Court File No. CV-15-10879-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

Applicant

and

NORMA WALTON, RONAULD WALTON, and THE ROSE & THISTLE GROUP LTD., PRINCE EDWARD PROPERTIES LTD., ST. CLARENS HOLDINGS LTD., AND EMERSON DEVELOPMENTS LTD.

Respondents

BOOK OF AUTHORITIES OF THE APPLICANT, CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

SIMPSONWIGLE LAW LLP
501 – 390 Brant Street
BURLINGTON, ON L7R 4J4

Rosemary A. Fisher (LSUC No. 32238T)
Tel: (905) 639-1052
Fax: (905) 333-3960
Email: fisherr@simpsonwigle.com

Lawyers for the Applicants, Christine DeJong Medicine Professional Corporation

TO: THE SERVICE LIST

INDEX

Court File No. CV-15-10879-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

Applicant

and

NORMA WALTON, RONAULD WALTON, and THE ROSE & THISTLE GROUP LTD., PRINCE EDWARD PROPERTIES LTD., ST. CLARENS HOLDINGS LTD., AND EMERSON DEVELOPMENTS LTD.

Respondents

I N D E X

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Jochems v. Jochems | 2014 SKQB 156, 2014 CarswellSask 324, [2014] W.D.F.L. 2782, [2014] W.D.F.L. 2785, [2014] W.D.F.L. 2836, [2014] W.D.F.L. 2854, 242 A.C.W.S. (3d) 872 | (Sask. Q.B., May 26, 2014)

2011 SCC 10
Supreme Court of Canada

Kerr v. Baranow

2011 CarswellBC 240, 2011 CarswellBC 241, 2011 SCC 10, [2011] 1 S.C.R. 269, [2011] 3 W.W.R. 575, [2011] B.C.W.L.D. 2245, [2011] B.C.W.L.D. 2316, [2011] B.C.W.L.D. 2321, [2011] B.C.W.L.D. 2322, [2011] B.C.W.L.D. 2346, [2011] B.C.W.L.D. 2347, [2011] B.C.W.L.D. 2440, [2011] B.C.W.L.D. 2441, [2011] W.D.F.L. 1631, [2011] W.D.F.L. 1646, [2011] W.D.F.L. 1647, [2011] W.D.F.L. 1648, [2011] W.D.F.L. 1649, [2011] W.D.F.L. 1651, [2011] W.D.F.L. 1657, [2011] W.D.F.L. 1660, [2011] W.D.F.L. 1668, [2011] W.D.F.L. 1680, [2011] W.D.F.L. 1685, [2011] W.D.F.L. 1690, [2011] W.D.F.L. 1700, [2011] W.D.F.L. 1701, [2011] W.D.F.L. 1702, [2011] W.D.F.L. 1706, [2011] W.D.F.L. 1714, [2011] W.D.F.L. 1715, [2011] A.C.S. No. 10, [2011] S.C.J. No. 10, 108 O.R. (3d) 399 (note), 108 O.R. (3d) 399, 14 B.C.L.R. (5th) 203, 199 A.C.W.S. (3d) 1214, 274 O.A.C. 1, 300 B.C.A.C. 1, 328 D.L.R. (4th) 577, 411 N.R. 200, 509 W.A.C. 1, 64 E.T.R. (3d) 1, 93 R.F.L. (6th) 1, J.E. 2011-333

Margaret Patricia Kerr (Appellant) and Nelson Dennis Baranow (Respondent)

Michele Vanasse (Appellant) and David Seguin (Respondent)

McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein, Cromwell JJ.

Heard: April 21, 2010
Judgment: February 18, 2011
Docket: 33157, 33358

Proceedings: reversing in part *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.); additional reasons at *Kerr v. Baranow* (2010), [2010] 4 W.W.R. 465, 2 B.C.L.R. (5th) 197, 2010 CarswellBC 108, 2010 BCCA 32, 78 R.F.L. (6th) 305 (B.C. C.A.); reversing in part *Kerr v. Baranow* (2007), 2007 CarswellBC 3047, 2007 BCSC 1863, 47 R.F.L. (6th) 103 (B.C. S.C.); and reversing *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.); reversing *Vanasse v. Seguin* (2008), 2008 CarswellOnt 4265 (Ont. S.C.J.); additional reasons at *Vanasse v. Seguin* (2009), 2009 CarswellOnt 606, 77 R.F.L. (6th) 109 (Ont. S.C.J.)

Counsel: Armand A. Petronio, Geoffrey B. Gomery for Appellant, Margaret Kerr
Susan G. Label, Marie-France Major for Respondent, Nelson Baranow
John E. Johnson for Appellant, Michele Vanasse
H. Hunter Phillips for Respondent, David Seguin

Subject: Restitution; Family; Property; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — Common law spouses

V and S lived together in common law relationship from 1993 until March 2005 — In 2000, S sold company for approximately $11 million — Parties separated almost 5 years later — V brought proceedings claiming unjust enrichment — Trial judge concluded that relationship of parties could be divided into three distinct periods and that S had been unjustly enriched by V in second period — Trial judge determined that V was entitled to one-half interest in prorated increase of S's net worth during period of unjust enrichment — S appealed, conceding unjust enrichment during period — Court of Appeal directed that proper approach to valuation was to place monetary value on services provided by V to family taking due account of S's own contributions — V appealed — Appeal allowed — Monetary award for unjust enrichment need not, as matter of principle, always be calculated on fee-for-service basis — Trial judge had concluded that V was at least equal contributor to family enterprise throughout relationship and that during period of unjust enrichment her contributions had significantly benefitted S — There were several factors which suggested that throughout relationship S and V were working collaboratively toward common goals — There were number of findings of fact that indicated that V and S considered their relationship to be joint family venture — There was strong inference from factual findings that, to S's knowledge, V relied on relationship to her detriment — Not only were V and S engaged in joint family venture but there was clear link between V's contribution to it and accumulation of wealth — Trial judge's approach to calculation was reasonable in circumstances.

Family law --- Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Resulting trusts generally

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — Court of Appeal was correct to intervene and conclude that transfer was not gratuitous — Common intention resulting trust has no further role to play in resolution of disputes such as this one — Resulting trust should not have been imposed on property on basis of finding of common intention between parties.

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — Miscellaneous

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — K's unjust enrichment claims should not have been dismissed but rather new trial ordered — Court of Appeal erred in assessing B's contributions as part of juristic reason analysis — Trying counterclaim separated from K's claim would be artificial and potentially unfair way of proceeding — K's claim was not presented, defended or considered by courts pursuant to joint family venture analysis — Even assuming K made out her claim in unjust enrichment, it was not possible to fairly apply joint family venture approach using record available.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Retroactivity of order

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — K was awarded $1,739 per month in spousal support effective date she commenced proceedings — B successfully appealed — Court of Appeal concluded that order for support should be effective as of first day of trial — K appealed — Appeal allowed in part — Court of Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Miscellaneous

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — K was awarded $1,739 per month in spousal support effective date she commenced proceedings — B successfully appealed — Court of Appeal concluded that order for support should be effective as of first day of trial — K appealed — Appeal allowed in part — Court of Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

Restitution et enrichissement injustifié --- Avantages conférés dans l'attente d'un retour — Famille — Conjoints de fait

V et S ont fait vie commune entre 1993 et mars 2005 — En 2000, S a vendu son entreprise pour la somme d'environ 11 millions $ — Parties se sont séparées pratiquement 5 années plus tard — V a entamé des procédures, invoquant l'enrichissement injustifié — Juge de première instance a conclu que la relation des parties pouvait se diviser en trois périodes distinctes et que S s'était injustement enrichi grâce à V au cours de la deuxième période — Juge de première instance a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié — S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période — Cour d'appel a statué que la meilleure façon de procéder à l'évaluation était de calculer la valeur monétaire des services fournis par V à la famille en considérant de façon adéquate la contribution de S — V a formé un pourvoi — Pourvoi accueilli — Il n'est pas toujours nécessaire, en principe, de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la rémunération des services rendus — Juge de première instance a conclu que V avait contribué au moins autant pendant la relation à la coentreprise familiale et que, pendant la période de l'enrichissement injustifié, ses contributions avaient grandement avantagé S — Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, V et S collaboraient en vue d'atteindre des buts communs — Certain nombre de conclusions de fait indiquaient que V et S considéraient leur relation comme une coentreprise familiale — Il y avait de fortes raisons d'inférer des conclusions de fait que, à la connaissance de S, V se fiait sur la relation à son détriment — Non seulement V et S étaient engagés dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V à celle-ci et l'accumulation de la richesse — Approche adoptée par la juge de première instance au sujet du calcul était raisonnable dans les circonstances.

Droit de la famille --- Partage du patrimoine familial — Détermination de la propriété des biens — Application des principes de fiducie — Fiducie résultoire et fiducie constructoire — Fiducies résultoires en général

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructoire de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Cour d'appel a eu raison d'intervenir et de conclure que le transfert n'a pas été fait à titre gratuit — Fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci — Fiducie résultoire n'aurait pas dû être imposée à l'égard de la propriété sur la base de l'intention commune des parties.

Restitution et enrichissement injustifié --- Avantages conférés dans l'attente d'un retour — Famille — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructoire de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Réclamations de K fondées sur l'enrichissement injustifié n'auraient pas dû être rejetées mais une nouvelle audition de ces demandes aurait dû être ordonnée — Cour d'appel a commis une erreur en évaluant les contributions de B dans le cadre de l'analyse du motif juridique — Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K — Demande de K n'a pas été présentée, défendue ni examinée par les tribunaux suivant la méthode d'analyse de la coentreprise familiale — Même à supposer que K avait réussi à établir ses prétentions au sujet de l'enrichissement injustifié, il n'était pas possible d'appliquer équitablement la méthode d'analyse de la coentreprise familiale sur la base du dossier.

Droit de la famille --- Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Application rétroactive de l'ordonnance

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 $ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel

n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

Droit de la famille --- Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 $ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

B and K separated after a common law relationship of more than 25 years. In 1991, K suffered a massive stroke and cardiac arrest leaving her unable to return to work. B took early retirement in 2002. After surgery in 2005, K was transferred to an extended care facility. K claimed support and a one-third share of the property held in her partner's name based on resulting trust and unjust enrichment principles. B brought a counterclaim that K had been unjustly enriched at his expense. The trial judge awarded K one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims. The trial judge did not address B's counterclaim. The trial judge also awarded substantial monthly support for K effective as of the date she applied to the court for relief. B appealed. The Court of Appeal allowed the appeal, concluding that K's claim for resulting trust and in unjust enrichment should be dismissed, that B'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 trial, not as of the date proceedings were commenced.

V and S lived together in a common law relationship for approximately 12 years. During the first four years the couple diligently pursued their respective careers. In 1997, V took a leave of absence. During the next three and one-half years, the couple had two children and V took care of the domestic labour while S devoted himself to developing his business. In 2000, S's business was sold after which V continued to assume most of the domestic responsibilities. V and S separated in 2005. At the time of separation, V's net worth was about $332,000 and S's net worth was about $8,450,000. V brought an action for spousal support and child custody, and claimed unjust enrichment. The trial judge concluded that the relationship could be divided into three distinct periods and that S had been unjustly enriched by V during the second period. The trial judge concluded that throughout the relationship V had been at least an equal contributor to the family enterprise and that V's efforts during this second period were directly linked to S's business success. The trial judge concluded that a monetary award was appropriate and determined that V was entitled to a one-half interest in the prorated increase in S's net worth during the period of unjust enrichment. The trial judge awarded just under $1 million. S appealed, conceding unjust enrichment during the second period. The Court of Appeal set aside the trial judge's finding and held that V should be treated as an unpaid employee, not a co-venturer. Both K and V appealed.

Held: The appeal by V was allowed and the appeal by K was allowed in part.

Per Cromwell J. (McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein JJ. concurring): The time had come to acknowledge that there was no continuing role for the "common intention" resulting trust. First, the "common intention" resulting trust was doctrinally unsound. It was inconsistent with the underlying principles of resulting trust law. Second,

the notion of common intention may be highly artificial, particularly in domestic cases. Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. Finally, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provided 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.

The law of unjust enrichment had been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. A critical early question — whether the provision of domestic services could support a claim for unjust enrichment — was conclusively resolved in a 1993 decision. Remedies for unjust enrichment were restitutionary in nature. The first remedy was always a monetary award. Restricting the money remedy to a fee-for-services calculation was inappropriate for four reasons. First, it failed to reflect the reality of the lives of many domestic partners. Second, it was inconsistent with the inherent flexibility of unjust enrichment. Third, it ignored the historical basis of quantum meruit claims. Finally, it was not mandated by the Court's judgment in the 1993 case. Where the unjust enrichment was 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 had contributed, the monetary remedy should reflect that fact. When the parties had been engaged in a joint family venture, and the claimant's contributions to it were 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. To be entitled to a monetary remedy of that nature, the claimant must show both that there was in fact a joint family venture and that there was a link between his or her contributions to it and the accumulation of assets and/or wealth. Whether there was a joint family venture was a question of fact and may be assessed by having regard to all the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family.

Unjust enrichment analysis in domestic situations was often complicated by the fact that there had been a mutual conferral of benefits. Mutual enrichments should mainly be considered at the defence and remedy stages but they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constituted relevant evidence of the existence of juristic reason for the enrichment. The parties' reasonable or legitimate expectations had little role to play in deciding whether the services were provided for a juristic reason within the existing categories. In some cases, the facts 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 was present. The parties' reasonable or legitimate expectations had a role to play at the second step of the juristic reason analysis.

In the V appeal, the trial judge's order should be restored. The money compensation for unjust enrichment need not always be calculated on a quantum meruit basis. The trial judge's findings of fact and analysis indicated that the unjust enrichment of S at the expense of V ought to be characterized as retention by S of a disproportionate share of the wealth generated from a joint family venture. There were several factors which suggested that throughout their relationship the parties were working collaboratively towards common goals. There was a pooling of resources. There were a number of findings of fact that indicated that the parties considered their relationship to be joint family venture. Not only were the parties engaged in a joint family venture but that there was a clear link between V's contribution to it and the accumulation of wealth. The trial judge's approach was reasonable in the circumstances. The trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to S's contribution.

In the K appeal, 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 B's counterclaim be returned to the Supreme Court of British Columbia for hearing. The Court of Appeal was correct to conclude that the transfer was not gratuitous. The trial judge apparently based his conclusions about the resulting trust on his finding of a common intention on the part of K and B to share in the property. The common intention resulting trust had no further role to play in the resolution of such disputes. K's claim for unjust enrichment should be returned for a new trial. The first consideration in support of a new trial was that the Court of Appeal directed a hearing of B's counterclaim. Trying the counterclaim separated from K's claim would be an artificial and potentially unfair way of proceeding. More fundamentally, K's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that had been set out. Attempting to resolve K's unjust enrichment claim on its merits, using the record before this Court, involved too much uncertainty and risked

injustice. With respect to the date of the spousal support order, the order of the trial judge should be restored. The Court of Appeal made two main errors. First, it erred in finding that the circumstances of K were such that there was no need prior to the trial. Second, the Court of Appeal was wrong to fault K for not bringing an interim application. 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. B had the means to provide support, had prompt notice of K's claim and there was no indication in the Court of Appeal's reasons that indicated that it had considered the trial judge's award a hardship so as to make that award inappropriate.

K et B se sont séparés après plus de 25 ans de vie commune. En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont rendue inapte au travail. B a pris une retraite anticipée en 2002. À la suite d'une intervention chirurgicale, en 2005, K a été transférée dans un établissement de soins prolongés. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, K a réclamé une pension alimentaire et un tiers des biens détenus au nom de son conjoint. Par demande reconventionnelle, B a cherché à faire reconnaître que K s'était injustement enrichie à ses dépens. Le juge de première instance a accordé à K un tiers de la valeur de la maison du couple, sur le fondement de la fiducie résultoire et de l'enrichissement injustifié. Le juge de première instance ne s'est pas prononcé au sujet de la demande reconventionelle de B. Le juge de première instance a également accordé à K une pension alimentaire mensuelle importante, rétroactive à la date d'introduction de l'instance. B a interjeté appel. La Cour d'appel a accueilli l'appel, concluant que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée, que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen et que l'ordonnance concernant la pension alimentaire devrait être rétroactive à la date du début de l'audition et non à la date d'introduction de l'instance.

V et S ont fait vie commune pendant environ 12 ans. Au cours des quatre premières années, les parties ont diligemment continué leur carrière respective. En 1997, V a pris un congé. Au cours des trois années et demie qui ont suivi, les parties ont eu deux enfants et V s'est occupée des travaux domestiques pendant que S se consacrait à la croissance de son entreprise. En 2000, l'entreprise de S a été vendue et V a continué de s'acquitter de la plupart des obligations familiales. V et S se sont séparés en 2005. Au moment de la séparation, l'avoir net de V était d'environ 332 000 $ tandis que l'avoir net de S était d'environ 8 450 000 $. V a déposé une action visant à obtenir une pension alimentaire et la garde des enfants et a invoqué l'enrichissement injustifié. La juge de première instance a conclu que la relation pouvait se diviser en trois périodes distinctes et que S s'était injustement enrichi grâce à V au cours de la deuxième période. La juge de première instance a conclu que tout le long de la relation, V avait contribué au moins autant à la coentreprise familiale et que les efforts déployés par V pendant cette deuxième période étaient directement liés au succès professionnel de S. La juge de première instance a conclu qu'une indemnité pécuniaire était appropriée et a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié. La juge de première instance a accordé un montant d'un peu moins d'un million de dollars. S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période. La Cour d'appel a annulé la conclusion de la juge de première instance et a conclu que V devait être considérée comme une employée non rémunérée, et non comme une co-entrepreneure. K et V ont toutes les deux formé un pourvoi.

Arrêt: Le pourvoi formé par V a été accueilli et le pourvoi formé par K a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., Binnie, LeBel, Abella, Charron, Rothstein, JJ., souscrivant à son opinion) : Il était temps de reconnaître que la fiducie résultoire fondée sur l'« intention commune » avait perdu sa raison d'être. Premièrement, la fiducie résultoire basée sur l'« intention commune » était mal fondée sur le plan théorique. Elle était incompatible avec les principes sous-jacents du droit des fiducies résultoires. Deuxièmement, la notion d'intention commune peut être extrêmement artificielle, surtout en matière familiale. Troisièmement, la fiducie résultoire fondée sur « l'intention commune » au Canada tirait son origine d'une interprétation erronée de quelques formulations imprécises dans l'ancienne jurisprudence de la Chambre des lords. Finalement, les principes de l'enrichissement injustifié, conjugués au recours possible à la fiducie constructoire, fournissaient un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter de la grande variété des circonstances donnant lieu à des réclamations découlant d'unions conjugales.

Les règles relatives à l'enrichissement injustifié ont été le principal moyen utilisé pour régler les réclamations pour

partage inéquitable des biens après la rupture d'une relation conjugale. Une question cruciale qui consistait au début à savoir si la prestation de services domestiques pouvait appuyer une action pour enrichissement injustifié a été définitivement réglée dans un arrêt de 1993. Les moyens utilisés pour corriger l'enrichissement injustifié étaient de nature réparatoire. La réparation pécuniaire était toujours considérée en premier. Il était inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflétait pas la réalité de nombreux conjoints vivant en union libre. Deuxièmement, il était incompatible avec la souplesse inhérente à l'enrichissement injustifié. Troisièmement, il ne tenait pas compte de l'historique des réclamations fondées sur le quantum meruit. Enfin, l'arrêt de la Cour de 1993 ne l'imposait pas. Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié était de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre d'une « coentreprise familiale » à laquelle les deux conjoints avaient contribué, la réparation pécuniaire devrait refléter ce fait. Quand les parties ont été engagées dans une coentreprise familiale, et que les contributions du demandeur sont liées à l'accumulation de la richesse, il convenait de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Pour avoir droit à une réparation pécuniaire de cette nature, le demandeur doit prouver qu'une coentreprise familiale existait effectivement et qu'il existait un lien entre ses contributions à la coentreprise et l'accumulation de l'avoir ou de la richesse. La question de savoir s'il existait une coentreprise familiale était une question de fait et on pouvait l'apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs à l'effort commun, à l'intégration économique, à l'intention réelle et à la priorité accordée à la famille.

L'analyse de l'enrichissement injustifié en matière familiale se compliquait souvent du fait qu'il y avait eu des avantages réciproques. Les enrichissements mutuels devraient être examinés principalement au stade de la défense ou à celui de la réparation, mais il était aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constituait une preuve pertinente de l'existence d'un motif juridique justifiant l'enrichissement. Les attentes raisonnables ou légitimes des parties jouaient un rôle négligeable au moment de décider si les services ont été fournis pour un motif juridique appartenant à une catégorie établie. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties pouvait constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'appliquait. Les attentes raisonnables ou légitimes des parties jouaient un rôle à la deuxième étape de l'analyse du motif juridique.

Dans le pourvoi de V, l'ordonnance de la juge de première instance devrait être rétablie. Il n'est pas toujours nécessaire de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction du quantum meruit. Selon les conclusions de fait et l'analyse de la juge de première instance, l'enrichissement injustifié de S au détriment de V tenait à la conservation, par S, d'une part disproportionnée de la richesse générée par la coentreprise familiale. Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Il y avait une mise en commun des ressources. Un certain nombre de conclusions de fait indiquaient que les parties considéraient leur relation comme une coentreprise familiale. Non seulement les parties étaient engagées dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V et l'accumulation de la richesse. L'approche adoptée par la juge de première instance était raisonnable dans les circonstances. La juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve dont elle disposait et a suffisamment tenu compte des contributions de S.

Dans le pourvoi de K, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié. Elle n'a pas non plus commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B à la Cour suprême de la Colombie-Britannique. La Cour d'appel a eu raison de conclure que le transfert n'avait pas été fait à titre gratuit. Le juge de première instance semblait avoir fondé ses conclusions relatives à la fiducie résultoire sur l'existence d'une intention commune, de la part de K et de B, de partager la propriété. La fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci. Il convenait de renvoyer la demande de K fondée sur l'enrichissement injustifié pour qu'elle fasse l'objet d'une nouvelle audition. La première considération à l'appui d'une nouvelle audition était que la Cour d'appel avait ordonné l'audition de la demande reconventionnelle de B. Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K. Fondamentalement, la demande de K n'a pas été présentée, défendue ni examinée par les tribunaux d'instance inférieure suivant la méthode d'analyse de la coentreprise familiale

qui a été exposée. Tenter de trancher sur le fond la demande de K fondée sur l'enrichissement injustifié, sur la base du dossier soumis à la Cour, présentait trop d'aléas et des risques d'injustice. En ce qui concernait la date d'exécution de l'ordonnance alimentaire, l'ordonnance de première instance devrait être rétablie. La Cour d'appel a commis deux erreurs principales. Premièrement, elle a commis une erreur en concluant que la situation de K était telle qu'elle n'avait pas besoin de soutien avant l'audition. Deuxièmement, la Cour d'appel a eu tort de reprocher à K de ne pas avoir présenté une demande provisoire. K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition. B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

Table of Authorities

Cases considered by *Cromwell J.*:

Becker v. Pettkus (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — considered

Bell v. Bailey (2001), 2001 CarswellOnt 2914, 148 O.A.C. 333, 203 D.L.R. (4th) 589, 20 R.F.L. (5th) 272 (Ont. C.A.) — referred to

Birmingham v. Ferguson (2004), 2004 CarswellOnt 3119 (Ont. C.A.) — referred to

Cadbury Schweppes Inc. v. FBI Foods Ltd. (1999), 235 N.R. 30, 83 C.P.R. (3d) 289, 42 B.L.R. (2d) 159, 117 B.C.A.C. 161, 191 W.A.C. 161, 59 B.C.L.R. (3d) 1, [1999] 5 W.W.R. 751, [1999] 1 S.C.R. 142, [2000] F.S.R. 491, 167 D.L.R. (4th) 577, 1999 CarswellBC 77, 1999 CarswellBC 78 (S.C.C.) — referred to

Clarke v. Clarke (1990), 28 R.F.L. (3d) 113, 1990 CarswellNS 261, 1990 CarswellNS 49, 113 N.R. 321, [1990] 2 S.C.R. 795, 73 D.L.R. (4th) 1, 101 N.S.R. (2d) 1, 275 A.P.R. 1 (S.C.C.) — considered

Dyer v. Dyer (1788), 30 E.R. 42, 2 Cox Eq. Cas. 92 (Eng. Ch. Div.) — referred to

Ford v. Werden (1996), 78 B.C.A.C. 126, 128 W.A.C. 126, 27 B.C.L.R. (3d) 169, [1997] 2 W.W.R. 245, 25 R.F.L. (4th) 372, 1996 CarswellBC 1550 (B.C. C.A.) — referred to

Garland v. Consumers' Gas Co. (1998), 114 O.A.C. 1, 40 O.R. (3d) 479 (headnote only), 165 D.L.R. (4th) 385, 129 C.C.C. (3d) 97, [1998] 3 S.C.R. 112, 1998 CarswellOnt 4053, 1998 CarswellOnt 4054, 231 N.R. 1, 20 C.R. (5th) 44, 49 M.P.L.R. (2d) 77 (S.C.C.) — referred to

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — followed

Giles v. McEwan (1896), 11 Man. R. 150 (Man. C.A.) — referred to

Gissing v. Gissing (1970), [1970] 3 W.L.R. 255, [1970] 2 All E.R. 780, [1971] A.C. 886 (U.K. H.L.) — referred to

Harrison v. Kalinocha (1994), 1994 CarswellBC 177, 1 R.F.L. (4th) 313, 112 D.L.R. (4th) 43, 90 B.C.L.R. (2d) 273 (B.C. C.A.) — referred to

Herman v. Smith (1984), 1984 CarswellAlta 142, 18 E.T.R. 169, 56 A.R. 74, 34 Alta. L.R. (2d) 90, 42 R.F.L. (2d) 154 (Alta. Q.B.) — referred to

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — referred to

MacFarlane v. Smith (2003), 49 E.T.R. (2d) 52, 2003 NBCA 6, 2003 CarswellNB 31, 2003 CarswellNB 32, 224 D.L.R. (4th) 127, 35 R.F.L. (5th) 112, 256 N.B.R. (2d) 108, 670 A.P.R. 108 (N.B. C.A.) — referred to

Mack v. Canada (Attorney General) (2002), 217 D.L.R. (4th) 583, 2002 CarswellOnt 2927, 96 C.R.R. (2d) 254, 165 O.A.C. 17, 24 Imm. L.R. (3d) 1, 60 O.R. (3d) 737, 60 O.R. (3d) 756 (Ont. C.A.) — referred to

MacKinnon v. MacKinnon (2005), 2005 CarswellOnt 1536, 199 O.A.C. 353, 75 O.R. (3d) 175, 13 R.F.L. (6th) 221, 256 D.L.R. (4th) 385 (Ont. C.A.) — referred to

McDougall v. Gesell Estate (2001), [2001] 3 W.W.R. 391, 153 Man. R. (2d) 54, 238 W.A.C. 54, 2001 MBCA 3, 2001 CarswellMan 2, 11 R.F.L. (5th) 342 (Man. C.A.) — referred to

Murdoch v. Murdoch (1973), [1974] 1 W.W.R. 361, 1973 CarswellAlta 119, 13 R.F.L. 185, 41 D.L.R. (3d) 367, [1975] 1 S.C.R. 423, 1973 CarswellAlta 156 (S.C.C.) — considered

Nance v. British Columbia Electric Railway (1951), 1951 CarswellBC 72, 67 C.R.T.C. 340, [1951] 2 All E.R. 448, [1951] 2 T.L.R. 137, 95 S.J. 543, [1951] A.C. 601, 2 W.W.R. (N.S.) 665, [1951] 3 D.L.R. 705 (British Columbia P.C.) — referred to

Nasser v. Mayer-Nasser (2000), 32 E.T.R. (2d) 230, 2000 CarswellOnt 530, 5 R.F.L. (5th) 100, 130 O.A.C. 52 (Ont. C.A.) — referred to

