File No. CI 22-01-38613

THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MANITOBA CLINIC MEDICAL CORPORATION AND THE MANITOBA CLINIC HOLDING CO. LTD.

BRIEF OF LAW OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
DATED APRIL 22, 2024
DATE OF HEARING : MONDAY, APRIL 29, 2024 AT 10:00A.M.
THE HONOURABLE MR. JUSTICE CHARTIER

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INDEX

I. DOCUMENTS AND AUTHORITIES RELIED ON

Documents to be relied on:

1. the pleadings and materials filed herein;
2. the Amended and Restated Initial Order granted December 1, 2022;
3. the Order (Sale and Investment Solicitation Process) granted April 21, 2023;
4. the Affidavit of Keith McConnell sworn November 28, 2022;
5. the Pre-Filing Report of Alvarez & Marsal Canada Inc. dated November 29, 2022;
6. the First Report of the Monitor dated January 20, 2023;
7. the Second Report of the Monitor dated April 18, 2023;
8. the Third Report of the Monitor dated July 31, 2023;
9. the Fourth Report of the Monitor dated September 22, 2023;
10. the Fifth Report of the Monitor dated October 27, 2023;
11. the Sixth Report of the Monitor dated November 20, 2023;
12. the Seventh Report of the Monitor dated February 6, 2024;
13. the Eighth Report of the Monitor dated April 22, 2024;
14. the Monitor's Notice of Motion dated April 22, 2024;
15. the Affidavit of Service of Shelby Braun, to be filed; and
16. such further and other documentation as counsel may advise and this Honourable Court may permit.

Cases, statutory provisions, and authorities to be relied on:

TABS

A. *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "***CCAA***"), s. 11 and 11.02(2);

B. *Carey v Laiken*, 2015 SCC 17;

C. *R v Lifchus*, [1997] 3 S.C.R. 320, 1997 CarswellMan 392

D. *HOOPP Realty Inc v Emery Jamieson LLP*, 2020 ABCA 159;

E. *Chiang (Trustee of) v Chiang*, 2009 ONCA 3;

F. *6165347 Manitoba Inc et al v The City of Winnipeg et al*, 2019 MBQB 121;

G. *Moore v Sweet*, 2018 SCC 52;

H. *Garland v Consumers' Gas Co.*,2004 SCC 25, [2004] 1 SCR 629;

I. *Kerr v Baranow*, 2011 SCC 10;

J. *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727;

K. *McKnight v Hutchison*, 2019 BCSC 944;

L. *Tar Heel Investments Inc v HL Staebler Company Limited*, 2022 ONCA 842;

M. *Canadian Imperial Bank of Commerce v Federal Business Development Bank*, 1985 CarswellAlta 323, [1985] 3 WWR;

N. *Winnipeg Motor Express Inc et al*, 2009 MBQB 204;

O. *Winnipeg Motor Express Inc et al, Re*, 2009 MBCA 110;

P. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758;

Q. Pages 7 – 10 of the Monitor's brief of law dated February 6, 2024;

R. *Re Green Relief Inc*, 2020 ONSC 6837;

S. CCAA Termination Order granted in the Old API Wind-down Ltd. *CCAA* proceeding, Ontario Superior Court of Justice Commercial List, Court File No. CV-18-603054-00CL; and

T. Distribution and CCAA Termination Order in the 9366016 Canada Inc. *CCAA* proceeding, Ontario Superior Court of Justice Commercial List, Court File No. CV-15-10869-00CL.

I. INTRODUCTION

1. The Monitor's work on this matter is largely complete, aside from the administrative work required to conclude the proceedings. But for the dispute with the Purchaser[1] with respect to the Pre-Closing Receivables, this would be a routine motion for the relief set out in the draft Termination Order.

2. As discussed in more detail below, the Purchaser did not purchase the Pre-Closing Receivables as part of the Medco Transaction or otherwise assume Medco's obligations to its former physicians under their services agreements with Medco. These facts are uncontroverted, and yet the Purchaser refused to return the Pre-Closing Receivables, which the parties agree were payable by Manitoba Health to Medco for services rendered by Medco's former physicians to its patients prior to the date of closing. Instead, without the Monitor's knowledge or approval, the Purchaser unilaterally decided to pay a portion of the Pre-Closing Receivables to Medco's former physicians for amounts the Purchaser claims were owing to them from Medco for their pre-closing services, and retained the balance without explanation.

3. With respect:

(a) the Monitor paid the former physicians the amounts to which they were entitled for services rendered prior to closing;

(b) the Purchaser does not have (or, to the Monitor's knowledge, purport to have) standing to challenge the Monitor's calculation of the amounts owing to Medco's former physicians in any event; and

(c) as a result of the Purchaser's retention and use of the Pre-Closing Receivables, the Purchaser:

(i) is in contempt of paragraph 7 of the Enhanced Powers Order;

(ii) has been unjustly enriched at Medco's expense with no juristic reason; and

[1] Unless otherwise defined herein, capitalized terms will have the meanings given to them in the Eighth Report and the Monitor's notice of motion and draft orders.

(iii) has wrongfully interfered with the Pre-Closing Receivables in a manner that is inconsistent with Medco's ownership of the funds, and thereby committed the tort of conversion.

4. This brief of law begins with a discussion of the law and evidence applicable to the dispute over the Pre-Closing Receivables (and granting of the Direction to Pay Order) before briefly commenting on the Monitor's methodology for the allocation of the professional costs incurred in the proceedings, and the balance of the relief sought in the draft Termination Order.

5. For the reasons that follow, the Monitor respectfully requests that the Direction to Pay Order and the Termination Order be granted in the forms filed with the Monitor's motion.

