Court File No. 35-2481393
Estate File No. 35-2481393

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
SIRIUS CONCRETE INC. OF THE CITY OF WATERLOO,
IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THE
CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30, as amended

BOOK OF AUTHORITIES OF BDO CANADA LIMITED,
IN ITS CAPACITY AS TRUSTEE OF SIRIUS CONCRETE INC.
(Moving Party)

September 4, 2020

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Tab 1

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Interpretation

Definitions

2 In this Act,

property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property

Tab 2

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Claims Provable

Claims provable

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Tab 3

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

- **135 (1)** The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
- **Marginal note:Determination of provable claims**

  (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
- **Marginal note:Disallowance by trustee**

  (2) The trustee may disallow, in whole or in part,

  - **(a)** any claim;
  - **(b)** any right to a priority under the applicable order of priority set out in this Act; or
  - **(c)** any security.
- **Marginal note:Notice of determination or disallowance**

  (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
- **Marginal note:Determination or disallowance final and conclusive**

  (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.
- **Marginal note:Expunge or reduce a proof**

  (5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

Tab 4

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

PART VI

Bankrupts

Debts not released by order of discharge

- **178 (1)** An order of discharge does not release the bankrupt from
    - **(a)** any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;
    - **(a.1)** any award of damages by a court in civil proceedings in respect of
        - **(i)** bodily harm intentionally inflicted, or sexual assault, or
        - **(ii)** wrongful death resulting therefrom;
    - **(b)** any debt or liability for alimony or alimentary pension;
    - **(c)** any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;
    - **(d)** any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;
    - **(e)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;
    - **(f)** liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;
    - **(g)** any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred
        - **(i)** before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or
        - **(ii)** within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

- **(g.1)** any debt or obligation in respect of a loan made under the *Apprentice Loans Act* where the date of bankruptcy of the bankrupt occurred
    - **(i)** before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or
    - **(ii)** within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or
- **(h)** any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

- **Court may order non-application of subsection (1)**

  (1.1) At any time after five years after the day on which a bankrupt who has a debt referred to in paragraph (1)(g) or (g.1) ceases to be a full- or part-time student or an eligible apprentice, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

    - **(a)** the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and
    - **(b)** the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

- **Claims released**

  (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

Tab 5

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

PART IV

Property of the Bankrupt

Property of bankrupt

- **67 (1)** The property of a bankrupt divisible among his creditors shall not comprise
    - **(a)** property held by the bankrupt in trust for any other person;

Tab 6

Construction Act
R.S.O. 1990, CHAPTER C.30

PART XII
MISCELLANEOUS RULES

Transition

Continued application of Construction Lien Act *and regulations*

87.3 (1) This Act and the regulations, as they read on June 29, 2018, continue to apply with respect to an improvement if,

(a) a contract for the improvement was entered into before July 1, 2018;

(b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises; or

(c) in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before the day subsection 19 (1) of Schedule 8 to the *Restoring Trust, Transparency and Accountability Act, 2018* came into force. 2018, c. 17, Sched. 8, s. 19 (1).

Same

(2) For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into. 2018, c. 17, Sched. 8, s. 19 (1).

Exception, municipal interest in premises

(3) Despite subsection (1), the amendments made to this Act by subsections 13 (4), 14 (4) and 29 (2) and (4) of the *Construction Lien Amendment Act, 2017* apply with respect to an improvement to a premises in which a municipality has an interest, even if a contract for the improvement was entered into or a procurement process for the improvement was commenced before July 1, 2018. 2018, c. 17, Sched. 8, s. 19 (2).

Non-application of Parts I.1 and II.1

(4) Parts I.1 and II.1 do not apply with respect to the following contracts and subcontracts:

1. A contract entered into before the day subsection 11 (1) of the *Construction Lien Amendment Act, 2017* came into force.
2. A contract entered into on or after the day subsection 11 (1) of the *Construction Lien Amendment Act, 2017* came into force, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises.
3. A subcontract made under a contract referred to in paragraph 1 or 2. 2018, c. 17, Sched. 8, s. 19 (3).

Tab 7

Construction Lien Act

R.S.O. 1990, CHAPTER C.30

PART II
TRUST PROVISIONS

Contractor's and subcontractor's trust
Amounts received a trust

8. (1) All amounts,

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (1).

Tab 8

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

PART IV

Property of the Bankrupt

Property of bankrupt

- **67 (1)** The property of a bankrupt divisible among his creditors shall not comprise
    - **(a)** property held by the bankrupt in trust for any other person;
    - **(b)** any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
    - **(b.1)** goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
    - **(b.2)** prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
    - **(b.3)** without restricting the generality of paragraph (b), property in a *registered retirement savings plan*, a *registered retirement income fund* or a *registered disability savings plan*, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

  but it shall comprise

    - **(c)** all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
        - **(i)** is not subject to the operation of this Act, or
        - **(ii)** in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
    - **(d)** such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.
- **Deemed trusts**

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

- **Exceptions**

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

- **(a)** that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
- **(b)** the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a ***provincial pension plan*** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Tab 9

Most Negative Treatment: Check subsequent history and related treatments.

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, 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.)

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Related Abridgment Classifications
Family law
VII Division of property
VII.2 Determination of ownership of property
VII.2.a Application of trust principles
VII.2.a.i Resulting and constructive trusts
VII.2.a.i.A Resulting trusts generally
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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

***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.

Tab 10

1994 CarswellAlta 769
Supreme Court of Canada

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.