Pacific National Investments Ltd. v. Victoria (City) (2004), 34 B.C.L.R. (4th) 1, 327 N.R. 100, [2004] 3 S.C.R. 575, 206 B.C.A.C. 99, 338 W.A.C. 99, 42 C.L.R. (3d) 76, [2005] 3 W.W.R. 1, 3 M.P.L.R. (4th) 1, 2004 SCC 75, 2004 CarswellBC 2673, 2004 CarswellBC 2674, 245 D.L.R. (4th) 211 (S.C.C.) — referred to

Panara v. Di Ascenzo (2005), 2005 CarswellAlta 135, 2005 ABCA 47, 42 Alta. L.R. (4th) 1, 361 A.R. 382, 339 W.A.C. 382, 16 R.F.L. (6th) 177, 13 E.T.R. (3d) 159, 250 D.L.R. (4th) 620, [2005] 9 W.W.R. 282 (Alta. C.A.) — referred to

Pecore v. Pecore (2007), 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, 32 E.T.R. (3d) 1, 37 R.F.L. (6th) 237, 361 N.R. 1, 224 O.A.C. 330, 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795 (S.C.C.) — considered

Peel (Regional Municipality) v. Canada (1992), (sub nom. *Peel (Regional Municipality) v. Ontario)* 144 N.R. 1, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 659 (S.C.C.) — followed

Peter v. Beblow (February 16, 1988), Doc. Vernon 8600296 (B.C. S.C.) — referred to

Peter v. Beblow (1990), 50 B.C.L.R. (2d) 266, 29 R.F.L. (3d) 268, 39 E.T.R. 113, [1991] 1 W.W.R. 419, 1990 CarswellBC 237 (B.C. C.A.) — referred to

Peter v. Beblow (1993), [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — followed

Pettitt v. Pettitt (1969), [1970] A.C. 777, [1969] 2 W.L.R. 699, [1969] 2 All E.R. 385, 20 P. & C.R. 991 (U.K. H.L.) — referred to

Pickelein v. Gillmore (1997), 87 B.C.A.C. 193, 143 W.A.C. 193, 30 B.C.L.R. (3d) 44, 16 E.T.R. (2d) 1, [1997] 5 W.W.R. 595, 1997 CarswellBC 307, 27 R.F.L. (4th) 51 (B.C. C.A.) — referred to

Rathwell v. Rathwell (1978), 1978 CarswellSask 36, 1978 CarswellSask 129, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1 (S.C.C.) — considered

Reference re Excise Tax Act (Canada) (1992), (sub nom. *Reference re Goods & Services Tax)* [1992] 4 W.W.R. 673, (sub nom. *Reference re Goods & Services Tax)* 138 N.R. 247, (sub nom. *Reference re Goods & Services Tax)* 127 A.R. 161, (sub nom. *Reference re Goods & Services Tax)* [1992] 2 S.C.R. 445, (sub nom. *Reference re Goods & Services Tax (Alberta))* 94 D.L.R. (4th) 51, 1992 CarswellAlta 469, (sub nom. *Reference re GST Implementing Legislation)* 5 T.C.T. 4165, (sub nom. *Reference re Goods & Services Tax)* 2 Alta. L.R. (3d) 289, (sub nom. *Reference re Goods & Services Tax)* 20 W.A.C. 161, (sub nom. *Reference re Bill C-62)* [1992] G.S.T.C. 2, 1992 CarswellAlta 61 (S.C.C.) — referred to

S. (D.B.) v. G. (S.R.) (2006), 61 Alta. L.R. (4th) 1, 31 R.F.L. (6th) 1, 391 A.R. 297, 377 W.A.C. 297, 2006 SCC 37, 2006 CarswellAlta 976, 2006 CarswellAlta 977, 351 N.R. 201, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, [2006] 2 S.C.R. 231 (S.C.C.) — referred to

S. (L.) v. P. (E.) (1999), 67 B.C.L.R. (3d) 254, 50 R.F.L. (4th) 302, [1999] 12 W.W.R. 718, 1999 BCCA 393, 1999 CarswellBC 1402, 126 B.C.A.C. 28, 206 W.A.C. 28, 175 D.L.R. (4th) 423 (B.C. C.A.) — considered

Shannon v. Gidden (1999), 178 D.L.R. (4th) 395, 1 R.F.L. (5th) 105, 71 B.C.L.R. (3d) 40, 129 B.C.A.C. 257, 210 W.A.C. 257, 1999 CarswellBC 2049, 1999 BCCA 539 (B.C. C.A.) — referred to

Sorochan v. Sorochan (1986), 1986 CarswellAlta 714, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 29 D.L.R. (4th) 1, 69 N.R. 81, 46 Alta. L.R. (2d) 97, 74 A.R. 67, 23 E.T.R. 143, 2 R.F.L. (3d) 225, [1986] R.D.I. 448, [1986] R.D.F. 501, 1986 CarswellAlta 143 (S.C.C.) — followed

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — referred to

Thomas v. Fenton (2006), 2006 BCCA 299, 2006 CarswellBC 1465, 228 B.C.A.C. 82, 376 W.A.C. 82, 269 D.L.R. (4th) 376, 29 R.F.L. (6th) 229, 27 E.T.R. (3d) 7, 57 B.C.L.R. (4th) 204 (B.C. C.A.) — referred to

Walsh v. Bona (2002), 211 N.S.R. (2d) 273, 659 A.P.R. 273, 2002 SCC 83, 2002 CarswellNS 511, 2002 CarswellNS 512, 102 C.R.R. (2d) 1, 32 R.F.L. (5th) 81, (sub nom. *Nova Scotia (Attorney General) v. Walsh)* 221 D.L.R. (4th) 1, 297 N.R. 203, (sub nom. *Nova Scotia (Attorney General) v. Walsh)* [2002] 4 S.C.R. 325 (S.C.C.) — referred to

Wilson v. Fotsch (2010), 81 R.F.L. (6th) 241, 2010 BCCA 226, 8 B.C.L.R. (5th) 1, 57 E.T.R. (3d) 159, 286 B.C.A.C. 276, 484 W.A.C. 276, 2010 CarswellBC 1158, [2010] 11 W.W.R. 29, 319 D.L.R. (4th) 26 (B.C. C.A.) — referred to

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

Family Relations Act, R.S.B.C. 1996, c. 128
s. 1(1) "spouse" (b) — referred to

s. 93(5)(d) — considered

Matrimonial Property Act, S.N.S. 1980, c. 9
Generally — referred to

APPEALS from judgments reported at *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.) and *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.).

POURVOIS à l'encontre des jugements publiés à *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.) et à *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.).

***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. 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-sixties 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 (B.C. S.C.)). 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 (B.C. C.A.)). 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.

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 (Ont. C.A.)). 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, 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 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, at p. 93, 30 E.R. 42 (Eng. Ch. Div.). 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 *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), 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 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, for example, *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), 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 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 (S.C.C.), 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 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* (1973), [1975] 1 S.C.R. 423 (S.C.C.). Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All

E.R. 780 (U.K. 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).

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. 842-3. 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 *Becker v. Pettkus* 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 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 trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), 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*, 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 (S.C.C.), 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).

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 (S.C.C.), 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.

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 (S.C.C.), and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), 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 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 Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.); *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. 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 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 "immeasureable 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 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 *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 *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.), 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 (*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), 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, "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 meruits*" (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 (B.C. C.A.), at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C. C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (B.C. C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108 (N.B. C.A.), at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40 (B.C. C.A.), 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*, vol 1, by J.G. McLeod and A.A. Mamo, eds.(loose-leaf), 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 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 trusts 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 (Alta. Q.B.), 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 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*; *Pickelein*; *Harrison*; *MacFarlane; Shannon*). If, as some courts have 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 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 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 (S.C.C.), at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), "... the Act supports the equality of both parties to a marriage and *recognized 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 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 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 *Becker v. Pettkus*" (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, "[I]t 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, 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.*, [1999] 1 S.C.R. 142 (S.C.C.), 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] *Lloyds' Mar. & Com. 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 (S.C.C.), 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 (S.C.C.) 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 other of the two 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), vol. 1 at § 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.

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 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 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 *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 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. 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 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, for example, *Birmingham v. Ferguson* [2004 CarswellOnt 3119 (Ont. C.A.)], 2004 CanLII 4764; *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54 (Man. C.A.), 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.) and *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382 (Alta. C.A.), 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 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, for example, *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 *Becker v. Pettkus*: 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 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 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.

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 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 (B.C. C.A.)). 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 (B.C. 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, 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 (B.C. C.A.), 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: (B.C. S.C.).

107 The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.), 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 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 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), vol. 2, at § 13:200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Man. C.A.). 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.

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 (S.C.C.). 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 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 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 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 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 the services were provided for a juristic reason within the existing categories.

2. In some cases, the facts 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 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 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 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 Saving 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 proportional.

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 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.]

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.

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 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 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 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, 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.

(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 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*, [1951] A.C. 601 (British Columbia 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 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.

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 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, 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 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 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 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** "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 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.

(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

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 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 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. 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 separated 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** 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.

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 the date Ms. **Kerr** had commenced proceedings. It faulted the judge in several respects: for apparently having made 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 Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

(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: s. 1(1), definition of "spouse" para. (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 *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 (S.C.C.), at paras. 2 and 69-70; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (B.C. C.A.), at paras. 55-57. Rather, I prefer to follow the example of Bastarache J. in *S. (D.B.)* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

207 While *S. (D.B.)* 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, 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. It 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 *S. (D.B.)*, 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, for example, M.L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (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 *S. (D.B.)*, 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 *S. (D.B.)*, 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 (Ont. C.A.), at para. 24. While in my view, the decision 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 *S. (D.B.)*, 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 *S. (D.B.)* 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: *S. (D.B.)*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *S. (D.B.)* 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 *S. (D.B.)* 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 *S. (D.B.)* 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.

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**.

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.

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 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 by V allowed; appeal by K allowed in part.

Pourvoi de V accueilli; pourvoi de K accueilli en partie.

End of Document

TAB 2

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Moreira v. Ontario Lottery and Gaming Corp. | 2013 ONCA 121, 2013 CarswellOnt 1995, 302 O.A.C. 244, 296 C.C.C. (3d) 245, 228 A.C.W.S. (3d) 253, 105 W.C.B. (2d) 430, [2013] O.J. No. 789 | (Ont. C.A., Feb 26, 2013)

2004 SCC 25, 2004 CSC 25
Supreme Court of Canada

Garland v. **Consumers**' **Gas** Co.

2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 2004 CSC 25, [2004] 1 S.C.R. 629, [2004] A.C.S. No. 21, [2004] S.C.J. No. 21, 130 A.C.W.S. (3d) 32, 186 O.A.C. 128, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 72 O.R. (3d) 80 (note), 72 O.R. (3d) 80, 9 E.T.R. (3d) 163, J.E. 2004-931, REJB 2004-60672

Gordon Garland, Appellant v. Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited, Respondent and Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited, Interveners

Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: October 9, 2003
Judgment: April 22, 2004*
Docket: 29052

Proceedings: reversing (2001), 19 B.L.R. (3d) 10 (Ont. C.A.); affirming (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.); and reversing (2000), 2000 CarswellOnt 1673 (Ont. S.C.J.); additional reasons to (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.)

Counsel: Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury for appellant
Fred D. Cass, John D. McCamus and John J. Longo for respondent
Christopher M. Rupar for intervener Attorney General of Canada
Thomson Irvine for intervener Attorney General for Saskatchewan
Alan H. Mark and Kelly L. Friedman for intervener Toronto Hydro-Electric System Limited
Mark M. Orkin, Q.C., for intervener Law Foundation of Ontario
Patricia D.S. Jackson and M. Paul Michell for intervener Union **Gas** Limited

Subject: Criminal; Public; Restitution

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Public utilities --- Operation of utility — Collection of utility charges — General

Receipt of late payment penalties by gas company constitutes unjust enrichment giving rise to restitutionary claim — Gas company ordered to repay late payment penalties in excess of interest limit set out in s. 347 of Criminal Code from 1994 forward.

Restitution --- General principles — Bars to recovery — Miscellaneous issues

Receipt of late payment penalties by gas company constitutes unjust enrichment giving rise to restitutionary claim — Gas company ordered to repay late payment penalties in excess of interest limit set out in s. 347 of Criminal Code from 1994 forward.

Public utilities --- Actions by and against public utilities — Practice and procedure — General

Plaintiff in action against gas company for restitution of late payment penalties entitled to his costs throughout.

Services publics --- Exploitation d'un service public — Recouvrement des redevances aux services publics — En général

Perception par la compagnie de gaz de pénalités pour paiement en retard constituait un enrichissement sans cause et donnait ouverture à une réclamation de restitution — Compagnie de gaz s'est vu ordonner de rembourser les pénalités pour paiement en retard excédant le taux d'intérêt maximal énoncé à l'art. 347 du Code criminel, et ce, à partir de l'année 1994.

Restitution --- Principes généraux — Motifs empêchant le recouvrement — Questions diverses

Perception par la compagnie de gaz de pénalités pour paiement en retard constituait un enrichissement sans cause et donnait ouverture à une réclamation de restitution — Compagnie du gaz s'est vu ordonner de rembourser les pénalités pour paiement en retard excédant le taux d'intérêt maximal énoncé à l'art. 347 du Code criminel, et ce, à partir de l'année 1994.

Services publics --- Actions intentées par ou contre les services publics — Procédure — En général

Demandeur dans le cadre de l'action qu'il avait intentée contre la compagnie de gaz afin d'obtenir la restitution des pénalités pour paiement en retard avait droit aux dépens devant toutes les cours.

The plaintiff brought a class action on behalf of more than 500,000 customers of a gas company. He claimed that the late payment penalties charged by the gas company on overdue payments violated s. 347 of the Criminal Code. The case reached the Supreme Court of Canada, which held that the penalties constituted the charging of a criminal rate of interest contrary to s. 347 of the Code. The plaintiff brought a second action claiming restitution for unjust enrichment of charges received by the gas company in violation of s. 347. The gas company moved for summary judgment dismissing this action. The motions judge granted the gas company's motion, finding that the action was a collateral attack on the order of the Ontario Energy Board, which had approved the creation of the late payment penalties. The plaintiff appealed. The appeal was dismissed. A majority of the Ontario Court of Appeal disagreed with the motions judge's reasons but held that the plaintiff's unjust enrichment claim could not be made out. The plaintiff appealed.

Held: The appeal was allowed.

The receipt of late payment penalties by the gas company constituted unjust enrichment giving rise to a restitutionary claim. The gas company was ordered to repay those penalties, collected from 1994 forward, that were in excess of the interest limit set out in s. 347 of the Criminal Code.

When money is transferred from plaintiff to defendant, there is an enrichment. Without doubt, the gas company received the money from the late payment penalties and the money was available to it to carry on its business. The availability of that money constituted a benefit to the gas company and there was no juristic reason for the enrichment.

The proper approach to the juristic reason analysis has two parts. First, the plaintiff must show that there is no juristic reason from an established category, such as a contract or a disposition of law, to deny recovery. If there is no juristic

reason, then the plaintiff has made out a prima facie case. The prima facie case can be rebutted if the defendant demonstrates another reason to deny recovery. A de facto burden of proof is placed on the defendant to show why the enrichment should be retained.

In this case, the only possible juristic reason from an established category (disposition of law) that could be used to justify the enrichment was the existence of Ontario Energy Board orders creating the late payment penalties. The orders were not a juristic reason for the enrichment, however, because they were rendered inoperative to the extent of their conflict with s. 347 of the Criminal Code. The plaintiff had made out a prima facie case for unjust enrichment and it fell to the **gas** company to show a juristic reason for the enrichment outside the established categories.

From 1981 to 1994 the **gas** company's reliance on the inoperative orders of the Ontario Energy Board provided a juristic reason for the enrichment. Section 347 of the Criminal Code was enacted in 1981 and the action was commenced in 1994. Between 1981 and 1994 no suggestion could be made that the **gas** company knew that the late payment penalties violated s. 347 of the Code. The **gas** company's reliance on the board's orders in the absence of actual or constructive notice that the orders were inoperative was sufficient to provide a juristic reason for the enrichment during this period. When the plaintiff commenced the first action in 1994, however, the **gas** company was put on notice that it might be violating the Code. This possibility became a reality in 1998, when the Supreme Court of Canada held, in the first action, that the late payment penalties were in excess of the s. 347 limits. After the **gas** company was put on notice of a serious possibility of a Criminal Code violation, the **gas** company could no longer reasonably rely on the board's orders to authorize the penalties. After the commencement of the action in 1994, there was no longer a juristic reason for the enrichment of the **gas** company. After 1994 the plaintiff was entitled to restitution of the portion of the penalties paid that exceeded the 60 per cent rate of interest set out in s. 347 of the Criminal Code.

The **gas** company could not rely on the defence of change of position. The penalties were obtained in contravention of the Criminal Code and, as a result, it could not be unjust for the **gas** company to have to return them.

Neither could the **gas** company rely on the defence set out in s. 25 of the Ontario Energy Board Act. This defence must be read down to exclude protection from civil liability that arises out of Criminal Code violations.

The doctrines of exclusive jurisdiction and collateral attack were likewise not defences on which the **gas** company could rely. The Ontario Energy Board did not have exclusive jurisdiction over this dispute. Although the dispute involved rate orders, at its heart it was a private law matter within the competence of the civil courts and the board had jurisdiction to order the remedy sought by the plaintiff. Furthermore, the action did not constitute an impermissible collateral attack on the board's orders. The object of the plaintiff's action was not to invalidate or render inoperable the board's orders but rather to recover money that had been illegally collected by the **gas** company as a result of the board orders. The plaintiff was not the object of the orders, and he was not seeking to avoid the orders by bringing the action.

The regulated industries defence was unavailable to the **gas** company. The language in s. 347 of the Criminal Code does not support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state.

Because the **gas** company was not a government official acting under colour of authority, it could not rely on the de facto doctrine to exempt it from liability. The underlying purpose of the de facto doctrine is to preserve law and order and the authority of the government. Those interests were not at stake in this litigation.

A preservation order was not appropriate. The **gas** company had ceased to collect the late payment penalties at a criminal rate and, if a preservation order was made, there were no future late payment penalties to which it could attach. For those late payment penalties paid between 1994 and 2004, a preservation order would serve no practical purpose. The plaintiff did not allege that the **gas** company was impecunious or that there was any reason to believe that it would not satisfy a judgment against it. Furthermore, the plaintiff did not satisfy the criteria set out in R. 45.02 of the Rules of Civil Procedure.

The plaintiff was entitled to his costs of all the proceedings throughout, regardless of the outcome of any future litigation.

Le demandeur a exercé un recours collectif au nom de plus de 500 000 clients d'une compagnie de gaz. Il a soutenu que les pénalités pour paiement en retard imposées par la compagnie à l'égard des paiements dus contrevenaient à l'art. 347 du Code criminel. L'affaire s'est rendue jusqu'en Cour suprême du Canada, qui a statué que les pénalités pour paiement en retard constituaient un taux d'intérêt criminel contrevenant à l'art. 347 du Code. Le demandeur a intenté une deuxième action, cette fois en restitution pour enrichissement sans cause des pénalités pour paiement en retard perçues par la compagnie en contravention de l'art. 347. La compagnie a présenté une requête en jugement sommaire afin d'obtenir le rejet de la deuxième action. Le juge saisi de la requête de la compagnie l'a accueillie au motif qu'il s'agissait d'une contestation indirecte de l'ordonnance de la Commission de l'énergie de l'Ontario approuvant la création des pénalités pour paiement en retard. Le demandeur a interjeté appel. Le pourvoi a été rejeté. Les juges majoritaires de la Cour d'appel étaient en désaccord avec les motifs du premier juge, mais ils ont quand même estimé que l'enrichissement sans cause n'avait pas été établi. Le demandeur a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

xtData=(sc.Search)" Âcompagnie des pénalités pour paiement en retard constituait un enrichissement sans cause donnant ouverture à une demande de restitution. La compagnie s'est vu ordonner de rembourser les pénalités payées à partir de 1994, lesquelles excédaient le taux d'intérêt maximal prévu par l'art. 347 du Code criminel.

Le transfert d'un montant d'argent du demandeur au défendeur constitue un enrichissement. Il n'y avait aucun doute que la compagnie avait perçu l'argent provenant des pénalités et qu'elle aurait pu l'utiliser dans l'exploitation de son entreprise. La disponibilité de l'argent constituait un avantage pour la compagnie et il n'existait aucun motif juridique pouvant justifier un tel enrichissement.

Il convient de scinder en deux l'étape de l'analyse du motif juridique. Premièrement, le demandeur doit démontrer qu'il n'existe aucun motif juridique appartenant à une catégorie établie permettant de refuser le recouvrement. S'il n'existe aucun motif juridique appartenant à une catégorie établie, alors le demandeur a prouvé sa cause de façon prima facie. Le défendeur peut réfuter la preuve prima facie en démontrant qu'il existe une autre raison justifiant de refuser le recouvrement. Le défendeur a l'obligation de facto de démontrer pourquoi il devrait conserver ce dont il s'est enrichi.

En l'espèce, le motif juridique appartenant à une catégorie établie (disposition légale) qui pouvait servir à justifier l'enrichissement était l'existence des ordonnances de la Commission de l'énergie de l'Ontario ayant créé les pénalités pour paiement en retard. Ces ordonnances ne constituaient cependant pas un motif juridique justifiant l'enrichissement puisqu'elles étaient inopérantes dans la mesure où elles entraient en conflit avec l'art. 347 du Code criminel. Le demandeur avait prouvé l'enrichissement sans cause de façon prima facie et c'était alors à la compagnie qu'il revenait de démontrer l'existence d'un motif juridique n'appartenant pas aux catégories qui puisse justifier l'enrichissement.

Le fait que, à partir de 1981 jusqu'en 1994, la compagnie se soit fondée sur les ordonnances inopérantes de la CEO était un motif juridique justifiant l'enrichissement. L'article 347 du Code criminel a été adopté en 1981 et cette action a été intentée en 1994. Rien ne prouvait que la compagnie savait, entre 1981 et 1994, que les pénalités contrevenaient à l'art. 347 du Code. Le fait que la compagnie se soit fondée sur les ordonnances de la Commission, sans savoir véritablement ou vraisemblablement qu'elles étaient inopérantes, suffisait pour fournir un motif juridique justifiant l'enrichissement pendant cette période. La compagnie a par ailleurs été avisée de la possibilité qu'elle puisse contrevenir au Code lorsque le demandeur a intenté son action en 1994. Cette possibilité est devenue réalité lorsque la Cour suprême du Canada a statué, dans le cadre de la première action, que les pénalités excédaient les limites de l'art. 347. Dès que la compagnie a été avisée qu'il existait une réelle possibilité que les pénalités puissent violer le Code, elle ne pouvait alors plus raisonnablement se fonder sur les ordonnances de la Commission pour autoriser les pénalités. Elle n'avait donc plus de motif juridique justifiant l'enrichissement dès après l'institution de l'action en 1994. Le demandeur avait donc droit, à partir de 1994, à la restitution de la portion des pénalités payées qui excédaient le taux d'intérêt de 60 pour cent prévu par l'art. 347 du Code criminel.

La compagnie ne pouvait invoquer le moyen de défense fondé sur le changement de situation. Les pénalités ont été obtenues en contravention du Code criminel et, par conséquent, il ne pouvait être injuste pour la compagnie d'avoir à les rembourser.

La compagnie ne pouvait non plus invoquer le moyen de défense prévu par l'art. 25 de la Loi sur la Commission de l'énergie de l'Ontario. Ce moyen de défense doit recevoir une interprétation stricte afin de pouvoir exclure la protection contre la responsabilité civile pouvant découler de contraventions au Code criminel.

La compagnie ne pouvait pas non plus invoquer les théories de la compétence exclusive et de la contestation indirecte. La Commission de l'énergie de l'Ontario n'avait pas compétence exclusive à l'égard du litige. Même si ce dernier impliquait des ordonnances en matière de taux, il portait principalement sur une question de droit privée relevant de la compétence des tribunaux civils, et la Commission n'avait pas compétence pour ordonner la réparation demandée par le demandeur. De plus, l'action ne constituait pas une contestation indirecte inacceptable des ordonnances de la Commission. L'action du demandeur ne visait pas à obtenir que les ordonnances de la Commission soient invalidées ou déclarées inopérantes, mais plutôt à obtenir le recouvrement de l'argent illégalement perçu par la compagnie en raison des ordonnances de la Commission. Le demandeur n'était pas régi par les ordonnances et il n'y avait aucune crainte qu'il ait cherché à éviter les ordonnances en intentant l'action.

Le moyen de défense fondé sur la réglementation de l'industrie ne pouvait non plus être invoqué par la compagnie. Rien dans l'art. 347 du Code criminel ne pouvait appuyer la théorie qu'un régime de réglementation provincial ne pouvait être contraire à l'intérêt public ni constituer une infraction contre l'État.

La compagnie n'était pas un fonctionnaire qui agissait avec une apparence d'autorité et ne pouvait donc se fonder sur le principe de la validité de facto pouvant l'exonérer de toute responsabilité. L'objectif sous-jacent du principe de la validité de facto était d'assurer le respect de la loi et l'ordre ainsi que de l'autorité du gouvernement. De tels intérêts n'étaient pas en jeu dans ce litige.

Il n'était pas approprié d'accorder une ordonnance de conservation. La compagnie avait cessé de percevoir les pénalités pour paiement en retard qui étaient à un taux criminel; une telle ordonnance ne pouvait se rattacher à aucune pénalité à venir. Quant aux pénalités payées de 1994 à 2004, une ordonnance de conservation ne serait d'aucune utilité pratique. Le demandeur n'a pas allégué que la compagnie était démunie ou qu'il existait des raisons de croire qu'elle n'exécuterait pas un jugement rendu contre elle. De plus, le demandeur n'a pas satisfait au critère énoncé dans la règle 45.02 des Règles de procédure civile.

Le demandeur avait droit aux dépens devant toutes les cours, quelle que soit l'issue de tout autre litige ultérieur.