II. FACTS

6. The facts are set out in the Eighth Report.

7. The Monitor submits that the following uncontroverted facts are of particular note for the resolution of the dispute over the Pre-Closing Receivables:

(a) pursuant to the Medco APA, the Purchaser agreed to:

(i) purchase the Purchased Assets,[2] which assets did not include the Pre-Closing Receivables; and

Eighth Report at para 29

(ii) assume the Assumed Liabilities,[3] which did not include Medco's obligations to its former physicians under their services agreements with Medco;

[2] The definition of *Purchased Assets* appears in section 2.2 of the Amendment to the Asset Purchase Agreement dated November 2, 2023.

[3] The definition of *Assumed Liabilities* appears in section 2.1 of the Asset Purchase Agreement dated September 21, 2023. The *Purchased Assets* and *Assigned Contracts* did not include the physicians' services agreements, and the physicians themselves were not *Transferring Employees* as defined in section 5.4.

***Ibid*. at paras 52(a)(ii) and 56 and Appendix "G"**

(b) the Medco Transaction closed on December 1, 2023, at which time Medco ceased operating, making November 30, 2023 Medco's *de facto* year end;

Seventh Report of the Monitor at para 21(a)
Eighth Report of the Monitor at para 38

(c) in December 2023, the Purchaser collected Pre-Closing Receivables payable by Manitoba Health to Medco in the amount of $757,126.65, which the parties agree was for services provided by Medco's former physicians to Medco patients in the time period of November 23 to November 30, 2023;

***Ibid*. at Appendix "G"**

(d) the Pre-Closing Receivables are therefore Medco's *Property* as defined in paragraph 4 of the ARIO;[4]

(e) the Purchaser's in-house counsel was in attendance at the November 24, 2023 hearing at which the Court granted, among other orders, the Enhanced Powers Order, and therefore had knowledge of the latter Order;

***Ibid*. at para 13.**

(f) the Enhanced Powers Order took effect on December 5, 2023 when the Monitor filed the Monitor's Certificate with the Court;

Seventh Report at para 21(b)

(g) paragraph 7 of the Enhanced Powers Order provides:

> 7. THIS COURT ORDERS that any Person having notice of this Order shall forthwith advise the Monitor of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Monitor, and shall deliver all such Property to the Monitor upon the Monitor's request.

(h) the Monitor requested that the Purchaser deliver the Pre-Closing Receivables to Medco (care of the Monitor) on:

(i) December 18 and 22, 2023;

(ii) January 3, 8, 11, 29, and 31, 2024;

[4] i.e., " current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof…" As *Property*, the Pre-Closing Receivables were also subject to the Charges (as defined in paragraph 40 of the ARIO) and CIBC's security.

(iii) February 26; and

(iv) March 26, 2024;

Eighth Report at paras 43, 47, 49, 51, and 53 and Appendices "G" and "H"

(i) the Purchaser did not comply with these requests, and instead purports to have:

(i) paid the former Medco physicians $613,000 of the $757,227.12 in Pre-Closing Receivables to satisfy what the Purchaser claims were Medco's outstanding obligations to the physicians for the November 23 to 30, 2023 period; and

(ii) retained the remaining $144,227.12.

***Ibid*. at Appendix "G"**

8. The Purchaser's assertion that there were residual amounts owing by Medco to the former physicians for the services provided in the November 23 to 30, 2023 period is incorrect. The Monitor (on behalf of Medco) paid the former Medco physicians their usual percentage of the revenue for the services they provided to Medco in November.

***Ibid*. at para 38**

9. Whether or not there were further amounts owing to the former physicians stood to be determined by the Monitor based on the reconciliation of the physicians' draw accounts to be completed as part of Medco's year-end. That process has now been completed, and the physicians entitled to true up payments (i.e., the 2023 True Up referenced in the Seventh Report) as a result of the year end draw reconciliations have now received the same.

***Ibid*.**

III. ISSUES

10. This brief of law addresses the following issues:

A. Is the Purchaser in contempt of the Enhanced Powers Order?

B. Has the Purchaser been unjustly enriched without any juristic reason?

C. Has the Purchaser committed the tort of conversion?

D. Is the Monitor's methodology for allocating the professional costs fair and equitable in the circumstances?

E. Should the Stay Period be extended?

F. Should the Monitor be authorized to make the proposed distributions to CIBC?

G. Are the releases sought fair and reasonable in the circumstances?

IV. DISCUSSION

A. The Purchaser is in Contempt of the Enhanced Powers Order

(i) Introduction

11. Contempt orders are declarations that a party has acted in defiance of a court order. The case law establishes that contempt orders are discretionary, and are to be used cautiously, with great restraint, and as a last resort rather than as a routine means of obtaining compliance with court orders or enforcing judgments.

***Carey v Laikin*, 2015 SCC 17 ("*Carey*") at paras 30 and 36 [TAB B]**

12. Motions for contempt orders are governed by Rule 60.10 of *The King's Bench Rules*, the relevant portions of which read:

> 60.10(1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

> 60.10(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise.
>
> 60.10(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit.
>
> […]
>
> 60.10(5) In disposing of a motion under subrule (1) the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,
>
> […]
>
> (c) pay a fine;
>
> (d) do or refrain from doing an act;
>
> (e) pay such costs as are just; and
>
> (f) comply with any other order that the judge considers necessary;
>
> […]

13. In *Carey*, McLachlin C.J. (as she then was) summarized the elements of civil contempt as follows:

> [32] Civil contempt has three elements which must be established beyond a reasonable doubt… These three elements, coupled with the heightened standard of proof, help ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases…
>
> [33] The first element is that the order alleged to have been breached 'must state clearly and unequivocally what should and should not be done'…
>
> [34] The second element is that the party alleged to have breached the order must have had actual knowledge of it…
>
> [35] Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels…

Supra.