1994 CarswellAlta 744, 1994 CarswellAlta 769, [1994] 2 S.C.R. 490, [1994] 7 W.W.R. 37, [1994] I.L.R. 1-3077, [1994] A.W.L.D. 658, [1994] S.C.J. No. 59, 115 D.L.R. (4th) 478, 155 A.R. 321, 168 N.R. 381, 20 Alta. L.R. (3d) 296, 23 C.C.L.I. (2d) 161, 48 A.C.W.S. (3d) 1240, 73 W.A.C. 321, J.E. 94-1053, EYB 1994-66952

MARITIME LIFE ASSURANCE COMPANY v. SASKATCHEWAN RIVER BUNGALOWS LTD. and CONNIE DOREEN FIKOWSKI

La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: March 14, 1994
Judgment: June 23, 1994
Docket: Doc. 23194

Counsel: *James D. McCartney* and *Brian E. Leroy*, for appellant.
James S. Peacock, for respondents.

Related Abridgment Classifications
Estoppel
II Estoppel in pais
II.5 Particular classes
II.5.a Corporations
II.5.a.ii Insurance companies
II.5.a.ii.A Cancellation of policy
Insurance
III Contracts of insurance
III.10 Cancellation and termination
III.10.e For non-payment
III.10.e.ii Waiver
Insurance
X Actions on policies
X.3 Relief against forfeiture

Table of Authorities

Cases considered:

Anguish v. Maritime Life Assurance Co., [1987] 4 W.W.R. 261, 51 Alta. L.R. (2d) 376, 24 C.C.L.I. 194, 77 A.R. 189, [1987] I.L.R. 1-2226 [additional reasons 29 C.C.L.I. 190, [1988] I.L.R. 1-2340, leave to appeal to S.C.C. refused, [1988] 2 S.C.R. vii, [1988] 6 W.W.R. lxviii, 61 Alta. L.R. (2d) lii, 91 A.R. 80, 32 C.C.L.I. xliii, 90 N.R. 319] — *referred to*

Duplisea v. T. Eaton Life Assurance Co., [1980] 1 S.C.R. 144, 26 N.B.R. (2d) 319, 55 A.P.R. 319, 27 N.R. 369, 7 B.L.R. 24, [1979] I.L.R. 1-1104, 99 D.L.R. (3d) 445 — *referred to*

Federal Business Develoment Bank v. Steinbock Development Corp. (1983), 42 A.R. 231 (C.A.) — *applied*

Guillaume v. Stirton (1978), 88 D.L.R. (3d) 191, leave to appeal to S.C.C. refused [1978] 2 S.C.R. vii — *referred to*

Hartley v. Hymans, [1920] 3 K.B. 475 — *referred to*
Holwell Securities Ltd. v. Hughes, [1974] 1 All E.R. 161 (C.A.) — *referred to*
Johnston v. Dominion of Canada Guarantee & Accident Insurance Co. (1908), 17 O.L.R. 462 (C.A.) — *distinguished*
Liscumb v. Provenzano Estate (1985), 51 O.R. (2d) 129, 40 R.P.R. 31, affirmed (1986), 55 O.R. (2d) 404 (C.A.) — *applied*
Marchischuk v. Dominion Industrial Supplies Ltd., [1991] 2 S.C.R. 61, [1991] 4 W.W.R. 673, [1991] I.L.R. 1-2729, 3 C.C.L.I. (2d) 173, 125 N.R. 306, 80 D.L.R. (4th) 670, 50 C.P.C. (2d) 231, 73 Man. R. (2d) 271, 30 M.V.R. (2d) 102 — *referred to*
McGeachie v. North American Life Insurance Co. (1893), 20 O.A.R. 187, affirmed (1894), 23 S.C.R. 148 — *distinguished*
Mitchell & Jewell Ltd. v. Canadian Pacific Express Co., [1974] 3 W.W.R. 259, 44 D.L.R. (3d) 603 (Alta. C.A.) — *referred to*
Northern Life Assurance Co. v. Reierson, [1977] 1 S.C.R. 390, [1976] 3 W.W.R. 275, [1976] I.L.R. 1-749, 8 N.R. 351, 67 D.L.R. (3d) 193 — *distinguished*
Rickards (Charles) Ltd. v. Oppenhaim, [1950] 1 K.B. 616, [1950] 1 All E.R. 420 (C.A.) — *referred to*
Shiloh Spinners Ltd. v. Harding, [1973] A.C. 691, [1973] 1 All E.R. 90 (H.L.) — *considered*
Stenhouse v. General Casualty Insurance Co. (1934), [1934] 3 W.W.R. 564, 2 I.L.R. 36, [1935] 1 D.L.R. 193 (Alta. C.A.) — *distinguished*
Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co., 2 Alta. L.R. (2d) 1, 2 A.R. 63, [1977] I.L.R. 1-844 (C.A.) — *distinguished*
Tudale Explorations Ltd. v. Bruce (1978), 20 O.R. (2d) 593, 88 D.L.R. (3d) 584 (Div. Ct.) — *referred to*
W.J. Alan & Co. v. El Nasr Export & Import Co., [1972] 2 Q.B. 189, [1972] 2 All E.R. 127 (C.A.) — *referred to*

Statutes considered:

Insurance Act, R.S.A. 1980, c. I-5 — *considered*

s. 201 — *considered*

s. 205 — *considered*

s. 211 — *considered*

Judicature Act, R.S.A. 1980, c. J-1 — *considered*

s. 10 — *considered*

The judgment of the court was delivered by *Major J.*:

I. FACTS

1 On July 26, 1978, the appellant Maritime Life Assurance Company ("Maritime") issued an insurance policy on the life of Michael Fikowski Sr. to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Connie Fikowski, at which time she became the beneficiary. SRB retained the responsibility of paying the annual premiums under the policy.

2 The policy issued to the respondents was a term policy, renewable every five years. The policy expiry date was the insured's 70th birthday — July 26, 2000. However, prior to July 26, 1988, the policy-holder had an option to convert the policy to a new life or endowment policy. The policy contained the following conditions relating to premium payment:

> **2. PREMIUM PAYMENT PROVISIONS**
>
> ***(1) General***
>
> The agreements made by the Company and contained in this contract are conditional upon payment of the premiums as they become due.
>
> Each premium is payable on or before its due date at the Head Office of the Company.

