earlier, remedies for unjust enrichment may either be proprietary (normally a remedial

constructive trust) or personal (normally a money remedy). Once the choice has been made to award a monetary rather than a proprietary remedy, the question of how to quantify that monetary remedy arises. Some courts have held that monetary relief must always be calculated based on a value received or *quantum meruit* basis (*Bell*), while others have held that monetary relief may also be based on a value survived (i.e. by reference to the value of property) approach (*Wilson; Pickelien; Harrison; MacFarlane; Shannon*). If, as some courts have [page302] held, a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or order a monetary remedy calculated on a *quantum meruit* basis. One scholar has referred to this approach as the false dichotomy between constructive trust and *quantum meruit* (McCamus, at pp. 375-76). Scholars have also noted this area of uncertainty in the case law, and have suggested that an *in personam* remedy using the value survived measure is a plausible alternative to the constructive trust (McCamus, at p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), at pp. 394-95). As I will explain below, *Peter* is said to have established this dichotomy of remedial choice. However, in my view, the focus in *Peter* was on the availability of the constructive trust remedy, and that case should not be taken as limiting the calculation of monetary relief for unjust enrichment to a *quantum meruit* basis. In appropriate circumstances, monetary relief may be assessed on a value survived basis.

56 I will first briefly describe the genesis of the purported limitation on the monetary remedy. Then I will explain why, in my view, it should be rejected. Finally, I will set out my views on how money remedies for unjust enrichment claims in domestic situations should be approached.

## (2) The Remedial Dichotomy

57 As noted, there is a widespread, although not unanimous, view that there are only two choices of remedy for an unjust enrichment: a monetary award, assessed on a fee-for-services basis; or a proprietary one (generally taking the form of a remedial constructive trust), where the claimant can show [page303] that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property. Some brief comments in *Peter* seem to have spawned this idea, which is reflected in a number of appellate authorities. For instance, in the *Vanasse* appeal, the Ontario Court of Appeal reasoned that since Ms. Vanasse could not show that her contributions were linked to specific property, her claim had to be quantified on a fee-for-services basis. I respectfully do not agree that monetary awards for unjust enrichment must always be calculated in this way.

## (3) Why the Remedial Dichotomy Should Be Rejected

58 In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of *quantum meruit* claims. Finally, it is not mandated by the Court's judgment in *Peter*. For those reasons, this remedial dichotomy should be rejected. The discussion which follows is concerned only with the quantification of a monetary remedy for unjust enrichment; the law relating to when a proprietary remedy should be granted is well established and remains unchanged.

### (a) *Life Experience*

59 The remedial dichotomy would be appropriate if, in fact, the bases of all domestic unjust enrichment claims fit into only two categories - those where the enrichment consists of the provision of unpaid services, and those where it consists [page304] of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. To be sure, those two bases for unjust enrichment claims exist. However, all unjust enrichment cases cannot be neatly divided into

these two categories.

**60** At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

**61** There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in *Clarke v. Clarke*, [1990] 2 S.C.R. 795, at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), "... the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise... . The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by [page305] women to the economic survival and growth of the family was not recognized" (emphasis added).

**62** Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

**63** This reality has also been recognized many times and in many contexts by the Court. For instance, in *Murdoch*, Laskin J. (as he then was), in dissent, would have imposed constructive trust relief, on the basis that the facts were "consistent with a pooling of effort by the spouses" to establish themselves in a ranch operation (p. 457), and that the spouses had worked together for fifteen years to improve "their lot in life through progressively larger acquisitions of ranch property" (p. 446). Similarly, in *Rathwell*, a majority of the judges agreed that Mr. and Mrs. Rathwell had pooled their efforts to accumulate wealth as a team. Dickson J. emphasized that the parties had together "decided to make farming their way of life" (p. 444), and that the acquisition of property in Mr. Rathwell's name was only made possible through their "joint effort" and "team work" (p. 461).

**64** A similar recognition is evident in *Pettkus* and *Peter*.

**65** In *Pettkus*, the parties developed a successful beekeeping business, the profits from which they used to acquire real property. Dickson J., writing for the majority of the Court, emphasized facts suggestive of a domestic and financial partnership. He observed that "each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort" (p. 853); that each contributed [page306] to the "good fortune of the common enterprise" (p. 838); that Wilson J.A. (as she then was) at the Court of Appeal had found the wealth they accumulated was through "joint effort" and "teamwork" (p. 849); and finally, that "[t]heir lives and their economic well-being were fully integrated" (p. 850).

**66** I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms.

Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

67 The significance of the fact that wealth had been acquired through joint effort was again at the forefront of the analysis in *Peter* where the parties lived together for 12 years in a common law relationship. While Mr. Beblow generated most of the family income and also contributed to the maintenance of the property, Ms. Peter did all of the domestic work (including raising the six children of their blended family), helped with property maintenance, and was solely responsible for the property when Mr. Beblow was away. The reality of their joint venture was acknowledged when McLachlin J. wrote that the "joint family venture, in effect, was no different from the farm which was the subject of the trust in *Pettkus v. Becker*" (p. 1001).

68 The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, [page307] in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

69 Relationships of this nature are common in our life experience. For many domestic relationships, the couple's venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis. Of course, this is a relationship-specific issue; there can be no presumption one way or the other. However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship.

(b) *Flexibility*

70 Maintaining a strict remedial dichotomy is inconsistent with the Court's approach to equitable remedies in general, and to its development of remedies for unjust enrichment in particular.

71 The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [page308] [1999] 1 S.C.R. 142, at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: "... the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *L.M.C.L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

72 Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific*

*National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, at p. 47.

73 Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. This means that a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or the other of the two [page309] remedial options into which some have tried to force them.

(c) *History*

74 Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), vol. I, at s.4: 200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) *Peter v. Beblow*

75 *Peter* does not mandate strict adherence to a *quantum meruit* approach to money remedies for unjust enrichment. One must remember that the focus of *Peter* was on whether the plaintiff's contributions entitled her to a constructive trust over the former family home. While it was assumed by both McLachlin J. and Cory J., who wrote concurring reasons in the case, that a money award would be fashioned on the basis of *quantum meruit*, that was not an issue, let alone a holding, in the case.

[page310]

76 There are, in fact, only two sentences in the judgments that could be taken as supporting the view that this rule should always apply. At p. 995, McLachlin J. said, "Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and the one the trial judge awarded, title to the house based on a constructive trust"; at p. 999, she wrote that "[f]or a monetary award, the 'value received' approach is appropriate". Given that the focus of the case was deciding whether a proprietary remedy was appropriate, I would not read these two brief passages as laying down the sweeping rule that a monetary award must always be calculated on a fee-for-services basis.

77 Moreover, McLachlin J. noted that the doctrine of unjust enrichment applies to a variety of situations, and that successful claims have been addressed through a number of remedies, depending on the circumstances. Only one of these remedies is a payment for services rendered on the basis of *quantum meruit*: p. 987. There is nothing in this observation to suggest that the Court decided to opt for a one-size-fits-all monetary remedy, especially when such an approach would be contrary to the very flexibility that the Court has repeatedly affirmed with regards to the law of unjust enrichment and corresponding remedies.

78 This restrictive reading of *Peter* is not consistent with the underlying nature of the claim founded on the principles set out in *Pettkus*. As Professor McCamus has suggested, cases like *Pettkus* rest on a claimant's right to share surplus wealth created by joint effort and teamwork. It follows that a remedy based on notional fees for services is not responsive to the underlying nature of that claim: McCamus, at pp. 376-77. In my view, this reasoning is persuasive whether the joint effort has led to the accumulation of specific property, in which case a remedial constructive trust may be appropriate according to the well-settled principles in that area of trust law, or where the joint effort has led to an accumulation of assets generally. In the [page311] latter instance, when appropriate, there is no reason in principle why a monetary remedy cannot be fashioned to reflect this basis of the enrichment and corresponding deprivation. What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in *Peter*, between the "value received" and the "value surviving". Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

79 Professor McCamus has suggested that the equitable remedy of an accounting of profits could be an appropriate remedial tool: p. 377. While I would not discount that as a possibility, I doubt that the complexity and technicality of that remedy would be well suited to domestic situations, which are more often than not rather straightforward. The unjust enrichment principle is inherently flexible and, in my view, the calculation of a monetary award for a successful unjust enrichment claim should be equally flexible. This is necessary to respond, to the extent money can, to the particular enrichment being addressed. To my way of thinking, Professor Fridman was right to say that "where a claim for unjust enrichment has been made out by the plaintiff, the court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled, regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398).