14. As noted in the quotation from *Carey* above, motions for civil contempt orders require proof beyond a reasonable doubt (as opposed to proof in accordance with the usual

civil standard). In *R v Lifchus* ("***Lifchus***"), Cory J. provided the following summary of how the *proof beyond a reasonable doubt* burden should be explained to a jury:

> 36 … Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> […]
>
> - a reasonable doubt is not a doubt based upon sympathy or prejudice;
> - rather, it is based upon reason and common sense;
> - it is logically connected to the evidence or absence of evidence;
> - it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
> - more is required than proof that the accused is probably guilty — a jury which concludes only that the accused is probably guilty must acquit.

[1997] 3 S.C.R. 320, 1997 CarswellMan 392 [TAB C]

15. Against this backdrop, the following sections of this brief will apply the legal test for civil contempt orders articulated in *Carey* to the facts of this case and conclude with a discussion of the Monitor's submissions as to the appropriate remedy and procedure in the circumstances.

(ii) The Enhanced Powers Order Is Clear and Unequivocal

16. For ease of reference, paragraph 7 of the Enhanced Powers Order again reads:

> 7. THIS COURT ORDERS that any Person having notice of this Order shall forthwith advise the Monitor of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Monitor, and shall deliver all such Property to the Monitor upon the Monitor's request.

17. In *Carey*, the McLachlin C.J. (as she then was) explained that, in order to satisfy the first element of civil contempt, "*the order alleged to have been breached 'must state clearly and unequivocally what should and should not be done*.'" For example, an order

may be unclear, and the party alleged to have breached it may therefore may not be held in contempt, where:

(a) the order is missing an essential detail about where, when, or to whom it applies;

(b) the order incorporates overly broad language; or

(c) external circumstances have obscured the order's meaning.

***Carey, supra*, at para 33.**

18. Paragraph 7 of the Enhanced Powers Order does not suffer from any such defects. The plain grammatical meaning of the words convey to the reader that the paragraph applies to any *Person* having notice of the Order who is in possession of any *Property* (i.e., the *whom*). Paragraph 7 then goes on to instruct the *Person* to, among other things, deliver all *Property* in its possession to the Monitor upon the Monitor's request; consequently, any such *Persons* in possession of any *Property* know *what* they must do, as well as *where* and *when* they must do it.

19. The language of paragraph 7 is purposely broad, but it is not so broad as to obscure its meaning. Paragraph 2 of the Enhanced Powers Order incorporates the definitions of *Person* and *Property* from the ARIO by reference. In the ARIO:

(a) *Person* is defined as "*any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being '**Persons**' and each being a '**Person**')*..." (ARIO, paragraph 12); and

(b) *Property* is defined as the Applicants' "*respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the '**Property**')*" (ARIO, paragraph 4).

20. Even if the Enhanced Powers Order is viewed in isolation, the colloquial meanings of *Person* and *Property* are well enough understood to have allowed the Purchaser to understand what the Order required without having to look to the ARIO. Indeed, the

Purchaser is the nominee of WELL Health Clinic Network Inc. ("**WELL**"), an established, reputable operator in the healthcare industry across Canada and can be presumed to know that, as a corporation, the Purchaser is a *person* at law; furthermore, the Purchaser agrees with the Monitor that the Pre-Closing Receivables were at all times Medco's *property* in the sense that the money was payable by Manitoba Health to Medco and therefore belonged to Medco.

Sixth Report of the Monitor at paras 25(b) and 32(d)

21. Finally, the Monitor is unaware of any external circumstances that can be argued to have otherwise obscured the meaning of paragraph 7 of the Enhanced Powers Order.

22. The Order is therefore, in the Monitor's respectful submission, clear and unequivocal in the sense contemplated by *Carey* and the first element of civil contempt is therefore established.

(iii) The Purchaser Had Knowledge of the Enhanced Powers Order

23. The second element of civil contempt requires evidence that the party alleged to have breached the order had notice of the same; however, in *Carey*, McClachlin C.J. (as she then was) noted that it is open to the Court "*to infer knowledge in the circumstances*," or impose "*liability on the basis of the willful blindness doctrine*…"

***Carey*, *supra*, at para 34**

24. The Enhanced Powers Order was granted along with the Medco AVO and Realco AVO on November 24, 2023. The Court record will reflect that WELL's in-house counsel, Brandon Rasula, attended that hearing as counsel for the Purchaser. Mr. Rasula's consent to the form of the Enhanced Powers Order is noted on the Order itself, and Monitor's counsel provided a courtesy copy of the Order to Mr. Rasula on February 26, 2024 as an enclosure to its letter of the same date (the "**February 26 Letter**").