Table of Authorities

Cases considered by *Iacobucci J.*:

Amax Potash Ltd. v. Saskatchewan, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 11 N.R. 222, 71 D.L.R. (3d) 1, 1976 CarswellSask 76, 1976 CarswellSask 115 (S.C.C.) — considered

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — followed

Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275, 8 C.P.C. 100, 90 D.L.R. (3d) 481, 23 N.R. 298, 1978

CarswellOnt 462, 1978 CarswellOnt 596 (S.C.C.) — considered

Canada (Attorney General) v. Law Society (British Columbia), 1982 CarswellBC 133, 1982 CarswellBC 743, [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1 (S.C.C.) — considered

Garland *v.* ***Consumers'*** ***Gas*** *Co.*, 1998 CarswellOnt 4053, 1998 CarswellOnt 4054, 231 N.R. 1, 40 O.R. (3d) 479 (headnote only), 165 D.L.R. (4th) 385, 129 C.C.C. (3d) 97, 114 O.A.C. 1, 20 C.R. (5th) 44, 49 M.P.L.R. (2d) 77, [1998] 3 S.C.R. 112 (S.C.C.) — considered

Gorman v. Karpnale Ltd., [1991] 2 A.C. 548, [1991] 3 W.L.R. 10, [1992] 4 All E.R. 512 (U.K. H.L.) — considered

M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., 1999 CarswellMan 368, 1999 CarswellMan 369, [1999] 9 W.W.R. 356, 176 D.L.R. (4th) 585, 245 N.R. 165, [1999] 2 S.C.R. 961, 35 C.P.C. (4th) 1, 138 Man. R. (2d) 161, 202 W.A.C. 161 (S.C.C.) — referred to

Mack v. Canada (Attorney General), 2002 CarswellOnt 2927, 217 D.L.R. (4th) 583, 96 C.R.R. (2d) 254, 60 O.R. (3d) 737, 60 O.R. (3d) 756, 165 O.A.C. 17, 24 Imm. L.R. (3d) 1 (Ont. C.A.) — referred to

Mahar v. Rogers Cablesystems Ltd., 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690, 1995 CarswellOnt 1195 (Ont. Gen. Div.) — referred to

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 128, 1982 CarswellOnt 738 (S.C.C.) — referred to

Oldfield v. Transamerica Life Insurance Co. of Canada, 2002 SCC 22, 2002 CarswellOnt 724, 2002 CarswellOnt 725, 210 D.L.R. (4th) 1, [2002] I.L.R. I-4058, 284 N.R. 104, 35 C.C.L.I. (3d) 165, 156 O.A.C. 310, 59 O.R. (3d) 160 (note), [2002] 1 S.C.R. 742 (S.C.C.) — referred to

Ontario Hydro v. Kelly, 159 D.L.R. (4th) 543, 1998 CarswellOnt 1695, 39 O.R. (3d) 107, 17 C.C.P.B. 186, 8 Admin. L.R. (3d) 128 (Ont. Gen. Div.) — referred to

Peel (Regional Municipality) v. Canada, (sub nom. *Peel (Regional Municipality) v. Ontario)* 144 N.R. 1, 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 1992 CarswellNat 659 (S.C.C.) — followed

Peter v. Beblow, [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — followed

R. v. Jorgensen, 43 C.R. (4th) 137, 102 C.C.C. (3d) 97, 129 D.L.R. (4th) 510, 189 N.R. 1, 87 O.A.C. 1, 32 C.R.R. (2d) 189, (sub nom. *R. v. Hawkins)* 25 O.R. (3d) 824, 1995 CarswellOnt 1185, [1995] 4 S.C.R. 55, 1995 CarswellOnt 985 (S.C.C.) — followed

R. v. Litchfield, 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321, 1993 CarswellAlta 160, 1993 CarswellAlta 568 (S.C.C.) — referred to

R. v. Wilson, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — considered

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 1978 CarswellSask 36, 1978 CarswellSask 129 (S.C.C.) — followed

RBC Dominion Securities Inc. v. Dawson, 111 D.L.R. (4th) 230, 114 Nfld. & P.E.I.R. 187, 356 A.P.R. 187, 1994 CarswellNfld 308 (Nfld. C.A.) — referred to

Reference re Excise Tax Act (Canada), *(*sub nom. *Reference re Goods & Services Tax)* 2 Alta. L.R. (3d) 289, *(*sub nom. *Reference re Goods & Services Tax)* 20 W.A.C. 161, *(*sub nom. *Reference re Bill C-62)* [1992] G.S.T.C. 2, *(*sub nom. *Reference re Goods & Services Tax)* [1992] 4 W.W.R. 673, *(*sub nom. *Reference re Goods & Services Tax)* 138 N.R. 247, *(*sub nom. *Reference re Goods & Services Tax)* 127 A.R. 161, *(*sub nom. *Reference re Goods & Services Tax)* [1992] 2 S.C.R. 445, *(*sub nom. *Reference re Goods & Services Tax (Alberta))* 94 D.L.R. (4th) 51, *(*sub nom. *Reference re GST Implementing Legislation)* 5 T.C.T. 4165, 1992 CarswellAlta 61, 1992 CarswellAlta 469 (S.C.C.) — referred to

Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 59 N.R. 321, 35 Man. R. (2d) 83, 1985 CarswellMan 183, 1985 CarswellMan 450 (S.C.C.) — considered

Sharwood & Co. v. Municipal Financial Corp., 2001 CarswellOnt 749, 197 D.L.R. (4th) 477, 12 B.L.R. (3d) 219, 142 O.A.C. 350, 53 O.R. (3d) 470 (Ont. C.A.) — referred to

Sprint Canada Inc. v. Bell Canada, 1997 CarswellOnt 4135, 79 C.P.R. (3d) 31 (Ont. Gen. Div.) — referred to

Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd., [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, 5 N.R. 23, 55 D.L.R. (3d) 1, 1975 CarswellSask 56, 1975 CarswellSask 97 (S.C.C.) — considered

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276 (S.C.C.) — referred to

Transport North American Express Inc. v. New Solutions Financial Corp., 2004 SCC 7, 2004 CarswellOnt 512, 2004 CarswellOnt 513, 40 B.L.R. (3d) 18, 316 N.R. 84, 235 D.L.R. (4th) 385, [2004] 1 S.C.R. 249, [2004] S.C.J. No. 9, 70 O.R. (3d) 255 (note), 18 C.R. (6th) 1, 17 R.P.R. (4th) 1, 183 O.A.C. 342 (S.C.C.) — referred to

Statutes considered:

Code civil du Québec, L.Q. 1991, c. 64

art. 1493 — referred to

art. 1494 — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 19 — referred to

s. 91 ¶ 27 — referred to

s. 92 ¶ 13 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 15 — considered

s. 347 — referred to

s. 347(1) — considered

s. 347(1)(b) — referred to

Municipal Franchises Act, R.S.O. 1990, c. M.55
Generally — referred to

Ontario Energy Board Act, R.S.O. 1990, c. O.13
Generally — referred to

s. 18 — considered

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B
s. 25 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 45.02 — considered

APPEAL by plaintiff from judgment reported at 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.), dismissing plaintiff's appeal from judgment granting **gas** company's motion to dismiss action against it.

POURVOI du demandeur à l'encontre de l'arrêt publié à 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.), qui a rejeté son pourvoi à l'encontre du jugement ayant accueilli la requête de la compagnie de gaz en rejet de l'action intentée contre elle.

***Iacobucci J.*:**

1 At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("OEBA"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at 5 per cent of the unpaid charges for that month. The LPP is a one-time penalty and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of 5 per cent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.) ("*Garland #1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the Code. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

> 18. An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

> 25. An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Criminal Code, R.S.C. 1985, c. C-46

> 15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.
>
> . . . . .
>
> 347.(1) Notwithstanding any Act of Parliament, every one who
>
> > (a) enters into an agreement or arrangement to receive interest at a criminal rate, or
> >
> > (b) receives a payment or partial payment of interest at a criminal rate,
>
> is guilty of
>
> > (c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
> >
> > (d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. Ontario Superior Court (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory language affords a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The OEBA indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its **consumers**. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Gen. Div.), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Ont. Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in ***Garland*** *#1* with respect to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the OEBA provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. Ontario Court of Appeal (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 OEBA (the equivalent provision to s. 18 of the 1990 OEBA) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that, while s. 25 provides a defence to any proceedings insofar as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.* (1978), [1979] 1 S.C.R. 275 (S.C.C.)). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing

criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence," it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurty C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(b) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, the Chief Justice stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O-13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28

1. Does the appellant have a claim for restitution?

    (a) Was the respondent enriched?

    (b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?

(b) Does s. 18 (now s. 25) of the OEBA ("s. 18/25") shield the respondent from liability?

(c) Is the appellant engaging in a collateral attack on the orders of the Board?

(d) Does the "regulated industries" defence exonerate the respondent?

(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?

(b) Should this Court make a declaration that the LLPs need not be paid?

(c) What order should this Court make as to costs?

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. Unjust Enrichment

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) an absence of juristic reason for the enrichment (*Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel*, *supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter*, *supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment." Other considerations, she held, belong more appropriately under the third element - absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated," he wrote at para. 95, "as a result

of each LPP received by **Consumers**' **Gas**, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter*, *supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was offset by a corresponding decrease in regular rates. Thus, McMurty C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [**Consumers**' **Gas**] customers in the form of lower **gas** delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that, where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit." It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains that the "straightforward economic analysis" from *Peter*, *supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel*, *supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (Ont. C.A.), at p. 478; Peter D. Maddaugh and John D. McCamus, *The Law of Restitution* (Aurora, Ont.: Butterworths, 1990), at p. 38; Lord Goff and Gareth Jones, *The Law of Restitution*, 6th ed. (London: Sweet & Maxwell, 2002), at p. 18). There simply is no doubt that **Consumers**' **Gas** received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to **Consumers**' **Gas**. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel*, *supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.); *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor Jacob S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *Journal of Contract Law* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP in finding that a benefit was not conferred "was really a change of position defence." I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) General Principles

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at p. 455 (adopted in *Pettkus*, *supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> . . . the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter*, *supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> . . . The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment" while English courts require "that the enrichment be unjust" (see discussion in L.D. Smith, "The Mystery of 'Juristic Reason' " (2000), 12 S.C.L.R. (2d) 211, at pp. 212-213). It is not of great use to speculate on why Dickson J. in *Rathwell*, *supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel*, *supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice."

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, others have decided cases by asking whether the plaintiff has a positive reason for demanding restitution." In his article, "The Mystery of 'Juristic Reason,' " *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust Enrichment - Restitution - Absence of Juristic Reason: *Campbell v. Campbell*" (2000), 79 Can. Bar Rev. 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely, the absence of a juristic reason. Because it is nearly impossible to do this,

he suggests that Canada would be better off adopting the British model, where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel*, *supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice." But, at the same time, there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. 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 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.

45 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.

46 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. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel*, *supra*, where she stated that courts must effect a balance between the traditional "category" approach, according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach, according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) Application

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell*, *supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.) ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter*, *supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.), the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution*, *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating, at p. 46:

> . . . it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 **Consumers**' **Gas** submits that the LPPs were authorized by the Board's rate orders, which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference*, *supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he writes, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [**Consumers**' **Gas**] with a defence under s. 18 of the OEBA because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [**Consumers**' **Gas's**] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code is intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require **Consumers**' **Gas** to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is

somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for **Consumers**' **Gas** to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.)). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to **Consumers**' **Gas** to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, **Consumers**' **Gas's** submissions are at first blush compelling. **Consumers**' **Gas** submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that **Consumers**' **Gas** could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because **Consumers**' **Gas** is operating in a regulated environment, their reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7 (S.C.C.).

56 **Consumers**' **Gas's** reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because they are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of their crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22 (S.C.C.), at para. 11; *New Solutions*, *supra*). Borins J.A. focused on this public policy consideration in his dissent. He held that, in light of this Court's decision in ***Garland** #1*, allowing **Consumers**' **Gas** to retain the LPPs collected in violation of s. 347 would let **Consumers**' **Gas** profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, **Consumers**' **Gas's** reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in ***Garland** #1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that **Consumers**' **Gas** was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of **Consumers**' **Gas** during this period. The reliance of **Consumers**' **Gas** on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative is sufficient to provide a juristic reason for **Consumers**' **Gas's** enrichment during this first period.

59 However, in 1994 when this action was commenced, **Consumers**' **Gas** was put on notice of the serious possibility that

it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LLPs were in excess of the s. 347 limit. **Consumers**' **Gas** could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble." After the action was commenced and **Consumers**' **Gas** was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for **Consumers**' **Gas** to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for **Consumers**' **Gas** to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 per cent, as defined in s. 347 of the *Criminal Code*.

B. Defences

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where 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 (*Storthoaks*, *supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower **gas** delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers, such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and

that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position defence appears to flow from considerations of equity. G.H.L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution*, 2nd ed. (Toronto: Carswell, 1992), at p. 458). In the leading British case on the defence, *Gorman v. Karpnale Ltd.* (1991), [1992] 4 All E.R. 512 (U.K. H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks*, *supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the Ontario Energy Board Act

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 OEBA. The former and the present sections are identical and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurty C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli*, *supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25 thus cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect **Consumers**' **Gas** from these types of claims. If the provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and, consequently, the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.); Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000), at pp. 369-370). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders; therefore, the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for **consumers**, would be served in the circumstances and, as a result, the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest.' " Absent such recognition in the statute of "public interest," he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (S.C.C.). In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse' " (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes; therefore, it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) De Facto Doctrine

80 **Consumers**' **Gas** submits that because it was acting pursuant to a disposition of law that was valid at the time - the Board orders - they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. **Consumers**' **Gas** is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, **Consumers**' **Gas** cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and, in my view, does not further the underlying purpose of the doctrine. In *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.), this Court held, at p. 756, that:

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that **Consumers**' **Gas** was a *de facto* officer acting under colour of authority when it charged LPPs to customers. **Consumers**' **Gas** is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, **Consumers**' **Gas** is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> . . . the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public *and private bodies corporate*, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which . . . *recognizes the existence of*, and protects from collateral attack, public or *private bodies corporate*, which, *though irregularly or illegally organized*, yet, under color of law, openly exercise the powers and functions of regularly created bodies . . . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example, where a corporation was incorporated under an invalid statute. It does not suggest that the acts of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755):

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in **Consumers**' **Gas's** argument that the *de facto* doctrine shields it from liability and, as a result, this doctrine should not be a bar to the appellant's recovery.

C. Other Orders Requested

(a) Preservation Order

85 The appellant, **Garland**, requests an "*Amax-type*" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Saskatchewan* (1976), [1977] 2 S.C.R. 576 (S.C.C.)). In my view, however, a preservation order is not appropriate in this case. **Consumers**' **Gas** has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax Potash Ltd.* can be distinguished from this case.

86 First, the appellant has not alleged that **Consumers**' **Gas** is an impecunious defendant or that there is any other reason to believe that **Consumers**' **Gas** would not satisfy a judgment against it. Even if there were some reason to believe that **Consumers**' **Gas** would not satisfy such a judgment, an *Amax Potash Ltd.*-type order allows the defendant to spend the monies being held in the ordinary course of business - no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent **Consumers**' **Gas** from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore), which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid R. 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that,

"Where the right of a party to a *specific fund* is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

88 Finally, the appellant's use of *Amax Potash Ltd.*, *supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598):

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. *Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose*. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration that the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and, as a result, such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including ***Garland*** *#1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by instalments," as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurty C.J.O., at para. 76 of his reasons:

> In this context, I note the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that **Consumers**' **Gas** repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* On June 2, 2004, the court issued a corrigendum correcting text; the change has been incorporated herein.

End of Document

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Fleming v. Fleming | 2001 CarswellOnt 974, [2001] O.J. No. 1052, 6 C.C.L.T. (3d) 271, 19 R.F.L. (5th) 274, 104 A.C.W.S. (3d) 354, [2001] W.D.F.L. 465 | (Ont. S.C.J., Mar 22, 2001)

1987 CarswellOnt 347
Supreme Court of Canada

Frame v. Smith

1987 CarswellOnt 347, 1987 CarswellOnt 969, [1987] 2 S.C.R. 99, [1987] W.D.F.L. 1896, [1987] S.C.J. No. 49, [1988] 1 C.N.L.R. 152, 23 O.A.C. 84, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 6 A.C.W.S. (3d) 263, 78 N.R. 40, 9 R.F.L. (3d) 225, 9 W.D.C.P. 125, J.E. 87-1003, EYB 1987-67479

FRAME v. SMITH and SMITH

Dickson C.J.C., Beetz, McIntyre, Chouinard,* Lamer, Wilson and La Forest JJ.

Heard: March 20, 1986
Judgment: September 17, 1987
Docket: No. 18164

Counsel: *S.B. Smart*, for appellant.
G. Frink, for respondents.

Subject: Family; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Family law

IX Custody and access
IX.13 Enforcement of order

Headnote

Family Law --- Custody and access — Access — Enforcement of order

Children — Custody and access — Civil action for interference with access — Father awarded access — Mother deliberately denying access notwithstanding specific access orders — Father incurring expenses and suffering stress because of denial of access — Father having no cause of action based on mother's interference with access rights — Family Law Act; Children's Law Reform Act.

Following separation, the mother was awarded custody and the father was granted liberal access. Subsequently, more specific

access orders were made. The wife moved with the children to various cities without notifying the father, changed the children's names and religion, told them the father was not their father, intercepted the father's letters to the children and denied him telephone contact with the children. As a result of the mother's actions, the father incurred considerable expense and underwent emotional stress. The father sued for damages for wrongful interference with his legal relationship with his children. The mother's application to strike was granted at trial and upheld by the Ontario Court of Appeal. The father appealed to the Supreme Court of Canada.

Held:

Appeal dismissed.

Per La Forest J. (Dickson C.J.C., Beetz, McIntyre and Lamer JJ. concurring)

No tort action exists for wrongful interference with access rights. The old causes of action which gave some protection to a father's interest in his children have been abolished and the tort of conspiracy cannot be extended to cover the situation. Any possible judicial initiative to protect access rights civilly has been overtaken by legislative action. The legislature has devised a comprehensive scheme for dealing with family breakdown, custody and access which does not envisage additional civil action. Further, a breach of a statutorily authorized order for access does not give rise to a fiduciary relationship on which a cause of action can be grounded. Permitting civil actions against custodial parents cannot be said to be in the best interests of the child, whether it be by creating a tort or by recognizing a fiduciary relationship arising out of a court order.

Per Wilson J. (dissenting)

The torts of conspiracy, intentional infliction of mental suffering and unlawful interference with another's relationship should not extend to the family law situation. Such actions would do little to encourage and develop the parent-child relationship and could lead to abuse, unreasonable litigation and vindictive behaviour. Nor can a person assert a civil cause of action based on the "right" of access embodied in a court order because of the potential for abuse and the comprehensive nature of custody/access enforcement legislation.

A person who has been denied access may, however, assert a cause of action based on breach of a fiduciary duty. Such a cause of action should only be allowed in any particular case if there is no risk of harm to the children and where there has been a sustained denial of access causing severe damage to the relationship between the access parent and the child. In the circumstances, the father could establish an actionable breach of fiduciary duty and should be entitled to equitable compensation.

Table of Authorities

Cases considered:

Considered by majority:

Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385, 47 N.R. 191 — *referred to*

Gottlieb v. Gleiser, [1958] 1 Q.B. 267, [1957] 3 All E.R. 715 — *referred to*

Kungl v. Schiefer, [1962] S.C.R. 443, 33 D.L.R. (2d) 278 — *referred to*

O'Byrne v. Koresec (1986), 2 R.F.L. (3d) 104 (B.C.S.C.) — *referred to*

R. in Right of Can. v. Sask. Wheat Pool, [1983] 1 S.C.R. 205, [1983] 3 W.W.R. 97, 23 C.C.L.T. 121, 143 D.L.R. (3d) 9, 45 N.R. 425 — *applied*

Schrenk v. Schrenk (1982), 36 O.R. (2d) 480, affirming 32 O.R. (2d) 122 (C.A.) — *referred to*

Seneca College of Applied Arts & Technology Bd. of Gov. v. Bhadauria, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 81 C.L.L.C. 14,117, 14 B.L.R. 157, 2 C.H.R.R. D/468, 124 D.L.R. (3d) 193, 37 N.R. 455 — *applied*

St. Anne Nackawic Pulp & Paper Co. v. C.P.W.U., Loc. 219, [1986] 1 S.C.R. 704, 86 C.L.L.C. 14,037, 28 D.L.R. (4th) 1, 73 N.B.R. (2d) 236, 184 A.P.R. 236, 68 N.R. 112 — *referred to*

Considered by Wilson J.:

A.G. v. Goddard (1929), 98 L.J.K.B. 743 — *considered*

A.G. v. Premier Line, Ltd., [1932] 1 Ch. 303 — *referred to*

A.G. v. Sharp, [1931] 1 Ch. 121 (C.A.) — *referred to*

A.G. Can. v. Inuit Tapirisat of Can., [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.] — *referred to*

Can. Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371 [Ont.] — *referred to*

Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385, 47 N.R. 191 — *considered*

Currie v. Currie (1975), 18 R.F.L. 47 (Alta. S.C.) — *referred to*

Dom. Bank v. Jacobs, [1951] O.W.N. 421, [1951] 3 D.L.R. 233 (H.C.) — *referred to*

Donald v. Donald (1973), 6 N.B.R. (2d) 665 (C.A.) — *referred to*

Dowson and Mason Ltd. v. Potter, [1986] 2 All E.R. 418 (C.A.) — *referred to*

English v. Dedham Vale Properties Ltd., [1978] 1 W.L.R. 93, [1978] 1 All E.R. 382 (Ch. D.) — *referred to*

Fast v. Fast (1983), 33 R.F.L. (2d) 337, 27 Sask. R. 96 (C.A.) — *referred to*

Guay v. Sun Publishing Co., [1953] 2 S.C.R. 216, [1953] 4 D.L.R. 577 [B.C.] — *referred to*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, *(*sub nom. *Guerin v. Can.)* 55 N.R. 161 — *referred to*

Hosp. Products Ltd. v. U.S. Surgical Corp. (1984), 55 A.L.R. 417 (H.C.) — *considered*

Int. Corona Resources Ltd. v. Lac Minerals Ltd. (1986), 53 O.R. (2d) 737, 9 C.P.R. (3d) 7, 39 R.P.R. 113, 32 B.L.R. 15, 25 D.L.R. (4th) 504 (H.C.) — *referred to*

Jirna Ltd. v. Mister Donut of Can. Ltd., [1972] 1 O.R. 251, 3 C.P.R. (2d) 40, 22 D.L.R. (3d) 639, affirmed [1975] 1 S.C.R. 2, 12 C.P.R. (2d) 1, 40 D.L.R. (3d) 303 — *referred to*

Jones v. Jones (1970), 1 R.F.L. 295 (Ont. C.A.) — *referred to*

Kungl v. Schiefer, [1962] S.C.R. 443, 33 D.L.R. (2d) 278 [Ont.] — *referred to*

Lumley v. Gye (1853), 2 E. & B. 216, 118 E.R. 749 — *referred to*

M v. M (child: access), [1973] 2 All E.R. 81 — *referred to*

Misener v. H.L. Misener & Son Ltd. (1977), 2 B.L.R. 106, 3 R.P.R. 265, 77 D.L.R. (3d) 428, 21 N.S.R. (2d) 92 (C.A.)*considered*

Mogul S.S. Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598 (C.A.) — *considered*

Moore Dry Kiln Co. of Can. v. Green Cedar Lumber Co. (1982), 37 O.R. (2d) 300 (H.C.) — *referred to*

Mulcahy v. R. (1868), L.R. 3 H.L. 306 — *considered*

Nayer v. Nayer (1981), 24 R.F.L. (2d) 400 (B.C.C.A.) — *referred to*

Nocton v. Asburton (Lord), [1914] A.C. 932 (H.L.) — *applied*

Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1 — *referred to*

R. v. Greenhill (1836), 4 Ad. & El. 624, 111 E.R. 922 — *referred to*

Racine v. Woods, [1983] 2 S.C.R. 173, *(*sub nom. *A.N.R. v. L.J.W.)* 36 R.F.L. (2d) 1, [1984] 1 W.W.R. 1, 1 D.L.R. (4th) 193, [1984] 1 C.N.L.R. 161, 24 Man. R. (2d) 314, 48 N.R. 362 — *considered*

Radovskis v. Tomm (1957), 65 Man. R. 61, 21 W.W.R. 658, 9 D.L.R. (2d) 751 (Q.B.) — *referred to*

Ratcliffe v. Evans, [1892] 2 Q.B. 524 (C.A.) — *referred to*

Reading v. A.G., [1951] A.C. 507, [1951] 1 All E.R. 617 (H.L.) — *considered*

R.H. Deacon & Co. v. Varga, [1973] 1 O.R. 233, 30 D.L.R. (3d) 653, 1 N.R. at 80, affirmed [1975] 1 S.C.R. 39, 41 D.L.R. (3d) 767, 1 N.R. 79 — *referred to*

Rookes v. Barnard, [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.) — *referred to*

Seager v. Copydex Ltd., [1967] 1 W.L.R. 923, [1967] 2 All E.R. 415 (C.A.) — *applied*

Seager v. Copydex Ltd., [1969] 1 W.L.R. 809 — *applied*

Seneca College of Applied Arts & Technology Bd. of Gov. v. Bhadauria, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 81 C.L.L.C. 14, 117, 14 B.L.R. 157, 2 C.H.R.R.D./468, 124 D.L.R. (3d) 193, 37 N.R. 455 — *distinguished*

Standard Invts. Ltd. v. C.I.B.C. (1985), 52 O.R. (2d) 473, 30 B.L.R. 193, 22 D.L.R. (4th) 410, 11 O.A.C. 318 (C.A.) [leave to appeal to S.C.C. refused 53 O.R. (2d) 663n, 15 O.A.C. 237n, 65 N.R. 78n] — *referred to*

Tufton v. Sperni, [1952] 2 T.L.R. 516 (C.A.) — *referred to*

U.S. Surgical Corp. v. Hosp. Products Int. Pty. Ltd., [1982] 2 N.S.W.L.R. 766 (S.C.) — *referred to*

Woodburn v. Woodburn (1975), 21 R.F.L. 179, 11 N.S.R. (2d) 528 (S.C.) — *referred to*

Wilkinson v. Downton, [1897] 2 Q.B. 57 — *considered*

Wright v. Wright (1973), 1 O.R. (2d) 337, 12 R.F.L. 200, 40 D.L.R. (3d) 321 (C.A.) — *referred to*

Zik v. High (1981), 35 O.R. (2d) 226 (H.C.) — *considered*

Statutes considered:

Children's Law Reform Act, R.S.O. 1980, c. 68

s. 19(a), (d)

s. 24

s. 35

s. 36

s. 37

s. 38

s. 39

s. 40

Children's Law Reform Amendment Act, S.O. 1982, c. 20

s. 1

Custody of Infants Act (Talfourd's Act), 1839 (2 & 3 Vict., c. 54)

s. 5

Divorce Act, S.C. 1986, c. 4

s. 16(10)

Family Law Reform Act, R.S.O. 1980, c. 152

s. 60

s. 69(4)

Guardianship of Infants Act, 1886 (49 & 50 Vict.), c. 27

Guardianship of Minors Act, S.O. 1887, c. 21

Human Rights Code, R.S.O. 1970, c. 318

Judicature Act, R.S.O. 1980, c. 223

s. 25

Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66)

Authorities considered:

Austin, "The Corporate Fiduciary: Standard Investments Ltd. v. Canadian Imperial Bank of Commerce" (1986-87), 12 Can. Bus. L.J. 96.

Brown, "Franchising — A Fiduciary Relationship" (1971), 49 Texas Law Rev. 650.

Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C.L. Rev. 229.

Davidson, "The Equitable Remedy of Compensation" (1982), 13 Melbourne Univ. Law Rev. 349.

Finn, Fiduciary Obligations (1977).

Fleming, Law of Torts, 6th ed. (1983), p. 32.

Goff and Jones, The Law of Restitution, 2nd ed. (1978), pp. 490-91.

16 Hals. (4th) 815, para. 1215

Heffey, "The Survival of Civil Conspiracy: A Question of Magic or Logic" (1975), 1 Monash Univ. Law Rev. 136.

Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968), 84 L.Q.R. 472.

Keeton and Seridan, Equity (1969), pp. 336-52.

Maidment, Child Custody and Divorce: The Law in Social Context (1984), pp. 93-95.

Mason, "Themes and Prospects", in Finn (ed.), Essays in Equity (1985), p. 246.

McLeod, annotation, *O'Byrne v. Koresec* (1986), 2 R.F.L. (3d) 104.

Milner, "Injuries to Consortium in Modern Anglo-American Law" (1958), 7 Int. & Comp. Law Q. 417.

Mosberg, "A Parent's Cause of Action for the Alienation of a Child's Affection" (1973-74), 22 Kansas Law Rev. 684.

Ontario Law Reform Commission, Report on Family Law (1969).

Restatement of the Law of Torts (1938).

Shepherd, The Law of Fiduciaries (1981), pp. 4-8, 94, 98, 138-41.

Solomon, Feldthusen and Mills, Cases and Materials on the Law of Torts, 2nd ed. (1986), p. 6.

Vinter, A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts, 3rd ed. (1955).

Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1.

Williams, "The Foundations of Tortious Liability" (1939), 7 Cambridge Law J. 111.

Appeal from judgment of Ontario Court of Appeal dismissing appeal from judgment of Boland J. granting order to strike for want of reasonable cause of action.

Wilson J. **(dissenting):**

1 The central issue in this case is whether the courts should recognize a common law parental right of access to children or, alternatively, a right to recover damages for interference with an order for access made by a court pursuant to statutory authority. The issue arises in the context of an application to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action. Because this is the context there is no evidence in the record to support the allegations made in the statement of claim but, in accordance with well established principles, the facts as pleaded must for this limited purpose be taken as proved.

1. The Facts

2 In September 1962 the appellant (plaintiff) and the respondent Eleanor Smith were married in Winnipeg. In the ensuing years they had three children. The eldest, Richard, was born in 1963; Kathleen was born in 1967; and the youngest, Diane, was born in 1969. In November 1970 Eleanor Smith left the appellant to live with another man. She subsequently returned to the matrimonial home in Montreal for a brief period of time. However, she left again, ostensibly to stay with her parents in Winnipeg and to seek counselling. She took the children with her. Once in Winnipeg she instituted proceedings for their custody. At some stage — it is not clear from the pleadings precisely when — the appellant took similar steps in Manitoba. On 12th August 1971 a judge of the family court in Winnipeg awarded Eleanor Smith custody of the three children. The appellant was awarded "generous visiting privileges".