#### (4) The Approach to the Monetary Remedy

80 The next step in the legal development of this area should be to move away from the false remedial dichotomy between *quantum meruit* and [page312] constructive trust, and to return to the underlying principles governing the law of unjust enrichment. These underlying principles focus on properly characterizing the nature of the unjust enrichment giving rise to the claim. As I have mentioned above, not all unjust enrichments arising between domestic partners fit comfortably into either a "fee-for-services" or "a share of specific property" mold. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of what McLachlin J. referred to in *Peter* (at p. 1001) as a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

81 In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the

accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

**82** This flexible approach to the money remedy in unjust enrichment cases is fully consistent with [page313] *Walsh*. While that case was focused on constitutional issues that are not before us in this case, the majority judgment was clearly not intended to freeze the law of unjust enrichment in domestic cases; the judgment indicates that the law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances" (para. 61). In short, while emphasizing respect for autonomy as an important value, the Court at the same time approved of the continued development of the law of unjust enrichment in order to respond to the plethora of forms and functions of common law relationships.

**83** A similar approach was taken in *Peter*. Mr. Beblow argued that the law of unjust enrichment should not provide a share of property to unmarried partners because the legislature had chosen to exclude them from the rights accorded to married spouses under matrimonial property legislation. This argument was succinctly - and flatly - rejected with the remark that it is "precisely where an injustice arises without a legal remedy that equity finds a role": p. 994.

**84** It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.

**85** I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts [page314] with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

**86** Thus the rejection of the remedial dichotomy leads us to consider in what circumstances an unjust enrichment may be appropriately characterized as a failure to share equitably assets acquired through the parties' joint efforts. While this approach will need further refinement in future cases, I offer the following as a broad outline of when this characterization of an unjust enrichment will be appropriate.

#### (5) Identifying Unjust Enrichment Arising From a Joint Family Venture

**87** My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's

contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

**88** It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. [page315] Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

**89** In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

(a) *Mutual Effort*

**90** One set of factors concerns whether the parties worked collaboratively towards common goals. Indicators such as the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent, if any, to which the parties have formed a true partnership and jointly worked towards important mutual goals.

**91** Joint contributions, or contributions to a common pool, may provide evidence of joint effort. For instance, in *Murdoch*, central to Laskin J.'s [page316] constructive trust analysis was that the parties had pooled their efforts to establish themselves in a ranch operation. Joint contributions were also an important aspect of the Court's analyses in *Peter, Sorochan*, and *Pettkus*. Pooling of efforts and resources, whether capital or income, has also been noted in the appellate case law (see, e.g., *Birmingham v. Ferguson*, 2004 CanLII 4764 (Ont. C.A.); *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54, at para. 14). The use of parties' funds entirely for family purposes may be indicative of the pooling of resources: *McDougall*. The parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce (see *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.); *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382, at para. 27).

(b) *Economic Integration*

**92** Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well



as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson; Panara*).

93 The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over [page317] the individual interests of the individual members (McCamus, at p. 366). These and other factors may indicate that the economic well-being and lives of the parties are largely integrated (see, e.g., *Pettkus*, at p. 850).

(c) *Actual Intent*

94 Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point, however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties *ought* to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.

95 Courts may infer from the parties' conduct that they intended to share in the wealth they jointly created (P. Parkinson, "Beyond *Pettkus v. Becker*: Quantifying Relief for Unjust Enrichment" (1993), 43 U.T.L.J. 217, at p. 245). The conduct of the parties may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture (*Pettkus; Peter; Sorochan*). In some cases, courts have explicitly labelled the relationship as a "partnership" in the social and economic sense (*Panara*, at para. 71; *McDougall*, at para. 14). Similarly, the intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was "equivalent to marriage" (*Birmingham*, at para. 1), or where the parties held themselves out to the public as married (*Sorochan*). The stability of the relationship may be a relevant factor as may the length of cohabitation (*Nasser; Sorochan; Birmingham*). When parties have lived together in a stable relationship for [page318] a lengthy period, it may be nearly impossible to engage in a precise weighing of the benefits conferred within the relationship (*McDougall; Nasser*).

96 The title to property may also reflect an intent to share wealth, or some portion of it, equitably. This may be the case where the parties are joint tenants of property. Even where title is registered to one of the parties, acceptance of the view that wealth will be shared may be evident from other aspects of the parties' conduct. For example, there may have been little concern with the details of title and accounting of monies spent for household expenses, renovations, taxes, insurance, and so on. Plans for property distribution on death, whether in a will or a verbal discussion, may also indicate that the parties saw one another as domestic and economic partners.

97 The parties' actual intent may also negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Once again, it is the parties' actual intent, express or inferred from the evidence, that is the relevant consideration.

(d) *Priority of the Family*

98 A final category of factors to consider in determining whether the parties were in fact engaged in a joint family venture is whether and to what extent they have given priority to the family in their decision making. A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. As Professor McCamus puts it, the

question is whether the parties have been "[p]roceeding on the basis of understandings or assumptions about a shared future which may or may not be articulated" (p. 365). The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare [page319] of the collective or family unit. Whether the roles of the parties fall into the traditional wage earner/homemaker division, or whether both parties are employed and share domestic responsibilities, it is frequently the case that one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment (Parkinson, at p. 243). This may occur in a number of ways including: leaving the workforce for a period of time to raise children; relocating for the benefit of the other party's career (and giving up employment and employment-related networks as a result); foregoing career or educational advancement for the benefit of the family or relationship; and accepting underemployment in order to balance the financial and domestic needs of the family unit.

99 As I see it, giving priority to the family is not associated exclusively with the actions of the more financially dependent spouse. The spouse with the higher income may also make financial sacrifices (for example, foregoing a promotion for the benefit of family life), which may be indicative that the parties saw the relationship as a domestic and financial partnership. As Professor Parkinson puts it, the joint family venture may be identified where

[o]ne party has encouraged the other to rely to her detriment by leaving the workforce or forgoing other career opportunities for the sake of the relationship, and the breakdown of the relationship leaves her in a worse position than she would otherwise have been had she not acted in this way to her economic detriment. [p. 256]

(6) Summary of *Quantum Meruit* Versus Constructive Trust

100 I conclude:

1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.

[page320]

2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions.
3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.
4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.

F. *Mutual Benefit Conferral*

(1) Introduction

**101** As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?

**102** The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth [page321] proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

**103** Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266). Others have looked at mutual benefits as an aspect of the juristic reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in *Wilson*). It is apparent that some clarity and consistency is necessary with respect to this issue.

**104** In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court, [page322] and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

**105** At the outset, however, I should say that this Court's decision in *Peter* does not mandate consideration of mutual benefits at the juristic reason stage of the analysis: see, e.g., *Ford*, at para. 14; *Thomas v. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376, at para. 18. Rather, *Peter* made clear that mutual benefit conferral should generally not be considered at the benefit and detriment stages; the Court also approved the trial judge's decision to take mutual benefits into account at the remedy stage of the unjust enrichment analysis.

**106** In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid \$350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required. The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by

one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: [1988] B.C.J. No. 887 (QL).

**107** The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266, set aside the judge's finding on the basis that Ms. Peter had failed to establish that she had suffered a deprivation corresponding to the benefits she had conferred on Mr. Beblow. The court reasoned that, although she had performed the services of a housekeeper and homemaker, she had [page323] received compensation because she and her children lived in Mr. Beblow's home rent free and he contributed more for groceries than she had.

**108** This Court reversed the Court of Appeal and restored the trial judge's award. The Court was unanimous that Ms. Peter had established all of the elements of unjust enrichment, including deprivation. Cory J. (with whom McLachlin J. agreed on this point) made short work of Mr. Beblow's submission that Ms. Peter had not shown deprivation. He observed, "As a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course be deprivation suffered by the plaintiff": at p. 1013. The Court also unanimously upheld the trial judge's approach of taking account of the benefits Ms. Peter had received at the remedy stage of his decision. As noted, the trial judge had reduced the monthly amount used to calculate Ms. Peter's award by 50 percent to reflect benefits she had received from Mr. Beblow. McLachlin J. did not disagree with this approach, holding at p. 1003 that the figure arrived at by the judge fairly reflected the value of Ms. Peter's contribution to the family assets. Cory J., at p. 1025, referred to the trial judge's approach as "a fair means of calculating the amount due to the appellant". Thus, the Court approved the approach of taking the mutual benefit issue into account at the remedy stage of the analysis. *Peter* therefore does not support the view that mutual benefits should be considered at the benefit/detriment or juristic reason stages of the analysis.

## (2) The Correct Approach

**109** As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should [page324] be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

**110** I turn first to why mutual benefits should not be addressed at the benefit/detriment stage of the analysis. In my view, refusing to address mutual benefits at that point is consistent with the *quantum meruit* origins of the fee-for-services approach and, as well, with the straightforward economic approach to the benefit/detriment analysis which has been consistently followed by this Court.