Eighth Report at para 13

25. At common law, Mr. Rasula's knowledge of the Enhanced Powers Order, as the Purchaser's solicitor of record in this proceeding, is imputed to his client. The following quotation from *HOOPP Realty Inc v Emery Jamieson LLP* is apposite in this regard:

> [71] The common law has long held that notice to a solicitor is considered notice to their client: *Bank of British North America v St John & Quebec R. Co*, [1920] 52 DLR 557 at 561, 1920 CanLII 376 (NB Sup Ct AD) aff'd [1921] 62 SCR 346, 1921 CarswellNB 49; *Toth v Kancz*, [1975] 54 DLR (3d) 144, 1975 CarswellSask 110 at para 19 (QB); *Kirilenko and Kirilenko v Lavoie and Sinclair*, 1981 CanLII 2211 at para 30, [1981] 5 WWR 645, (Sask QB); *Stoimenov v Stoimenov*, 1985 CanLII 2166, 1985 CarswellOnt 234 at para 11 (CA); and *Burns v Kelly Peters & Associates Ltd*, 1988 CarswellBC 440 at para 23, [1988] BCJ No 2273 (Sup Ct).
>
> […]
>
> [80] The rule that solicitor's knowledge is imputed to the client is founded upon the rebuttable presumption that this knowledge will be communicated to the client because it is the duty of the solicitor to do so: *Cameron v Hutchison*, 1869 CarswellOnt 121 at paras 11, [1869] OJ No 257 (QL). This presumption has since been held to be so strong that it cannot be rebutted: *St. John & Quebec* at 561. Furthermore, in 2009 the *Code of Conduct* imposed an express obligation upon a solicitor to inform a client as to the progress of the client's matter (Chapter 9, Rule 14).
>
> […]
>
> [82] Knowledge held by a solicitor that is unrelated to the solicitor's retainer will not be imputed to the client: see for example, *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at paras 164-176. This is presumably because there is no duty to communicate such information; the retainer agreement stands as a reasonable proxy for determining what would affect the interests of the client 'in the matter.'

***HOOPP Realty*, 2020 ABCA 159 [TAB D]**

26. Whatever the scope of Mr. Rasula's retainer at the time of the November 24, 2023 hearing, he remained involved in the matter, communicating on the Purchaser's behalf in respect of the Pre-Closing Receivables, thereby engaging his duty to convey his knowledge of the Enhanced Powers Order to his client once the dispute arose. For this reason, the Court can (and, in the Monitor's respectful submission, should) infer from the

circumstances that the Purchaser had notice of the Enhanced Powers Order throughout the dispute with respect to the Pre-Closing Receivables.

27. In terms of the evidence of the Purchaser's actual knowledge of the Enhanced Powers Order, it is uncontroverted that Mr. Rasula received a copy of the Order enclosed with the February 26 Letter, which specifically quoted paragraph 7 and elaborated on its requirements in the body of the same; consequently, the evidence establishes that the Purchaser had actual notice of the Order as of February 26, 2024 at the absolute latest.

Eighth Report at para 53 and Appendix "H"

(iv) The Purchaser Breached the Enhanced Powers Order

28. The final element of civil contempt is that "*the party allegedly in breach must have… intentionally failed to do the act that the order compels…*" The party's reasons for intentionally acting contrary to the order are, however, irrelevant for the purposes of the contempt inquiry. Mistakes of law are not a defence to an allegation of civil contempt, but can be taken into account in determining the appropriate penalty to be imposed.

***Carey*, *supra* at paras 32, 35, and 38**

29. The Purchaser had imputed knowledge of the Enhanced Powers Order as early as November 24, 2023, actual knowledge as of February 26, 2024 (if not earlier), and failed (and continues to fail) to deliver the Pre-Closing Receivables to the Monitor. This evidence leads to the inescapable conclusion that the Purchaser intended to breach paragraph 7 of the Enhanced Powers Order. Absolute certainty is not required. The evidence proffered by the Monitor is *logically connected* to that common sense based conclusion in the sense contemplated by the *Lifchus* decision and therefore meets the heightened standard of proof beyond a reasonable doubt.

***Lifchus*, *supra* at para 36**

30. The Purchaser's motives for acting in contravention of the Enhanced Powers Order (e.g., to purportedly repay a debt the Purchaser claims was owed by Medco to its former physicians) or the fact that the Purchaser may have been operating on mistaken facts (e.g., that Medco was indebted to the former physicians for the pre-closing period) do not factor into the analysis or excuse its ongoing breach of the Order.

(v) Remedy

31. Rule 60.10(5) empowers the Court to "*make such order as is just*" in disposing of the Monitor's motion, and where, as is the case here, "*a finding of contempt* [is anticipated to be made] *made*," the Court may order that the Purchaser:

(a) comply with paragraph 7 of the Enhanced Powers Order and deliver the Pre-Closing Receivables to the Monitor (Rule 60.10(1) and (5)(f));

(b) pay a fine (Rule 60.10(5)(c);

(c) do or refrain from doing an act (Rule 60.10(5)(d)); and

(d) pay such costs as are just (Rule 60.10(5)(e)).

32. As set out in paragraphs 2(b) and 3 of the Direction to Pay Order, the Monitor is asking the Court to order that the Purchaser pay the sum of $757,126.65 (plus interest and solicitor-client costs) to Medco (care of the Monitor) forthwith as restitution for the Purchaser's appropriation of the Pre-Closing Receivables and to purge the Purchaser's contempt of the Enhanced Powers Order. The Monitor's intent in seeking this relief is not to penalize the Purchaser, but rather to make the Medco estate whole so that the additional proceeds can be distributed to CIBC, the first-ranking secured creditor with a priority claim to the funds. As noted in the Eighth Report, the restitutionary payment and reimbursement for costs incurred will also result in further funds being distributed to the former Medco physicians entitled to the 2023 True Up.

Eighth Report at para 60

33. The relief sought by the Monitor as set out in the Direction to Pay Order therefore accomplishes the Court's overriding goal of ensuring compliance with its orders (as opposed to simply punishing contemnors), while also ensuring that the Medco estate is not depleted as a result of the Purchaser's contempt and that the additional proceeds are distributed to the parties entitled to the same. The Monitor therefore respectfully requests that the Direction to Pay Order be granted in the form filed.