(2) Grace Period

After the first period has been paid, a grace period of thirty-one days following its due date is allowed for the payment of each subsequent premium. During the grace period, this policy continues in effect.

(3) Non-payment of Premiums

If any premium remains unpaid at the end of the grace period, this policy automatically lapses (terminates because of non-payment of premiums).

Under certain conditions, this policy may be reinstated, as described below.

(4) Reinstatement

This policy may be reinstated within 3 years of the date of the lapse upon written application to the Company subject to the following conditions:

a) evidence that satisfies the Company of the life insured's good health and insurability must be submitted; and

b) all unpaid premiums plus interest, at a rate to be determined by the Company, must be paid to the Company.

3 Over the years, SRB paid the annual policy premium irregularly. In 1979, the policy lapsed after SRB failed to pay the annual premium within the 31-day grace period. The policy was subsequently reinstated in accordance with the reinstatement provision (cl. 2(4)) of the policy. In 1981, SRB again failed to make payment within the grace period. On this occasion, Maritime accepted late payment and did not require evidence of insurability or an application for reinstatement.

4 On July 24, 1984, SRB mailed a cheque for $1,316 to pay the annual premium due on July 26, 1984. On August 13, 1984, SRB received a premium due notice from Maritime, requesting payment of $1,361. It sent Maritime a cheque for $45 — the difference between the July 24 cheque and the amount demanded in the payment due notice. This second cheque was received by Maritime on August 22, 1984. The first cheque, in the amount of $1,316, was never received by Maritime, nor was it deducted from SRB's bank account.

5 Subsequent to the expiry of the grace period on August 26, 1984, Maritime sent a late payment offer to SRB. In this offer, Maritime agreed to accept late payment of the July premium if it was "postmarked or, if not mailed, received at the Head Office at Halifax, N.S." on or before September 8, 1984. The offer also contained an explicit reserve of Maritime's right to require evidence of insurability. SRB did not respond to the late payment offer.

6 On November 28, 1984, Maritime wrote a letter ("the November letter") advising the respondent Connie Fikowski that the premium due on July 26, 1984 remained unpaid. This letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

7 Finally, on February 2, 1985, Maritime sent a notice of policy lapse to the respondents. This notice was originally sent to an incorrect address in Vancouver, but was eventually forwarded to SRB. It read, in part:

> According to our records this policy has lapsed for non-payment of the premium due on the date shown. The policy is no longer in force and no benefits are payable. Because your insurance affords valuable protection and represents a worthwhile investment we invite you to apply for reinstatement of the policy.

The Application for Reinstatement appended to the lapse notice required evidence of insurability.

8 SRB closed its hotel business at Lake Louise, Alberta, for the winter season around the middle of November, 1984. SRB picked up the corporate mail on an infrequent basis throughout the winter. As a result, SRB did not become aware of the late payment offer, the November letter or the lapse notice until April, 1985. They then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused.

9 On July 9, 1985, SRB's insurance agent informed Maritime that Michael Fikowski Sr. was terminally ill and uninsurable. On August 10, 1985, Michael Fikowski Sr. died. On October 11, 1985, Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The respondents then commenced the present action, claiming a right to benefits under the policy or, alternatively, relief against forfeiture.

II. JUDGMENTS BELOW

A. Alberta Court of Queen's Bench

10 Deyell J. rejected the plaintiffs' claim and refused to grant them relief against forfeiture. He made no specific finding as to whether a cheque was actually mailed to Maritime by SRB in July 1984, but emphasized that Maritime did not receive payment and advised SRB accordingly. Deyell J. reasoned that the respondents had to "live with the results" of their decision to have their corporate mail sent to Lake Louise throughout the year. As well, he considered that SRB was obliged to do more than search for a cancelled cheque when they learned of the policy lapse in April of 1985. Deyell J. further ruled that Connie Fikowski was bound by SRB's actions.

B. Alberta Court of Appeal

11 A majority of the Alberta Court of Appeal allowed the respondents' appeal: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895. The majority held that the postal acceptance rule did not apply, since an express term of the policy required that premiums be paid, not posted, by the due date: *Holwell Securities Ltd. v. Hughes*, [1974] 1 All E.R. 161 (C.A.). However, both Harradence and Hetherington JJ.A. considered that, because it encouraged policy-holders to mail premium payments, Maritime was barred from demanding strict compliance with the time requirements for payment under the policy. Harradence J.A. cast this ruling in terms of estoppel, while Hetherington J.A. relied on waiver. Both agreed that, until the respondents were notified that the 1984 cheque had not been received and were given a reasonable period during which to effect payment, Maritime could not terminate the policy for non-payment.

12 Hetherington J.A. considered that none of Maritime's acts, including the late payment offer, the November letter and the lapse notice, gave the respondents reasonable notice that Maritime intended to rely on the lapsing provision of the policy. The February lapse notice was premature because it stated that "this policy has lapsed", without giving reasonable notice to the respondents. As such, Maritime's right to rely on the lapsing provision of the policy was never reinstated. She concluded that the policy was still in force in August 1985.

13 Harradence J.A. found that the respondents could have made payment within a reasonable period after they received actual notice of the overdue premium in April 1985. However, the respondents failed to pay within this period. Their three-month delay in providing a replacement cheque was unreasonable, and the policy lapsed. However, Harradence J.A. concluded that it was an appropriate case to relieve against forfeiture under s. 10 of the *Judicature Act*, R.S.A. 1980, c. J-1.

14 In dissent, McClung J.A. stated that Maritime did not waive its right to rely on the lapsing provision of the policy by encouraging policy holders to use the mail. He found that while Maritime had waived its position in the November letter, the eventual payment of the missing premium in July 1985 did not comply with the request for "immediate payment" in the November letter. As a result, there was no waiver. In addition, he concluded that the Court had no jurisdiction to relieve against forfeiture since the field was occupied by a statutory scheme (the *Insurance Act*, R.S.A. 1980, c. I-5).