3 Some time around February 1972 Eleanor Smith and the co-defendant Johnston Smith began living together. During 1973 they left Winnipeg and took the children with them. They did not tell the appellant that they were leaving the city. After several months of searching the appellant managed to locate his children who were with the respondents in Toronto. He was prevented from seeing his children. The respondents told him "You are not their father. Stay away from them". So the appellant applied to the Ontario courts to spell out his access rights more specifically. On 22nd November 1974 Master Davidson of the Supreme Court of Ontario ordered Eleanor Smith to provide specified access to the appellant so that he could see and spend time with his children. A further order for access was made by Master Davidson in January 1975. In October 1976 the ap pellant went to Toronto to see his children but found the house deserted and no indication where the children or the respondents had gone. The respondents knew the appellant was coming to Toronto to see his children on that occasion. It took the appellant six months of searching to find them. They were living with the respondents in Denver, Colorado. On being discovered there, they all moved back to Toronto.

4 The appellant pleads that from 1972 on the respondents made it extremely difficult, if not impossible, for him to have any contact with his children. They deliberately limited or prevented telephone contact. They diverted the letters and gifts he sent them. They also instructed the children not to attempt to contact the appellant. The children were told not to use their real surname, Frame; they were to use the surname, Smith. Against the express wishes of the appellant the children's religion was changed by the respondents. Throughout the years the respondents told the children that the appellant was not their father, that they were to regard Johnston Smith as their father.

5 The appellant has since 1972 expended considerable amounts of money trying to maintain his relationship with his children. He has sought the assistance of the courts to no avail. The respondents' behaviour has frustrated him at every turn. Moreover, since 1977 the appellant has had to seek medical treatment for severe depression resulting from the respondents' conduct. They have effectively deprived him of a normal, meaningful, parent-child relationship or, indeed, of any relationship at all with his children.

6 In April 1982 the appellant issued a writ against the respondents in the Supreme Court of Ontario. A statement of claim was filed some months later. It contained several allegations concerning the respondents' interference with the appellant's access to his children and identified a number of heads under which the cause of action might be subsumed including wilful infliction of harm on the appellant, intentional interference with a legal right of the appellant and conspiracy to do either or both. The appellant sought general damages of $1,000,000, punitive damages of $500,000 and special damages estimated at $25,000. He did not seek access to his children as they were by that time all over 15 years of age and his relationship with them had been completely destroyed.

2. The Courts Below

7 In response to the statement of claim counsel for the respondents moved under R. 126 of the Ontario Rules of Practice for an order striking it out as disclosing no reasonable cause of action. Boland J., considering herself bound by the earlier decision of Gray J. in *Schrenk v. Schrenk*, 32 O.R. (2d) 122, affirmed (1982), 36 O.R. (2d) 480 (C.A.), made the order.

8 The appellant appealed to the Ontario Court of Appeal. His appeal failed. In an endorsement on the record Blair J.A. indicated that the court was unable to distinguish this claim from the claim in *Schrenk*, supra, and he saw no reason to depart from the position taken in that case.

3. The Issue

9

(i) General considerations

10 The appellant argues that all the elements of a cause of action have been pleaded, namely, wilful infliction of harm or intentional interference with a legal right. He adds that these causes of action are not prohibited by s. 69(4) of the Family Law Reform Act, R.S.O. 1980, c. 152, which provides as follows:

> (4) No action shall be brought by a parent for the enticement, harbouring, seduction or loss of services of his or her child or for any damages resulting therefrom.

In substance, the appellant's case rests on the premise that tort liability is founded on a general principle of liability for wilful damage subject to certain exceptions. Accordingly, he argues, the abrogation of certain heads of liability by s. 69(4) of the Family Law Reform Act only negates a claimant's ability to recover for the infliction of harm in those specific situations. The appellant argues that the harm he has experienced falls outside these discrete categories and is therefore actionable.

11 The appellant's argument is reminiscent of one side of a debate begun in the last century which is yet to be resolved. It has been described in Solomon, Feldmusen and Mills, Cases and Materials on the Law of Torts, 2nd ed. (1986), as follows (at p. 6):

> Initially, the search for a theoretical basis for tort law centred on the issue of whether there was a general principle of tortious liability. Sir John Salmond argued that tort law was merely a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability [see Salmond, *The Law of Torts* (6th ed., 1924) at pp. 9-10]. Essentially the law of torts was a finite set of independent rules, and the courts were not free to recognize new heads of liability. In contrast, writers such as Pollock contended that the law of torts was based upon the single unifying principle that all harms were tortious unless they could be justified [see Pollock, *The Law of Torts* (13th ed., 1929) at p. 21]. The courts were thus free to recognize new torts. Glanville Williams suggested a compromise between the two viewpoints. He argued that tort law historically exhibited no comprehensive theory, but that the existing categories of liability were sufficiently flexible to enable tort law to grow and adapt.

12 While it would perhaps be interesting for the court to join in this debate, I think that Dr. Glanville Williams' pragmatic resolution of the question correctly characterizes the task before the court when confronted with a heretofore unprecedented basis for liability: see Williams, "The Foundations of Tortious Liability" (1939), 7 Cambridge Law J. 111. He wrote at p. 131:

> Why should we not settle the argument by saying simply that there are some general rules creating liability (recognizing the plaintiff's interest, conferring upon him a right not to be damaged), and some equally general rules exempting from liability (refusing to recognize the plaintiff's interest, or recognizing a conflicting interest in the defendant, and thus conferring a privilege upon the defendant to cause damage)? Between the two is a stretch of disputed territory, with the Courts as an unbiased boundary commission. If, in an unprovided case, the decision passes for the plaintiff, it will be not because of a general theory of liability but because the Court feels that here is a case in which existing principles of liability may properly be extended.

Thus, whatever one considers the theoretical foundation of liability to be, it is not enough for the appellant simply to invoke a general principle of freedom from harm. Rather, he must show why "existing principles of liability may properly be extended", that is, he must identify the nature of the right he invokes and justify its protection. But the appellant in the circumstances of this case must do more. Because he is claiming protection for a right involving the wellbeing of children, in addition to justifying its protection by an existing principle of liability, the appellant must also satisfy the court that to afford legal protection for such a right would be in the best interests of children.

13 The award of a court order of custody to one parent and access to the other is premised on the existence of a relationship between the custodial parent and the child and another relationship between the non-custodial parent and the child, the maintenance and development of both relationships being considered by the court making the order to be in the best interests of the child. But the bitterness arising from litigation brought by one parent against the other may result in the destruction of one or both of the child's relationships. At the very least it may cause conflict in the child's loyalties. This cannot be in the child's best interests and the traumatization and upset caused by it can clearly be detrimental.

14 By the same token, however, it clearly cannot be in the best interests of children to have custodial parents defy with impunity court orders designed to preserve their relationship with their non-custodial parents. The order for access to the non-custodial parent would not have been made had it not been found by the trial judge to be in the child's best interests. Accordingly, the custodial parent who denies access to the other parent is sacrificing the child's best interests as so found to his or her own selfish interests and this would appear, as a general principle at least, to favour a policy of intervention by the law to protect the child's best interests in such circumstances. This is not to deny that in specific cases that general policy of intervention in order to uphold what has been found to be in the child's best interests may have to yield to a greater threat to the child's interests arising from the fact of litigation by one parent against the other. It is simply to say that the limits on any cause of action which the law might recognize would have to be the result of a weighing of the positive against the negative factors impacting on the children.

15 The proper test for the disposition of a motion under R. 126 (now R. 21.01(1)(*b*)) to strike out a statement of claim as disclosing no cause of action must also be borne in mind. It is well established that the power to strike is to be exercised sparingly and only when there is no doubt that no cause of action exists: see *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1; *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304; *Moore Dry Kiln Co. of Can. v. Green Cedar Lumber Co.* (1982), 37 O.R. (2d) 300 (H.C.). It is also well established that "a pleading should not be struck out unless it is incurable by a proposed amendment": *Dom. Bank v. Jacobs*, [1951] O.W.N. 421 at 423, [1951] 3 D.L.R. 233 (H.C.). While the normal rule in such motions is that any doubt is to be resolved in favour of finding the existence of the cause of action and permitting the action to proceed, given the overriding importance of ensuring that such litigation is in the best interests of the children in a particular case, the court may impose a more stringent standard before it allows the action to be brought.

16 With these considerations in mind, I turn to an examination of the various causes of action advanced by the appellant.

(ii) Possible causes of action

17 The appellant correctly notes that s. 69(4) of the Family Law Reform Act abolishes the old actions of enticement, harbouring or seduction and loss of services. As well, it should be added that this court has already unanimously rejected "alienation of affections" as a separate head of liability: see *Kungl v. Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278 [Ont.]. In that case Cartwright J. held that there was no separate action for alienation apart from an action for criminal conversation or enticement. Now that these causes of action have been abolished by the Family Law Reform Act, clearly, no recovery can be permitted for "alienation of affections" in respect of these causes of action. The appellant advances a number of other causes of action.

(a) Conspiracy

18 Counsel for the appellant submitted that the tort of conspiracy was available to the appellant. This court in *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-72, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385, 47 N.R. 191, while conceding that "the law concerning the scope of the tort of conspiracy is far from clear", held that the law of torts recognizes a conspiracy claim against two or more defendants if:

> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

This case would seem to fit within either of these two branches. The plaintiff may well be able to establish at trial that the predominant purpose of the defendants' conduct was to cause injury to the plaintiff. In addition, since the defendants' conduct in violating the court order was unlawful, if it is proved at trial that the conduct was directed at the plaintiff and that the defendants should have known that injury to the plaintiff was likely to and did result, this case would fall squarely within the second branch. In my view, therefore, given this court's holding in *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, supra, this tort is capable of extension to the family law context. The real question is whether such an extension should be permitted.

19 It would be my view that the tort of conspiracy should not be extended to the family law context. Although "the law concerning the scope of the tort of conspiracy is far from clear", the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context. As was said by Estey J. in *Can. Cement LaFarge Ltd.* at p. 473:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho* ... In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly.

20 The criticisms of the tort to which Estey J. refers focus on the rationale for the tort and thus are not confined to the commercial context but extend to other contexts as well. The rationale of the tort was explained by Bowen L.J. in *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 616 (C.A.):

> ... a combination may make oppressive or dangerous that which if proceeded only from a single person would be otherwise ...

Noting that in many cases this "totem of numbers" is demonstrably false, one commentator asserts that "the question of abolishing ... conspiracy to injure must be seriously considered": Peter Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C.L. Rev. 229 at 254. Another commentator notes that the tort "rests rather shakily on a notion of plurality which derives more from magic than reason": Peter G. Heffey, "The Survival of Civil Conspiracy: A

Question of Magic or Logic" (1975), 1 Monash Univ. Law Rev. 136. This court, however, affirmed the ongoing existence of the tort in *Can. Cement LaFarge Ltd.* Estey J. stated at p. 473:

> ... it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

21 In light of these comments I would not extend the tort of civil conspiracy to the custody and access context. Such an extension would not be consistent with the rationale expressed in *Mogul*, namely, that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination. I do not believe that in cases such as the one at bar the combination makes "oppressive or dangerous that which if proceeded only from a single person would be otherwise". The conduct of the custodial parent, if proven, is equally "oppressive or dangerous" whether done singly or in combination. If the tort of conspiracy is applied to the facts of this case, an arbitrary and unjustifiable distinction would emerge. The alleged conspiracy by the defendants would be actionable but the same conduct done by the spouse alone would not be actionable (for reasons to be discussed post). The differing treatment of these two situations for no principled reason and, indeed, the lack of any principle supporting the extension of the tort to the "conspiracy" in this case, lead me to conclude that this tort should not be extended to the family law context.

22 Another rather arbitrary distinction inherent in the conspiracy concept is the distinction between an actual agreement (actionable) and a likely but unproven agreement (not actionable): *Mulcahy v. R.* (1868), L.R. 3 H.L. 306. Proving such an agreement is a very difficult task. Resolving this difficulty in the family law context by extending the tort to "likely" agreements or "presumed" agreements would, in effect, presume the spouse's "friend" liable merely because of his or her association with the custodial spouse, a rather drastic step.

23 But the paramount concern in extending the tort of conspiracy into the family law context is, I think, that such an extension would not be in the best interests of children. If the tort only applies to conduct in combination it would do little to encourage the maintenance and development of a relationship between both parents and their children. Yet it would be tailor-made for abuse. It would lend itself so readily to malicious use by one spouse against the other. The fact that the action is against not only the ex-spouse but also his or her "friend" may well provide an incentive to the plaintiff to litigate. Moreover, a single "agreement" to deny the plaintiff one visitation would be actionable and the success of that action would depend largely on uncertain evidence of agreement and intention as to which each party might be expected to take a fundamentally different view. These factors — incentive to litigate, low threshold for actionability, uncertainty of success and issues of credibility with respect to the crucial evidence — suggest frequent resort to this cause of action as a "weapon" with little possibility of amicable settlement. These concerns are aggravated by the fact that, if the tort of conspiracy were introduced into the family law context, it would be difficult to restrict it to the area of custody and access. Acts which contributed to marriage breakdown would also be actionable as conspiracy and the potential for detrimental impact on the children could be substantial. Having regard to the overriding concern for the best interests of the children, I am not persuaded that the tort of conspiracy should be extended to encompass the claim of the plaintiff.

(b) Other torts

24 Counsel for the appellant submitted that the torts of intentional infliction of mental suffering and unlawful interference with another's relationship could cover the facts as pleaded. It may well be that the tort of intentional infliction of mental suffering could be extended to cover the facts alleged by the appellant. The requirements of this cause of action were set out in the case of *Wilkinson v. Downton*, [1897] 2 Q.B. 57. In that case the defendant as a "practical joke" told the plaintiff that her husband had been involved in an accident and had broken his legs. The plaintiff believed the defendant and as a result suffered nervous shock and a number of physical consequences. In granting recovery, Wright J. stated at p. 59:

> One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under

> the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable.

25 In this case, the conduct of the respondents may have been "plainly calculated to produce some effect of the kind which was produced". Certainly the conduct appears to be of the extreme and outrageous character which was held in *Wilkinson v. Downton*, supra, to be required before this cause of action exists. But there are a number of disadvantages associated with this tort which make me reluctant to extend it to the facts of this case. One such disadvantage is that a visible and provable illness caused by the defendant's action must be present for this tort to be actionable: see *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216 at 238, [1953] 4 D.L.R. 577 [B.C.], per Estey J.; *Radovskis v. Tomm* (1957), 65 Man. R. 61, 21 W.W.R. 658 at 664, 9 D.L.R. (2d) 751 (Q.B.). This requirement is based on the need to discourage spurious claims — an especially pressing need in the family law context where unnecessary and vexatious litigation is to be discouraged. Another disadvantage associated with this tort is that, even if it were extended to cover the case at bar, it might not provide the plaintiff with the compensation that he wishes. According to John G. Fleming, The Law of Torts, 6th ed. (1983), p. 32, "our courts, while at last admitting that injury to the nervous system is capable of causing recognisable physical harm, are not yet prepared to protect emotional security as such ..." If such a cause of action were extended to the facts of this case the appellant could only be entitled to recover damages stemming from recognizable physical or psychopathological harm caused by the actions of the defendant. This would include only the damages stemming from the appellant's treatment for mental depression. In my view, if another cause of action better vindicates the plaintiff's interest and is in the best interests of the children, this particular cause of action should not be recognized.

26 Finally, and most importantly, the extension of this cause of action to the custody and access context would not appear to be in the best interests of children. Like the tort of conspiracy the tort of intentional infliction of mental suffering would be relatively ineffective in encouraging conduct conducive to the maintenance and development of a relationship between both parents and their children. It is obvious also that such a cause of action, if it were made available throughout the family law context, would have the same potential for petty and spiteful litigation and, perhaps worse, for extortionate and vindictive behaviour as the tort of conspiracy. Indeed, the tort of intentional infliction of mental suffering appears to be an ideal weapon for spouses who are undergoing a great deal of emotional trauma which they believe is maliciously caused by the other spouse. It is not for this court to fashion an ideal weapon for spouses whose initial, although hopefully short-lived, objective is to injure one another, especially when this will almost inevitably have a detrimental effect on the children. Yet, if this cause of action were extended to encompass the facts of this case, it seems to me that there is no rational basis upon which its extension to other areas of family law could be resisted. The gist of the tort is the intentional infliction of mental suffering regardless of the relationship between plaintiff and defendant. It would be available in respect of all inter-spousal conduct both before and after marital breakdown. I would therefore not extend this common law tort to the family law context where the spinoff effects on the children could only be harmful.

27 There would appear to be no generalized tort of "wrongful interference with another's relationship" as the appellant submits. The law of torts up to this point has protected only certain types of relationships from interference. Relief has been granted for interference with contractual relationships (e.g., *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749), interference through intimidation and unlawful means (e.g., *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.)), and interference with economic relations through injurious falsehood (e.g., *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 (C.A.)). The common denominator of these torts is that they constitute wrongful interference with economic relationships and I do not think they should be extended to a non-economic relationship such as the one under review. As in the case of the tort of intentional infliction of mental suffering, if they were extended to the area of custody and access, there is no rational basis upon which their extension to other areas of family law could be resisted. They would be available in respect of all inter-spousal conduct both before and after marital breakdown and torts grounded in intimidation and injurious falsehood would again seem to be tailor-made for spouses, so motivated, to use against each other. Their extension to the family law area would not, it seems to me, be in the best interests of children.

28 But there are two other causes of action which could loosely be said to fall within the rubric of "wrongful interference with another's relationship" and which may well cover the case at bar. These are (a) a cause of action for interference with a right of access founded on the common law or the court order, and (b) a cause of action for breach of a fiduciary duty owed by the custodial to the non-custodial parent to respect the latter's relationship with the child. As neither has traditionally been

regarded as a "tort", I shall deal with them under separate headings.

(c) The enforcement of a parental right

29 The appellant submitted by way of alternative to his claims in tort that a parent has at common law a right of access to his children upon which a civil suit can be based. He submitted further that a parent has a legally enforceable right of access pursuant to the order of the court. These might be seen as separate sources of his parental right or, alternatively, the court order might be viewed as declaratory of his common law right for purposes of enforcement. The respondents submitted that there was no such thing as a right of access at common law, that access was part of a bundle of rights compendiously constituting custody, that the sole source of the appellant's access right was the court order and that the mechanisms for enforcement enacted in the Children's Law Reform Amendment Act, S.O. 1982, c. 20, were the only means of enforcement. They did not include the type of cause of action pleaded in this case.

30 I believe that there is considerable support for the view that access as a distinct juridical concept is purely a creature of statute. Prior to statute, fathers had an almost absolute common law right to the custody of their children to the total exclusion of mothers: see, for example, *R. v. Greenhill* (1836), 4 Ad. & El. 624, 111 E.R. 922, and for a general discussion see Susan Maidment, Child Custody and Divorce: The Law in Social Context (1984), at pp. 93-95. It was not until 1839 that the rigours of this common law rule were ameliorated. In that year the British Parliament empowered the Court of Chancery in the Custody of Infants Act, 1839 (U.K.), 2 & 3 Vict., c. 54, (Talfourd's Act), to make an order for the access of a mother to her children. The same statute permitted women to apply for custody of their children under 7 years of age. But there could be no order for access except as an adjunct to an order for custody. Custody and access were conceptually linked under Talfourd's Act and have been so ever since. It is therefore doubtful that a common law right of access exists independently of statute.

31 Even if a common law parental right of access pre-existed and survived the passage of Talfourd's Act, the subsequent development of the law of custody and access may have effectively eliminated it. The English Supreme Court of Judicature Act, 36 & 37 Vict., c. 66, expressly stipulated that in matters concerning the custody and guardianship of infants the rules of equity were to prevail over the common law: see the Judicature Act, R.S.O. 1980, c. 223, s. 25, repealed and replaced by Courts of Justice Act, S.O. 1984, c. 11, s. 109. The paramountcy of the father's claim at common law had to yield to an equitable weighing of the merits of the respective claims of each parent and in this context the question of what would be best for the child became an important consideration. In 1886, the British Parliament passed the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27), which provided in s. 5 that a court could make "such order as it may think fit regarding the custody of [an] infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father ..." In Ontario this statute was essentially duplicated in the Guardianship of Minors Act, S.O. 1887, c. 21.

32 At first the courts were much more comfortable assessing the competing claims of parents than they were in trying to decide what was in the best interests of children. But over time the best interests of children increasingly became an important concern of the court and today it is the paramount concern. See the Children's Law Reform Act, as amended by the Children's Law Reform Amendment Act, S.O. 1982, c. 20, s. 1, which added s. 24, for a statutory expression of this principle. In light of these developments it can be said with some assurance that the concept of "parental rights" has fallen into disfavour. Parental responsibilities yes, but rights no. It appears, therefore, that the appellant is on shaky ground when he bases his case for damages on a violation or destruction of his "parental right" to access at common law. The access right has become the child's right, not the parent's right, and it would be a regressive step to recognize today a cause of action in the parent based on an outmoded concept of parental rights in children: see, for example, *M v. M (child: access)*, [1973] 2 All E.R. 81. Accordingly, to summarize, I believe that the appellant cannot rely on the common law as the source of his right. He must rely on the court order because: (a) it is doubtful that a common law right of access independent of the statutory right granted by the court exists; and (b) even if such a right survived or came into existence after the enactment of Talfourd's Act, it could not have survived to the present day in the face of the shift in emphasis from parental rights to children's rights. In my view, the court order, which establishes that the appellant's ac cess to his children is in his children's best interests, is the only possible source of the right he claims.

33 Three very persuasive factors lead me to hold that the appellant does not have a civil cause of action based on the "right" of access embodied in the court order. First, it is simply not in the child's best interests to recognize the general availability of an action based on the court order. Such an action would be available every time a visitation was denied by the

custodial parent. Litigation could occur frequently, thus multiplying the traumatizing effects of the marriage breakdown on the child. Second, a civil action for breach of a court order has never been recognized by our law as a method of enforcing court orders. And third, the legislature, in spelling out the enforcement mechanisms, has not provided for such an action.

34 Since the appellant instituted his action, the Children's Law Reform Amendment Act, S.O. 1982, c. 20, has been passed. Section 19(*a*) as enacted by that statute re-affirms that all matters relating to custody and access are to be decided in the child's best interests. Section 19(*d*) states that the Act is intended to provide for the more effective enforcement of custody and access orders. Section 35 permits the court to order supervised access, if necessary, and it may attach any conditions it considers appropriate. Section 37 empowers the court to authorize any person to apprehend the child so as to give effect to the entitlement of that person to access or custody. The police or the sheriff may be empowered by the court to apprehend the child to that end. An application for apprehension may be made ex parte. Section 38 may be used to require any person who may remove a child from Ontario to post a bond, to give up his or her passport and to transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order. Section 39 allows a Provincial Court (Family Division) to impose fines of up to $1,000 and/or up to 90 days' imprisonment for contempt of a court order. Finally, s. 40 enables the court to order any person or public body to assist a parent in finding his or her child by giving the name and address of the person with whom the child resides. It is apparent from these provisions that the legislature is not unaware of the problem in relation to the enforcement of these orders. Yet it has not seen fit to provide a civil cause of action. I think we must assume that it acted advisedly in this regard. I would hold, therefore, that no cause of action can be based directly on the court order.

(d) Breach of fiduciary duty

35 The final cause of action to be considered is breach of fiduciary duty. This possibility was not advanced by counsel in his original material but, since the issue before the court was whether the statement of claim should be struck out "as disclosing no reasonable cause of action", the court was of the view that it should be addressed. Counsel was accordingly invited to file written submissions of which we have had the benefit.

36 In the past the question whether a particular relationship is subject to a fiduciary obligation has been approached by referring to categories of relationships in which a fiduciary obligation has already been held to be present. Some recognized examples of these categories are relationships between directors and corporations, solicitors and clients, trustees and beneficiaries, agents and principals, life tenants and remaindermen, and partners. As well, it has frequently been noted that the categories of fiduciary relationship are never closed: see, for example, *Guerin v. R.*, [1984] 2 S.C.R. 335 at 384, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, *(*sub nom. *Guerin v. Can.)* 55 N.R. 161, per Dickson J. (as he then was); *Int. Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 53 O.R. (2d) 737, 9 C.P.R. (3d) 7, 39 R.P.R. 113, 32 B.L.R. 15, 25 D.L.R. (4th) 504 (H.C.); *Standard Invts. Ltd. v. C.I.B.C.* (1985), 52 O.R. (2d) 473, 30 B.L.R. 193, 22 D.L.R. (4th) 410, 11 O.A.C. 318 (C.A.); *English v. Dedham Vale Properties Ltd.*, [1978] 1 W.L.R. 93, [1978] 1 All E.R. 382 at 398 (Ch. D.); *Tufton v. Sperni*, [1952] 2 T.L.R. 516 at 522 (C.A.); R. Goff and G. Jones, The Law of Restitution, 2d ed. (1978), pp. 490-91. An extension of fiduciary obligations to new "categories" of relationship presupposes the existence of an underlying principle which governs the imposition of the fiduciary obligation.

37 However, there has been a reluctance throughout the common law world to affirm the existence of and give content to a general fiduciary principle which can be applied in appropriate circumstances. Sir Anthony Mason ("Themes and Prospects", in P. Finn (ed.), Essays in Equity (1985), p. 246) is probably correct when he says that "the fiduciary relationship is a concept in search of a principle". As a result there is no definition of the concept "fiduciary" apart from the contexts in which it has been held to arise and, indeed, it may be more accurate to speak of relationships as having a fiduciary component to them rather than to speak of fiduciary relationships as such: see J.C. Shepherd, The Law of Fiduciaries (1981), pp. 4-8. Perhaps the biggest obstacle to the development of a general fiduciary principle has been the fact that the content of the fiduciary duty varies with the type of relationship to which it is applied. It seems on its face therefore to comprise a collection of unrelated rules such as the rule against self-dealing, the misappropriation of as sets rule, the conflict and profit rules and (in Canada) a special business opportunity rule: see R.P. Austin, "The Corporate Fiduciary: Standard Investments Ltd. v. Canadian Imperial Bank of Commerce" (1986-87), 12 Can. Bus. L.J. 96, at pp. 96-97; P.D. Finn, Fiduciary Obligations (1977). The failure to identify and apply a general fiduciary principle has resulted in the courts relying almost exclusively on the established list of categories of fiduciary relationships and being reluctant to grant admittance to new relationships despite their oft-repeated declaration that the category of fiduciary relationships is never closed.

38 A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts, 3rd ed. (1955); Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968), 84 L.Q.R. 472; George W. Keeton and L.A. Sheridan, Equity (1969), pp. 336-52; Shepherd, ante, at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

39 Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

40 (1) The fiduciary has scope for the exercise of some discretion or power.

41 (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

42 (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

43 Very little need be said about the first characteristic except this, that unless such a discretion or power is present there is no need for a superadded obligation to restrict the damaging use of the discretion or power: see, for example, *R.H. Deacon & Co. v. Varga*, [1973] 1 O.R. 233, 30 D.L.R. (3d) 653, 1 N.R. at 80 (C.A.), affirmed [1975] 1 S.C.R. 39, 41 D.L.R. (3d) 767, 1 N.R. 79.

44 With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary. Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or "practical" interests. For example, it is generally conceded that a director is in a fiduciary relationship to the corporation. But the corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial wellbeing of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation. Another example is found in cases of undue influence where a fiduciary uses a power over the beneficiary to obtain money at the expense of the beneficiary. The beneficiary's interest in such a case is a pecuniary interest. Finally, in *Reading v. A.G.*, [1951] A.C. 507, [1951] 1 All E.R. 617 (H.L.), a British soldier who was able to smuggle items past Egyptian guards because these guards excused uniformed soldiers from their inspections was held to be a fiduciary. The Crown's interest was a "practical" or even a "moral" one, namely, that its uniform should not be used in corrupt ways. The soldier-fiduciary had no power to change the legal position of the British Crown, so how could the Crown's legal interests have been affected by the soldier's action? The same can be said of the Crown's interest in *A.G. v. Goddard* (1929), 98 L.J.K.B. 743, where the Crown was able to recover bribes which had been paid to its employee, a sargeant in the Metropolitan Police. In my view, what was protected in that case was not a "legal" interest but a vital and substantial "practical" interest.