**111** An unjust enrichment claim based on a fee-for-services approach is analogous to the traditional claim for *quantum meruit*. In *quantum meruit* claims, the fact that some benefit had flowed from the defendant to the claimant is taken into account by reducing the claimant's recovery by the amount of the countervailing benefit provided. For example, in a *quantum meruit* claim where the plaintiff is seeking to recover money paid pursuant to an unenforceable contract, but received some benefit from the defendant already, the claim will succeed but the award will be reduced by an amount corresponding to the value of that benefit: Maddaugh and McCamus (loose-leaf ed.), vol. II, at s.13: 200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Q.B. *en banc*). In that case, two employees recovered in *quantum meruit* for services provided to the defendant under an unenforceable agreement, but the amount of the award was reduced to reflect the value of benefits the defendant had provided to them. Thus, taking the benefits conferred by the defendant into account at the remedy stage is consistent with general principles of *quantum meruit* claims. Of course, if the defendant has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that

defence or claim.

[page325]

**112** Refusing to take mutual benefits into account at the benefit/detriment stage is also supported by a straightforward economic approach to the benefit/detriment analysis which the Court has consistently followed. *Garland* is a good example. The class action plaintiffs claimed in unjust enrichment to seek restitution for late payment penalties that had been imposed but that this Court (in an earlier decision) found had been charged at a criminal rate of interest: see *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112. The company argued that it had not been enriched because its rates were set by a regulatory mechanism out of its control, and that the rates charged would have been even higher had the company not received the late payment penalties as part of its revenues. That argument was accepted by the Court of Appeal, but rejected on the further appeal to this Court. Iacobucci J., for the Court, held that the payment of money, under the "straightforward economic approach" adopted in *Peter*, was a benefit: para. 32. He stated at para. 36: "There simply is no doubt that Consumers' Gas received the monies represented by the [late payment penalties] and had that money available for use in the carrying on of its business... . We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme." The Court held that the company was in fact asserting the "change of position" defence (that is, the defence that is available when "an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned": para. 63). This defence is considered only after the three elements of an unjust enrichment claim have been established: para. 37. Thus the Court declined to get into a detailed consideration at the benefit/detriment stage of the defendant's submissions that it had not benefitted because of the regulatory scheme.

**113** While *Garland* dealt with the payment of money, my view is that the same approach should be applied where the alleged enrichment consists [page326] of services. Provided that they confer a tangible benefit on the defendant, the services will generally constitute an enrichment and a corresponding deprivation. Whether the deprivation was counterbalanced by benefits flowing to the claimant from the defendant should not be addressed at the first two steps of the analysis. I turn now to the limited role that mutual benefit conferral may have at the juristic reason stage of the analysis.

**114** As previously set out, juristic reason is the third of three parts to the unjust enrichment analysis. As McLachlin J. put it in *Peter*, at p. 990, "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'." The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.

**115** The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

(3) Summary

**116** I conclude that mutual benefits may be considered at the juristic reason stage, but only to [page327] the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.

G. *Reasonable or Legitimate Expectations*

**117** The final point that requires some clarification relates to the role of the parties' reasonable expectations in the domestic context. My conclusion is that, while in the early domestic unjust enrichment cases the parties' reasonable expectations played an important role in the juristic reason analysis, the development of the law, and particularly the Court's judgment in *Garland*, has led to a more limited and clearly circumscribed role for those expectations.

**118** In the early cases of domestic unjust enrichment claims, the reasonable expectations of the claimant and the defendant's knowledge of those expectations were central to the juristic reason analysis. For example, in *Pettkus*, when Dickson J. came to the juristic reason step in the analysis, he said that "where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it" (p. 849). Similarly, in *Sorochan*, at p. 46, precisely the same reasoning was invoked to show that there was no juristic reason for the enrichment.

**119** In these cases, central to the Court's concern was whether it was just to require the defendant to pay - in fact to surrender an interest in property - for services not expressly requested. The Court's answer was that it would indeed be unjust for the defendant to retain the benefits, given [page328] that he had continued to accept the services when he knew or ought to have known that the claimant was providing them with the reasonable expectation of reward.

**120** The Court's resort to reasonable expectations and the defendant's knowledge of them in these cases is analogous to the "free acceptance" principle. The notion of free acceptance has been invoked to extend restitutionary recovery beyond the traditional sorts of *quantum meruit* claims in which services had either been requested or provided under an unenforceable agreement. The law's traditional reluctance to provide a remedy for claims where no request was made was based on the tenet that a person should generally not be required, in effect, to pay for services that he or she did not request, and perhaps did not want. However, this concern carries much less weight when the person receiving the services knew that they were being provided, had no reasonable belief that they were a gift, and yet continued to freely accept them: see P. Birks, *Unjust Enrichment* (2nd ed. 2005), at pp. 56-57.

**121** The need to engage in this analysis of the claimant's reasonable expectations and the defendant's knowledge thereof with respect to domestic services has, in my view, now been overtaken by developments in the law. *Garland*, as noted, mandated a two-step approach to the juristic reason analysis. The first step requires the claimant to show that the benefit was not conferred for any existing category of juristic reasons. Significantly, the fact that the defendant also provided services to the claimant is not one of the existing categories. Nor is the fact that the services were provided pursuant to the parties' reasonable expectations. However, the fact that the parties reasonably expected the services to be provided might afford relevant evidence in relation to whether the case falls within one of the traditional categories, for example a contract or gift. Other than in that way, mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the [page329] first step in the

juristic reason analysis set out in *Garland*.

**122** However, different considerations arise at the second step. Following *Peter* and *Garland*, the parties' reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical. As Iacobucci J. put it in *Garland*, this introduces a category of residual situations in which "courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.

**123** It will be helpful in understanding how *Peter* and *Garland* fit together to apply the *Garland* approach to an issue touched on, but not resolved, in *Peter*. In *Peter*, an issue was whether a claim based on the provision of domestic services could be defeated on the basis that the services had been provided as part of the bargain between the parties in deciding to live together. While the Court concluded that the claim failed on the facts, it did not hold that such a claim would inevitably fail in all circumstances: p. 991. It seems to me that, in light of *Garland*, where a "bargain" which does not constitute a binding contract is alleged, the issue will be considered at the stage when the defendant seeks to show that there is a juristic reason for the enrichment that does not fall within any of the existing categories; the claim is that the "bargain" represents the parties' reasonable expectations, and evidence about their reasonable expectations would be relevant evidence of the existence (or not) of such a bargain.

**124** To summarize:

1. The parties' reasonable or legitimate expectations have little role to play in deciding whether [page330] the services were provided for a juristic reason within the existing categories.
2. In some cases, the fact that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.
3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

**125** I will now turn to the two cases at bar.

#### IV. The Vanasse Appeal

##### A. Introduction

**126** In the *Vanasse* appeal, the main issue is how to quantify a monetary award for unjust enrichment. The trial judge awarded a share of the net increase in the family's wealth during the period of unjust enrichment. The Court of Appeal held that this was the wrong approach, finding that the trial judge ought to have performed a *quantum meruit* calculation in which the value that each party received from

the other was assessed and set off. This required an evaluation of the defendant [page331] Mr. Seguin's non-financial contributions to the relationship which, in the view of the Court of Appeal, the trial judge failed to perform. As the record did not permit the court to apply the correct legal principles to the facts, it ordered a new hearing with respect to compensation and consequential changes to spousal support.

**127** In this Court, the appellant Ms. Vanasse raises two issues:

1. Did the Court of Appeal err by insisting on a strict *quantum meruit* (i.e. "value received") approach to quantify the monetary award for unjust enrichment?
2. Did the Court of Appeal err in finding that the trial judge had failed to consider relevant evidence of Mr. Seguin's contributions?

**128** In my view, the appeal should be allowed and the trial judge's order restored. For the reasons I have developed above, my view is that money compensation for unjust enrichment need not always, as a matter of principle, be calculated on a *quantum meruit* basis. The trial judge here, although not labelling it as such, found that there was a joint family venture and that there was a link between Ms. Vanasse's contribution to it and the substantial accumulation of wealth which the family achieved. In my view, the trial judge made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of Mr. Seguin's undoubted and substantial contributions.

#### B. *Brief Overview of the Facts and Proceedings*

**129** The background facts of this case are largely undisputed. The parties lived together in [page332] a common law relationship for approximately 12 years, from 1993 until March 2005. Together, they had two children who were aged 8 and 10 at the time of trial.

**130** During approximately the first four years of their relationship (1993 to 1997), the parties diligently pursued their respective careers, Ms. Vanasse with the Canadian Security Intelligence Service ("CSIS") and Mr. Seguin with Fastlane Technologies Inc., marketing a network operating system he had developed.