III. ISSUES

15 This appeal raises two issues:

(1) Did Maritime waive its right to compel timely payment in accordance with the terms of the policy?

(2) If there was no waiver, are the respondents entitled to relief against forfeiture under the *Judicature Act*, R.S.A. 1980, c. J-1, s. 10?

IV. ANALYSIS

A. Waiver

16 Maritime's position is that the policy issued to the respondents lapsed after the expiry of the grace period for payment of the 1984 premium. Fikowski Sr.'s death occurred when the policy was not in force and the respondents had no right to benefits under it.

17 The respondents' position is that Maritime, through its conduct, waived its right to compel timely payment under the policy. The respondents further submit that none of Maritime's acts were sufficient to retract its waiver of time and that the policy was still in force at the time of death.

18 Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see, e.g., *Alan (W.J.) & Co. v. El Nasr Export & Import Co.*, [1972] 2 Q.B. 189 (C.A.), and *Tudale Explorations Ltd. v. Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S.M. Waddams, *The Law of Contracts* (3rd ed., 1993), p. 418, at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished. As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.

19 Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. C.A.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 [[1991] 4 W.W.R. 673] (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

21 As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that by encouraging policy-holders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the $45 partial payment, and in accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

22 It is not necessary to address each of the factors identified by the respondents, for it seems clear that the November letter, taken alone, constituted a waiver of Maritime's right to receive timely payment under the policy. The November letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

23 As late as November 28, 1984, Maritime was willing to *continue* coverage under the policy upon payment of the July 1984 premium. The November letter makes no mention of evidence of insurability, nor does it speak of reinstatement. As such, it constitutes clear evidence of Maritime's intention to waive its right to compel timely payment. In this regard, little weight should be given to the assertion that the policy was "technically out of force", for the qualifier "technical" removes all meaning from the expression "out of force". In any event, this assertion does not detract from the clarity of Maritime's demand for payment.

24 The appellant submits that, whereas the right to compel timely payment is clearly waived where premium payments are received and deposited by an insurance company after the expiry of the policy grace period (*Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144; *Anguish v. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376 [[1987] 4 W.W.R. 261] (C.A.), leave to appeal refused [1988] 2 S.C.R. vii [[1988] 6 W.W.R. lxviii, 61 Alta. L.R. (2d) lii]), a mere demand for payment beyond the grace period is insufficient. Support for that proposition is found in *McGeachie v. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), affirmed (1894), 23 S.C.R. 148; and in *Northern Life Assurance Co. v. Reierson*, [1977] 1 S.C.R. 390 [[1976] 3 W.W.R. 275]. In both cases, this Court concluded that a demand for payment was equivocal or insufficient to give rise to a waiver. However, in some circumstances a demand for payment may constitute waiver. The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

25 The demand for payment in the present appeal provides stronger evidence of waiver than did the demands in either *McGeachie* or *Reierson*. The demand for payment by the appellant in its November letter was made well beyond the expiry of the grace period. As well, payment in the present case was tendered prior to the occurrence of the event insured against. Any doubt about whether Maritime intended to waive the time requirements of the policy was resolved by the testimony of its legal advisor, who indicated that, having received the $45 partial payment, Maritime was *still* awaiting payment of the July 1984 premium in January 1985. It was for this reason that the lapse notice was not sent until February 2, 1985. In these circumstances, the demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy.

26 As the November letter constituted waiver, the question is then whether the waiver was still in effect when SRB tendered payment of the missing premium in July 1985.

27 Waiver can be retracted if reasonable notice is given to the party in whose favour it operates: *Hartley v. Hymans*, [1920] 3 K.B. 475; *Rickards (Charles) Ltd. v. Oppenhaim*, [1950] 1 K.B. 616 (C.A.); *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused [1978] 2 S.C.R. vii. As Waddams notes, the "reasonable notice" requirement has the effect of protecting reliance by the person in whose favour waiver operates: *The Law of Contracts*, at paras. 604 and 606. It follows that a notice requirement should not be imposed where reliance is not an issue: ibid., at para. 606. In the present appeal, the respondents were not aware of Maritime's waiver until they received the November letter, along with the lapse notice and late payment offer, in April 1985. It follows that they did not rely on Maritime's waiver. In such circumstances, Maritime was not required to give any notice of its intention to lapse the policy. The statement that "this policy has lapsed", contained in the February lapse notice, took effect on its terms.

28 In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. An informal communication of a party's intention to insist on strict compliance with the terms of a contract is sufficient notice: see, e.g., *Guillaume v. Stirton*, supra. The respondents did not tender a replacement cheque until July 1985,

three months after they became aware of Maritime's intentions. As such, even if a reasonable notice requirement were imposed, it would be adequately met by the respondents' failure to act between April and July.

29 Maritime's waiver, as contained in the November letter, was no longer in effect when the respondents sought to make payment in July 1985. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case. Therefore, the respondents are not entitled to any of the benefits under the policy.

B. Relief Against Forfeiture

30 The second issue on appeal is the Court's equitable jurisdiction to relieve against forfeiture. The respondents submit that the general power to grant relief, contained in s. 10 of the *Judicature Act*, should be exercised in this case. The appellant contends that the *Judicature Act* does not apply since the field is occupied by a statutory scheme (the *Insurance Act*). It further submits that the respondents' loss was not a forfeiture and argues that, in any event, this is not an appropriate case for granting relief.

31 Section 10 of the *Judicature Act* reads:

> 10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

32 The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.) ; *Snell's Principles of Equity* (29th ed., 1990), at pp. 541-42.