***Chiang (Trustee of) v Chiang*, 2009 ONCA 3 at para 11 [TAB E]**

(vi) <u>Procedure for Granting the Relief Sought</u>

34. The Monitor recognizes that cases, such as *Carey*, have noted that, as a general rule, contempt proceedings are bifurcated into an initial liability phase, and if liability is established, the matter proceeds to a secondary phase to consider the appropriate remedy. That procedure was adopted and followed by this Court in *6165347 Manitoba Inc et al v The City of Winnipeg et al* ("***City of Winnipeg***"), although in that case, Grammond J. did not go so far as to state that she was bound to follow that procedure. Instead, Her Ladyship noted that it was what the applicants had proposed and that the respondents did not object to that procedure.

***Carey, supra,* at para 18**
***City of Winnipeg*, 2019 MBQB 121, at para 74 [TAB F]**

35. Indeed, there is nothing in Rule 60.10 that requires the Court to adopt a bifurcated approach. Rule 60.10(5) simply states that, "[i]*n disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt*," among other things, "*do or refrain from doing an act*."

36. In the circumstances of this case, there is a finite pool of money available for the creditors, and an additional hearing only stands to increase professional costs and reduce the amounts available for distribution. Consequently, the Monitor is requesting that, in the interests of minimizing costs and bringing the proceedings to a close, the remedy sought (i.e., the Direction to Pay Order) not be deferred to a later date in the event the Court finds the Purchaser in contempt of the Enhanced Powers Order, but rather be granted immediately.

B. The Purchaser Has Been Unjustly Enriched without Juristic Reason

(i) Unjust Enrichment

37. In the alternative, it is open for the Court grant the Direction to Pay Order based on the doctrine of unjust enrichment:

> [35] Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be 'against all conscience' for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff. As recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788, 'At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain.'

Moore v Sweet, 2018 SCC 52 ("_Moore_") [TAB G]

38. A plaintiff is entitled to relief for unjust enrichment where the evidence establishes that:

(a) the defendant was enriched;

(b) the plaintiff suffered a corresponding deprivation; and

(c) there is no juristic reason for the defendant's enrichment and the plaintiff's corresponding deprivation.

***Ibid*. at para 37**

39. Where unjust enrichment is established, the remedy is "*restitutionary in nature*" and can take the form of an order for the defendant to pay damages (i.e., a personal remedy), or the imposition of a constructive trust to allow the plaintiff to enforce its rights against a particular piece of property (i.e., a proprietary remedy); however, the latter remedy is only awarded where the plaintiff establishes that a monetary award would be inadequate and that there is a causal link between the plaintiff's loss and the property over which the constructive trust is claimed.

***Ibid*. at paras 89 - 91**

(ii) <u>The Purchaser's Enrichment and Medco's Corresponding Deprivation</u>

40. The *Moore* case instructs that, "[t]*o establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value – a ' tangible benefit' – passed from the latter to the former*…" The analysis is a straightforward economic approach, with the causal connection between the defendant's enrichment and the plaintiff's loss being a crucial component.

***Moore*, *supra*, at paras 41 and 43**

41. As noted by Iacobucci J. in *Garland v Consumers' Gas Co.* ("***Garland***"), in cases such as this one, where the defendant comes into possession of the plaintiff's money and refuses to return it, the defendant's enrichment is established:

> … <u>The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit</u> (see *Peel*, supra, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas...

[Emphasis added.]

2004 SCC 25, [2004] 1 SCR 629 at pg 647 [TAB H]

42. Notably, at the enrichment stage of the analysis, it does not matter whether or not the defendant retained the benefit permanently:

> While the respondent rightly points out that the language of 'received and retained' has been used with respect to the benefit requirement (see, for example, *Peel*, supra, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a 'change of position' defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)).
>
> [Emphasis added.]

Ibid.

43. Consequently, for the purposes of determining whether the Purchaser was enriched, it does not matter that it purports to have divested itself of $613,000 of the $757,227.12 in Pre-Closing Accounts Receivable by paying that amount to the former Medco physicians. The Purchaser was enriched through its unilateral actions that resulted in it receiving of the full amount of the Pre-Closing Accounts Receivable, with Medco suffering a corresponding deprivation through the loss of the funds that the parties agree were payable to Medco for the pre-closing services the former physicians provided to Medco's patients.

(iii) Absence of a Juristic Reason

44. With the Purchaser's enrichment and Medco's corresponding deprivation established, Medco must next establish that "*there is no reason in law or justice for* [the Purchaser's] *retention of the benefit conferred by* [Medco]*, making its retention 'unjust' in the circumstances of the case…*" If such a reason exists, then the Purchaser will be justified in retaining the benefit received at Medco's expense, and Medco's claim will fail.

***Kerr v Baranow*, 2011 SCC 10 at para 40 [TAB I]**

***Moore*, *supra*, at para 55**

45. The juristic reason analysis proceeds in two stages:

> [57] The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the 'established' categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (*Garland*, at para. 43).
>
> [58] If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).
>
> […]
>
> [83] The second stage of the juristic reason analysis affords the defendant an opportunity to rebut the plaintiff's *prima facie* case by establishing that there is some residual reason to deny recovery. At this stage, various other considerations come into play, like the parties' reasonable expectations and moral and policy-based arguments — including considerations relating to the way in which the parties organized their relationship (*Garland*, at paras. 45-46; Pacific National Investments, at para. 25; Kerr, at paras. 44-45).