**131** In March of 1997, Ms. Vanasse took a leave of absence to move with Mr. Seguin to Halifax, where Fastlane had relocated for important business reasons. During the next three and one-half years, the parties had two children; Ms. Vanasse took care of the domestic labour, while Mr. Seguin devoted himself to developing Fastlane. The family moved back to Ottawa in 1998, where Mr. Seguin purchased a home and registered it in the names of both parties as joint tenants. In September 2000, Fastlane was sold and Mr. Seguin netted approximately \$11 million. He placed the funds in a holding company, with which he continued to develop business and investment opportunities.

**132** After the sale of Fastlane, Ms. Vanasse continued to assume most of the domestic responsibilities, although Mr. Seguin was more available to assist. He continued to manage the finances.

**133** The parties separated on March 27, 2005. At that time, they were in starkly contrasting financial positions: Ms. Vanasse's net worth had gone from about \$40,000 at the time she and Mr. Seguin started living together, to about \$332,000 at the time of separation; Mr. Seguin had come into the relationship with about \$94,000, and his net worth at the time of separation was about \$8,450,000.

**134** Ms. Vanasse brought proceedings in the Superior Court of Justice. In addition to seeking orders with respect to spousal support and child [page333] custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr.



Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

**135** Mr. Seguin contested the unjust enrichment claim. While conceding he had been enriched during the roughly three-year period where he was working outside the home full time and Ms. Vanasse was working at home full time (May 1997 to September 2000), he argued there was no corresponding deprivation because he had given her a one-half interest in the family home and approximately \$44,000 in Registered Retirement Savings Plans ("RRSPs"). In the alternative, Mr. Seguin submitted that a constructive trust remedy was inappropriate because there was no link between Ms. Vanasse's contributions and the property of Fastlane.

**136** The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportionate.

[page334]

**137** In the second period, however, the trial judge concluded that Mr. Seguin had been unjustly enriched by Ms. Vanasse. Ms. Vanasse had been in charge of the domestic side of the household, including caring for their two children. She had not been a "nanny/housekeeper" and, as the trial judge held, throughout the relationship she had been at least "an equal contributor to the family enterprise". The trial judge concluded that Ms. Vanasse's contributions during this second period "significantly benefited Mr. Seguin and were not proportional" (para. 139).

**138** The trial judge found as a fact that Ms. Vanasse's efforts during this second period were directly linked to Mr. Seguin's business success. She stated, at para. 91, that

Mr. Seguin was enriched by Ms. Vanasse's running of the household, providing child care for two young children and looking after all the necessary appointments and needs of the children. Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane. [Emphasis added.]

Again at para. 137, the trial judge found that

Mr. Seguin was unjustly enriched and Ms. Vanasse deprived for three and one-half years of their relationship, during which time Mr. Seguin often worked day and night and traveled frequently while in Halifax. Mr. Seguin could not have succeeded, as he did, and built up the company, as he did, without Ms. Vanasse assuming the vast majority of childcare and household responsibilities. Mr. Seguin could not have devoted his time to Fastlane but for Ms. Vanasse's assumption of those responsibilities... . Mr. Seguin reaped the benefit of Ms. Vanasse's efforts by being

able to focus all of his considerable energies and talents on making Fastlane a success. [Emphasis added.]

[page335]

**139** The trial judge concluded that a monetary award in this case was appropriate, given Mr. Seguin's ability to pay, and lack of a sufficiently direct and substantial link between Ms. Vanasse's contributions and Fastlane or Mr. Seguin's holding company, as required to impose a remedial constructive trust.

**140** With respect to quantification, Blishen J. noted that Ms. Vanasse had received a one-half interest in the family home, but concluded that this was not adequate compensation for her contributions. The trial judge compared the net worths of the parties and determined that Ms. Vanasse was entitled to a one-half interest in the prorated increase in Mr. Seguin's net worth during the period of the unjust enrichment. She reasoned that his net worth had increased by about \$8.4 million dollars over the 12 years of the relationship. Although she noted that the most significant increase took place when Fastlane was sold towards the end of the period of unjust enrichment, she nonetheless prorated the increase over the full 12 years of the relationship, yielding a figure of about \$700,000 per year. Starting with the \$2.45 million increase attributable to the three and one-half years of unjust enrichment, the trial judge awarded Ms. Vanasse 50 percent of that amount, less the value of her interest in the family home and her RRSPs. This produced an award of just under \$1 million.

**141** Mr. Seguin did not appeal Blishen J.'s unjust enrichment finding, and conceded unjust enrichment between 1997 and 2000 on appeal. Therefore, the trial judge's findings that there had been an unjust enrichment during that period and that there was no unjust enrichment during the other periods are not in issue. The sole issue for determination in this Court is the propriety of the trial judge's monetary award for the unjust enrichment which she found to have occurred.

[page336]

### C. Analysis

(1) Was the Trial Judge Required to Use a *Quantum Meruit* Approach to Calculate the Monetary Award?

**142** I agree with the appellant that a monetary award for unjust enrichment need not, as a matter of principle, always be calculated on a fee-for-services basis. As I have set out earlier, an unjust enrichment is best characterized as one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts. This will be so when the parties were engaged in a joint family venture and where there is a link between the contributions of the claimant and the accumulation of wealth. When this is the case, the amount of the enrichment should be assessed by determining the claimant's proportionate contribution to that accumulated wealth. As the trial judge saw it, this was exactly the situation of Ms. Vanasse and Mr. Seguin.

(2) Existence of a Joint Family Venture

**143** The trial judge, after a six-day trial, concluded that "Ms. Vanasse was not a nanny/housekeeper". She found that Ms. Vanasse had been at least "an equal contributor to the family enterprise" throughout

the relationship and that, during the period of unjust enrichment, her contributions "significantly benefited Mr. Seguin" (para. 139).

**144** The trial judge, of course, did not review the evidence under the headings that I have suggested will be helpful in identifying a joint family venture, namely "mutual effort", "economic integration", "actual intent" and "priority of the family". However, her findings of fact and analysis indicate that the unjust enrichment of Mr. Seguin at the expense of Ms. Vanasse ought to be characterized as the retention by Mr. Seguin of a disproportionate share of the wealth generated from a joint family [page337] venture. The judge's findings fit conveniently under the headings I have suggested.

(a) *Mutual Effort*

**145** There are several factors in this case which suggest that, throughout their relationship, the parties were working collaboratively towards common goals. First, as previously mentioned, the trial judge found that Ms. Vanasse's role was not as a "nanny/housekeeper" but rather as at least an equal contributor throughout the relationship. The parties made important decisions keeping the overall welfare of the family at the forefront: the decision to move to Halifax, the decision to move back to Ottawa, and the decision that Ms. Vanasse would not return to work after the sale of Fastlane are all clear examples. The parties pooled their efforts for the benefit of their family unit. As the trial judge found, during the second stage of their relationship from March 1997 to September 2000, the division of labour was such that Ms. Vanasse was almost entirely responsible for running the home and caring for the children, while Mr. Seguin worked long hours and managed the family finances. The trial judge found that it was through their joint efforts that they were able to raise a young family and acquire wealth. As she put it, "Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities" (para. 91). While Mr. Seguin's long hours and extensive travel reduced somewhat in September 1998 when the parties returned to Ottawa, the basic division of labour remained the same.

**146** Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together (in 1997 and 1999), a further indicator that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. Finally, the trial [page338] judge described the arrangement between the parties as a "family enterprise", to which Ms. Vanasse was "at least, an equal contributor" (paras. 138-39).

(b) *Economic Integration*

**147** The trial judge found that "[t]his was not a situation of economic interdependence" (para. 105). That said, there was a pooling of resources. Ms. Vanasse was not employed and did not contribute financially to the family after the children were born, and thus was financially dependent on Mr. Seguin. The family home was registered jointly, and the parties had a joint chequing account. As the trial judge put it, "She was 'the C.E.O. of the kids' and he was 'the C.E.O. of the finances'" (para. 105).

(c) *Actual Intent*

**148** The actual intent of the parties in a domestic relationship, as expressed by the parties or inferred from their conduct, must be given considerable weight in determining whether there was a joint family venture. There are a number of findings of fact that indicate these parties considered their relationship to be a joint family venture.

**149** While a promise to marry or the discussion of legal marriage is by no means a prerequisite for the identification of a joint family venture, in this case the parties' intentions with respect to marriage

strongly suggest that they viewed themselves as the equivalent of a married couple. Mr. Seguin proposed to Ms. Vanasse in July 1996 and they exchanged rings. While they were "devoted to one another and still in love", a wedding date was never set (para. 14). Mr. Seguin raised the topic of marriage again when Ms. Vanasse found out she was pregnant with their first child. Although they never married, the trial judge found that there had been "mutual expectations [of marriage] during the first few years of their 12 year relationship" (para. 64). Mr. Seguin continued to address Ms. Vanasse [page339] as "my future wife", and she was viewed by the outside world as such (para. 33).