33 The Ontario High Court in *Liscumb v. Provenzano Estate* (1985), 51 O.R. (2d) 129, affirmed 55 O.R. (2d) 404 (C.A.), relying on the *Shiloh* decision, summarized the governing principles as follows (at p. 137, per McKinlay J.):

> I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

34 The first element of the test set out in *Liscumb* — the reasonable conduct requirement — is not met in this case. The respondents knew, at all relevant times, that Fikowski Sr. was terminally ill and uninsurable. Nonetheless, they chose to have their correspondence from Maritime sent to Lake Louise over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. The trial judge, who was in a position to assess the respondents' conduct, concluded that it was not reasonable. He wrote:

> The corporation chose to have a mail box at the Post Office at Lake Louise to receive its corporate mail on a 12-month basis and, having made that decision, I think they must live with the results. If you only pick up your mail every two weeks then you are going to be late in getting notices that may be of some importance. Ultimately, when the advice that the policy had lapsed was received in late April or early May of 1985, Mr. Michael Fikowski and Mr. J.D. Thomas started a search for a cancelled cheque. Under the circumstances, in this day and age of long distance telephones and all the communications that are available I think that they had an obligation to their company to take additional procedures in regard to this matter. They were advised that payment had not been made. There were procedures to have the policy reinstated. If they were going to do anything about it, it had to be done quickly. It wasn't until July 25th, if memory serves me correctly, met [sic] the replacement cheque was sent out, that is, three months after they ultimately received the notice.
>
> I therefore find that the plaintiffs' case fails and that they are not entitled to relieve against forfeiture.

35 As the failure to satisfy the first test in *Liscumb* determines the outcome of this appeal, it is unnecessary to comment on the second and third tests outlined in the case.

36 As the respondents are barred by their conduct from recovering, it is not necessary to determine whether our general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act*. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited (*Insurance Act*, ss. 201, 205, 211) does not preclude application of the *Judicature Act* to contracts of life insurance. The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.

37 Several of the authorities cited by the appellant involved forfeitures made under statutory insurance conditions, which is not the case here: *Stenhouse v. General Casualty Insurance Co.*, [1934] 3 W.W.R. 564 (Alta. C.A.); *Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co.* (1977), 2 A.R. 63 [2 Alta. L.R. (2d) 1] (C.A.). The case of *Johnston v. Dominion of Canada Guarantee & Accident Insurance Co.* (1908), 17 O.L.R. 462 (C.A.), treated the insurance legislation at issue as a statutory code, and for this reason is no longer good law.

38 It is also unnecessary to determine whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context. Clearly, the holder of a term life policy has no vested right to benefits until the loss insured against — death of the insured — has occurred. However, a modern understanding of the doctrine of relief would likely expand the notion of forfeiture to include less tangible losses, such as the loss of an option to convert a term policy into one under which benefits would be certain, or the loss of one's insurability. This question remains open.

C. Conclusion

39 For the foregoing reasons, I would allow the appeal with costs, set aside the judgment of the Alberta Court of Appeal and restore the judgment at trial.

Appeal allowed.

Tab 11

2009 CarswellOnt 4163
Ontario Superior Court of Justice

Motors Insurance Corp. v. Old Republic Insurance Co.

2009 CarswellOnt 4163, [2009] O.J. No. 3005, 179 A.C.W.S. (3d) 38, 76 C.C.L.I. (4th) 151

Motors Insurance Corporation (Applicant / Respondent in Appeal) and Old Republic Insurance Company (Respondent / Appellant in Appeal)

Herman J.

Heard: June 11, 2009
Judgment: June 24, 2009
Docket: 68-CV-369244

Proceedings: affirmed *Motors Insurance Corp. and Old Republic Insurance Co., Re* (2008), 2008 CarswellOnt 11423 ((Ont. Arb. (Ins. Act)))

Counsel: Lee Samis for Applicant / Respondent in Appeal
Mark K. Donaldson for Respondent / Appellant in Appeal

Related Abridgment Classifications
Administrative law
III Standard of review
III.2 Reasonableness
III.2.c Miscellaneous
Estoppel
I What constitutes
Insurance
VI Contract of indemnity
VI.3 Contribution among insurers
VI.3.a Availability
Table of Authorities
Cases considered by *Herman J.*:

Aviva Insurance Co. of Canada v. Royal & SunAlliance Insurance Co. (2008), 2008 CarswellOnt 4894, *(*sub nom. *Aviva Insurance Co. of Canada v. Royal & SunAlliance Insurance Co.)* [2008] I.L.R. I-4726, 66 C.C.L.I. (4th) 262 (Ont. S.C.J.) — followed

GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co. (1999), 19 C.C.L.I. (3d) 266, 1999 CarswellOnt 4725 (Ont. S.C.J.) — considered

Gill v. Zurich Insurance Co. (2002), 156 O.A.C. 390, 35 C.C.L.I. (3d) 239, 2002 CarswellOnt 741 (Ont. C.A.) — referred to

Moore (Township) v. Guarantee Co. of North America (1991), 2 O.R. (3d) 370, 1991 CarswellOnt 639, [1991] I.L.R. 1-2706, 3 C.C.L.I. (2d) 93 (Ont. Gen. Div.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65 (S.C.C.) — considered

Oxford Mutual Insurance Co. v. Co-operators (2006), 2006 CarswellOnt 6991, 43 C.C.L.I. (4th) 199, *(*sub nom. *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.)* 83 O.R. (3d) 591, [2007] I.L.R. I-4564, 40 M.V.R. (5th) 1 (Ont. C.A.) — followed

Ryan v. Moore (2005), 254 D.L.R. (4th) 1, 334 N.R. 355, [2005] 2 S.C.R. 53, 2005 SCC 38, 2005 CarswellNfld 157, 2005 CarswellNfld 158, 247 Nfld. & P.E.I.R. 286, 735 A.P.R. 286, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, [2005] R.R.A. 694, 18 E.T.R. (3d) 163 (S.C.C.) — referred to

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (1994), [1994] 2 S.C.R. 490, 1994 CarswellAlta 744, [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, *(*sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.)* [1994] I.L.R. 1-3077, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, 1994 CarswellAlta 769 (S.C.C.) — considered