***Moore*, *Ibid*.**

46. There is no juristic reason recognized by the case law summarized in *Moore* that justifies the Purchaser's misappropriation of the Pre-Closing Receivables:

(a) the Medco APA (i.e., the contract) did not contemplate the Purchaser purchasing the Pre-Closing Receivable or assuming Medco's obligations to

its former physicians under their services agreements with Medco, and therefore, there was no disposition at law;

Eighth Report at para 56

(b) Medco did not intend to gift the Pre-Closing Receivables to the Purchaser; rather, the Purchaser received the Pre-Closing Receivables owed to Medco as a result of the Purchaser having changed the account information with Manitoba Health; and

***Ibid*.**

(c) Medco does not owe any common law, equitable, or statutory obligations to the Purchaser in respect of the Pre-Closing Receivables.

47. The Purchaser claims to have used $613,000 of the Pre-Closing Receivables to satisfy Medco's outstanding contractual obligations to its former physicians, and retained the remaining $144,227.12 without further explanation. With respect, the wrongdoer's use of the benefit received from the plaintiff to satisfy a debt allegedly owed by the plaintiff to a third party is not an "*established category of juristic reasons*" arising from *Moore* and the cases cited therein; rather, the common law, equitable, or statutory obligations discussed in the jurisprudence are obligations owed by the plaintiff to the defendant that therefore justify *the defendants'* retention of the benefit.

48. Accordingly, Medco has established a *prima facie* case, making it necessary to turn to the second stage of the analysis to determine if the Purchaser can discharge its burden to establish that there is a residual reason for the Court to deny recovery based on "*the parties' reasonable expectations and moral and policy-based arguments – including considerations relating to the way in which the parties organized their relationship*..."

***Moore*, *supra*, at paras 58 and 83**

49. Notably, the relationship between Medco and the Purchaser is that of vendor and purchaser, respectively, in relation to a transaction that closed on December 1, 2023. As a purchaser of Medco's assets pursuant to a transaction that has closed, the Purchaser cannot have any reasonable expectation that it would be entitled to receive or direct the flow of

the Pre-Closing Receivables pursuant to the pre-existing contractual arrangements between Medco and its former physicians. Indeed, the Purchaser did not assume Medco's obligations under those services agreements and therefore is not itself indebted to the former Medco physicians for the same.

Eighth Report at paras 56 and 61

50. The Purchaser is not a shareholder or creditor of Medco and does not have standing to challenge the Monitor's calculation of the amounts owing to the former Medco physicians for the services rendered prior to the date of closing. In the circumstances, there are no public policy considerations could possibly justify the Purchaser unilaterally paying $613,000 of the Pre-Closing Receivables to the former Medco physicians and retained the remaining $144,227.12.

***Ibid*. at para 61**

51. The Monitor will respond to any further arguments that the Purchaser may advance at the hearing of this matter, but respectfully submits that, on the evidence set out in the Eighth Report, there are no reasonable expectations or policy considerations to justify the Purchaser's enrichment and Medco's corresponding deprivation in respect of the Pre-Closing Receivables.

(iv) The Purchaser Is Not Entitled to Assert the Change of Position Defence

52. As noted above, the Purchaser purports to have paid $613,000 of the Pre-Closing Receivables to the former Medco physicians. Assuming for the sake of argument that the $613,000 paid to the physicians can actually be specifically traced to the Pre-Closing Receivables, then the Purchaser may suggest that it has only retained $144,227.12 of the $757,126.65 benefit it received.

53. In *Garland*, Iacobucci J. explained that, where a defendant has not retained the benefit received from the plaintiff, the circumstances *may* give rise to the *change of position* defence:

> … The rationale for the change of position defence appears to flow from considerations of equity. G. H. L. Fridman writes that '[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question' (Restitution (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):
>
> > [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.
>
> If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff…
>
> [Emphasis added.]

***Garland*, *supra*, at pgs 658 - 659**

54. The same rationale should apply in this case: the Purchaser had no right to take possession of or distribute the Pre-Closing Receivables, which it knew and agreed belonged to Medco. The Purchaser therefore cannot benefit from its wrongdoing after the fact and assert that it would be unjust for it to be liable to the plaintiff for the whole amount of the Pre-Closing Receivables, but instead only the $144,227.12 it ultimately retained. Based on the reasoning set out in *Garland* quoted above, the *change of position* defence is not available to the Purchaser because of its wrongful act (i.e., its unilateral payment to the former Medco physicians who were not, in fact, owed anything further on account of their pre-closing services in November, 2023). The Purchaser should therefore be held liable for the whole $757,126.65 and be obliged to immediately repay the same.

55. Another way to view what the Purchaser has done is through the lens of the constructive trust remedy:

> [32] A constructive trust is a vehicle of equity through which one person is required by operation of law — regardless of any intention — to hold certain property for the benefit of another (*Waters' Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at p. 478)…

***Moore*, *supra*, at para 32**

56. When the Purchaser took possession of the Pre-Closing Receivables, a constructive trust arose by operation of law, and the Purchaser became the trustee of those funds for the benefit of Medco. The Monitor has requested on numerous occasions that the Pre-Closing Receivables be returned to Medco (care of the Monitor). The Purchaser did not comply with these requests and, instead, without the Monitor's knowledge or approval, the Purchaser purports to have distributed $613,000 of the Pre-Closing Receivables to the former Medco physicians in breach of the constructive trust. The Purchaser should not be permitted to escape liability for making restitution for the entire amount as a result of its breach of the constructive trust.

57. If the Court is not prepared to grant the Direction to Pay Order on the basis of civil contempt, the Monitor therefore respectfully requests that it be granted based on the doctrine of unjust enrichment.

C. The Purchaser Committed the Tort of Conversion

(i) Conversion

58. In the further alternative, it is open to the Court to grant the Direction to Pay Order based on conversion. The tort of conversion "*involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession*." It is a strict liability tort.

***Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para 31 [TAB J]**

59. In *McKnight v Hutchison* ("***McKnight***"), Hinkson CJC quoted a passage from *Ask v Mikolas*, 2010 BCSC 127 with approval, which described the elements that must be proven to establish the tort of conversion as follows:

> (a) there must be a wrongful act by the defendant involving the goods of the plaintiff;
>
> (b) the act must consist of handling, disposing, or destroying the goods; and
>
> (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

2019 BCSC 944 at para 166 [TAB K]

60. While the authorities are divided on the broader issue of whether intangible property can properly be the subject of a conversion claim, cases such as *McKnight* have held that there is more specific authority establishing that "[f]*unds and money can be the subject of a conversion claim*."

***Tar Heel Investments Inc v HL Staebler Company Limited*, 2022 ONCA 842 at para 18 TAB L]**

***McKnight*, *supra* at para 168**

61. See also *Canadian Imperial Bank of Commerce v Federal Business Development Bank* where a privately appointed receiver and the appointing bank were held liable for conversion as a result of the receiver having collected the debtor company's accounts receivable and expended a portion of the same while operating the debtor's business.

1985 CarswellAlta 323, [1985] 3 WWR [TAB M]

62. If conversion is established, the Court will typically order that "*the defendant pay the value of the property at the time that it was wrongfully taken, together with the consequential loss…*"

***McKnight*, *supra* at para 172**

63. As discussed in more detail below, the elements of the tort of conversion, as described in *McKnight*, are established on the facts of this case.

(ii) Application to the Facts

64. The elements of the tort of conversion are established on the facts:

(a) ***the Purchaser's commission of a wrongful act involving Medco's money*:** the Purchaser only received the Pre-Closing Receivables owed to Medco as a result of the Purchaser having changed the account information with Manitoba Health without the Monitor's knowledge or approval;

Eighth Report at para 30

(b) ***the Purchaser's handling or disposition of the Medco's money*:** contrary to the Monitor's request that the Pre-Closing Receivables be returned, the Purchaser, again without the Monitor's knowledge or approval, unilaterally paid $613,000 of the Pre-Closing Receivables to its former physicians, and retained the remaining $144,227.12; and

***Ibid*. at para 58**

(c) ***the Purchaser's actions have had the effect of interfering with and denying Medco's right and title to the Pre-Closing Receivables*:** the Purchaser's unilateral payment to the former Medco physicians and retention of the balance of the fund satisfies this element of the cause of action.

***Ibid*.**

65. The Purchaser is therefore strictly liable to Medco for the value of the Pre-Closing Receivables as of the date they were taken (plus interest and costs), thereby further justifying the granting of the Direction to Pay Order.

D. The Monitor's Allocation Methodology

66. In *Winnipeg Motor Express Inc et al*, Suche J. summarized the general principles applicable to the allocation of court-ordered charges in insolvency proceedings as follows:

> [41] I turn, then, to the question of principles of allocation of Court Ordered Charges under the CCAA. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.
>
> [42] In *Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164, at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:
>
> (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
>
> (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
>
> (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

[…]

[48] I agree with the view expressed in *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. Superior Court of Justice), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

[Emphasis added.]

2009 MBQB 204 [TAB N]

67. The foregoing summary of the applicable law was affirmed on appeal.

***Winnipeg Motor Express Inc et al, Re*, 2009 MBCA 110 at para 8 [TAB O]**

68. As explained at paragraphs 70 to 71 of the Eighth Report, this is very much a case where, in the Monitor's respectful review, it is fair and equitable to deviate from allocating the court ordered charges on the basis of the sale price received for the Medco and Realco assets because:

(a) CIBC is the first-ranking secured creditor, and therefore has the primary economic interest in the proceedings, as it is CIBC's security that is bearing the professional costs incurred;

(b) a disproportionate amount of the Monitor's professional time (i.e., approximately 75%) was devoted to dealing with issues relating to Medco during the proceedings;

(c) Realco self-funded its post-filing business operations and paid the ongoing professional fees on behalf of the Applicants'; and

(d) Medco had to draw on the Interim Financing Facility in order to stay current with its post-filing obligations.

69. The Monitor will respond to any objections to its allocation that may be forthcoming, but in the absence of the same, the Monitor has articulated why a deviation should be made and has therefore established a *prima facie* case for the same.

E. Extension of the Stay Period

70. The Monitor is requesting an extension of the Stay Period until the earlier of July 5, 2024 or the filing of the Monitor's Certificate.

71. The Court may grant extensions of the stay of proceedings (on an application other than an initial application) if it is satisfied that circumstances exist that warrant the extension, and the Applicants are continuing to act in good faith and with due diligence (*CCAA*, section 11.02(2) and (3)).

72. On such an application, the Court may also consider whether:

(a) extending the Stay Period will further the remedial purposes of the *CCAA*;

(b) the debtor has made progress to either restructure or sell its business assets during the previous Stay Period; and

(c) the comparative prejudice to any creditors or other stakeholders is outweighed by the prejudice that would be experienced by the debtor if stay extension were not granted.

***Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras 13 and 22**

[TAB P]

73. As set out in the Eighth Report:

(a) circumstances exist that warrant the extension, which include, but are not limited to, the fact that an extension will maintain the *status quo* in the proceedings and allow the Monitor to make the final distributions and complete the remaining work to conclude the proceedings;

(b) when that work is complete, the Monitor will file the Monitor's Certificate certifying the same to terminate the proceedings, including the Stay Period;

(c) the Monitor is of the view that the Applicants, under the Monitor's direction, have acted and continue to act in good faith and with due diligence; and

(d) the Monitor is unaware of any creditor who will be materially prejudiced by the proposed extension of the Stay Period.