**150** The trial judge also referred to statements made by Mr. Seguin that were strongly indicative of his view that there was a joint family venture. As the trial judge put it, at para. 28, upon the sale of Fastlane

Mr. Seguin became a wealthy man. He told Ms. Vanasse that they would never have to worry about finances as their parents did; their children could go to the best schools and they could live a good life without financial concerns.

Again, at para. 98:

After the sale of the company, Mr. Seguin indicated they could retire, the children could go to the best schools and the family would be well cared for. The family took travel vacations, enjoyed luxury cars, bought a large cabin cruiser which they used for summer vacations and purchased condominiums at Mont-Tremblant.

**151** While the trial judge viewed Mr. Seguin's promises and reassurances as contributing to a reasonable expectation on the part of Ms. Vanasse that she was to share in the increase of his net worth during the period of unjust enrichment, in my view these comments are more appropriately characterized as a reflection of the reality that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children.

(d) *Priority of the Family*

**152** There is a strong inference from the factual findings that, to Mr. Seguin's knowledge, Ms. Vanasse relied on the relationship to her detriment. As the trial judge found, in 1997 Ms. Vanasse gave up a lucrative and exciting career with CSIS, where she was training to be an intelligence officer, to move to Halifax with Mr. Seguin. In many ways this was a sacrifice on her part; she left her career, [page340] gave up her own income, and moved away from her family and friends. Mr. Seguin had moved to Halifax in order to relocate Fastlane for business reasons. Ms. Vanasse then stayed home and cared for their two small children. As I have already explained, during the period of the unjust enrichment, Ms. Vanasse was responsible for a disproportionate share of the domestic labour. It was these domestic contributions that, in part, permitted Mr. Seguin to focus on his work with Fastlane. Later, in 2003, the "family's decision" was for Ms. Vanasse to remain home after her leave from CSIS had expired (para. 198). Ms. Vanasse's financial position at the breakdown of the relationship indicates she relied on the relationship to her economic detriment. This is all evidence supporting the conclusion that the parties were, in fact, operating as a joint family venture.

**153** As a final point, I would refer to the arguments made by Mr. Seguin, which were accepted by the Court of Appeal, that the trial judge failed to give adequate weight to sacrifices Mr. Seguin made for the benefit of the relationship. Later in my reasons, I will address the question of whether the trial judge actually failed in this regard. However, the points raised by Mr. Seguin to support this argument actually serve to reinforce the conclusion that there was a joint family venture. Mr. Seguin specifically notes a number of factors, including: agreeing to step down as CEO of Fastlane in September 1997 to make himself more available to Ms. Vanasse, causing friction with his co-workers and partners, and reducing

his remuneration; agreeing to relocate to Ottawa at Ms. Vanasse's request in 1998; and making increased efforts to work at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

[page341]

(e) *Conclusion on Identification of the Joint Family Venture*

**154** In my view, the trial judge's findings of fact clearly show that Ms. Vanasse and Mr. Seguin engaged in a joint family venture. The remaining question is whether there was a link between Ms. Vanasse's contributions to it and the accumulation of wealth.

(3) Link to Accumulation of Wealth

**155** The trial judge made a clear finding that there was a link between Ms. Vanasse's contributions and the family's accumulation of wealth.

**156** I have referred earlier, in some detail, to the trial judge's findings in this regard. However, to repeat, her conclusion is expressed particularly clearly at para. 91 of her reasons:

Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these [household and child-rearing] responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.

**157** Given that and similar findings, I conclude that not only were these parties engaged in a joint family venture, but that there was a clear link between Ms. Vanasse's contribution to it and the accumulation of wealth. The unjust enrichment is thus best viewed as Mr. Seguin leaving the relationship with a disproportionate share of the wealth accumulated as a result of their joint efforts.

(4) Calculation of the Award

**158** The main focus of the appeal was on whether the award ought to have been calculated on a *quantum meruit* basis. Very little was argued before this Court regarding the way the trial judge approached her calculation of a proportionate share of the parties' accumulated wealth. I conclude that [page342] the trial judge's approach was reasonable in the circumstances, but I stress that I do not hold out her approach as necessarily being a template for future cases. Within the legal principles I have outlined, there may be many ways in which an award may be quantified reasonably. I prefer not to make any more general statements about the quantification process in the context of this appeal, except this. Provided that the correct legal principles are applied, and the findings of fact are not tainted by clear and determinative error, a trial judge's assessment of damages is treated with considerable deference on appeal: see, e.g., *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.). A reasoned and careful exercise of judgment by the trial judge as to the appropriate monetary award to remedy an unjust enrichment should be treated with the same deference. There are two final specific points that I must address.

**159** Mr. Seguin submits, very briefly, that a proper application of the "value survived" approach in this case would require a careful determination of the contributions by third parties to the growth of

Fastlane during the period his own contributions were diminished, as a result of what counsel characterizes as Ms. Vanasse's "demands" that he reduce his hours and move back to Ottawa. This argument is premised on the notion that the money he received from the sale was not justly his to share with Ms. Vanasse. I cannot accept this premise. Unexplained is why he received more than his share when the company was sold or why, having received more than he was due, Ms. Vanasse is still not entitled to an equitable share of what he actually received.

**160** Second, there is the finding of the Court of Appeal that the trial judge failed to take into account evidence of Mr. Seguin's numerous and significant non-financial contributions to the family. I respectfully cannot accept this view. The trial judge specifically alluded to these contributions in her reasons. Moreover, by confining the period of [page343] unjust enrichment to the three and one-half year period, the trial judge took into account the periods during which Ms. Vanasse's contributions were not disproportionate to Mr. Seguin's. In my view, the trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to Mr. Seguin's contributions.

#### *D. Disposition*

**161** I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. The appellant should have her costs throughout.

### V. The Kerr Appeal

#### *A. Introduction*

**162** When their common law relationship of more than 25 years ended, Ms. Kerr sued her former partner, Mr. Baranow, advancing claims for unjust enrichment, resulting trust, and spousal support. Mr. Baranow counterclaimed that Ms. Kerr had been unjustly enriched by his housekeeping services provided between 1991 and 2006, and by his early retirement in order to provide her personal assistance. The trial judge awarded Ms. Kerr \$315,000, holding that she was entitled to this amount both by way of resulting trust (to reflect her contribution to the acquisition of property) and by way of remedial constructive trust (as a remedy for her successful claim in unjust enrichment). He also awarded Ms. Kerr \$1,739 per month in spousal support effective the date she commenced proceedings. Although the trial judge rejected Mr. Baranow's assertion that Ms. Kerr had been unjustly enriched at his expense, the reasons for judgment and the order after trial do not otherwise address Mr. Baranow's counterclaim.

[page344]

**163** Mr. Baranow appealed. The Court of Appeal allowed the appeal, concluding that Ms. Kerr's claims for a resulting trust and in unjust enrichment should be dismissed, that Mr. Baranow's claim for unjust enrichment should be remitted to the trial court for determination, and that the order for spousal support should be effective as of the first day of the trial, not as of the date proceedings were commenced.

**164** Ms. Kerr appeals, submitting that the Court of Appeal erred by setting aside the trial judge's findings that:

- (1) a resulting trust arose in her favour;
- (2) she had unjustly enriched Mr. Baranow; and
- (3) spousal support should begin as of the date she instituted proceedings.

**165** In my view, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that Mr. Baranow's counterclaim be returned to the Supreme Court of British Columbia for hearing. However, my view is that Ms. Kerr's unjust enrichment claim should not have been dismissed, but rather a new trial ordered. While the trial judge's errors certainly were not harmless, it is not possible to say on this record, which includes findings of fact tainted by clear error, that her unjust enrichment claim would inevitably fail if analyzed using the clarified legal framework set out above. With respect to the commencement date of the spousal support order, I would set aside the order of the Court of Appeal and restore the trial judge's order.

### *B. Overview of the Facts*

**166** The trial judge's disposition of both the resulting trust and unjust enrichment claims [page345] turned on his conclusion that Ms. Kerr had provided \$60,000 worth of equity and assets at the beginning of the relationship. This fact, in the trial judge's view, supported awarding her one-third of the value of the home she shared with Mr. Baranow at the time of separation. According to the trial judge, this \$60,000 of equity and assets consisted of three elements: her \$37,000 of equity in the Coleman Street home she had shared with her former husband; the value of an automobile; and the value of furniture which she brought into her relationship with Mr. Baranow. The trial judge did not make specific findings of fact about the value of either Ms. Kerr's or Mr. Baranow's non-monetary contributions to the relationship. As previously noted, while the judge rejected in a single sentence Mr. Baranow's contention that Ms. Kerr had been unjustly enriched at his expense, the judge did not explain the basis of that conclusion. Mr. Baranow's counterclaim was not otherwise addressed.