Zurich Insurance Co. v. Personal Insurance Co. (2009), 73 C.C.L.I. (4th) 301, 2009 CarswellOnt 2968 (Ont. S.C.J.) — followed

Statutes considered:

Highway Traffic Act, R.S.O. 1990, c. H.8

Generally — referred to

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 275(4) — considered

Rules considered:

Fault Determination Rules, R.R.O. 1990, Reg. 668

R. 12(4) — considered

***Herman J.*:**

1 Old Republic Insurance Company appeals from the decision of Arbitrator M. Guy Jones, dated November 24, 2008.

2 The arbitrator's decision arises out of a motor vehicle accident in which the vehicle that was insured by Old Republic hit the vehicle that was insured by Motors Insurance Corporation. The driver of the Motors' vehicle was seriously injured and Motors continues to pay accident benefits to him. Motors claims indemnification from Old Republic for its payments by way of a loss transfer claim.

3 Old Republic submits that the arbitrator erred when he decided:

> (i) Old Republic had waived its right to dispute its insured's fault for the accident and was estopped from disputing responsibility for Motors' loss transfer claim; and
>
> (ii) Old Republic's insured bore 20% responsibility for the accident.

Background

4 Motors' loss transfer claim arises from a motor vehicle accident that occurred on March 11, 2005.

5 On that day, Robert Doiron was operating a tractor-trailer combination owned by the Pepsi Bottling Group and insured by Old Republic. Mr. Doiron was driving westbound on Highway 407.

6 The Pepsi truck was struck twice by a UPS truck which had moved into its lane.

7 The second impact caused Mr. Doiron to lose control. The Pepsi truck moved across westbound lanes, through the median and into the eastbound lanes of Highway 407. This resulted in a collision with a vehicle that was driven by Mr. Andrew Leroux and insured by Motors.

8 As a result of the accident, Mr. Leroux sustained serious and devastating injuries. He applied to Motors to receive statutory accident benefits. Motors paid and continues to pay accident benefits to him.

9 On June 22, 2005, Motors provided Old Republic with a Notification of Loss Transfer, indicating its intention to pursue indemnification pursuant to the loss transfer provisions. Sedgwick CMS handled the handled the claim on behalf of Old Republic.

10 On June 29, 2005, Old Republic denied the loss transfer claim.

11 On or about November 25, 2005, Motors forwarded to Old Republic a Request for Indemnification claiming a total amount of $45,323.50.

12 By letter dated November 29, 2005, Sedgwick, on behalf of Old Republic, again denied the loss transfer claim.

13 As a result of the denial, Motors served on Old Republic a Notice to Participate and Demand for Arbitration, dated December 14, 2005.

14 On March 23, 2006, Motors sent a second Request for Indemnification to Old Republic.

15 By letter dated April 19, 2006, Mr. Michaud, a claims examiner with Sedgwick, acknowledged that Pepsi would accept Motors' Loss Transfer Indemnity Request from November 29, 2005. He said that they would respond shortly to the second request.

16 On June 1, 2006, Old Republic issued payment to Motors.

17 By letter dated July 13, 2006, Louise Rivett, the operations manager at Sedwick, responded to the second Request for Indemnification. She said that Segdgwick would give no further consideration to Motor's request for payment under the loss transfer provision. She also requested reimbursement of the funds paid on June 1, 2006.

18 Motors sent two additional Requests for Indemnification to Old Republic in September 2006 and October 2007. As of October 2007, Mr. Leroux had been deemed catastrophically impaired and Motors was continuing to pay accident benefits. Old Republic did not pay anything further.

19 The parties agreed to the appointment of the arbitrator. The hearing was held on March 25, 2008 and the arbitrator issued his decision on November 24, 2008.

Issues

20 The primary issue is whether the letter of April 19, 2006 constituted a waiver of Old Republic's right to dispute Motors' loss transfer claim. A secondary issue is the apportionment of fault for the accident as between the driver of the UPS truck and the driver of the Pepsi truck.

Standard of Review

21 Section 275 (4) of the *Insurance Act*, R.S.O. 1990, c.I.8, provides that if insurers are unable to agree with respect to loss transfer indemnification, the dispute shall be resolved through arbitration. The agreement between the parties provides for full rights of appeal with respect to "all issues, law, and mixed fact and law".

22 The parties agree that the arbitrator's decision involves mixed fact and law but disagree as to the appropriate standard of review that should be applied. Old Republic submits that the appropriate standard is correctness, while Motors submits that the appropriate standard is reasonableness.

23 The Supreme Court of Canada reconsidered the standard of review that courts should apply to decisions of adjudicative tribunals in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] S.C.J. No. 9 (S.C.C.). The court determined that there were two standards of review: reasonableness and correctness.

24 The court's task in each case is to determine which of these two standards to apply. The court is required to undertake a two-step analysis. The first step is to find out whether the jurisprudence has already determined the degree of deference to be given with regard to the particular category of question. If it has, that is the end of the analysis. If it has not, the court then has to examine various factors to help it identify the proper standard of review.

25 The following factors support a conclusion that the court should give the decision maker deference and apply the reasonableness standard:

(i) the existence of a privative clause;

(ii) a discrete and special administrative regime in which the decision maker has special expertise; and

(iii) the nature of the question of law.

26 The correctness standard will be applied if the question of law is of central importance to the legal system and outside the specialized area of expertise of the decision maker (*New Brunswick (Board of Management) v. Dunsmuir* at para. 55).

27 The Ontario Court of Appeal considered the standard of review applicable to an arbitrator under the *Insurance Act* in *Oxford Mutual Insurance Co. v. Co-operators* (2006), 83 O.R. (3d) 591 (Ont. C.A.). The issue before the arbitrator was whether the relationship between the injured person and his mother made him principally dependent upon her for his care. The arbitrator's task was to apply the correct legal principles to the factual findings about the particular circumstances of the relationship. It was therefore a question of mixed fact and law and was closer to a factual determination. Lang J.A. concluded that, given the special expertise of arbitrators in evaluating facts for a determination of dependency for statutory accident benefits entitlement, unless the arbitrator's decision was unreasonable, it was entitled to deference.