45 The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Can. Ltd.*, [1972] 1 O.R. 251, 3 C.P.R. (2d) 40, 22 D.L.R. (3d) 639 (C.A.), affirmed [1975] 1 S.C.R. 2, 12 C.P.R. (2d) 1, 40 D.L.R. (3d) 303. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely, damages, are adequate in such a case.

46 A similar three-fold formulation of the principle underlying fiduciary obligation has recently been adopted by the Australian High Court in deciding whether a sole distributor of a product has fiduciary obligations. In *Hospital Products Ltd.*

v. U.S. Surgical Corp. (1984), 55 A.L.R. 417 at 432, Gibbs C.J. considered the following test "not inappropriate in the circumstances":

> ... there were two matters of importance in deciding when the court will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is ... analogous to a trust. Secondly, ... the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power.

Mason J. in the same case stated (at p. 454) that the critical feature in these relationships is that:

> ... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

A similar formulation of the principle was enunciated in at least one Canadian case. In *Misener v. H.L. Misener & Son Ltd.* (1977), 2 B.L.R. 106, 3 R.P.R. 265, 77 D.L.R. (3d) 428, 21 N.S.R. (2d) 92 (C.A.), Macdonald J.A. enunciated the principle in this way at p. 440:

> The reason such persons [directors] are subjected to the fiduciary relationship apparently is because they have a leeway for the exercise of discretion in dealing with third parties which can affect the legal position of their principals.

As well, it has been advanced by many learned commentators: see, generally, Weinrib, ante, at pp. 4-9; Shepherd, ante, at pp. 98, 138-41; Harold Brown, "Franchising — A Fiduciary Relationship" (1971), 49 Texas Law Rev. 650 at 664.

47 In my view, the relationship between the custodial parent and the non-custodial parent fits within the fiduciary principle I have described. There is no doubt that prior to the custody and access order the parent who will become the non-custodial parent has a very substantial interest in his or her relationship with the child. The granting of the access order confirms that the relationship between the non-custodial parent and the child is of benefit to the child and therefore worth preserving. That relationship pre-dated the access order and it continues to subsist after the access order is made. It is not itself created by the access order. But the custody and access order, by splitting access from custody, puts the custodial parent in a position of power and authority which enables him or her, if so motivated, to affect the non-custodial parent's relationship with his or her child in an injurious way. The selfish exercise of custody over a long period of time without regard to the access order can utterly destroy the non-custodial parent's relationship with his child. The non-custodial parent (and, of course, the child also) is completely vulnerable to this. Yet the underlying premise in a grant of custody to one parent and access to the other is that the custodial parent will facilitate the exercise of the other's access rights for the sake of the child. This is reflected in s. 16(10) of the Divorce Act, S.C. 1986, c. 4, which provides:

> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

The custodial parent is expected to act in good faith not only towards the non-custodial parent but also towards the children. Section 16(10) makes it clear that this is one of the qualifications of a good custodial parent.

48 It seems to me that the three underlying characteristics of relationships in which fiduciary duties are imposed are present in the relationship under review. The custodial parent has been placed as a result of the court's order in a position of power and authority over the children with the potential to prejudicially affect and indeed utterly destroy their relationship with their non-custodial parent through improper exercise of the power. There can be no doubt also that the requisite vulnerability is present and that in practical terms there is little that the non-custodial parent can do to restrain the custodial parent's improper exercise of authority or to obtain redress for it. The options open to an aggrieved non-custodial parent in

the face of a campaign by a custodial parent to cut the non-custodial parent off from the child are exceedingly limited. As mentioned above, s. 37 of the Children's Law Reform Act gives courts the authority to direct a sheriff or police force, or both, to locate, apprehend and deliver back a child who is being unlawfully withheld from a person entitled to custody or access. This does not appear to be an appropriate means of compelling a custodial parent to permit access and it seems unlikely that any parent sensitive to his or her child's feelings would resort to it. The option of refusing payment of child maintenance in order to secure a right of access is not available to a non-custodial spouse: *Wright v. Wright* (1973), 1 O.R. (2d) 337, 12 R.F.L. 200, 40 D.L.R. (3d) 321 (C.A.). The powers of the court to order a custodial parent to post a bond or other security, to have support payments made to a specified trustee who holds them subject to certain conditions, and to have the custodial parent give up his or her passport are usually ineffective. The forfeiture of the bond or other security and the withholding of support payments by a trustee may not be in the child's best interests (it may affect the custodial parent's ability to meet the expenses of raising the child) and the giving up of the passport only prevents the child from being removed from the country. Section 39 of the Children's Law Reform Act allows a Provincial Court (Family Division) to impose fines of up to $1,000 and/or imprisonment of up to 90 days for contempt. But imprisoning and fining the custodial parent will usually not be in the child's best interests and will therefore seldom be available to the non-custodial parent. As James G. McLeod has written (annotation to *O'Byrne v. Koresec* (1986), 2 R.F.L. (3d) 104 at 105):

> Where they [access orders] are wilfully ignored, proper sanctions must be imposed. Such actions may be a fine ... or imprisonment ... Neither of these sanctions, however, is entirely appropriate. In many cases, the custodial spouse may not have the resources to pay the fine without resort to funds required for day-to-day living expenses, in which event the child will suffer ... Where imprisonment is ordered, one approach would be to imprison the custodial parent over weekends when access by the other parent could be enjoyed, so as to minimize disruption to the children. Even then, the children may suffer from the knowledge (which they will surely gain!) that one parent has put the other parent in jail.

49 It is sometimes suggested that transferring custody is an appropriate means of punishing the custodial parent for an ongoing denial of access: see, for example, the suggestions made in *Woodburn v. Woodburn* (1975), 21 R.F.L. 179 at 182-83, 11 N.S.R. (2d) 528 (S.C.); *Jones v. Jones* (1970), 1 R.F.L. 295 at 295-96 (Ont. C.A.); *Currie v. Currie* (1975), 18 R.F.L. 47 at 55 (Alta. S.C.); *Donald v. Donald* (1973), 6 N.B.R. (2d) 665 at 668 (C.A.). And indeed this is being done: see *Nayar v. Nayar* (1981), 24 R.F.L. (2d) 400 (B.C.C.A.), and *Fast v. Fast* (1983), 33 R.F.L. (2d) 337, 27 Sask. R. 96 (C.A.). But again, because of the bonding that takes places between the custodial parent and his or her child over a period of time, such a step may not be in the child's best interests. In *Racine v. Woods*, [1983] 2 S.C.R. 173, *(*sub nom. *A.N.R. v. L.J.W.)* 36 R.F.L. (2d) 1, [1984] 1 W.W.R. 1, [1984] 1 C.N.L.R. 161, 1 D.L.R. (4th) 193, 24 Man. R. (2d) 314, 48 N.R. 362, a case involving a custody dispute between an Indian child's natural parents and the child's adopted parents, this court stressed the need for children to have continuity of relation ships. It held that, while an Indian child's cultural heritage and background were important factors to be considered by the court in applying the best interests doctrine, these factors had declined in importance in light of the degree of psychological bonding which had developed with the foster parents. Because of this psychological bonding a transfer of custody may not be a suitable remedy. Finally, as has been indicated above, there are good reasons for not extending common law causes of action in tort in order to permit the non-custodial parent to obtain redress for the custodial parent's denial of access.

50 I have already indicated that substantial non-legal, practical interests are protected by the imposition of fiduciary duties in appropriate cases. It cannot be denied that the non-custodial parent's interest in his or her child is as worthy of protection as some interests commonly protected by a fiduciary duty. For example, just as a corporation has a substantial interest in its relationship to corporate opportunities and customers that is worthy of protection (see, for example, *Can. Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371 [Ont.]), it can be said that a non-custodial parent has a substantial interest in his or her relationship with his or her child that is worthy of protection. However, one salient distinction between the non-custodial, parent-child relationship and the corporation-customer relationship is that the former involves a substantial non-economic interest of the parent while the latter normally involves a substantial economic interest of the corporation. But I believe that this distinction should not be determinative. The non-custodial parent's interest in the relationship with his or her child is without doubt of tremendous importance to him or her. To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme. In contract law equity recognizes interests beyond the purely economic when, instead of awarding damages in the market value of real estate against a vendor who has wrongfully refused to close, it grants specific performance. Other non-economic interests should also be capable of protection in equity through the imposition of a

fiduciary duty. I would hold, therefore, that the appellant's interest in a continuing relationship with his or her child is capable of protection by the imposition of such a duty.

51 Before a cause of action for breach of fiduciary duty can be said to exist in this limited area within the field of family law, it is necessary to ask the same question as was asked in the context of the various torts proposed by the appellant, namely, should existing fiduciary principles be extended? In examining this question it will again be necessary to consider the possibility that this cause of action might be used as a weapon by vindictive spouses and, more important still, it is necessary to consider whether or not the extension of fiduciary principles to this particular relationship would be in the best interests of children.

52 This cause of action has, in my view, a number of significant advantages over the others. First, it arises only in one particular circumstance, the circumstance of vulnerability created by the splitting of the custody and access of children by the issuance of a court order. Unlike some of the torts examined this action would not be available in any other family law context. This is a very important consideration in light of the possible detrimental impact on children of recurring lawsuits by one parent against the other.

53 Second, the cause of action for breach of fiduciary duty creates a very strong incentive to custodial parents to exercise their custodial rights so as to further the best interests of their children, to recognize that their children are entitled to an ongoing relationship with their other parent and that it is a serious matter to use the authority confided in them by an order of the court to deprive their children of this other dimension in their lives. I believe that this cause of action will help to promote a healthy and beneficial relationship between a child and both parents and is, in this respect, much more conducive to the best interests of the child than the tort actions previously considered.

54 Finally, unlike the causes of action in tort, the cause of action for breach of fiduciary duty allows the court to take into account conduct of a non-custodial parent (whether related to custody and access issues or not) which might be contrary to the best interests of children. When considering breaches of equitable duty and awarding equitable remedies the court has a wide scope for the exercise of discretion which does not exist in respect of common law causes of action. In the context of breach of fiduciary duty this discretion would allow the court to deny relief to an aggrieved party or grant relief on certain terms if that party's conduct has disabled him or her from full relief, e.g., non-payment of spousal support or previous abuse of access rights. There is neither precedent nor historical basis for the exercise of such a discretion in the case of a common law tort action. The tort would be actionable regardless of the inequitable conduct of the plaintiff.

55 It may be objected that despite these advantages which the action for breach of fiduciary duty possesses over the tort actions I have examined, the availability of any action would be contrary to the best interests of children because of the unavoidable deleterious effects of litigation on children. To some extent, this objection is well founded. Inter-spousal litigation may create a conflict of loyalties in the children and may also have the effect of impairing child support. But it is within the jurisdiction of the courts, particularly courts of equity, to prevent a cause of action from proceeding if there is any risk of injury to the children's interests. The interests of the children are the paramount concern. I would hold, therefore, that the cause of action for breach of fiduciary duty can proceed only if there is no risk that the support of the children will be impaired and no risk of a harmful conflict of loyalties arising in the children. The former condition may be satisfied when the children are fully grown and self-supporting or where the custodial parent has substantial assets. The latter condition may be satisfied where the relationship between the non-custodial parent and the children has been so severely damaged by the custodial parent's conduct that it is unlikely that a conflict of loyalties would occur. Accordingly, it will not be every denial of access rights that will give rise to a cause of action for breach of fiduciary duty but only where a sustained course of conduct has caused severe damage to the non-custodial parent-child relationship to the detriment of both the non-custodial parent and the child.

56 The legislature has provided a series of remedies for the violation of the court order by the denial of access rights on specific occasions. As I have indicated earlier in the context of a common law cause of action enforcing a parental right of access, it is not open to this court to introduce common law causes of action which the legislature did not see fit to provide in order to redress the violation of a court order. The ability of the court to introduce common law actions into areas where the legislature has intervened was recently addressed by this court in *Seneca College of Applied Arts & Technology Bd. of Gov. v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 14 B.L.R. 157, 17 C.C.L.T. 106, 81 C.L.L.C. 14,117, 2 C.H.R.R. D/468, 124 D.L.R. (3d) 193, 37 N.R. 455. In that case the plaintiff sought recognition of a new common law tort against unjustified

invasion of one's interest not to be discriminated against in respect of an employment opportunity on grounds of race or national origin. The plaintiff urged that this common law right of action arose directly from a breach of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended. This court denied the existence of such an action because of "the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law" (at p. 183, per Laskin C.J.C.). Laskin C.J.C. noted, at p. 188, that there was "a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute". In his view, the proposed action fell into the former category. Laskin C.J.C. at p. 189 also stated:

> It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation — one in no sense analogous to a duty of care in the law of negligence — to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of statute which itself provides comprehensively for remedies for its breach.

57 In my view, the recognition of the existence of a cause of action for breach of fiduciary duty, limited in the way I have suggested ante, is in no way inconsistent with the *Seneca College* case. There are two distinguishing features which lead me to this view. First, what is being proposed in this case is a form of equitable relief. The comments made in *Seneca College* were restricted to common law relief. There is every reason to believe that it would require stronger statutory language to oust the jurisdiction of the court to grant equitable relief for an equitable wrong such as breach of fiduciary duty. As already pointed out, the extensive statutory intervention of the legislature in the area of corporate law has not succeeded in ousting the equitable jurisdiction of the court to grant relief for breach of fiduciary duty in that context. Historically, courts of equity have even been willing to grant equitable relief supplementing statutory relief for a statutory wrong. For example, courts of equity have granted injunctions restraining the commission of certain acts even where a statute proscribes and provides remedies for the commission of those acts. This is done whenever the applicable statutory remedies are ineffective to prevent their commission and severe harm will result: Halsbury's Laws of England, 4th ed., vol. 16, para. 1215, p. 815; *A.G. v. Sharp*, [1931] 1 Ch. 121 (C.A.); *A.G. v. Premier Line, Ltd.*, [1932] 1 Ch. 303. I believe, therefore, that it would take clear and compelling statutory language to oust equity's broad inherent jurisdiction to give equitable relief in appropriate circumstances. No such statutory language exists in any of the legislation applicable to this case.

58 Second, the cause of action for breach of fiduciary duty is not founded "directly upon breach of a statute". Instead, it falls on the other side of the line drawn by Laskin C.J.C. — i.e., it is a cause of action existing independently of the statute founded "by reference to the policies reflected in the statute and standards fixed by the statute". While the legislature's enforcement scheme is dedicated to the enforcement of the court order as such, the cause of action for breach of fiduciary duty is dedicated to the protection of the child's relationship with his or her non-custodial parent on which the court order was based. That relationship was not created by the court order. The remedy is accordingly given not for individual violations of the court order or the statute but for an entire course of conduct designed to undermine or destroy the underlying relationship which access was intended to preserve and foster.

59 Accordingly, it would be my view that the cause of action for breach of fiduciary duty should be extended to this narrow but extremely important area of family law where the non-custodial parent is completely at the mercy of the custodial parent by virtue of that parent's position of power and authority over the children. If this is a situation which for very good reason the common law is ill-equipped to handle, resort to equity is entirely appropriate so that no just cause shall go without a remedy. The breach will be actionable only when judgment recovery will not impair child support and when the non-custodial parent-child relationship has been so severely damaged by the custodial parent's conduct as to make it highly unlikely that the action brought by the non-custodial parent would be the cause of any conflict of loyalties in the children. Such a cause of action, properly tailored as only equity can do and has done in other contexts, will create a strong incentive to further the best interests of children while eliminating the more harmful effects commonly associated with inter-spousal litigation.

60 One word of caution may be in order. At times, a perfectly legitimate exercise by the custodial parent of his or her custodial rights or custodial obligations will result in an individual denial of access to the other parent. It is not the role of the court to review this sort of exercise of discretion with respect to the child. It is only when a sustained course of conduct

designed to destroy the relationship is being engaged in that there is a breach of the duty. If and when a custodial parent comes to believe that continued access to the child by the other parent is not in the child's interests or is harmful to the child, the proper course for the custodial parent to follow is not to engage in ongoing wilful violations of the access order but to apply to the court to vary or rescind it.

(iii) The remedy

61 The remedies normally awarded for breach of fiduciary duty are the imposition of a constructive trust and the accounting of profits. Neither remedy is applicable here. However, equitable compensation is also an available remedy: see, for example, *Seager v. Copydex Ltd.*, [1967] 1 W.L.R. 923, [1967] 2 All E.R. 415 (C.A.) ; *Dowson and Mason Ltd. v. Potter*, [1986] 2 All E.R. 418 (C.A.); *Nocton v. Ashburton (Lord)*, [1914] A.C. 932 at 946, 956, 957 (H.L.); *U.S. Surgical Corp. v. Hosp. Products Int. Pty. Ltd.*, [1982] 2 N.S.W.L.R. 766 at 816 (S.C.). The purpose of equitable compensation is to restore to the plaintiff what has been lost through the defendant's breach or the value of what has been lost.

62 The issue in the leading case of *Nocton v. Ashburton (Lord)* was the liability of the appellant's solicitor to his client, the respondent, in respect of advice given by the solicitor that the client release part of the premises comprised in a mortgage held by him. Neville J. dismissed the action but the Court of Appeal held the appellant liable in damages for deceit. The House of Lords disagreed that the solicitor was liable in tort but held that the solicitor had failed to discharge his fiduciary duty to the client. This was a matter falling within the exclusive jurisdiction of equity. Viscount Haldane explained [p. 952] that the Court of Chancery, being a court of conscience, "could order the defendant, not ... to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury".

63 Viscount Haldane pointed out that it was no bar to an award of equitable compensation that the plaintiff would have had a remedy in damages for breach of contract. It might be to the plaintiff's advantage to claim for compensation in equity. Viscount Haldane stated at p. 957:

> My Lords, since the Judicature Act any branch of the Court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of Jessel M.R. in *Cockburn v. Edwards* [(1881) 18 Ch. D. 449] may, I think, really be regarded as an illustration of the latter jurisdiction. In the case with which we are dealing the statement of claim was framed mainly on the lines of breach of fiduciary duty. This was probably deliberately done in order to endeavour to get over the difficulty occasioned by the Statute of Limitations as regards any mere case of negligence in the original mortgage transaction of 1904. As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would none the less, if proved, have afforded ground for an action for mere negligence.

He then goes on to conclude at p. 957:

> It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence.

64 In a learned article on "The Equitable Remedy of Compensation" (1982), 13 Melbourne Univ. Law Rev. 349, the author, Ian E. Davidson, discusses the fact that the quantum of common law damages and of equitable compensation need not necessarily be the same because different principles apply. Quoting from p. 352:

> Although compensation in Equity will often produce the same result as damages the common law and equitable remedies utilise different rules to achieve the similar goal of compensating a plaintiff for loss suffered. This can lead to significant differences in the ultimate awards. For example, common law damages in negligence and contract are subject to requirements of foreseeability and remoteness which are not relevant to Equity when it restores property or money lost by breach of an equitable obligation. This is brought out by the judgment of Street J. in *Re Dawson (deceased)* [(1966), 2 N.S.W.R. 211] which illustrates the different principles involved in the assessment of compensation in Equity

> and damages at law.

65 While it is premature at this stage to consider the proper level of compensation should the appellant succeed in this case, I would think that equitable compensation would allow the appellant to recover not only his out-of-pocket expenses incurred throughout the campaign to destroy his relationship with his children but also a realistic sum for his pain and suffering which in this case would include compensation for the severe depression he suffered as a result of the respondents' conduct. In assessing the appropriate sum for "pain and suffering" some assistance may be gleaned from cases allowing recovery for "loss of guidance, care and companionship" in wrongful death actions pursuant to s. 60 of the Family Law Reform Act (now s. 61 of the Family Law Act, S.O. 1986, c. 4). In examining these cases regard should be paid to the apt comments made by J. Holland J. in *Zik v. High* (1981), 35 O.R. (2d) 226 at 237 (H.C.):

> ... s. 60 of the *Family Law Reform Act, 1978* cries out for the exercise of judicial restraint in the general interest of the public in the assessment of damages consequent upon an inquiry to another as in this case. I say this because uncontrolled by such restraint the ceiling under the heading of loss of guidance, care and companionship for an award could be unlimited. Much of s. 60, as I view it, was a legislative attempt to codify the principle laid down in *St. Lawrence & Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, and enunciated once again by the Supreme Court of Canada in *Vana v. Tosta et al.*, [1968] S.C.R. 71 ... that loss of care and guidance, where a mother was killed leaving children, was a measurable pecuniary loss but that the amount to be awarded under that heading should be modest, although not merely conventional.

These comments are especially appropriate in this context where the prospect of very sizable awards may encourage unmeritorious actions possibly detrimental to the children's best interests.

66 The usefulness of the remedy of equitable compensation for breach of fiduciary duty is hard to assess from the case law since the award made in many of the cases is not always identified as equitable compensation. For example, in *Seager v. Copydex*, supra, the plaintiff, while negotiating with the defendant company to market his patented carpet grip "Invisigrip", disclosed details of the grip. Later the defendant applied to patent a grip very similar to the plaintiff's using the same name "Invisigrip". Its assistant manager who had been present at the confidential interview was named as the inventor in the patent application. The Court of Appeal found the defendant liable for breach of confidence and held the plaintiff entitled to damages to be assessed by the Master on the basis of reasonable compensation for the use of confidential information. Lord Denning M.R. stated at p. 932:

> It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him [the defendant] in saving him time and trouble.

The court made no reference to any problem in awarding damages for breach of purely equitable obligations, particularly in a case where an injunction would not be granted, nor did it refer to the inherent compensatory jurisdiction of equity which would appear to be the proper basis for the award. Nor did it discuss the inherent jurisdiction of equity to award equitable compensation when the issue of the correct basis for assessing the damages was referred back to it in *Seager v. Copydex Ltd. (No. 2)*, [1969] 1 W.L.R. 809. Davidson concludes in his article that awards of damages in cases such as *Seager* are applications of the compensatory jurisdiction of equity affirmed in *Nocton v. Ashburton (Lord)* although not identified by the courts as such.

4. Conclusion

67 The facts as pleaded in the statement of claim could, if proved, give rise to a cause of action for breach of fiduciary duty. The plaintiff alleges that the defendants engaged in a course of conduct over a substantial period of time designed to defeat his access rights and destroy his relationship with his children, that they were in fact successful in so doing, and that he incurred financial loss, the loss of his relationship with his children, and damage to his psychiatric and physical health as a consequence. The action should therefore proceed to trial.

5. Disposition

68 I would allow the appeal, set aside the orders of the Ontario Court of Appeal and of Boland J. and direct the respondents to file their statement of defence to the action within 20 days. The appellant should have his costs both here and in the courts below.

***La Forest J. (Dickson C.J.C., Beetz, Mcintyre*, and *Lamer JJ.* concurring):**

69 The issue in this case is whether the appellant has a right of action against his former spouse and her present husband for interfering with his access to his children.

Background

70 This appeal arises out of a motion to strike out a statement of claim on the ground that it discloses no cause of action. That being the case, it must be assumed, for the purposes of the motion, that the facts pleaded are true. The most salient of these are as follows.

71 Richard Frame and Eleanor Smith were formerly husband and wife and had three children, now aged 24, 19 and 18. The couple separated in 1970, and in 1971 a Manitoba court granted the wife custody of the children, with generous visiting privileges to her husband. Later orders of access were issued in Ontario in 1974 and 1975. According to the husband, however, his former wife has done everything in her power to frustrate his access to the children. She has moved between Winnipeg, Toronto, Denver and Ottawa, making access and visitation, in his words, impossible. She changed the children's surname and religion, told them that the appellant was not their father, forbade telephone conversation with him, and intercepted his letters to them. The husband alleges that as a result of his former wife's conduct he has undergone considerable expense and has suffered severe emotional and psychic distress. He claims that she and her present husband are liable for any damages flowing from their wrongful interference with the legal relationship he had with his children. Accordingly, he seeks recovery not only of his out-of-pocket expenses (estimated at $25,000), but of general and punitive damages in the sum of $1,000,000 and $500,000, respectively. The endorsement on the writ of summons reads as follows:

> The Plaintiff's claim is for damages as a result of the defendants' failure to permit the plaintiff to exercise the right to access to his children or alternatively, damages relating to the defendants' wilful denial or refusal to permit the plaintiff from exercising his lawful right to access to his children or alternatively, damages arising from the defendants' conspiracy to commit acts in order to prevent the plaintiff from exercising his legal rights and for damages related to the plaintiff's loss of opportunity to develop a meaningful human relationship and have social companionship and contact with his children and to provide and give to the said children proper parental love, care and guidance.

72 The defendants moved for an order to have the action struck out under R. 126 of the Ontario Rules of Practice. Considering herself bound by the similar case of *Schrenk v. Schrenk*, 32 O.R. (2d) 122, affirmed (1982), 36 O.R. (2d) 480 (C.A.), Boland J. made the order. On appeal to the Ontario Court of Appeal, that court, too, considered itself bound by its earlier decision in Schrenk and dismissed the appeal.

73 The appellant then sought and was granted leave to appeal to this court.

Possible Tort Liability

74 Despite their deep human and social importance, the interest of parents in the love and companionship of their children and the reciprocal interest of children in the love and companionship of their parents were not, at common law, accorded specific protection. The Restatement of the Law of Torts (1938), s. 699, puts the parent's common law position in these words: "One who, without more, alienates from its parents the affection of a child, whether a minor or of full age, is not liable to the child's parent". There were the old actions of enticement, harbouring, or seduction or loss of services that gave some protection to a father's interest in his children, but these actions had a distinctly pecuniary flavour. In any event, they

have now been abolished in Ontario by the Family Law Reform Act, R.S.O. 1980, c. 152, s. 69(4).

75 In the United States, a separate tort of "alienation of affections" was developed to protect the reciprocal interest of spouses in one another's companionship, but from the mid-1930s onward, it began to fall into disfavour and, along with the traditional actions already mentioned, was abolished in many of the states. It simply did not sit well in an age of "rapidly shifting husbands and wives and ever-increasing family catastrophes": for an account, see Alan Milner, "Injuries to Consortium in Modern Anglo-American Law" (1958), 7 Int. & Comp. Law Q. 417, especially at pp. 435-36. The extension of the tort in a few state courts to allow parents to sue for the loss of affection of their children received anything but universal approval: see Milner, ante; Clay A. Mosberg, Note, "A Parent's Cause of Action for the Alienation of a Child's Affection" (1973-74), 22 Kansas Law Rev. 684. Opening the gates to a multiplicity of actions within the family circle and against close family friends was not viewed as an undiluted good. Indeed, in Michigan, one of the few states where this extension was made, the state legislature went out of its way to abolish it: see Mosberg, ante, pp. 689-90. In Canada, this court, in *Kungl v. Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278, rejected an action by a husband to recover damages for the alienation of the affection of his wife, holding that no such tort existed in Canada. In this, it followed the lead of the English courts where, in *Gottlieb v. Gleiser*, [1958] 1 Q.B. 267, [1957] 3 All E.R. 715, Denning L.J. made it clear that such domestic matters lie outside the realm of the law altogether.

76 The husband in the present case also sought to rely on the tort of conspiracy but, as my colleague Wilson J. explains in her judgment, there are grave disadvantages associated with applying this tort to circumstances like the present. Further, as she notes, this court has made it clear that it does not look kindly upon the extension of this tort, which it regards as an anomaly: see *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 473, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385, 47 N.R. 191, per Estey J. Wilson J., in her judgment, has also adequately disposed of the possibility of other existing torts applying to the circumstances of this case. It is also doubtful, as she observes, that a parent had at common law a right of access, as opposed to custody, upon which an action could be grounded. There is no pecuniary interest here and, in any event, any possible interest seems to be very much akin to that which would have been protected by the rejected tort of alienation of affections.

77 It would, of course, be possible for the courts to devise a new tort to meet the situation. And the temptation to do so is clearly present, for one cannot help but feel sympathy for the appellant and others in like situations. But there are formidable arguments against the creation of such a remedy. I have already mentioned the undesirability of provoking suits within the family circle. The spectacle of parents not only suing their former spouses but also the grandparents, and aunts and uncles of their children, to say nothing of close family friends, for interfering with rights of access is one that invites one to pause. The disruption of the familial and social environment so important to a child's welfare may well have been considered reason enough for the law's inaction, though there are others.