**167** The trial judge's findings of fact, of course, must be accepted unless tainted with clear and determinative error. In this case, however, the Court of Appeal's intervention on some of the judge's key findings was justified, because those findings simply were not supported by the record. I will have to delve into the facts, more than might otherwise be required, to explain why.

**168** The parties began to live together in Mr. Baranow's home on Wall Street in Vancouver in May 1981. Shortly afterward, they moved into Ms. Kerr's former matrimonial home on Coleman Street. They had met at their mutual place of work, the Port of Vancouver, where she worked as a secretary and he as a longshoreman. Ms. Kerr was in midst of a divorce. Through her separation agreement, Ms. Kerr received her husband's interest in their former matrimonial home on Coleman Street in North Vancouver, all of the furniture in the house, and a 1979 Cadillac Eldorado. However, [page346] Ms. Kerr's ex-husband owed more than \$400,000 and Ms. Kerr was guarantor of some of that debt.

**169** In the summer of 1981, the Coleman Street property was the subject of foreclosure proceedings and, according to the evidence, was about to be foreclosed on July 29, 1981. Ms. Kerr testified at trial that, at the time, she had two teenage children, was earning under \$30,000 a year, and had no money to save the house.

**170** Ms. Kerr instructed her lawyer to place the titles to the Coleman Street property and the vehicle into Mr. Baranow's name. Mr. Baranow paid \$33,000 in cash to secure the property against outstanding debts, and guaranteed a \$100,000 mortgage at a rate of 22 percent. He then began to make the mortgage payments and eventually refinanced the mortgage, together with that on his Wall Street property, and assumed that new mortgage himself.

**171** The couple lived together for the next 25 years, first in the Wall Street property, then at Coleman Street, then in a temporary apartment, and finally in their "dream home" which they constructed on Mr. Baranow's Wall Street property.

**172** While the parties lived together in the Coleman Street property (from September 1981 to December 1985), Mr. Baranow retained the \$450 per month he received by renting out his Wall Street property. The trial judge found that, although the parties kept their financial affairs separate, there was an arrangement by which Mr. Baranow would pay the property taxes and mortgage payments on both the Coleman Street and the Wall Street properties. The mortgage on both properties was paid off before July 1985. However, Mr. Baranow took out a \$32,000 mortgage on the Wall Street property in July 1985, which was paid in full by August 1988.

**173** The Coleman Street property was sold in August 1985 for \$138,000. This sale was at a considerable loss, taking into account the real estate [page347] commission, the \$33,000 in cash Mr. Baranow had contributed at the time of the transfer to him, and the mortgage payments he alone had made between the transfer in the summer of 1981 and the sale in the summer of 1985.

**174** The parties moved into an apartment (from August 1985 until October 1986) while they constructed their "dream home" at the Wall Street location. The existing dwelling was torn down and replaced. Mr. Baranow spent somewhere between \$97,000 and \$105,000 on its construction, with additional amounts spent for materials, labour and permits. Ms. Kerr, the trial judge found, was involved with the planning, interior decorating and cleaning. She also planted sod, tended the flower garden, and paid for some wood paneling in the downstairs bedroom. In addition, she made contributions towards the purchase of furniture, appliances, and other chattels for the Wall Street property. Her son paid \$350 per month in rent, which Mr. Baranow retained. At one point in his reasons, the trial judge stated that Ms. Kerr paid "all of the household expenses and the insurance on the new house ... even after the \$32,000.00 mortgage was paid off by [Mr. Baranow] in August 1988" (para. 24). However, at another point, the judge noted that Ms. Kerr paid the utilities and insurance and bought "some groceries" (para. 36). Mr. Baranow, he found, paid the property-related expenses, consisting of property taxes (less the disability benefit attributable to Ms. Kerr) and upkeep (which was minimal in the new house). The trial judge found that the current value of the Wall Street property was \$942,500, compared with \$205,000 in October of 1986. He then concluded that, given there were no mortgage payments after 1988, Ms. Kerr's share of the expenses "was probably higher" than Mr. Baranow's for approximately 18 years before they stopped living together.

**175** In 1991, Ms. Kerr suffered a massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work. Her health steadily deteriorated, and relations between the couple became increasingly strained. Mr. Baranow took an [page348] early retirement in 2002. The trial judge acknowledged that Mr. Baranow claimed to have done this to care for Ms. Kerr, but noted that early retirement was also favourable to him. The trial judge found that Mr. Baranow started to experience "caregiver fatigue" and began exploring institutional care alternatives in June 2005. The next summer, in August 2006, Ms. Kerr had to undergo surgery on her knee. After the surgery, Mr. Baranow made it clear to the hospital staff that he was not prepared to have her return home. Ms. Kerr was transferred to an extended care facility where she remained at the time of trial. The trial judge found that, in the last 18 months Ms. Kerr resided at the Wall Street property, Mr. Baranow did most of the housework and helped her with her bodily functions.

### *C. Analysis*

#### (1) The Resulting Trust Issue

**176** The trial judge found that Mr. Baranow held a one-third interest in the Wall Street property by way of resulting trust for Ms. Kerr, on three bases. The Court of Appeal found that each of these holdings was erroneous. I respectfully agree.



(a) *Gratuitous Transfer*

**177** The trial judge found that the transfer of the Coleman Street property to Mr. Baranow was gratuitous, therefore raising the presumption of a resulting trust in Ms. Kerr's favour. At the time of transfer to Mr. Baranow, roughly \$133,000 was required to save the property (it was subject to a first mortgage of just under \$80,000, a second mortgage of just under \$35,000, a judgment in favour of the Bank of Montreal of just under \$12,000, and other miscellaneous debts and charges, adding up to roughly \$133,000). There was also a \$26,500 judgment in favour of CIBC, which was of concern [page349] to Ms. Kerr, although it is not listed in the payouts required to close the transfer. We know that Ms. Kerr had guaranteed some of her former husband's debts, and that she declared bankruptcy in 1983 in relation to \$15,000 of debt for which she had co-signed with her former husband.

**178** The Court of Appeal reversed the trial judge's resulting trust finding, holding that the transfer was not gratuitous. The court pointed to the contributions and liabilities undertaken by Mr. Baranow to make the transfer possible, and concluded that the trial judge's finding in this regard constituted a palpable and overriding error.

**179** On this point, I respectfully agree with the Court of Appeal. There is no dispute that Mr. Baranow injected roughly \$33,000 in cash, and guaranteed a \$100,000 mortgage, so that the property would not be lost to the bank in the foreclosure proceedings. This constituted consideration, and the transfer therefore cannot reasonably be labelled gratuitous. The respondent would have us hold otherwise on the basis of technical arguments about the lack of a precise coincidence between the time of the transfer and payments, and the lack of payment directly to Ms. Kerr because Mr. Baranow's payments were made to her creditors. These arguments have no merit. An important element of the trial judge's finding of a resulting trust was his conclusion that there was "no evidence" that Mr. Baranow's payment of \$33,000 in cash and his guarantee of the \$100,000 mortgage "were in connection with the transfer or part of an agreement between the parties so as to constitute consideration for the transfer" (para. 76). Putting to one side for the moment whether this finding reflects a correct understanding of a gratuitous transfer, the judge clearly erred in making this statement; there was in fact much evidence to that precise effect. Mr. Baranow testified that Ms. Kerr had "tearfully asked" Mr. Baranow for help to save the property from the creditors. Ms. Kerr's solicitor recorded in his reporting letter that Ms. Kerr felt she had little choice but to convey the property to Mr. Baranow [page350] "faced with the large outstanding debts of [her] husband which include[d] a Judgment taken by C.I.B.C. for a debt outstanding in the amount of \$26,500.00". At trial, Ms. Kerr was asked whether she had requested Mr. Baranow to save the house; she responded, "I guess so." Thus, contrary to the judge's finding, there was in fact considerable evidence that Mr. Baranow's paying off of the debts and guaranteeing the mortgage were in connection with the transfer of the property to him. This evidence shows that he accepted the transfer and assumed the financial obligations at Ms. Kerr's request, and in order to further her purpose of preventing the creditors from foreclosing on the property.

**180** The Court of Appeal was correct to intervene on this point and conclude that the transfer was not gratuitous. The trial judge's imposition of a resulting trust on one-third of the Wall Street property on this basis accordingly cannot be sustained.