28 There are several decisions of this court, following the decision in *Oxford Mutual*, that consider the application of the standard of review to decisions of arbitrators under the *Insurance Act*. Brown J. conducted a useful review of these decisions in *Zurich Insurance Co. v. Personal Insurance Co.*, [2009] O.J. No. 2157 (Ont. S.C.J.) at paras. 25-27, a case involving a priority dispute. He noted that, of the two cases that cited *Oxford Mutual*, the court in *Aviva Insurance Co. of Canada v. Royal & SunAlliance Insurance Co.*, [2008] O.J. No. 3240 (Ont. S.C.J.) concluded that the reasonableness standard applied to questions of mixed fact and law while the court in *Lombard Canada v. Royal & SunAlliance* concluded that correctness was the appropriate standard.

29 After reviewing these various cases, Brown J. concluded at para. 29, that the applicable standard of review of decisions by arbitrators under the *Insurance Act* was that articulated in *Oxford Mutual*: correctness on questions of law; and reasonableness on questions of fact and questions of mixed fact and law.

30 In my opinion, the issues in this case are ones within the special expertise of the arbitrator: loss transfer claims and apportionment of liability in motor vehicle accidents. I note that in *Aviva Insurance Co. of Canada v. Royal & SunAlliance Insurance Co.*, Mesbur J. referred to the special expertise of arbitrators in determining issues of loss transfer when she reached her conclusion that the arbitrator's decision should be afforded deference.

31 I conclude that the appropriate standard of review in the case before me is one of reasonableness.

Waiver and Estoppel

The Arbitrator's Decision

32 The arbitrator concluded that Old Republic had waived its right to dispute its insured's fault for the accident. He also concluded that Old Republic was estopped from disputing responsibility for Motors' loss transfer claim.

33 His conclusion rested primarily on his consideration of three pieces of evidence: the letters from Sedgwick of April 19, 2006 and July 13, 2006, and the transcript of the examination under oath of Louise Rivett of Sedgwick.

34 By letter dated April 19, 2006, Mr. Marcel Michaud, of Sedgwick, wrote Motors in response to Motors' request for indemnification. He stated that "we acknowledge that Pepsi Bottling Group will accept your Loss Transfer Indemnity Request from November 25, 2005". He also indicated that they were reviewing the indemnification request from March 23, 2006 and would be commenting upon it shortly.

35 On June 1, 2006, Old Republic issued a cheque to Motors in payment of the first indemnity request.

36 Sedgwick sent a second letter to Motors on July 13, 2006. This letter was from Ms. Rivett, Mr. Michaud's supervisor at Sedgwick. She stated that they had now completed their investigation into the motor vehicle accident. Since the accident was governed by the ordinary rules, they would give no further consideration to Motors' request for payments under the loss transfer provision. Ms. Rivet also indicated that the previous payment that had been made was "on an interim basis pending completion of our investigation". She requested repayment without delay.

37 The third piece of evidence was the examination of Ms. Rivett. She explained that payment of the first request for indemnification was made because, upon receipt of the notice to participate in arbitration, there was further review and consideration, including receipt of a legal opinion. It was decided at that point "in order to avoid arbitration that they would agree to pay Motors the first subrogation request".

38 The arbitrator also considered the broader context of loss transfer claims. They are part of a statutory scheme to allow for the relatively quick and efficient transfer of risk between insurers. There is a premium on speed and efficient resolution. The users are sophisticated. The arbitrator noted that, in such a system, it is desirable that parties' agreements be enforced, except in the most extreme circumstances.

39 The arbitrator's interpretation of Old Republic's conduct was as follows:

> There is little doubt in my mind that Old Republic, after conducting an investigation of the facts and obtaining a legal opinion, had made a conscious decision to pay the loss transfer request and it did so for these reasons and the desire to avoid arbitration expenses.

40 The arbitrator did not accept Old Republic's position that it had changed its mind because "we have now completed our investigation into the motor vehicle accident", as Ms. Rivett claimed in her letter. Rather, he concluded that, based on the evidence, Sedgwick had changed its mind because another person had reviewed the file, took a different view of the applicability of Rule 12 (4) (the rule that provides that, in certain circumstances, where a car is over the centre line of the road at the time of the accident, the driver of that car is 100% at fault) and had obtained new counsel.

41 The arbitrator concluded that the letter of April 16 constituted a clear and unequivocal agreement between the parties so as to constitute a waiver. Furthermore, this was a situation to which estoppel applied in that Motors had acted in reliance on Old Republic's actions.

42 In the result, Old Republic was not entitled to repayment of the monies it had already paid and it was responsible for the ongoing payment of all reasonable loss transfer claims.

Analysis

43 A determination of whether there was waiver and estoppel involves questions of mixed fact and law: an application of the law of waiver and estoppel to the facts in this case.

44 The arbitrator stated that waiver does not require prejudice but does require expressed words and an unequivocal course of action. He applied the criteria in the cases of *Gill v. Zurich Insurance Co.* (2002), 156 O.A.C. 390, 35 C.C.L.I. (3d) 239 (Ont. C.A.) and *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.).

45 In *Saskatchewan River Bungalows*, the Supreme Court stated at para. 20 that waiver will only be found "where the evidence demonstrates that the waiving party had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them".

46 Given the sophistication of the parties, there can be no doubt that Old Republic had a full knowledge of its rights. What is in question is whether Old Republic had an unequivocal and conscious intention to abandon those rights.

47 The arbitrator found that the April 2006 letter was written on the basis of an investigation of the facts and a desire to avoid arbitration expenses. Sedgwick had also obtained a legal opinion.