78 There are also serious difficulties in defining such a tort. At what stage and for what actions should one be able to claim interference with access? Is advice or encouragement to a child sufficient? It is notorious that free, and not always disinterested and wise, advice abounds in a family setting. There are degrees of interference, of course, and some interference is malicious and some is not, but where the line is to be drawn defies specification. It seems to me that there is no clear boundary between ordinary interruptions to access and sustained, putatively actionable interference, and where the point is reached where permissible advice intended for the child's benefit stops and malicious obstruction begins is virtually impossible to divine. This is especially so because, as Alan Milner, ante, at p. 429, has pointed out, "when there is dislike, a desire to injure is never far behind". Besides, the awarding of damages will do little to bring back love and companionship, but it may, in some cases, well deprive a child of the support he or she might otherwise obtain from a custodial parent and relatives. If, on the other hand, the action is generally limited to the recovery of expenses, it will be of little use to most parents given the costs, in time and money, of court actions. These and other practical considerations are sufficient to raise serious doubts about whether an action at law is the appropriate way to deal with this type of situation. This probably explains the reticence of the courts in finding a remedy at common law.

79 But what really determines the matter, in my view, is that any possible judicial initiative has been overtaken by legislative action. In all the provinces (and at the federal level for that matter), legislation has been enacted to deal with the modern phenomenon of frequent family breakdowns and, in particular, to provide for custody of and access to children. (In Ontario, the Children's Law Reform Act, R.S.O. 1980, c. 68, as amended by the Children's Law Reform Amendment Act, 1982, S.O. 1982, c. 20, now deals with the matter in a comprehensive manner. In particular, the courts are given the role of

ensuring that issues involving custody of and access to children are determined on the basis of the best interests of the children (see ss. 19(*a*), 24(1)). Numerous remedies are provided for the enforcement of orders granting custody or access. The court can give such directions as it considers appropriate for the supervision of those having custody of or access to the children (s. 35). It may, on application, make an order restraining any person from molesting, annoying or harassing the applicant or a child in the applicant's custody (s. 36). It may also empower the applicant or someone on his or her behalf to apprehend a child to give effect to the applicant's entitlement to custody or access (s. 37(1)). In certain circumstances, it may direct the sheriff or the police to do so (s. 37(2)), and empower them to enter and search any place where they have reasonable and probable grounds for believing the child may be, and to use such assistance or force as may be reasonable in the circumstances (s. 37(5)). The court may also take steps to prevent a child from being removed from the province (s. 38). In addition to its powers in respect of contempt, the court is empowered to impose a fine or imprisonment for wilful contempt of, or resistance to, its process or orders in respect of custody or access (s. 39).

80 It seems obvious to me that the legislature intended to devise a comprehensive scheme for dealing with these issues. If it had contemplated additional support by civil action, it would have made provision for this, especially given the rudimentary state of the common law. Indeed, as we saw, the legislature in a separate statute (the Family Law Reform Act) went out of its way to abolish all the relevant, if inadequate, remedies then existing at common law. Gray J. in *Schrenk*, supra, assumed that an action like the present fell within the ambit of these abolished common law remedies, and I agree that the statute shows a clear disposition not to permit recourse to the courts for civil actions of this nature. There is more here than the usual presumption that the legislature must be taken to have known the pre-existing law. It had acted on the basis of a Report on Family Law (1969) prepared by the Ontario Law Reform Commission.

81 In adopting this position, I am merely following the approach taken by this court in a number of recent cases. In *Seneca College of Applied Arts & Technology Bd. of Gov. v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 81 C.L.L.C. 14,117, 14 B.L.R. 157, 2 C.H.R.R.D/468, 124 D.L.R. (3d) 193, 37 N.R. 455, the court had to deal with the issue whether the repeated denial of employment on the ground of racial discrimination gave rise to a common law tort. As is the case here, a comprehensive statute, the Ontario Human Rights Code, had been enacted to deal with the problem in the face of rudimentary common law development. As here too, the substance of the right was defined by the statute and an array of remedies had been devised to enforce it. Laskin C.J.C., speaking for the court, at p. 189, made it clear that there was no room "to create by judicial fiat an obligation ... to confer ... [a] benefit upon certain persons ... solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach". The present case, in my view, affords a complete parallel to that situation.

82 More generally, what the present action appears to contemplate is the enforcement of a statutory duty, or what amounts to the same thing, an order made by virtue of a statutory discretion, by means of a civil action rather than by means of the remedies provided by the Act. This court had occasion to deal with that issue in *R. in Right of Can. v. Sask. Wheat Pool*, [1983] 1 S.C.R. 205, [1983] 3 W.W.R. 97, 23 C.C.L.T. 121, 143 D.L.R. (3d) 9, 45 N.R. 425. There the Canadian Wheat Board sought to recover damages against the Pool for having delivered infested grain out of its terminal elevators contrary to a statutory provision; no negligence was pleaded. The action failed. The court flatly rejected the notion of a nominate tort of statutory breach; if the legislature wished to provide for a civil action, it held, it could do so. Any other course would simply allow the courts to choose, in no predictable fashion, to grant a civil remedy for a statutory breach whenever they thought fit. The tenor of the court's approach may be gleaned from the following passage of the judgment of the present Chief Justice, then Dickson J. at pp. 215-16:

> The pretence of seeking what has been called a "will o' the wisp", a non-existent intention of Parliament to create a civil cause of action, has been harshly criticized. It is capricious and arbitrary, "judicial legislation" at its very worst ...
>
> It is a "bare faced fiction" at odds with accepted canons of statutory interpretation: "the legislature's silence on the question of civil liability rather points to the conclusion that it either did not have it in mind or deliberately omitted to provide for it" (Fleming, *The Law of Torts*, 5th ed., 1977, at p. 123). Glanville Williams is now of the opinion that the "irresolute course" of the judicial decisions "reflect no credit on our jurisprudence" and, with respect, I agree. He writes:
>
> > The failure of the judges to develop a governing attitude means that it is almost impossible to predict, outside the decided authorities, when the courts will regard a civil duty as impliedly created. In effect the judge can do what he

likes, and then select one of the conflicting principles stated by his predecessors in order to justify his decision.

83 There is no need today to supplement legislative action in this way. Indeed, to do so may well do violence to the comprehensive statutory scheme provided by the legislature: see *St. Anne Nackawic Pulp & Paper Co. v. C.P.W.U., Loc. 219*, [1986] 1 S.C.R. 704, 86 C.L.L.C. 14,037, 28 D.L.R. (4th) 1, 73 N.B.R. (2d) 236, 184 A.P.R. 236, 68 N.R. 112, per Estey J., especially at p. 721. I shall have more to say about this later. As well, when it is subsequently desired to make changes to a legislative scheme, common law accretions are difficult to deal with adequately.

84 In my view, therefore, the appellant husband has not established a proper basis for an action in tort.

Possible Fiduciary Obligation

85 Much of what I have already stated seems to me, with respect, to apply with equal force to the possibility, about which this court invited counsel to make additional submissions, that the appellant may have an action for a breach of fiduciary obligation arising out of the court order granting him access to the child. All the reasons for not permitting a tort action apply equally to an action for the breach of such an obligation. The legislature created the rights of custody and access and, as we saw, provided a whole array of remedies for enforcing them, from directions for supervising access, to restraining orders against interference, to apprehending the child, if necessary by permitting entries into premises and searches by the police or the sheriff, to fines and imprisonment. Why the legislature should be thought to have intended enforcement by an action for breach of a fiduciary obligation when there is a failure to comply with an access order, when an intention to permit a tortious action will not be implied, I fail to understand. All the more so when the legislature had taken pains to abolish all non-statutory actions that had any obvious relevance to the matter. Indeed there are in my view stronger reasons to doubt that the legislature would have contemplated recourse to this action. It is extremely ill-defined and it would scarcely be one that would immediately leap to mind.

86 There is no greater clarity as to when an action for a breach of fiduciary obligation would arise than is the case respecting possible tortious action for interference with access. Even if one assumes that not every breach of the right of access can give rise to an action, at what point precisely does an action arise? As I noted in discussing a possible tort action, precision is virtually impossible in this area. The fact that the court may have some discretion in awarding damages does not alter the fact that there may be a wide area of conduct that might be thought by litigants to warrant suit. These are but a few of the uncertainties that surround this amorphous remedy. These uncertainties have the potential to generate pyrrhic, excessive and often needless litigation.

87 Permitting such an action may well be violative of the express direction of the Act that custody of and access to children should, in situations like these, be accorded solely on the basis of the children's best interests. The legislature may well have thought that allowing a civil action would have this effect. I might mention here that the courts will not permit violence to be done indirectly to a legislative scheme. In other contexts, not only have they refused to allow a tort action, but they have gone further and not permitted what had traditionally been permissible contractual actions: see, for example, *St. Anne Nackawic*, supra.

88 In sum, it is by no means certain that permitting civil actions against the custodial parents can be said to be in the best interests of the child, whether this be by creating a tort or recognizing a fiduciary relationship arising out of a court order. Resort even to fines and imprisonment, which is permitted by the Act, has been described as not "entirely appropriate": see James G. McLeod, annotation to *O'Byrne v. Koresec* (1986), 2 R.F.L. (3d) 104 at 105. That is because these may encroach on the resources of the custodial parent and because the child may suffer from the knowledge that one parent has taken such drastic action against the other. This applies, and in some respects with greater force to a legal action. Damages can impose a far greater financial burden than the fine of up to $1,000 which may be imposed under the Act (s. 39(1)). Furthermore, though the imprisonment of one parent at the behest of the other may be damaging to the child, litigation by one against the other over a protracted period may well be even more damaging.

89 For these reasons, I cannot accept that a breach of the statutorily authorized order in the present case gives rise to a fiduciary relationship on which a cause of action can be grounded.

Conclusion

90 No possible basis for a cause of action having been presented, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

[*] Chouinard J. took no part in the judgment

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Rea v. Wildeboer | 2014 ONSC 2740, 2014 CarswellOnt 8884, 30 B.L.R. (5th) 291, 242 A.C.W.S. (3d) 79 | (Ont. S.C.J., Jun 30, 2014)

2008 ONCA 111
Ontario Court of Appeal
Malata Group (HK) Ltd. v. **Jung**

2008 CarswellOnt 699, 2008 ONCA 111, 164 A.C.W.S. (3d) 94, 233 O.A.C. 199, 290 D.L.R. (4th) 343, 44 B.L.R. (4th) 177, 89 O.R. (3d) 36

MALATA GROUP (HK) LIMITED (Plaintiff / Respondent) and HENRY CHI HANG JUNG (Defendant / Appellant)

J.C. MacPherson, R.P. Armstrong, G. Epstein JJ.A.

Heard: January 11, 2008
Judgment: February 15, 2008*
Docket: CA C47199

Proceedings: affirming *Malata Group (HK) Ltd. v. Jung* (2007), 2007 CarswellOnt 2730 (Ont. S.C.J.) [Ontario]; &affirming *Malata Group (HK) Ltd. v. Jung* (2007), 2007 CarswellOnt 4714 (Ont. S.C.J.) [Ontario]

Counsel: Terry Corsianos for Appellant
Brett D. Moldaver, Brendan Hughes for Respondent

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply

Plaintiff were minority shareholder of company based in Hong Kong, defendant was shareholder of Canadian branch of company — Minority shareholder brought oppression action against shareholder of Canadian branch of company — Shareholder brought motion to dismiss minority shareholder's claim on basis that minority shareholder was without legal capacity to commence action in that it was in substance a derivative action and minority shareholder failed to comply with s. 246 of Ontario Business Corporations Act to bring derivative action — Motion was dismissed — Trial judge held that minority shareholder did have legal capacity to bring action — Shareholder appealed decision — Appeal dismissed — Trial judge did not err in holding that relief sought in Statement of Claim were properly advanced under oppression remedy section of Ontario Business Corporations Act — Relief sought was clearly appropriate in oppression action in that it was premised on conduct of shareholder causing business affairs of Canadian branch of company to be

conducted in manner that was oppressive or unfairly prejudicial to Hong Kong branch — It was appropriate in oppression action to seek relief sought pursuant to provisions of unanimous shareholders agreement governing Canadian branch, in that it was position of minority shareholder that same conduct constituted breach of unanimous shareholders agreement and entitled minority shareholder to an order requiring that shareholder sell shares of Canadian branch to minority shareholder — Allowing s. 248 oppression claims to proceed where there was harm to corporation would not nullify s. 246, because two sections involved different threshold tests — Section 246 simply required violation of corporation's legal rights — On other hand, s. 248 required, in case of harm to corporation, violation of corporate legal rights that was oppressive or unfairly prejudicial, or that unfairly disregarded complainant's interests.

Table of Authorities

Cases considered by *R.P. Armstrong J.A.*:

C.I. Covington Fund Inc. v. White (2000), 22 C.B.R. (4th) 183, 10 B.L.R. (3d) 173, 10 C.P.R. (4th) 49, 2000 CarswellOnt 4680 (Ont. S.C.J.) — followed

Deluce Holdings Inc. v. Air Canada (1992), 8 B.L.R. (2d) 294, 12 O.R. (3d) 131, 98 D.L.R. (4th) 509, 13 C.P.C. (3d) 72, 1992 CarswellOnt 154 (Ont. Gen. Div. [Commercial List]) — considered

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2004), 2004 CarswellOnt 208, 2004 D.T.C. 6224, 41 B.L.R. (3d) 74 (Ont. S.C.J. [Commercial List]) — considered

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 12 B.L.R. (4th) 189, 79 O.R. (3d) 81, 263 D.L.R. (4th) 450, 2006 CarswellOnt 13, 206 O.A.C. 61 (Ont. C.A.) — followed

Foss v. Harbottle (1843), 67 E.R. 189, 2 Hare 461 (Eng. V.-C.) — followed

Hercules Management Ltd. v. Ernst & Young (1997), 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, 1997 CarswellMan 198, 211 N.R. 352, 1997 CarswellMan 199, 115 Man. R. (2d) 241, 139 W.A.C. 241, *(*sub nom. *Hercules Managements Ltd. v. Ernst & Young)* 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, [1997] 8 W.W.R. 80 (S.C.C.) — considered

Jabalee v. Abalmark Inc. (1996), 1996 CarswellOnt 2391 (Ont. C.A.) — considered

Meditrust Healthcare Inc. v. Shoppers Drug Mart (2002), 28 B.L.R. (3d) 163, 165 O.A.C. 147, 2002 CarswellOnt 3380, 220 D.L.R. (4th) 611, 61 O.R. (3d) 786 (Ont. C.A.) — considered

Ontario (Securities Commission) v. McLaughlin (1987), 11 O.S.C.B. 442, 1987 CarswellOnt 2568 (Ont. H.C.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1980, c. 54
s. 245 — referred to

s. 247 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 134(1)(a) — referred to

s. 246 — considered

s. 247(d) — considered

s. 248 — considered

s. 248(2) — considered

s. 248(3) — considered

s. 248(3)(h) — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 21.01(3)(b) — referred to

APPEAL by shareholder of decisions reported at ***Malata Group*** *(HK) Ltd. v.* ***Jung*** (2007), 2007 CarswellOnt 2730 (Ont. S.C.J.) and ***Malata Group*** *(HK) Ltd. v.* ***Jung*** (2007), 2007 CarswellOnt 4714 (Ont. S.C.J.).

***R.P. Armstrong J.A.*:**

Introduction

1 This appeal concerns the relationship between derivative actions and oppression complaints under the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("the Act"), and the impact on that relationship of the rule in *Foss v. Harbottle*[1] that a shareholder has no personal cause of action for harm done to the corporation.

2 The appellant moved before Justice Ground of the Superior Court of Justice to dismiss certain paragraphs of the statement of claim pursuant to rule 21.01(3)(b) of the *Rules of Civil Procedure* on the ground that the claims advanced were derivative in nature and required leave of the court as provided in s. 246 of the Act. The motion judge declined the relief sought and held that the claims were appropriately advanced in an oppression action. In doing so, the motion judge observed that, "the rule in *Foss v. Harbottle* has been substantially diluted by the enactment of the derivative and oppression action provisions of the [Act]".

3 The appellant also appeals the judge's order declining to dismiss two other paragraphs of the statement of claim

pursuant to rule 21.01(3)(b) on the ground that they breach the notice provisions of a unanimous shareholder agreement.

4 I would dismiss the appeal.

Facts

5 The respondent, **Malata Group** (HK) Limited ("**Malata** HK"), commenced an action against the appellant, Henry Chi Hang **Jung**. According to the allegations in the statement of claim, **Malata** HK, Mr. **Jung** and Jimmy Jian Yuan Chen are the three shareholders of **Malata** Canada Ltd. **Jung** and Chen each own approximately 41 per cent of the common shares of **Malata** Canada. **Malata** HK owns approximately 18 per cent of the common shares of **Malata** Canada. **Malata** HK is also a creditor of **Malata** Canada. **Jung**, Chen and **Malata** HK are parties to a unanimous shareholder agreement. Messrs. Chen and **Jung** are also directors and officers of **Malata** Canada.

6 **Malata** Canada is an Ontario corporation that imported and sold consumer electronic products manufactured in China. **Malata** Canada operated in the wholesale market in Canada and sold its products to customers such as Home Depot, Canadian Tire, Best Buy and Philips Electronics.

7 **Malata** HK alleges in its statement of claim that Mr. **Jung** misappropriated corporate funds, breached his fiduciary duty to **Malata** Canada, and failed to act honestly and in the best interests of **Malata** Canada and **Malata** HK. It is alleged that such conduct has threatened the business life of the company and rendered **Malata** Canada incapable of paying its debt to **Malata** HK. **Malata** HK also alleges that **Jung** breached the shareholder agreement.

8 In subparagraphs 1(a), (c), (d), (e) and (j) of the statement of claim, **Malata** HK seeks the following relief:

> (a) An Order for a declaration that the Defendant, Henry Chi Hang **Jung**, is in breach of the Unanimous Shareholder Agreement among Jimmy Jian Yuan Chen, **Malata Group** (HK) Limited and **Malata** Canada Ltd., entered into on April 1st, 2004.
>
> (c) An Order for a declaration that Henry Chi Hang **Jung** has acted [*sic*] and has failed to act honestly and in good faith as an officer and director of the Corporation in contravention of the *Ontario Business Corporation Act* R.S.O., 1990 c. B-16.
>
> (d) An Order for an ex-parte mandatory, interim mandatory, and mandatory injunction directing Henry Chi Hang **Jung** and the Canadian Imperial Bank of Commerce to forthwith immediately transfer and cause to be transferred the sum of $918,879.44 (USD) unlawfully diverted by him and deposited to an account solely operated by Henry Chi Hang **Jung** at the Canadian Imperial Bank of Commerce under the account name of **Malata** Canada Ltd. back to **Malata** Canada. Ltd.'s corporate account at the Scotia Bank bearing account number: 459220012815.
>
> (e) An Order for an ex-parte mandatory, interim mandatory, and mandatory injunction requiring Henry Chi Hang **Jung** forthwith to return $601,400.00 (CND) improperly removed by him on his instructions on or about January 13, 2005 from **Malata** Canada Ltd.'s corporate bank account at the Bank of Nova Scotia, bearing Account Number: 459220012815 and to forthwith provide the Plaintiffs with full details, banking records, instructions, and information as to where the said funds were transferred, to whose account, and to whose benefit including, but not limited to, all wiring instructions, account numbers, transit numbers, bank branch information, addresses, telephone

> numbers and fax numbers.
>
> (j) An Order for a mandatory injunction requiring that Henry Chi Hang **Jung** sell all of his shares to the Plaintiffs in **Malata** Canada Ltd. pursuant to sections 9.42, 9.5 and 9.6 of the Unanimous Shareholder Agreement.

9 In the motion, Mr. **Jung** sought to dismiss subparagraphs 1(c), (d) and (e) on the ground that the substance of the claims is derivative in nature and therefore required leave of the court before proceeding.

10 Mr. **Jung** also sought to dismiss subparagraphs 1(a) and (f) on the ground that **Malata** HK had failed to give Mr. **Jung** 30 days to rectify his breaches of the shareholder agreement and therefore **Malata** HK lacked standing to advance these claims.

The Motion Judge's Reasons

11 The motion judge's position is summarized in paragraphs 5, 6 and 7 of his reasons:

> [5] I am of the view that the relief in clauses (b) and (c) above is clearly appropriate in an oppression action in that it is premised on the conduct of the Defendant causing the business affairs of **Malata** Canada to be carried on or conducted in a manner that is oppressive or unfairly prejudicial to **Malata** HK. I am further of the view that it would be appropriate in an oppression action to seek the relief sought in clauses (a) and (j) above, being relief sought pursuant to the provisions of the unanimous shareholders agreement governing **Malata** Canada, in that it is the position of the Plaintiff that the same conduct constituted a breach of the unanimous shareholders agreement and entitles the Plaintiff to an order requiring that the Defendant sell his shares of **Malata** Canada to the Plaintiff. ...
>
> [6] The position of the Defendant appears to be principally based on the relief sought in clauses (d) and (e) above in that such relief is solely for the benefit of **Malata** Canada and the claims made by the Plaintiff in the action are therefore derivative in nature and cannot be brought within an oppression action. The defendant relies on the rule in *Foss v. Harbottle* as enunciated by LaForest J. in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at paragraph 59 as follows:
>
> > The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action.
>
> [7] In my view, the Defendant's position ignores the development of the law in this province which recognizes that the rule in *Foss v. Harbottle* has been substantially diluted by the enactment of the derivative action and oppression action provisions of the *OBCA* and the case law recognizing that derivative actions and oppression actions are not mutually exclusive.

12 In support of his conclusion, the motion judge relied on three cases: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); and *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)*, [2004] O.J. No. 191 (Ont. S.C.J. [Commercial List]).

13 In *McLaughlin*, Henry J., on a motion to strike out a statement of claim, considered the scope of the then-relatively new oppression remedy section (then s. 247) of the Act and its relationship with the derivative actions section (then s. 245) of the Act. In so doing, he made the following comment at para. 12:

> Under the new Part XVII there is no inconsistency in a derivative action under sec. 245 requiring leave and sec. 247 not being so limited; leave is required under sec. 245 to protect the corporation from frivolous and unwarranted interference by disaffected claimants who seek to inject the corporation into litigation as a party plaintiff for which the corporation may initially have to provide the financing. The proceeding now created by sec. 247 on the other hand is quite different; it creates a new personal cause of action to which the corporation need not be a party. A careful reading of the statement of claim reflects a claim for payment direct to plaintiffs and not to Mascan.

14 In *Deluce*, the defendant moved to strike certain paragraphs of the statement of claim as being outside the scope of the oppression remedy. In dismissing the motion, R.A. Blair J. said at p. 155:

> The other thrust of Air Canada's attack on the pleading was that the allegations raise claims which are the claims of Air Ontario and not those of Deluceco as shareholder. The action is therefore derivative in nature and Deluceco requires leave of the court to commence it in relation to these claims, counsel submit. There is authority, however, that merely because the plaintiffs in a minority shareholder oppression action rely on conduct which might in the first instance have caused harm to the company (and, therefore, give rise to a derivative claim), the plaintiffs are not deprived of their personal remedy under s. 241: see *Ontario (Securities Commission) v. McLaughlin* (1987), 11 O.S.C.B. 442 (H.C.J.) (Henry J.). Accordingly, again, it cannot be said to be plain, obvious and beyond doubt that the plaintiff cannot succeed.

15 In *Ford*, Cumming J. said at para. 241:

> Conduct which may result in harm to a company and may therefore be the subject of a derivative claim may also result in oppression to minority shareholders. The presence of a derivative action remedy does not preclude minority shareholders from pursuing their personal remedy under s. 241. The two are not mutually exclusive. (*Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 at para. 5 (C.A.); *Ontario Securities Commission v. McLaughlin* (1988), O.S.C.B. 442, [1987] O.J. No. 1247 (H.C.J.)).

The Appeal

(i) The Position of the Appellant

16 Counsel for the appellant submits that the motion judge erred in ruling that **Malata** HK has the legal capacity to seek a declaration (as in subparagraph 1(c) of the statement of claim) that Mr. **Jung** has breached his statutory duties to the company to act honestly and in good faith with a view to the best interests of the corporation as required by s. 134(1)(a) of the Act. As such, absent an order granting the leave of the court, the appellant lacks standing to proceed.

17 In respect of subparagraphs 1(d) and (e) of the statement of claim, in which the appellant seeks the return of monies owed to **Malata** Canada, counsel for the appellant submits that the motion judge erred in holding that these claims could be advanced pursuant to the oppression remedy, because the harm alleged was harm to the company, and therefore the claim can only be advanced by way of derivative action with leave of the court.

18 Counsel for the appellant also argues that the oppression remedy cannot be invoked against an individual acting in his personal capacity. He submits that Mr. **Jung** is being sued in his personal capacity and not in respect of his powers as a director. Counsel for the appellant concludes, therefore, that the oppression remedy simply does not apply in these circumstances.

19 Counsel for the appellant further submits in respect of subparagraphs 1(a) and (j) that these claims assert breaches of the shareholder agreement which are subject to a 30-day notice period during which the appellant may correct its defaults. Since this action was commenced before the 30-day notice period had expired, the respondent lacked the capacity to commence the action and the motion judge erred in failing to so find.

(ii) The Position of the Respondent

20 The respondent's position *simpliciter* is that the motion judge got it right. Respondent's counsel submits that derivative actions and claims made under the oppression remedy are not mutually exclusive. There is a degree of overlap between the two. Respondent's counsel relies upon the endorsement in *Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (Ont. C.A.) where this court said at paras. 4-5:

> The oppression remedy in section 248 of the *Ontario Business Corporations Act* is very broad and may well entitle a minority shareholder in a closely-held company to relief arising out of a director's breach of fiduciary duty.
>
> Equally, although some of the claims in the proposed amended statement of claim could be the subject of a derivative action, they may also make out a case of oppression. The two are not mutually exclusive. See *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.) and *PMSM Investments Limited v. Bureau* (1995), 25 O.R. (3d) 586 (Gen. Div.).

21 Counsel for the respondent also argues that the respondent's claims are based upon breaches of the shareholder agreement to which the respondent is a party and therefore his client is entitled to sue Mr. **Jung** directly for those breaches whether or not the breaches also caused harm to the company.

22 Counsel for the respondent further submits that **Malata** HK's failure to abide by the 30-day notice period for the curing of defaults under the shareholder agreement does not oust the jurisdiction of the court to entertain this action.

Analysis

***(i) The rule in* Foss v. Harbottle**

23 Laskin J.A. in *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (Ont. C.A.) succinctly stated the rule in *Foss v. Harbottle* as follows at para. 12:

> The rule in *Foss v. Harbottle* provides simply that a shareholder of a corporation — even a controlling shareholder or the sole shareholder — does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See *Salomon v. Salomon*, [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.). A shareholder cannot be sued for the liabilities of the corporation

and, equally, a shareholder cannot sue for the losses suffered by the corporation.

24 In *Meditrust* at para. 16, Laskin J.A. also considered the limits to the rule in *Foss v. Harbottle* as described by the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 62:

> The rule in *Foss v. Harbottle* does not, of course, preclude an individual shareholder from maintaining a claim for harm done directly to it. Again, in *Hercules*, LaForest J. explained the limit of the rule at p. 214 S.C.R.:
>
> > One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done *to the corporation*.
> >
> > Indeed, this is the limit of the rule in *Foss v. Harbottle*. [Emphasis in original.]

(ii) Can the claims advanced in subparagraphs 1(c), (d) and (e) be advanced under the oppression remedy of the Act?

25 The answer to this question raises the distinction between derivative actions and oppression claims. One author has described this distinction as "murky": see Markus Keohnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 443. Another author observed in 1991 that, "for every holding that the oppression remedy may not be enlisted in a derivative cause, there is an opposite holding": see Jeffrey G. MacIntosh. "The Oppression Remedy: Personal or Derivative?" (1991) 70 Can. Bar Rev. 29 at 49.

26 It appears from my reading of the case law that there is not a bright-line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

27 Owing to this overlap between the oppression remedy and the derivative action, a court cannot determine which is the appropriate avenue for a claim to proceed through the simple application of a rule such as the rule in *Foss v. Harbottle*. Instead, a court must examine the relevant statutory text and the facts of the claim at issue. I now turn to the language of s. 248.