(b) *Ms. Kerr's Contributions*

**181** The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of \$60,000: \$37,000 in equity from the transfer of the Coleman Street property to Mr. Baranow; \$20,000 for the value of the Cadillac also transferred to Mr. Baranow; and \$3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title

of Coleman, Mr. Baranow was able to "re-mortgage both properties for \$116,000.00 and apply the \$16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the [page351] extent of the resulting trust which he imposed on the Wall Street property.

**182** The Court of Appeal reversed this finding as not being supported by the record. The court noted that Ms. Kerr did not have \$37,000 in equity in the Coleman Street property when Mr. Baranow took title, Mr. Baranow did not receive any beneficial interest in the vehicle, and there was no evidence of the value of the furnishings.

**183** I agree with the Court of Appeal's disposition of this issue. As it pointed out, the evidence showed that, in addition to Mr. Baranow paying cash and guaranteeing a mortgage, he paid the monthly mortgage payments, taxes and upkeep expenses on the Coleman property until it was sold in 1985 for \$138,000 (less real estate commission). Mr. Baranow received no beneficial interest in the vehicle and the judge made no finding about the value of the furnishings. There was not, in any meaningful sense of the word, any equity in the Coleman property for Ms. Kerr to contribute to the acquisition or improvement of the Wall Street property. I would affirm the conclusion of the Court of Appeal on this point.

(c) *Common Intention Resulting Trust*

**184** The trial judge also appears to have based his conclusions about the resulting trust on his finding of a common intention on the part of Ms. Kerr and Mr. Baranow to share in the Wall Street property. For the reasons I have given earlier, the "common intention" resulting trust has no further role to play in the resolution of disputes such as this one. I would hold that a resulting trust should not have been imposed on the Wall Street property on the basis of a finding of common intention between these parties.

[page352]

(d) *Conclusion With Respect to Resulting Trust*

**185** In my view the Court of Appeal was correct to set aside the trial judge's conclusions with respect to the resulting trust issues.

(2) Unjust Enrichment

**186** The trial judge also found that Mr. Baranow had been unjustly enriched by Ms. Kerr to the extent of \$315,000, the value of the one-third interest in the Wall Street property determined during the resulting trust analysis. The judge found that Ms. Kerr had provided the following benefits to Mr. Baranow:

- a. \$37,000 equity in the Coleman Street property;
- b. the automobile;
- c. the furnishings;
- d. \$16,000 in refinancing permitted by the Coleman transfer and applied to the Wall Street property;

- e. \$22,000 gained on the resale of the Coleman Street property;
- f. household expenses and insurance paid on both properties;
- g. spousal services such as housework, entertaining guests and preparing meals until Ms. Kerr's disability made it impossible to continue;
- h. assistance with planning and decoration of the Wall Street house;
- i. financial contributions towards the purchase of chattels for the new home;
- j. a disability tax exemption;

[page353]

- k. approximately five years' worth of rental income from Ms. Kerr's son.

**187** Turning to the element of corresponding deprivation, the trial judge noted that it was "unlikely" that Ms. Kerr had given up any career or educational opportunities over the course of the relationship. Furthermore, her income remained unchanged, even following her stroke, due to her receipt of disability pensions and other benefits. The judge found that she had lived rent-free for the entire relationship. He concluded, however, that she had suffered a deprivation because, had she not contributed her equity in the Coleman Street property, it was "reasonable to infer that she would have used it to purchase an asset in her own name, invest for her own benefit, use it for some personal interest, or otherwise avail herself of beneficial financial opportunity": para. 92. He also concluded, without elaboration, that the benefits that she received from the relationship did not overtake her contributions.

**188** The Court of Appeal set aside the trial judge's finding of unjust enrichment. It found that Mr. Baranow's direct and indirect contributions, by which Ms. Kerr was enriched and for which he was not compensated, constituted a juristic reason for any enrichment which he experienced at her expense. The court found that, for reasons mentioned earlier, there was no \$60,000 contribution by Ms. Kerr and therefore her claim rested on her indirect contributions. The court also concluded that the trial judge's analysis failed to assess the extent of Mr. Baranow's direct and indirect contributions to Ms. Kerr, including: his payment of accommodation expenses for the duration of the relationship; his contribution to the purchase price of the van which Ms. Kerr still possesses; her receipt of almost half of his lifetime amount of union medical benefits, used to pay for her health care expenses; his taking early retirement with a reduced monthly pension to care for Ms. Kerr; and his provision of extensive personal caregiver and domestic services without compensation. Moreover, in the Court of Appeal's view, the trial judge had failed to note that Mr. Baranow's payment of her living expenses [page354] permitted her to save about \$272,000 over the course of the relationship.

**189** The appellant challenges the Court of Appeal's decision on two bases. First, she argues that the court improperly interfered with the trial judge's finding of fact with respect to Ms. Kerr's \$60,000 contribution to the relationship. Second, she submits that the court improperly considered the question of mutual benefits through the lens of juristic reason, and that this resulted in the court failing to consider globally who had been enriched and who deprived. Ms. Kerr's submission on this latter point is that consideration of mutual benefit conferral should occur during the first two steps of the unjust enrichment analysis: enrichment and corresponding deprivation. Once that has been established, she argues that the legitimate expectations of the parties may be considered as part of the analysis of whether there was a juristic reason for the enrichment. The main point is that, in the appellant's submission, it was open to the trial judge to conclude that the parties' legitimate expectation was that they would accumulate wealth in proportion to their respective incomes; without a share of the value of the real property acquired during the relationship, that reasonable expectation cannot be realized.

190 More fundamentally, the appellant urges the Court to adopt what she calls the "family property approach" to unjust enrichment. In essence, the appellant submits that her contributions gave rise to a reasonable expectation that she would have an equitable share of the assets acquired during the relationship.

191 I will deal with these submissions in turn.

(a) *Findings of Fact Regarding the \$60,000 Contribution*

192 As noted earlier, the Court of Appeal was right to set aside the trial judge's conclusion that the [page355] appellant had contributed \$60,000 to the couple's assets. There was, in no realistic sense of the word, any "equity" to contribute from the Coleman Street property to acquisition of the new Wall Street "dream home". Furthermore, the appellant retained the beneficial use of the motor vehicle, and there was no satisfactory evidence of the value of the furniture. The judge's findings on this point were the product of clear and determinative error.

(b) *Analysis of Offsetting Enrichments*

193 On this issue, I cannot accept the conclusions of either the trial judge or the Court of Appeal. As noted, in his determination of the extent of Ms. Kerr's unjust enrichment, the trial judge largely ignored Mr. Baranow's contributions. However, for the reasons I have developed earlier, the Court of Appeal erred in assessing Mr. Baranow's contributions as part of the juristic reason analysis; this analysis prematurely truncated Ms. Kerr's *prima facie* case of unjust enrichment. I have set out the correct approach to this issue earlier in my reasons. As, in my view, there must be a new trial of both Ms. Kerr's unjust enrichment claim and Mr. Baranow's counterclaim, it is not necessary to say anything further. The principles set out above must accordingly be applied at the new trial of these issues.

(c) *The "Family Property Approach"*

194 I turn finally to Ms. Kerr's more general point that her claim should be assessed using a "family property approach". As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. [page356] She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

(d) *Disposition of the Unjust Enrichment Appeal*

195 I conclude that the findings of the trial judge in relation to unjust enrichment cannot stand. The next question is whether, as the Court of Appeal decided, Ms. Kerr's claim for unjust enrichment should be dismissed or whether it ought to be returned for a new trial. With reluctance, I have concluded the latter course is the more just one in all of the circumstances.

196 The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other

monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separately from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

**197** More fundamentally, Ms. Kerr's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that I have set out. Even assuming that Ms. Kerr [page357] made out her claim in unjust enrichment, it is not possible to fairly apply the joint family venture approach to this case on appeal, using the record available to this Court. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Moreover, even if one were persuaded that the evidence permitted resolution of the joint family venture issue, the record is unsatisfactory for deciding whether Ms. Kerr's contributions to a joint family venture were linked to the accumulation of wealth and, if so, in what proportion. The trial judge found that her payment of household expenses and insurance payments, along with the "proceeds" from the Coleman Street property, allowed Mr. Baranow to pay off the \$116,000 mortgage on both properties before July 1985. There is, thus, a finding that her contributions were linked to the accumulation of wealth, given that the Wall Street property was valued at \$942,500 at the time of trial. However, as the judge's findings with respect to Ms. Kerr's equity in the Coleman Street property cannot stand, this conclusion is considerably undermined. For much the same reason, there is no possibility on this record of evaluating the proportionate contributions to a joint family venture. In short, to attempt to resolve Ms. Kerr's unjust enrichment claim on its merits, using the record before this Court, involves too much uncertainty and risks injustice.