48 The arbitrator did not accept Sedgwick's claim that its change of position, as reflected in the July 2006 letter, was due to it just having completed its investigation. Rather, Sedgwick changed its mind because someone new had looked at the file and they had obtained new legal counsel. While Ms. Rivet stated in the July 2006 letter that payment had been made to Old Republic on an interim basis, pending investigation, there was no such qualification in Mr. Michaud's April 2006 letter nor was there any qualification when the funds were paid.

49 Old Republic relied on the decision in *GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, [1999] O.J. No. 4467 (Ont. S.C.J.). In that case, the vehicle insured by Gan hit several vehicles, one of which was insured by State Farm. State Farm paid out benefits and sought loss transfer against GAN. GAN paid State Farm approximately $11,000 for loss transfer claims. GAN later requested repayment from State Farm saying it had incorrectly applied the fault determination rules and did not owe the money. Pitt J. concluded that the money had been paid in error and should be repaid.

50 Pitt J. cited *Moore (Township) v. Guarantee Co. of North America* (1991), 2 O.R. (3d) 370 (Ont. Gen. Div.), at 378, in which Eberle J. said that money paid because of a mistake of law or fact may be recovered subject to equitable defences, such as, where the payee has changed his position or where the payment was made in settlement of a claim.

51 The arbitrator distinguished *Gan* from the facts before him because he concluded that Old Republic had made a conscious decision to pay, after an investigation and receiving a legal opinion, and in order to avoid arbitration expenses.

52 In my opinion, the arbitrator applied the correct legal principles. He considered the broader context of loss transfer claims. His finding that Sedgwick did not make a payment by mistake, but rather, made a conscious decision to pay in order to avoid the costs of arbitration was reasonable given the evidence before him and is entitled to deference. So too, was his conclusion that Old Republic had therefore waived its right to dispute Motors' loss transfer claim. His conclusion was also, in my opinion, correct.

53 The doctrines of waiver and promissory estoppel are closely related. Both doctrines rest on the principle that a party should not be allowed to go back on a choice where it would be unfair to the other party to do so (*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.* at para. 9). The added feature of estoppel is detrimental reliance.

54 The arbitrator's treatment of the issue of estoppel was brief. He adopted the test for estoppel that was articulated by the Supreme Court of Canada in *Ryan v. Moore*, [2005] 2 S.C.R. 53 (S.C.C.). However, it is not clear from his reasons how Motors relied on the April 2006 letter to its detriment. While Motors did not proceed with the arbitration at that time, Motors was aware of the change in position three months later and the arbitration did proceed.

55 I contrast this situation to that in *Kingsway General Insurance Company v. The Personal Insurance Company* (August 2004, Arbitrator G. Jones), a decision of the same arbitrator. In that decision, the arbitrator outlined the ways in which Kingsway had relied on Personal's acceptance of the loss transfer dispute to its detriment. It had, in fact, relied on Personal's position for more than six years. As a result of the time that had passed, Personal was no longer able to conduct a thorough investigation. That situation is very different from the case at hand.

56 I have some difficulty in concluding that the arbitrator's decision with respect to the application of estoppel is reasonable given the lack of evidence of detrimental reliance. I have, however, concluded that his decision with respect to waiver is both reasonable and correct.

Apportionment of Liability

Arbitrator's Decision

57 The conclusion on waiver effectively ends the matter, in that the result is that Old Republic is responsible for all reasonable loss transfer claims. However, the arbitrator went on to consider other issues that the parties had raised.

58 Of these issues, the one that Old Republic now challenges is the arbitrator's apportionment of liability.

59 Applying the ordinary rules of law, the arbitrator concluded that the action of the UPS truck was the main contributing factor to the accident. The UPS truck struck the Pepsi truck, which caused it to go out of control, cross the median and hit the vehicle driven by Mr. Leroux.

60 However, the arbitrator also found that the Pepsi truck driver had contributed to the accident. The driver of the Pepsi truck had originally thought that his truck had been struck on the opposite side of the truck than was actually struck. He was talking on his cell phone at the time of the first contact with the UPS truck.

61 Based on the evidence, the arbitrator found that the UPS truck was 80% at fault for the accident and the Pepsi truck was 20 % at fault.

62 There was no *vive voce* evidence at the hearing. The evidence before the arbitrator included: various documents (including the accident report); a transcript of the *Highway Traffic Act* trial of the driver of the UPS truck; a transcript of the examination for discovery of Mr. Doiron, the driver of the Pepsi truck; and a video of the accident;

Analysis

63 Although there was no *vive voce* evidence, the arbitrator had ample evidence before him so as to be in a position to apportion liability.

64 While the arbitrator concluded that the UPS truck driver was primarily at fault, he found that the Pepsi driver was 20% at fault. The arbitrator noted, in particular, that the Pepsi truck driver thought that his truck had been struck on the opposite side and that he was on his cell phone at the time. In the transcript of his discovery, the driver said that he was concerned about his daughter and had been talking to her to find out how she was. He also indicated that the first time he was aware that something was wrong was when he was hit.

65 Given this evidence, the arbitrator's conclusion as to the apportionment of fault was a reasonable one to reach and should be accorded deference.

Conclusion

66 For the reasons set out above, I have concluded that the arbitrator's decision that Old Republic has waived its right to dispute the loss transfer claim is both reasonable and correct. The appeal is therefore dismissed.

67 I would urge the parties to try to resolve the matter of costs. If they are unable to do so, they may make brief written submissions (no more than three pages in length plus a bill of costs). Motors should provide their submissions within 14 days of the release of this decision. Old Republic has a further 14 days within which to provide a response.

Appeal dismissed.

IN THE MATTER OF THE BANKRUPTCY OF
SIRIUS CONCRETE INC. OF THE CITY OF WATERLOO,
IN THE PROVINCE OF ONTARIO

Court File No. 35-2481393
Estate File No. 35-2481393

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT LONDON

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