28 Subsection 248(2) of Act defines the nature of the conduct which is covered by the oppression remedy:

> Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> > (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

Subsection 248(3) sets out a non-exhaustive list of remedial orders available to the court. In its preamble, s. 248(3) states that, "the court may make any interim or final order it thinks fit".

29 It is stating the obvious to say that s. 248 of the Act is drawn in broad language, both in terms of the harms it addresses and the non-exhaustive list of remedies it contemplates. Included in the list of remedies in s. 248(3) is a provision for "an order varying or setting aside a transaction or contract to which a corporation is a party and *compensating the corporation* or any other party to the transaction or contract": see s. 248(3)(h). [Emphasis added.] This provision contemplates a remedy under s. 248 that benefits the company itself even though the claim made by the complainant could also have been pursued by way of a derivative action.

30 As already noted, this court recognized in *Jabalee*, *supra*, that there is a degree of overlap between the claims that could be made out as derivative actions and those that could fall under the oppression remedy. As this court said at para. 5 of the endorsement, "[t]he two are not mutually exclusive."

31 One situation in which the overlap between the oppression remedy and the derivative action can be found is where directors in closely held corporations engage in self-dealing to the detriment of the corporation and other shareholders or creditors. A relevant case in this respect is *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), in which Swinton J. observed at para. 41:

> A number of oppression cases turn on the fact that there has been conduct by directors or majority shareholders that amounts to self-dealing at the expense of the corporation or other corporate stakeholders (*SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 36 B.L.R. (2d) 207 (Ont. Ct. (Gen. Div.)), aff'd (1998), 110 O.A.C. 160 (Div. Ct.)); *Neri v. Finch Hardware* (1976) Ltd. (1995), 20 B.L.R. (2d) 216 (Ont. Ct. (Gen. Div.)); *Loveridge Holdings Ltd. v. King-Pin Ltd.* (1991), 5 B.L.R. (2d) 195 (Ont. Ct. (Gen. Div.)). For example, in SCI, there was oppression because the directors unfairly removed assets from the corporation so as to prevent the payment of a corporate debt and to benefit themselves.

32 In *Covington*, the complainant purchased shares in and loaned money to a closely held company. The respondent, the CEO and majority shareholder of the company (presumably also a director), misappropriated intellectual property (patents) belonging to the company, resulting in the company's inability to pay its creditors. Invoking s. 248(3) of the Act, the court ordered the respondent to cease using the technology related to the patents and assigned the patents and patent applications to the company. In reaching this conclusion, Swinton J. said at paras. 46 and 47:

> Section 248(3) of the OBCA confers a broad discretion on the Court in determining an appropriate remedy, including "any interim or final order it thinks fit". The purpose of the remedy is to rectify the oppression. The provision has been used to make compensation orders against individual directors where their conduct has been found oppressive in small, closely held corporations such as Delta, and they have personally benefited — for example, by the removal of assets from the corporation (see, for example, SCI; Sidaplex, supra).

> In this case, Delta has represented that the patents and patent applications for the Snowfluent technology are the property of the corporation, and White, as a principal of the corporation, was behind those representations. The corporation has a right to claim beneficial ownership at common law. This is not a case where a monetary award against White will adequately protect the interests of the stakeholders, especially given his evidence that he faces financial difficulties personally. If Delta's proprietary interest is not protected, the corporation will be denied the value of the patents, both in terms of possible licensing fees for their use and their value if they can be sold. Clearly, the creditors will be in a better position to recoup some of their funds if the patents are assets of the corporation which can be sold.

33 I find Swinton J.'s analysis persuasive and useful. Although not identical, the circumstances in *Covington* are not dissimilar from the circumstances alleged in the statement of claim in this case. The complainant in each case is a shareholder and creditor of a closely held corporation. In both cases, the complainant alleges misappropriation of corporate property by another shareholder and director. In both cases, a loss to the company results in a derivative loss to the complainant.

34 This analysis begs the question of whether there is any meaningful distinction between the oppression remedy under s. 248 of the Act and the derivative action under s. 246 of the Act. In my view, allowing s. 248 oppression claims to proceed where there is harm to the corporation would not nullify s. 246, because the two sections involve different threshold tests. Section 246 simply requires a violation of the corporation's legal rights. On the other hand, s. 248 requires, in the case of harm to the corporation, a violation of corporate legal rights that is oppressive or unfairly prejudicial, or that unfairly disregards the complainant's interests.

35 It is perhaps worth noting that another relevant difference between the derivative action and the oppression remedy relates to costs. Subsection 247(d) explicitly allows a court to order the corporation to pay the legal fees or other costs reasonably incurred in connection with a derivative action. The oppression remedy section of the Act, though it invests courts with broad remedial authority, contains no such provision.

36 On the appeal of the *Ford* case, *supra*, Rosenberg J.A., in a much different fact situation, considered the distinction between personal causes of action and derivative actions in the context of the oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. He observed at paras. 111 and 112:

> [111] It seems to me that it would be a serious mistake to attempt to confine the broad discretion granted courts by the oppression remedy within a formal construct of causes of action. To do so could bring with it all the complexities of the common law as to when a shareholder might, notwithstanding the rule in *Foss v. Harbottle* ... maintain a personal action and thrust those complexities into the oppression remedy. Parliament could not have intended such a result. The breadth of the remedy to which these shareholders are entitled must turn on the wording of the statutory provisions.
>
> [112] While s. 241 contemplates remedies that benefit the corporation or shareholders as a whole, it is nevertheless founded on the principle of a wrong done to a shareholder or identifiable **group** of shareholders. Section 241(2)(a) (the provision relied upon in this case) is drawn in broad terms but it depends upon a finding that the complained of act or omission by the corporation or any of its affiliates "is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer".

See *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.).

37 While Rosenberg J.A. makes it clear in *Ford* that the minority shareholder in that case was seeking a personal remedy,

i.e. damages, I find that his reasoning in the above paragraphs informs the approach to be taken to the issue raised in this case.

38 It is important in my view that in this case, we have a closely held corporation. It seems to me that if the alleged oppressive conduct is made out when **Malata** HK is one of three shareholders and, more particularly, is a major creditor of **Malata** Canada, it is appropriate for **Malata** HK to seek a return of the monies to **Malata** Canada under s. 248 of the Act. **Malata** HK could have proceeded by way of a derivative action. However, given the overlap between ss. 246 and 248 of the Act and the particular circumstances of this case, I do not believe that it was required to do so.

39 In disputes involving closely held companies with relatively few shareholders, such as the case at bar and *Covington*, there is less reason to require the plaintiff to seek leave of the court. The small number of shareholders minimizes the risk of frivolous lawsuits against the corporation, thus weakening the main rationale for requiring a claim to proceed as a derivative action.

40 In the result, I am satisfied that the claims in subparagraphs 1(c), (d) and (e) of the statement of claim are properly advanced under the oppression remedy section of the Act.

41 Counsel for the appellant also submits that the oppression remedy cannot be invoked against an individual in his personal capacity. He argues that Mr. **Jung** was acting personally and not as a director of **Malata** Canada when he is alleged to have misappropriated the company's funds. This is a matter better left to the trial judge who will have the benefit of argument made on a full trial record. I would not give effect to this ground of appeal.

(iii) Are the claims advanced under subparagraphs 1(a) and (j) barred by reason of the failure to give 30 days' notice under the shareholder agreement?

42 In respect of the claims asserted in subparagraphs (a) and (j) of the statement of claim, I am unable to find anything in the notice provisions of the shareholder agreement that would preclude the respondent from commencing the action prior to the expiry of the notice period. The notice period simply provides an opportunity for the appellant to cure the alleged breaches; it does not limit the availability of resort to the court. In my view, it would take express language in the agreement to accomplish that result, and the agreement here contains no such language.

Disposition

43 For the above reasons, I would dismiss the appeal.

Costs

44 The parties are agreed that the appropriate award for the costs of the appeal is $5,000 inclusive of disbursements and GST. I would make that order in favour of the respondent.

***J.C. MacPherson J.A.*:**

I agree.

***G. Epstein J.A.*:**

I agree.

Appeal dismissed.

Footnotes

[*] A corrigendum isssued by the Court on February 20, 2008 has been incorporated herein.

[1] *Foss v. Harbottle* (1843), 67 E.R. 189, 2 Hare 461 (Eng. V.-C.), Wigram V.C.

TAB 5

Kevin P. McGuinness

Halsbury's Laws of Canada - Restitution

VIII. PROPRIETARY REMEDIES

3. Constructive Trust

(4) Liability of a Stranger

HRE-130 No entitlement to general assets.

HRE-130 No entitlement to general assets. The mere fact that the plaintiff establishes a claim to a constructive trust over certain of the defendant's assets does not mean that there is a corresponding entitlement with respect to the general assets of the defendant or any other particular asset. The claim must be assessed on a case by case basis.[1]

Three types of stranger liability. There are three ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust: as a trustee *de son tort*; for "knowing assistance"; and for "**knowing receipt**". Liability as a trustee *de son tort* arises where a stranger assumes the office or function of trustee. A stranger to a trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees. Only actual knowledge, recklessness, or wilful blindness will render a stranger liable for participating in the breach of trust. Constructive knowledge or notice cannot render a stranger liable under the "knowing assistance" category of constructive trusteeship.

Actual knowledge a question of fact. Whether a transferee had actual notice of a competing interest in trust property is a question of fact. The burden of proving the absence of notice is on the person alleging that he or she is a purchaser for valuable consideration without notice.[2] There can be little question that notice to the lawyer of a person, within the context of a transaction in which that lawyer is acting for that person, will normally constitute notice.[3]

"Knowing receipt". Liability on the basis of "**knowing receipt**" requires that a stranger to the trust receive or apply trust property for his or her own use and benefit. The receipt requirement in "**knowing receipt**" cases is best characterized in restitutionary terms: liability arises if the stranger has been enriched at the plaintiff's expense. However, the second requirement for establishing liability on the basis of "**knowing receipt**" relates to the degree of knowledge required of the bank in relation to the breach of trust. While constructive knowledge is excluded as the basis for liability in "knowing assistance" cases, in cases based on "**knowing receipt**", there is a lower threshold of knowledge required of the stranger to the trust, since in such cases the court is concerned with the receipt of trust property for the stranger's own benefit. More is expected of a recipient, who -- unlike the accessory -- is enriched at the plaintiff's expense. Accordingly, constructive knowledge --

that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry -- is sufficient to afford a basis for restitutionary liability. The stranger must have had knowledge of facts that would put a reasonable person on inquiry, and then failed to inquire as to the possible misapplication of trust property.[4]

Footnote(s)

1 *Carmichael v. Douglas*, [2003] B.C.J. No. 924, 2003 BCSC 611 at paras. 100-101, *per* Ross J. (B.C.S.C.) (constructive trust granted over real property but not pension).

2 *McDougal v. MacKay*, [1922] S.C.J. No. 23, 64 S.C.R. 1 at 7 (S.C.C.); *Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd.*, [1996] O.J. No. 2099, 29 O.R. (3d) 350 at 356, *per* Salhany J. (Ont. Gen. Div.):

> ... means actual notice (as opposed to constructive notice) of the nature of the prior agreement and its legal effect. There is no requirement that there be actual notice of the precise terms of the agreement, such as the amount of the consideration passing between the parties or the term of the agreement. The test, in my view, is whether the registered instrument holder is in receipt of such information as would cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument.

See also *Durrani v. Augier*, [2000] O.J. No. 2960, 50 O.R. (3d) 353 at para. 62, *per* Epstein J. (Ont. S.C.J.):

> ... a person has actual notice if he or she is aware of the existence of a legal right. It is not necessary that the person have knowledge of the precise details of that legal right. In circumstances that involve the transfer of title, a purchaser does not need to have actual knowledge of the particular person who is in fact the true owner or holder of title of the property. It is sufficient for actual notice that the purchaser is aware that the person with whom they are dealing as the vendor does not have a legitimate claim to the title. This follows, since the logical inference to draw from the knowledge that the vendor with whom the purchaser is dealing does not have a legitimate right to the title is that someone else is, in fact, the true owner.

3 See, for instance, *John M.M. Troup Ltd. & National Painting and Decorating Ltd. v. Royal Bank of Canada*, [1962] S.C.J. No. 29, 34 D.L.R. (2d) 556 (S.C.C.).

4 *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] S.C.J. No. 92, [1997] 3 S.C.R. 805 (S.C.C.).

TAB 6

Most Negative Treatment: Not followed
Most Recent Not followed: M. (L.D.) v. M. (D.R.) | 2008 BCSC 1752, 2008 CarswellBC 2740, [2009] B.C.W.L.D. 1125, [2009] B.C.W.L.D. 1132, [2009] B.C.W.L.D. 1134, [2009] B.C.W.L.D. 1135, 173 A.C.W.S. (3d) 545, [2009] W.D.F.L. 689, [2009] W.D.F.L. 706, [2009] W.D.F.L. 708, [2009] W.D.F.L. 709 | (B.C. S.C., Dec 18, 2008)

1997 CarswellOnt 1489
Supreme Court of Canada

Soulos v. Korkontzilas

1997 CarswellOnt 1489, 1997 CarswellOnt 1490, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 100 O.A.C. 241, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89, 212 N.R. 1, 32 O.R. (3d) 716 (headnote only), 46 C.B.R. (3d) 1, 9 R.P.R. (3d) 1

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited, Appellants v. Nick Soulos, Respondent

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: February 8, 1997
Judgment: May 22, 1997
Docket: 24949

Proceedings: affirming (1995), 84 O.A.C 390 (Ont. C.A..); reversing (1991), 4 O.R. (3d) 51 (Ont. Gen. Div.); additional reasons at (1991), 4 O.R. (3d) 51 at 71 (Ont. Gen. Div.)

Counsel: *Thomas G. Heintzman, Q.C.*, and *Darryl A. Cruz*, for the appellants.
David T. Stockwood, Q.C., and *Susan E. Caskey*, for the respondent.

Subject: Insolvency; Estates and Trusts; Contracts; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Trusts and Trustees --- Constructive trust — Gains by fiduciaries

Real estate agent failed to advise client that seller had accepted offer on property — Agent subsequently purchased property for himself — Client sued agent for breach of fiduciary duty and claimed property on basis of constructive trust — Client did not suffer monetary loss from breach of duty — Constructive trust remedy not granted at trial because client did not suffer monetary damages — Court of Appeal ruled that breach of moral duty by itself can give rise to constructive trust — Court of Appeal ordered agent to convey property to client — Real estate agent appealed decision to Supreme Court of Canada — Appeal dismissed.

Agency --- Relationship between principal and agent — Agent's duties to principal — Fiduciary duty — Duty to

disclose

Real estate agent failed to advise client that seller had accepted offer on property — Agent subsequently purchased property for himself — Client sued agent for breach of fiduciary duty and claimed property on basis of constructive trust — Client did not suffer monetary loss from breach of duty — Constructive trust remedy not granted at trial because client did not suffer monetary damages — Court of Appeal ruled that breach of moral duty by itself can give rise to constructive trust — Court of Appeal ordered agent to convey property to client — Real estate agent appealed decision to Supreme Court of Canada — Constructive trust remedy necessary to hold fiduciaries to high standards of trust and probity that commercial institutions require to function effectively — Appeal dismissed.

Fiducies et fiduciaires --- Fiducie par interprétation — Avantages tirés par le fiduciaire

Courtier en immeuble n'a pas informé son client que le vendeur avait accepté son offre pour une propriété — Courtier a subséquemment acquis la propriété pour lui-même — Client a poursuivi le courtier pour manquement à son obligation de fiduciaire et a réclamé la propriété en se fondant sur la doctrine de la fiducie par interprétation — Client n'a subi aucun dommage pécuniaire du manquement à l'obligation fiduciaire — Recours en vertu de la fiducie par interprétation n'a pas été accueilli parce que le client n'a pas subi de dommage pécuniaire — Cour d'appel a statué que le manquement à une obligation morale pouvait en soi donner lieu à une fiducie par interprétation — Cour d'appel a ordonné que le courtier cède la propriété au client — Courtier a formé un pourvoi à la Cour suprême du Canada — Pourvoi a été rejeté.

Mandat --- Relation entre le mandant et le mandataire — Obligations du mandataire envers le mandant — Obligation fiduciaire — Obligation d'informer — Courtier en immeuble n'a pas informé son client que le vendeur avait accepté son offre pour une propriété

Courtier a subséquemment acquis la propriété pour lui-même — Client a poursuivi le courtier pour manquement à son obligation de fiduciaire et a réclamé la propriété en se fondant sur la doctrine de la fiducie par interprétation — Client n'a subi aucun dommage pécuniaire du manquement à l'obligation fiduciaire — Recours en vertu de la fiducie par interprétation n'a pas été accueilli parce que le client n'a pas subi de dommage pécuniaire — Cour d'appel a statué que le manquement à une obligation morale pouvait en soi donner lieu à une fiducie par interprétation — Cour d'appel a ordonné que le courtier cède la propriété au client — Courtier a formé un pourvoi à la Cour suprême du Canada — Recours en vertu de la fiducie par interprétation était nécessaire afin d'astreindre les fiduciaires au respect d'une norme élevée de probité et de loyauté, norme requise pour le bon fonctionnement des institutions commerciales — Pourvoi a été rejeté.

A real estate broker failed to advise his client that the seller of a commercial property had accepted the client's counter-offer and arranged for his wife to purchase the property. Title was then transferred to the broker and his wife as joint tenants. When the client discovered what had happened, he commenced an action against the broker for breach of fiduciary duty and sought to have the property conveyed to him on the basis of constructive trust. The client had not suffered any monetary loss as a result of the broker's conduct because of a subsequent decrease in the market value of the property. However, the client still wanted the property because of the prestige associated with the ownership of it.

At trial, the broker was found to have been in breach of fiduciary duty, but the judge refused to grant the constructive trust remedy because the broker had not been enriched by his purchase of the property, in that its value had decreased. The decision was reversed on appeal, with the Court of Appeal holding the the moral quality of the broker's conduct allowed the court to grant the constructive trust remedy. It stated that the remedy was necessary in order to act as deterrent to activity in the real estate business that would undermine bonds of trust that enabled that industry to function. The broker appealed to the Supreme Court of Canada

Held: The appeal was dismissed

Per McLachlin J. (La Forest, Gonthier, Cory and Major JJ. concurring): Constructive trusts are not limited exclusively to cases involving unjust enrichment. Wrongful conduct by itself can give rise to the remedy if the following criteria are met: the defendant must have been under an equitable obligation, the defendant must have derived the assets from agency activities in breach of his equitable obligation to the plaintiff, the plaintiff must show a legitimate reason for seeking the remedy, either persona or related to the need to ensure that others like the defendant remain faithful to their

duties, and there must be no factors (such as the rights of third parties) which would render imposition of a constructive trust unjust in all the circumstances of the case. In this case, the broker obtained the property as a result of a breach of his obligation to the client and as a direct result of his agency activities with respect to the client. As well, the client still had a desire to own the property and the remedy was necessary to ensure that real estate agents and others in positions of trust remain faithful to their duty of loyalty to their clients. To allow the broker to keep the property in these circumstances would have undermined the trust and confidence which underpins the institution of real estate brokerage. Finally, there were no factors which would make the imposition of a constructive trust unjust.

Per Sopinka J. (dissenting) (Iacobucci J. concurring): The granting of a constructive trust is a discretionary remedy and, as such, a decision of a trial judge on this issue can be overturned only if it can be shown that the judge made an error in principle. In this case, the trial judge did not commit any error in principle in rendering his decision

Recent case law had made it very clear that a constructive trust can be granted only in cases of unjust enrichment, which must be pecuniary in nature. In this case, there was no such enrichment.

. . . . .

Un courtier en immeuble a volontairement omis d'informer son client que le vendeur d'un immeuble commercial avait accepté sa contre-offre et s'est arrangé pour que son épouse en fasse l'acquisition. Le titre a ensuite été transféré au courtier et à son épouse en tant que cotitulaires. Lorsque le client a eu vent de la manoeuvre, il a entrepris une action contre le courtier pour manquement à son obligation de fiduciaire, avec des conclusions translatives de propriété en vertu de la doctrine de la fiducie par interprétation. Le client n'avait pas subi de dommages pécuniaires par suite des agissements du courtier, car l'immeuble avait subséquemment subi une dévaluation. Cependant, le client désirait toujours acquérir l'immeuble à cause du prestige lié à cette propriété.

Au procès, le juge du procès a estimé que le courtier avait manqué à son obligation de fiduciaire, mais a refusé d'accorder le redressement en vertu de la fiducie par interprétation puisque le courtier ne s'était pas enrichi par suite de l'acquisition de l'immeuble, celui-ci s'étant dévalué. Le jugement a été annulé par la Cour d'appel, qui a statué que la turpitude du courtier l'autorisait à accueillir le recours fondé sur la fiducie par interprétation. La Cour a conclu que ce redressement s'avérait nécessaire afin de dissuader les agissements dans le domaine du courtage immobilier qui nuiraient au lien de confiance, élément essentiel dans ce secteur d'activité. Le courtier a formé un pourvoi à la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

McLachlin, J. (La Forest, Gonthier, Cory et Major, JJ., souscrivant) : Les fiducies par interprétation ne se limitent pas seulement aux cas d'enrichissement sans cause. En soi, l'inconduite peut donner ouverture à ce recours si les critères suivants sont rencontrés : le défendeur doit assumer une obligation équitable, le défendeur doit avoir distrait les biens objets de son mandat en violation de son obligation équitable envers le demandeur, le demandeur doit avoir une raison légitime d'entreprendre un tel recours, soit personnelle ou liée au besoin de s'assurer que d'autres dans la position du défendeur respectent leurs obligations et il ne doit pas exister d'autres facteurs (tels les droits des tiers) qui, dans les circonstances du litige, rendraient injuste l'imposition d'une fiducie par interprétation. En l'espèce, le courtier a obtenu l'immeuble à la suite d'une violation de son obligation envers son client et à la suitede ses activités en tant que mandataire pour le compte du client. En outre, le client désirait toujours acquérir l'immeuble et le recours s'avérait nécessaire pour s'assurer que les courtiers en immeuble, de même que d'autres personnes en situation de confiance, respectent leur obligation de loyauté envers leurs clients. En l'occurrence, permettre au courtier de conserver l'immeuble compromettrait le lien de confiance qui sous-tend l'institution du courtage immobilier. En terminant, il n'y avait aucun facteur qui rendait injuste l'imposition d'une fiducie par interprétation.

Sopinka, J. (dissident) (Iacobucci, J., souscrivant) : Accorder une fiducie par interprétation est un redressement discrétionnaire et, comme telle, la décision du juge du procès ne peut être annulée que s'il est démontré une erreur de principe de sa part. En l'espèce, le juge du procès n'a pas commis d'erreur de principe.

La jurisprudence récente a établi très clairement qu'une fiducie par interprétation ne peut être accordée que dans des cas d'enrichissement sans cause, de nature pécuniaire. Il n'existait pas de tel enrichissement dans ce dossier.

Table of Authorities

Cases considered by *McLachlin J.* (*La Forest, Gonthier, Cory* and *Major JJ.* concurring):

Beatty v. Guggenheim Exploration Co., 122 N.E. 378 (U.S. 1919) — considered

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — distinguished

Binions v. Evans, [1972] 2 All E.R. 70, [1972] Ch. 359 (Eng. C.A.) — considered

Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2), [1968] 2 All E.R. 367, [1968] 2 Ch. 276 (Eng. C.A.) — considered

Elders Pastoral Ltd. v. Bank of New Zealand (1989), 2 N.Z.L.R. 180 — considered

Goldcorp Exchange Ltd., Re, [1994] 2 All E.R. 806 (New Zealand P.C.) — considered

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245 (S.C.C.) — considered

Hussey v. Palmer, [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (Eng. C.A.) — considered

MacMillan Bloedel Ltd. v. Binstead (1983), 22 B.L.R. 255, 14 E.T.R. 269 (B.C. S.C.) — considered

Meinhard v. Salmon, 164 N.E. 545 (U.S. 1928) — considered

Neale v. Willis (1968), 112 Sol. Jo. 521, 19 P. & C.R. 836 (Eng. C.A.) — referred to

Neste Oy v. Lloyd's Bank Ltd., [1983] 2 Lloyd's Rep. 658 (Eng. C.A.) — considered

Ontario (Wheat Producers' Marketing Board) v. Royal Bank (1984), 46 O.R. (2d) 362, 9 D.L.R. (4th) 729 (Ont. C.A.) — considered

White v. Central Trust Co. (1984), 7 D.L.R. (4th) 236, 54 N.B.R. (2d) 293, 17 E.T.R. 78 (N.B. C.A.) — considered

Cases considered by *Sopinka J.* (dissenting) (*Iacobucci J.* concurring):

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — considered

Brissette v. Westbury Life Insurance Co., [1992] I.L.R. 1-2888, 47 E.T.R. 109, 13 C.C.L.I. (2d) 1, 142 N.R. 104, 58 O.A.C. 10, (sub nom. *Brissette Estate v. Westbury Life Insurance Co.)* [1992] 3 S.C.R. 87 (S.C.C.) — considered

Canadian Aero Service Ltd. v. O'Malley (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206 (S.C.C.) — considered

Canson Enterprises Ltd. v. Boughton & Co., [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 131 N.R. 321, 85 D.L.R. (4th) 129, 61 B.C.L.R. (2d) 1, 6 B.C.A.C. 1, 13 W.A.C. 1, [1991] 3 S.C.R. 534, 43 E.T.R. 201 (S.C.C.) — considered

Donkin v. Bugoy, [1985] 2 S.C.R. 85, [1985] 6 W.W.R. 97, 21 D.L.R. (4th) 327, 61 N.R. 172, 44 Sask. R. 178, 20 E.T.R. 225, 47 R.F.L. (2d) 113 (S.C.C.) — considered

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245 (S.C.C.) — referred to

International Corona Resources Ltd. v. LAC Minerals Ltd., 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574 (S.C.C.) — considered

Lee v. Chow (1990), 12 R.P.R. (2d) 217 (Ont. H.C.) — considered

MacMillan Bloedel Ltd. v. Binstead (1983), 22 B.L.R. 255, 14 E.T.R. 269 (B.C. S.C.) — considered

Ontario (Wheat Producers' Marketing Board) v. Royal Bank (1984), 46 O.R. (2d) 362, 9 D.L.R. (4th) 729 (Ont. C.A.) — considered

Phipps v. Boardman, [1965] Ch. 992, [1965] 1 All E.R. 849 (Eng. C.A.) — considered

Phipps v. Boardman, [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (Eng. H.L.) — considered

Reading v. R., [1948] 2 K.B. 268, [1948] 2 All E.R. 27 (Eng. K.B.) — considered

Reading v. R., [1949] 2 K.B. 232, [1949] 2 All E.R. 68 (Eng. C.A.) — considered

Reading v. R., [1951] A.C. 507, [1951] 1 All E.R. 617 (Eng. H.L.) — considered

Syncrude Canada Ltd. v. Hunter Engineering Co., (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* [1989] 3 W.W.R. 385, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 57 D.L.R. (4th) 321, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 35 B.C.L.R. (2d) 145, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 92 N.R. 1, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* [1989] 1 S.C.R. 426 (S.C.C.) — considered

APPEAL from judgment reported at [1995] 84 O.A.C. 390, allowing appeal from (1991), 4 O.R. (3d) 51 (Gen. Div.), additional reasons at (1991), 4 O.R. (3d) 51 at 71 (Gen. Div.) which refused to grant remedy of constructive trust for breach of fiduciary duty when no resulting unjust enrichment.

POURVOI à l'encontre d'un arrêt publié à [1995] 84 O.A.C. 390, accueillant le pourvoi à l'encontre de (1991), 4 O.R. (3d)

51 (Gen. Div.), motifs additionnels publié à (1991), 4 O.R. (3d) 51 à 71 (Div. Gén.), refusant le redressement en vertu de la fiducie par interprétation résultant de la violation de l'obligation fiduciaire lorsque aucun enrichissement sans cause n'en résulte.