**198** In this respect, the *Kerr* appeal is in marked contrast to the *Vanasse* appeal. There, an unjust enrichment was conceded and the trial judge's findings of fact closely correspond to the analytical approach I have proposed. In the present appeal, while the findings made do not appear to demonstrate a joint family venture or a concomitant link to accumulated wealth, it would be unfair to reach that conclusion without giving an opportunity to the parties to present their evidence and arguments in light of the approach set out in these reasons.

[page358]

**199** Reluctantly, therefore, I would order a new trial of Ms. Kerr's unjust enrichment claim, as well as affirm the Court of Appeal's order for a hearing of Mr. Baranow's counterclaim.

### (3) Effective Date of Spousal Support

**200** The final issue is whether, as the Court of Appeal held, the trial judge erred in making his order for spousal support in favour of Ms. Kerr effective on the date she had commenced proceedings rather than on the first day of trial. In my respectful view, the Court of Appeal erred in its application of the relevant factors and ought not to have set aside the trial judge's order.

**201** The trial judge found that the appellant's income in 2006 was \$28,787 and the respondent's income was \$70,520, on the basis of their respective income tax returns. He then applied the Spousal Support Advisory Guidelines ("SSAG") to arrive at a range of \$1,304 to \$1,739 per month. He settled on an amount at the higher end of that range in order to assist Ms. Kerr in pursuing a private bed while waiting for a subsidized bed in a suitable facility closer to her family.

**202** The Court of Appeal agreed with the trial judge that Ms. Kerr was entitled to an award of spousal support given the length of the parties' relationship, her age, her fixed and limited income and her

significant disability; she was entitled to a spousal support award that would permit her to live at a lifestyle that is closer to that which the parties enjoyed when they were together; and that the judge had properly determined the quantum of support. The Court of Appeal concluded, however, that the trial judge had erred in ordering support effective [page359] the date Ms. Kerr had commenced proceedings. It faulted the judge in several respects: for apparently making the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government-subsidized care facility and had not had to encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.

**203** The appellant submits that the decision to equate the principles pertaining to retroactive spousal support with those of retroactive child support has been done without any discussion or legal analysis. Furthermore, she argues that the Court of Appeal's reasoning places an untoward and inappropriate burden on applicants, essentially mandating that they apply for interim spousal support or lose their entitlement. Lastly, she argues that there is a legal distinction between retroactive support before and after the application is filed, and that in the latter circumstance there is less need for judicial restraint. I agree with the second and third of these submissions.

**204** There is no doubt that the trial judge had the discretion to award support effective the date proceedings had been commenced. This is clear from the British Columbia *Family [page360] Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

93...

(5) An order under this section may also provide for one or more of the following:

...

(d) payment of support in respect of any period before the order is made;

**205** The appellant requested support effective the date her writ of summons and statement of claim were issued and served. She was and is not seeking support for the period before she commenced her proceedings, or for any period during which another court order for support was in effect. I note that she was obliged by statute to seek support within a year of the end of cohabitation: definition of "spouse", s. 1(1)(b) of the *FRA*. Ms. Kerr made her application just over a month after the parties ceased living together.

**206** I will not venture into the semantics of the word "retroactive": see *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, at paras. 2 and 69-70; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (C.A.), at paras. 55-57. Rather, I prefer to follow the example of Bastarache J. in *D.B.S.* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

**207** While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, [page361] the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and

objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

**208** Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *D.B.S.*, at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" [page362] (2004-2005), 23 *C.F.L.Q.* 243, at pp. 281 and 291-92.

**209** Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *D.B.S.*, at paras. 100-103).

**210** Neither of these concerns carries much weight in this case. The order was made effective the date on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount. Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with more diligence.

**211** In *D.B.S.*, Bastarache J. referred to the date of effective notice as the "general rule" and "default option" for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support has been described by the Ontario Court of Appeal as the "usual commencement date", absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175, at para. 24. While in my view, the decision [page363] to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *D.B.S.*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

**212** Other relevant considerations noted in *D.B.S.* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned

by the award. The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example, concealing assets or failing to make appropriate disclosure: *D.B.S.*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *D.B.S.* analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of *D.B.S.* may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in *D.B.S.* emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

[page364]

**213** In light of these principles, my view is that the Court of Appeal made two main errors.

**214** First, it erred by finding that the circumstances of the appellant were such that there was no need prior to the trial. The trial judge found, and the Court of Appeal did not dispute, that the appellant was entitled to non-compensatory spousal support, at the high end of the range suggested by the SSAG, for an indefinite duration. Entitlement, quantum, and the indefinite duration of the order were not appealed before this Court. It is clear that Ms. Kerr was in need of support from the respondent at the date she started her proceedings and remained so at the time of trial. The Court of Appeal rightly noted the relevant factors, such as her age, disability, and fixed income. However, the Court of Appeal did not describe how Ms. Kerr's circumstances had changed between the commencement of proceedings and the date of trial, nor is any such change apparent in the trial judge's findings of fact. As I understand the record, one of the objectives of the support order was to permit Ms. Kerr to have access to a private pay bed while waiting for her name to come up for a subsidized bed in a suitable facility closer to her son's residence. From the date she commenced her proceedings until the date of trial, she resided in the Brock Fahrni Pavilion in a government-funded extended care bed in a room with three other people. In my respectful view, her need was constant throughout the period. If the Court of Appeal's rationale was that Ms. Kerr's need would only arise once she actually had secured the private pay bed, its decision to make the order effective the first day of trial seems inconsistent with that approach. The Court of Appeal did not suggest that her need was any different on that day than on the day she had commenced her proceedings. Nor did the court point to any financial hardship that the trial judge's award would have on Mr. Baranow.

[page365]

**215** Respectfully, the Court of Appeal erred in principle in setting aside the judge's order effective as of the date of commencement of proceedings on the ground that Ms. Kerr had no need during that period, while upholding the judge's findings of need in circumstances that were no different from those existing at the time proceedings were commenced.

**216** Second, the Court of Appeal in my respectful view was wrong to fault Ms. Kerr for not bringing an interim application, in effect attributing to her unreasonable delay in seeking support for the period in



question. Ms. Kerr commenced her proceedings promptly after separation and, in light of the fact that the trial occurred only about thirteen months afterward, she apparently pursued those proceedings to trial with diligence. There was thus clear notice to Mr. Baranow that support was being sought and he could readily take advice on the likely extent of his liability. Given the high financial, physical, and emotional costs of interlocutory applications, especially for a party with limited means and a significant disability such as Ms. Kerr, it was in my respectful view unreasonable for the Court of Appeal to attach such serious consequences to the fact that an interim application was not pursued. The position taken by the Court of Appeal to my way of thinking undermines the incentives which should exist on parties to seek financial disclosure, pursue their claims with due diligence, and keep interlocutory proceedings to a minimum. Requiring interim applications risks prolonging rather than expediting proceedings. The respondent's argument based on the fact that a different legal test would have applied at the interim support stage is unconvincing. After a full trial on the merits, the trial judge made clear and now unchallenged findings of need on the basis of circumstances that had not changed between commencement of proceedings and trial.

[page366]

**217** In short, there was virtually no delay in applying for maintenance, nor was there any inordinate delay between the date of application and the date of trial. Ms. Kerr was in need throughout the relevant period, she suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with the respondent. Mr. Baranow had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

**218** While it is regrettable that the judge did not elaborate on his reasons for making the order effective as of the date proceedings had been commenced, the relevant legal principles applied to the facts as he found them support the making of that order and the Court of Appeal erred in holding otherwise.

**219** In summary, I conclude that the Court of Appeal erred in setting aside the portion of the judge's order for support between the commencement of proceedings and the beginning of trial. I would restore the order of the trial judge making spousal support effective September 14, 2006.

#### *D. Disposition*

**220** I would allow the appeal in part. Specifically, I would:

- a. allow the appeal on the spousal support issue and restore the order of the trial judge with respect to support;
- b. allow the appeal with respect to the Court of Appeal's decision to dismiss Ms. Kerr's unjust enrichment claim and order a new trial of that claim;
- c. dismiss the appeal in relation to Ms. Kerr's claim of resulting trust and the ordering of a [page367] new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

**221** As Ms. Kerr has been substantially successful, I would award her costs throughout.

*Appeal 33157 allowed in part with costs.*

*Appeal 33358 allowed with costs.*

**Solicitors:**

*Solicitors for the appellant Margaret Kerr: Hawthorne, Piggott & Company, Burnaby.*

*Solicitor for the respondent Nelson Baranow: Susan G. Label, Vancouver.*

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