McLachlin J. **(La Forest, Gonthier, Cory and Major JJ. concurring):**

I

1 This appeal requires this Court to determine whether a real estate agent who buys for himself property for which he has been negotiating on behalf of a client, may be required to return the property to his client despite the fact that the client can show no loss. This raises the legal issue of whether a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff. In my view, this question should be answered in the affirmative.

II

2 The appellant Mr. Korkontzilas is a real estate broker. The respondent, Mr. Soulos, was his client. In 1984, Mr. Korkontzilas found a commercial building which he thought might interest Mr. Soulos. Mr. Soulos was interested in purchasing the building. Mr. Korkontzilas entered into negotiations on behalf of Mr. Soulos. He offered $250,000. The vendor, Dominion Life, rejected the offer and tendered a counter-offer of $275,000. Mr. Soulos rejected the counter-offer but "signed it back" at $260,000 or $265,000. Dominion Life advised Mr. Korkontzilas that it would accept $265,000. Instead of conveying this information to Mr. Soulos as he should have, Mr. Korkontzilas arranged for his wife, Panagiota Goutsoulas, to purchase the property using the name Panagiot Goutsoulas. Panagiot Goutsoulas then transferred the property to Panagiota and Fotios Korkontzilas as joint tenants. Mr. Soulos asked what had happened to the property. Mr. Korkontzilas told him to "forget about it"; the vendor no longer wanted to sell it and he would find him a better property. Mr. Soulos asked Mr. Korkontzilas whether he had had anything to do with the vendor's change of heart. Mr. Korkontzilas said he had not.

3 In 1987 Mr. Soulos learned that Mr. Korkontzilas had purchased the property for himself. He brought an action against Mr. Korkontzilas to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member. However, Mr. Soulos abandoned his claim for damages because the market value of the property had, in fact, decreased from the time of the Korkontzilas purchase.

4 The trial judge found that Mr. Korkontzilas had breached a duty of loyalty to Mr. Soulos, but held that a constructive trust was not an appropriate remedy because Mr. Korkontzilas had purchased the property at market value and hence had not been "enriched": (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (Ont. Gen. Div.) (hereinafter cited to O.R.). The decision was reversed on appeal, Labrosse J.A. dissenting: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (Ont. C.A.) (hereinafter cited to O.R.).

5 For the reasons that follow, I would dismiss the appeal. In my view, the doctrine of constructive trust applies and requires that Mr. Korkontzilas convey the property he wrongly acquired to Mr. Soulos.

III

6 The first question is what duties Mr. Korkontzilas owed to Mr. Soulos in relation to the property. This question returns us to the findings of the trial judge. The trial judge rejected the submission of Mr. Soulos that an agreement existed requiring Mr. Korkontzilas to present all properties in the Danforth area to him exclusively before other purchasers. He found, however, that Mr. Korkontzilas became the agent for Mr. Soulos when he prepared the offer which Mr. Soulos signed with respect to the property at issue. He further found that this agency relationship extended to reporting the vendor's response to Mr. Soulos. This relationship of agency was not terminated when the vendor made its counter-offer. The trial judge therefore concluded that Mr. Korkontzilas was acting as Mr. Soulos' agent at all material times.

7 The trial judge went on to state that the relationship of agent and principal is fiduciary in nature. He concluded that as agent to Mr. Soulos, Mr. Korkontzilas owed Mr. Soulos a "duty of loyalty". He found that Mr. Korkontzilas breached this duty of loyalty when he failed to refer the vendor's counter-offer to Mr. Soulos.

8 The Court of Appeal did not take issue with these conclusions. The majority did, however, differ from the trial judge on what consequences flowed from Mr. Korkontzilas' breach of the duty of loyalty.

IV

9 This brings us to the main issue on this appeal: what remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?

10 At trial Mr. Soulos' only claim was that the property be transferred to him for the price paid by Mr. Korkontzilas, subject to adjustments for changes in value and losses incurred on the property since purchase. He abandoned his claim for damages at an early stage of the proceedings. This is not surprising, since Mr. Korkontzilas had paid market value for the property and had, in fact, lost money on it during the period he had held it. Still, Mr. Soulos maintained his desire to own the property.

11 Mr. Soulos argued that the property should be returned to him under the equitable doctrine of constructive trust. The trial judge rejected this claim, on the ground that constructive trust arises only where the defendant has been unjustly enriched by his wrongful act. The fact that damages offered Mr. Soulos no compensation was of no moment: "It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none" (p. 69). Furthermore, "it seems simply disproportionate and inappropriate to utilize the drastic remedy of a constructive trust where the plaintiff has suffered no damage" (p. 69). The trial judge added that nominal damages were inappropriate, damages having been waived, and that Mr. Soulos had mitigated his loss by buying other properties.

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention.

Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The majority in the Court of Appeal, by contrast, took a broader view of when a constructive trust could apply. It held that a constructive trust requiring reconveyance of the property could arise in the absence of an established loss in order to condemn the agent's improper act and maintain the bond of trust underlying the real estate industry and hence the "integrity of the laws" which a court of equity supervises.

14 The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions.

15 It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of constructive trust, the theory underlying the constructive trust, and the purposes which the constructive trust serves in our legal system.

V

16 The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.). Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.

17 The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, *The Constructive Trust* (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which ... the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations ... on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development of the Remedial Constructive Trust" (1981), 6 *Est. & Tr. Q.* 312, at p. 317, citing Waters, *supra*.

19 The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. See Dewar, *supra*, at p. 334. The fiduciary relationship underlies much of the English law of constructive trust. As Waters, *supra*, at p. 33, writes: "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation". At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. As L. S. Sealy, "Fiduciary Relationships", [1962] *Camb. L.J.* 69, at p. 73, states:

> The word "fiduciary," we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied. [Emphasis in original.]

Nor does the absence of a classic fiduciary relationship necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute breach of a trust-like duty: see Dewar, *supra*, at pp. 322-23.

20 Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Becker v. Pettkus, supra*.

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Becker v. Pettkus* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. The language used makes no such claim. A. J. McClean, "Constructive and Resulting Trusts — Unjust Enrichment in a Common Law Relationship — *Pettkus v. Becker*" (1982), 16 *U.B.C.L. Rev.* 156 at p. 170, describes the ratio of *Becker v. Pettkus* as "a modest enough proposition". He goes on: "It would be wrong ... to read it as one would read the language of a statute and limit further development of the law".

22 Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations. D. M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors, (1989), 68 *Can. Bar Rev.* 315, at p. 318, states: "the constructive trust that is used to remedy unjust enrichment must be distinguished from the other types of constructive trusts known to Canadian law prior to 1980". Paciocco asserts that unjust enrichment is not a necessary condition of a constructive trust (at p. 320):

> ... in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the

> particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall.

23 Dewar, *supra*, holds a similar view (at p. 332):

> While it is unlikely that Canadian courts will abandon the learning and the classifications which have grown up in connection with the English constructive trust, it is submitted that the adoption of the American style constructive trust by the Supreme Court of Canada in *Pettkus v. Becker* will profoundly influence the future development of Canadian trust law.

Dewar, *supra*, at pp. 332-33, goes on to state: "In English and Canadian law there is no general agreement as to precisely which situations give rise to a constructive trust, although there are certain general categories of cases in which it is agreed that a constructive trust does arise". One of these is to correct fraudulent or disloyal conduct.

24 M. M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust", (1988), 26 *Alta. L. Rev.* 407, at p. 414, sees unjust enrichment as a useful tool in rationalizing the traditional categories of constructive trust. Nevertheless he opines that it would be a "significant error" to simply ignore the traditional principles of constructive trust. He cites a number of Canadian cases subsequent to *Becker v. Pettkus, supra*, which impose constructive trusts for wrongful acquisition of property, even in the absence of unjust enrichment and correlative deprivation, and concludes that the constructive trust "cannot always be explained by the unjust enrichment model of constructive trust" (p. 416). In sum, the old English law remains part of contemporary Canadian law and guides its development. As La Forest J.A. (as he then was) states in *White v. Central Trust Co.* (1984), 17 E.T.R. 78 (N.B. C.A.), at p. 90, cited by Litman, *supra*, the courts "will not venture far onto an uncharted sea when they can administer justice from a safe berth".

25 I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

VI

26 Various principles have been proposed to unify the situations in which the English law found constructive trust. R. Goff and G. Jones, *The Law of Restitution* (3rd ed. 1986), at p. 61, suggest that unjust enrichment is such a theme. However, unless "enrichment" is interpreted very broadly to extend beyond pecuniary claims, it does not explain all situations in which the constructive trust has been applied. As McClean, *supra*, at p. 168, states: "however satisfactory [the unjust enrichment theory] may be for other aspects of the law of restitution, it may not be wide enough to cover all types of constructive trust." McClean goes on to note the situation raised by this appeal: "In some cases, where such a trust is imposed the trustee may not have obtained any benefit at all; this could be the case, for example, when a person is held to be a trustee *de son tort*. A plaintiff may not always have suffered a loss." McClean concludes (at pp. 168-69): "Unjust enrichment may not, therefore, satisfactorily explain all types of restitutionary claims".

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):

> "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

28 Other scholars agree with McClean that good conscience may provide a useful way of unifying the different forms of constructive trust. Litman, *supra*, adverts to the "natural justice and equity" or "good conscience" trust "which operates as a remedy for wrongs which are broader in concept than unjust enrichment" and goes on to state that this may be viewed as the underpinning of the various institutional trusts as well as the unjust enrichment restitutionary constructive trust (at pp. 415-16).

29 Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2)*, [1968] 2 Ch. 276 (Eng. C.A.). Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (U.S. 1919), at p. 380:

> A constructive trust is the formula through which the conscience of equity finds expression. *When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee*. [Emphasis added.]

30 Lord Denning M.R. expressed similar views in a series of cases applying the constructive trust as a remedy for wrong-doing: see *Neale v. Willis* (1968), 112 Sol. Jo. 521 (Eng. C.A.); *Binions v. Evans*, [1972] Ch. 359 (Eng. C.A.); *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 (Eng. C.A.). In *Binions*, referring to the statement by Cardozo J., *supra*, Denning M.R. stated that the court would impose a constructive trust "for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises" (p. 368). In *Hussey*, he said the following of the constructive trust (at pp. 1289-90): "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it".

31 Many English scholars have questioned Lord Denning's expansive statements on constructive trust. Nevertheless, he is not alone: Bingham J. similarly referred to good conscience as the basis for equitable intervention in *Neste Oy v. Lloyd's Bank Ltd.*, [1983] 2 Lloyd's Rep. 658 (Eng. C.A.).

32 The New Zealand Court of Appeal also appears to have accepted good conscience as the basis for imposing a constructive trust in *Elders Pastoral Ltd. v. Bank of New Zealand* (1989), 2 N.Z.L.R. 180. Cooke P., at pp. 185-86, cited the following passage from Bingham J.'s reasons in *Neste Oy, supra*, at p. 666:

> Given the situation of [the defendants] when the last payment was received, any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the defendants] to take any benefit from the payment, and it would have seemed contrary to any ordinary notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure

> of consideration. Of course it is true that insolvency always causes loss and perfect fairness is unattainable. The bank, and other creditors, have their legitimate claims. *It nonetheless seems to me that at the time of its receipt [the defendants] could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred.* [Emphasis added.]

Cooke P. concluded simply (at p. 186): "I do not think that in conscience the stock agents can retain this money." *Elders* has been taken to stand for the proposition that even in the absence of a fiduciary relationship or unjust enrichment, conduct contrary to good conscience may give rise to a remedial constructive trust: see *Mogal Corp. v. Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101, 783; J. Dixon, "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1995), 7 *Auck. U. L. Rev.* 147, at pp. 157-58. Although the Judicial Committee of the Privy Council rejected the creation of a constructive trust on grounds of good conscience in *Goldcorp Exchange Ltd., Re*, [1994] 2 All E.R. 806 (New Zealand P.C.), the fact remains that good conscience is a theme underlying constructive trust from its earliest times.

33 Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. As La Forest J. states in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 453:

> The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as *Keech* in the passage cited *supra*; see also *Canadian Aero, supra*, at pp. 607 and 610; *Canson, supra*, at p. 547, *per* McLachlin J. In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

36 The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the

defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

37 In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed in this direction. The courts do, however, find constructive trusts in circumstances similar to those at bar. Equity traditionally recognized the appropriateness of a constructive trust for breach of duty of loyalty simpliciter. The English law is summarized by Goff and Jones, *The Law of Restitution, supra*, at p. 643:

> A fiduciary may abuse his position of trust by diverting a contract, purchase or other opportunity from his beneficiary to himself. If he does so, he is deemed to hold that contract, purchase, or opportunity on trust for the beneficiary.

P. Birks, *An Introduction to the Law of Restitution* (1985) (at pp. 330; 338-43) agrees. He suggests that cases of conflict of interest not infrequently may give rise to constructive trust, absent unjust enrichment. Birks distinguishes between anti-enrichment wrongs and anti-harm wrongs (at p. 340). A fiduciary acting in conflict of interest represents a risk of actual or potential harm, even though his misconduct may not always enrich him. A constructive trust may accordingly be ordered.

38 Both categories of constructive trust are recognized in the United States; although unjust enrichment is sometimes cited as the rationale for the constructive trust in the U.S., in fact its courts recognize the availability of constructive trust to require the return of property acquired by wrongful act absent unjust enrichment of the defendant and reciprocal deprivation of the plaintiff. Thus the authors of *Scott on Trusts* (3rd ed. 1967), vol. V, at p. 3410, state that the constructive trust "is available where property is obtained by mistake or by fraud or by other wrong". Or as Cardozo C.J. put it, "[a] constructive trust is, then, the remedial device through which preference of self is made subordinate to loyalty to others": *Meinhard v. Salmon* (1928), 164 N.E. 545 (U.S. 1928), at p. 548, cited in *Scott on Trusts, supra*, at p. 3412. *Scott on Trusts, supra*, at p. 3418, states that there are cases "in which a constructive trust is enforced against a defendant, although the loss to the plaintiff is less than the gain to the defendant or, indeed, where there is no loss to the plaintiff".

39 Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust enrichment: *Becker v. Pettkus, supra*. However, since *Becker v. Pettkus* Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.

40 Litman, *supra*, at p. 416, notes that in "the post-*Pettkus v. Becker* era there are numerous cases where courts have used the institutional constructive trust without adverting to or relying on unjust enrichment". The imposition of a constructive trust in these cases is justified not on grounds of unjust enrichment, but on the ground that the defendant's wrongful act requires him to restore the property thus obtained to the plaintiff.

41 Thus in *Ontario (Wheat Producers' Marketing Board) v. Royal Bank* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor.

42 Again, in *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.), a constructive trust was imposed on individuals who knowingly participated in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Becker v. Pettkus, supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, *supra*, at pp. 167-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

VII

45 In *Becker v. Pettkus, supra*, this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows ed., *Essays on the Law of Restitution* (1991), I would identify four conditions which generally should be satisfied:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

VIII

46 Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

47 First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

48 Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

49 Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms, supra, per* La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpins the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

51 I come finally to the question of whether there are factors which would make imposition of a constructive trust unjust in this case. In my view, there are none. No third parties would suffer from an order requiring Mr. Korkontzilas to convey the property to Mr. Soulos. Nor would Mr. Korkontzilas be treated unfairly. Mr. Soulos is content to make all necessary financial adjustments, including indemnification for the loss Mr. Korkontszilas has sustained during the years he has held the property.

52 I conclude that a constructive trust should be imposed. I would dismiss the appeal and confirm the order of the Court of Appeal that the appellants convey the property to the respondent, subject to appropriate adjustments. The respondent is entitled to costs throughout.

Sopinka J. **(dissenting) (Iacobucci J. concurring):**

53 I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

Standard of Review and the Exercise of Discretion

54 It is a matter of settled law that appellate courts should generally not interfere with orders exercised within a trial judge's discretion. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: see *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.). As acknowledged by the majority in the Court of Appeal ((1995), 25 O.R. (3d) 257 (Ont. C.A.), at p. 259), the decision to order a constructive trust is a matter of discretion. In *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), the majority held that the order of a constructive trust in response to a breach of a fiduciary duty would depend on all the circumstances. La Forest J. stated at p. 674:

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. ... [A constructive trust] is but one remedy, and will only be imposed in appropriate circumstances.

The discretionary approach to constructive trusts is also consistent with the approach to equitable remedies generally: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at p. 585.

55 Given that ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy. In my view, the trial judge committed no such error.

56 The majority of the Court of Appeal apparently found that the trial judge erred in failing to consider the moral blameworthiness of the appellants' actions. Similarly, McLachlin J. would hold that a constructive trust was appropriate in the present case simply because of considerations of "good conscience". In my view, the trial judge considered the moral quality of the appellants' actions and thus there is no room for appellate intervention on this ground. He stated ((1991), 4 O.R. (3d) 51 (Ont. Gen. Div.), at p. 69) that, while "[n]o doubt the maintenance of commercial morality is an element of public policy and a legitimate concern of the court", morality should generally not invite the intervention of the court, except where it is required in aid of enforcing some legal right. Put another way, in my view the trial judge was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which statement of the law is in my view correct.

57 The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only

remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plaintiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have been ordered), the plaintiff could have sought exemplary damages — his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

58 The trial judge put significant emphasis on the absence of pecuniary gains in concluding that he would not order a constructive trust. For the reasons which I set out in detail below, I am of the opinion that the trial judge was correct in this regard. On the other hand, the majority of the Court of Appeal and McLachlin J. hold that the trial judge erred in improperly appreciating the deterrence role of a constructive trust in the present case. In my view, consideration of deterrence fails to disclose any error in principle on the part of the trial judge. Deterrence, like the morality of the acts in question, may be relevant to the exercise of discretion with respect to the remedy for a breach of a fiduciary duty (see, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at pp. 421 and 453), but the trial judge in the present case did not fail to consider deterrence in deciding whether to order a constructive trust. As noted above, he stated that while "maintenance of commercial morality is ... a legitimate concern of the court" (p. 69), it would not alone justify ordering a remedy in the present case. In my view, his mention of the "maintenance of commercial morality" indicates that the judge considered deterrence, but held that it alone could not justify a remedy in the present case. Thus, even if failure to consider deterrence could be considered an error in principle, the trial judge in the present case did not so err.

59 In my view, the trial judge committed no error in principle which could justify a decision to set aside his judgment and order a constructive trust. Even if the trial judge did commit some error in principle, however, in my view the remedy of a constructive trust was not available on the facts of the present case. That is, even if no deference is owed to the trial judge, the majority below erred in ordering a constructive trust and the appeal should be allowed. The following are my reasons for this conclusion.

Unjust Enrichment and the Availability of a Constructive Trust

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may *only* be ordered where there has been an unjust enrichment. For example, passages in *LAC Minerals, supra*, set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker, supra*, set out a two-step approach. *First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment*. In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "*The principle of unjust enrichment lies at the heart of the constructive trust*": see *Pettkus v. Becker*, at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

> *Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out*. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. [Emphasis added.]

61 In *Brissette v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87 (S.C.C.), the majority cited some of the passages above from *Lac* with approval and held at p. 96 that, "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust."

62 Citing only *Pettkus, supra*, specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Canadian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "The requirement of unjust enrichment is fundamental to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a *requirement* for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

63 Even aside from the case law, in my view, the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role. The respondent submitted that if no remedy is available in the present case, there would inappropriately be a right without a remedy. I disagree. Clearly, the beneficiary has a right to have the fiduciary adhere to its duty, and *if damages are suffered*, the beneficiary has a right to a remedy. In my view, this is analogous to remedial principles found elsewhere in the private law. Even if a duty is owed and breached in other legal contexts, there is no remedy unless a loss has been suffered. I may owe a duty to my neighbour to shovel snow off my walk, and I may breach that duty, but if my neighbour does not suffer any loss because of the breached duty, there is no tort and no remedy. Similarly, I may have a contractual duty to supply goods at a specific date for a specific price, but if I do not and the other party is able to purchase the same goods at the contract price at the same time and place, the party has not suffered damage and no remedy is available. It is entirely consistent with these rules to state that even if a fiduciary breaches a duty, if the fiduciary is not unjustly enriched by the breach, there is no remedy.

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out in *LAC Minerals*. In *LAC Minerals*, La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd., supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; *a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property*. [Emphasis added.]

65 La Forest J. thus held that generally an aggrieved beneficiary will only be entitled to damages, not to the property itself. This implies that the beneficiary does not generally have a right to the property in question, but rather has a right to receive the value of the gains resulting from the acquisition of the property. Following this reasoning, if the value of the gains is zero, that is, there is no unjust enrichment, the beneficiary will not have a right to a remedy. Consequently, where there has been no unjust enrichment, there is no right to a constructive trust or any other remedy.

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by the plaintiff and the absence of any juristic reason for the enrichment: *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.); *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.). McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

67 In *Ontario (Wheat Producers' Marketing Board) v. Royal Bank* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor. The bank was a secured creditor of the depositor, which depositor was in financial difficulty at the time of the deposits. Clearly, this case involved an unjust enrichment: the bank benefitted by gaining rights over the deposited money, as well as by increasing the likelihood of repayment of the depositor's credit; the plaintiff (a corporation whose agent, the depositor, breached his fiduciary obligations) was deprived of its right to its money; and there was no juristic reason for the enrichment. Thus, the order of a constructive trust responded to an unjust enrichment, whether or not the court adverted to such doctrine.

68 *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits, there was no "corresponding deprivation" and therefore no unjust enrichment.

69 I disagree with McLachlin J. that there was no unjust enrichment in *MacMillan Bloedel Ltd.* First of all, courts have consistently treated fiduciaries' profits explicitly as unjust enrichment, whether or not the beneficiary could have earned the profits itself. For example, in *Reading v. R.*, [1948] 2 All E.R. 27 (Eng. K.B.), aff'd [1949] 2 All E.R. 68 (Eng. C.A.), aff'd [1951] 1 All E.R. 617 (Eng. H.L.), Denning J. stated at p. 28:

> It matters not that the master has not lost any profit, nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has *unjustly enriched himself* by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money. ... [Emphasis added.]

In *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.), at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty *does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract*; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, *as based on unjust enrichment*, I would not interfere with the quantum. [Emphasis added.]

Reading and *Canadian Aero Service Ltd.* are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself. Thus, *MacMillan Bloedel Ltd.* involved unjust enrichment, contrary to McLachlin J.'s assertion.

70 I wish to add that the treatment of the profits as unjust enrichment in *Reading, O'Malley*, and *MacMillan Bloedel Ltd.* is not inconsistent with the general rules governing unjust enrichment. The plaintiff in each case had a right to have the fiduciary adhere to his duty. When the defendant breached that duty, the profits earned as a result of that breach are essentially treated in equity as belonging to the corporation, whether or not the corporation could have earned those profits in the absence of the breach. As an example of the proprietary analogy, Denning M.R. stated at p. 856 in *Phipps v. Boardman*, [1965] 1 All E.R. 849 (Eng. C.A.), aff'd [1966] 3 All E.R. 721 (U.K. H.L.), that:

> [W]ith *information or knowledge* which he has been employed by his principal to collect or discover, *or which he has otherwise acquired*, for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, *he is accountable ... for such information or knowledge is the property of his principal, just as much as an invention is*. ... [Italics in original; underlining added.]

71 Thus, in *MacMillan Bloedel Ltd.*, the retention of the profits by the fiduciary would have deprived the corporation of its right to the profits. The deprivation is represented by the monies obtained by the fiduciary as a result of infringing the rights of the plaintiff. In order for there not to have been deprivation and unjust enrichment in circumstances otherwise similar to *MacMillan Bloedel Ltd.*, the self-dealing could not have resulted in any secret profits — if a remedy were awarded in a case without profit, thus no enrichment nor deprivation, McLachlin J. could well point to the case for support. Given that there *was* profit in *MacMillan Bloedel Ltd.*, however, there was unjust enrichment which justified the order of a constructive trust, whether or not the court explicitly relied upon unjust enrichment.

72 In summary, McLachlin J. fails to refer to a single Canadian case where a constructive trust was ordered despite the absence of unjust enrichment. Given this conclusion and given that recent cases of this Court unambiguously foreclose the possibility of ordering a constructive trust in the absence of unjust enrichment, in my view McLachlin J. is in error in concluding that a constructive trust may be ordered in the absence of unjust enrichment.

73 Aside from Canadian case law, McLachlin J. attempts to rely on various scholars and foreign case law as providing support for her conclusion. Because of the clear statement of the law recently set out by this Court, in my view the scholarly writings and foreign cases are only useful insofar as the policy they set out suggests that the law in Canada should be modified. I will therefore simply address the policy upon which McLachlin J. relies, rather than each case and each article she cites.

74 Simply put, McLachlin J., reasoning similarly to the majority below, concludes that to fail to permit the order of a constructive trust where there has been a breach of a fiduciary duty, but no unjust enrichment, would inadequately safeguard

the integrity of fiduciary relationships. She says at para. 33 that ordering a constructive trust simply on the basis of "good conscience",

> addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. ... The constructive trust imposed for breach of fiduciary relationship, thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of constructive trust as a remedy even where there has been no unjust enrichment.

75 In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

76 In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there *were* gains in value, and therefore unjust enrichment, he or she *would* be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.

Was There Unjust Enrichment?

78 In my opinion, there was no enrichment and therefore no unjust enrichment in the present case. It is first of all plain that there were no pecuniary advantages accruing to the appellants from the purchase of the property. The trial judge stated (at p. 68):

> I now consider the facts of the case at bar. The nature of the duty and of the breach have already been discussed. At an interlocutory stage, the plaintiff abandoned any claim for damages. *This step involved no sacrifice because the plaintiff could not have proved any*. [Emphasis added.]

Any enrichment from the purchase of the property was not pecuniary, which would suggest that there has in fact been no enrichment and therefore no unjust enrichment.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the defendant's pecuniary gains may not represent the enrichment of the defendant or the deprivation of the plaintiff. Analogizing to the award of specific performance in contract, where property that is the subject of a contract is unique or otherwise difficult to value, and the contract is breached, it may be held that monetary damages are inadequate and thus a remedy of specific performance must be ordered to compensate the plaintiff adequately. In such cases, pecuniary damages may not represent the loss to the plaintiff or the gain to the defendant from the breach. Thus, perhaps, an enrichment could be found in the absence of a change in market price if the property were unique or otherwise difficult to value.

80 Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of *Lee v. Chow* (1990), 12 R.P.R. (2d) 217 (Ont. H.C.). In *Lee*, a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case. The trial judge in the instant appeal distinguished *Lee* in the following way (at p. 70):

> [The circumstances in *Lee*] included the following: a degree of dependence by the plaintiff which, in my view, is lacking in the case at bar; that it was a residential property meeting the specific requirements of the plaintiff, *rather than a commercial property having value only as an investment*; and that it appeared probable that the acquisition price represented a bargain, while the property at issue in the case at bar did not. [Emphasis added.]

In *Lee* there were pecuniary gains, thus an enrichment, and the property had unique qualities which helped justify a constructive trust. In the present case there were no pecuniary gains, and the trial judge did not find any meaningful non-pecuniary advantages associated with the property — the property had value "only as an investment". In my view, given the absence of both pecuniary and non-pecuniary advantages from the property, there was no enrichment and therefore no unjust enrichment.

81 In the absence of unjust enrichment, in my view the trial judge was correct not to order the remedy sought, a constructive trust. The trial judge stated (at p. 69):

> A constructive trust was deemed appropriate in *Lac Minerals, supra*, because damages were deemed to be unsatisfactory. It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none.

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's

reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

82 Since the trial judge did not err in not ordering a constructive trust, but rather the majority of the Court of Appeal did in ordering one, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. In the circumstances, I would not award costs to the appellants either here or in the Court of Appeal.

Appeal dismissed.

Pourvoi rejeté.

CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION	-and-	NORMA WALTON et al.
Applicant		Respondents

Court File No. CV-15-10879-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE APPLICANT, CHRISTINE DEJONG MEDICINE PROFESSIONAL CORPORATION

SimpsonWigle LAW LLP
501 - 390 Brant Street
BURLINGTON, ON L7R 4J4

Rosemary A. Fisher (LSUC #32238T)
E-mail: fisherr@simpsonwigle.com
Tel: (905) 639-1052
Fax: (905) 333-3960

Lawyers for the Applicant, Christine DeJong Medicine Professional Corporation