Eighth Report at para 96(a), (e), and (f)

74. The Monitor therefore requests that the Stay Period be extended until the earlier of July 5, 2024 or the filing of the Monitor's Certificate.

F. The Proposed Distributions to CIBC

75. Pursuant to the Order (Stay Extension, Interim Distribution, and Other Relief) dated February 9, 2024, the Monitor made a $35,849,000 distribution to CIBC. The evidentiary and legal basis for this distribution appears at pages 7 – 10 of the Monitor's brief of law dated February 6, 2024. For the sake of economy, that discussion will not be repeated here; however, for ease of reference, the pages themselves are appended to this brief at **TAB Q**.

76. Suffice it to say that:

(a) CIBC is the Applicants' only secured lender;

(b) the Monitor has received a legal opinion confirming that the CIBC Security (as defined in the Monitor's previous brief) is valid and enforceable against the Net Proceeds; and

(c) the Monitor is not aware of any other creditor that is asserting priority over CIBC with respect to the Net Proceeds.

77. The Monitor is therefore requesting authorization to immediately distribute $593,000 of the Net Proceeds to CIBC, along with the amounts payable by the Purchaser

pursuant to the Direction to Pay Order and any residual amounts remaining from the Monitor's Holdback.

G. The Releases

78. The non-exhaustive list of factors that the Court may consider in determining whether to grant third-party releases was recently discussed in *Re Green Relief Inc*:

> [27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in *CCAA* proceedings as including the following:
>
> (a) Whether the claims to be released are rationally connected to the purpose of the plan;
>
> (b) Whether the plan can succeed without the releases;
>
> (c) Whether the parties being released contributed to the plan;
>
> (d) Whether the releases benefit the debtors as well as the creditors generally;
>
> (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
>
> (f) Whether the releases are fair, reasonable and not overly-broad.
>
> [28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

2020 ONSC 6837 [TAB R]

79. The Monitor submits that it is appropriate to grant the releases sought in the Termination Order for the following reasons:

(a) the Released Parties each played distinct, but nevertheless critical, roles in the Applicants' restructuring and the results achieved, and they have therefore meaningfully contributed to the same;

(b) this motion is being made on notice to the Service List and this Report details the nature and effect of the releases sought;

(c) any person who objects to the releases will have the opportunity to object at the hearing of this matter; and

(d) the scope of the releases is not overly broad as it does not include claims based on gross negligence or willful misconduct.

Eighth Report at para 93

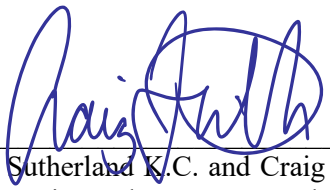
80. Releases of this nature are now an established part of *CCAA* termination orders. See for example paragraph 16 of the CCAA Termination Order granted in the Old API Wind-down Ltd. *CCAA* proceeding, and paragraph 12 of the Distribution and CCAA Termination Order in the 9366016 Canada Inc. *CCAA* proceeding, copies of which are attached as **TAB S** and **T**, respectively.

V. CONCLUSION

81. For the reasons stated in this brief of law, the Monitor respectfully requests that the relief set out in the Direction to Pay Order and Termination Order be granted in the forms filed with the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of April, 2024.

McDOUGALL GAULEY LLP

Per: 

Ian A. Sutherland K.C. and Craig Frith, counsel to the Monitor, Alvarez & Marsal Canada Inc.

TAB A

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to October 31, 2023

Last amended on April 27, 2023

À jour au 31 octobre 2023

Dernière modification le 27 avril 2023

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Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

TAB B

SUPREME COURT OF CANADA

CITATION: Carey *v.* Laiken, 2015 SCC 17, [2015] 2 S.C.R. 79

DATE: 20150416
DOCKET: 35597

BETWEEN:

Peter W. G. Carey
Appellant
and
Judith Laiken
Respondent

CORAM: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 68): Cromwell J. (McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. concurring)

Carey *v.* Laiken, 2015 SCC 17, [2015] 2 S.C.R. 79

Peter W. G. Carey *Appellant*

v.

Judith Laiken *Respondent*

Indexed as: Carey *v.* Laiken

2015 SCC 17

File No.: 35597.

2014: December 10; 2015: April 16.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Contempt of court — Required intent — Mareva injunction issued enjoining any person with knowledge of order from disposing of or otherwise dealing with assets of lawyer's client — Lawyer having knowledge of injunction but returning trust account funds to client — Lawyer not found in contempt on basis that terms of order not clear and lawyer's interpretation of order not deliberately and wilfully blind — Whether intent to interfere with administration of justice required to prove civil contempt — Whether lawyer in contempt.

Courts — Judges — Jurisdiction — Contempt of court — Motions judge's discretion to revisit contempt finding — Lawyer breaching terms of injunction found in contempt — Lawyer moving to reopen contempt hearing — Motions judge setting aside initial contempt finding — Whether motions judge erred in setting aside initial contempt finding — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 60.11.

L brought contempt proceedings against C, alleging that he had breached the terms of a *Mareva* injunction by returning over $400,000 to his client S for whom he was holding it in trust. The injunction was issued in the course of litigation between L, S and related parties. It enjoined any person with knowledge of the order from disposing of, or otherwise dealing with, the assets of various parties, including those of S. The motions judge initially found C in contempt. She was satisfied that the injunction was clear and that C had knowingly and deliberately breached it by transferring the funds. When the parties reappeared before the motions judge for determination of the appropriate penalty, C moved to reopen the contempt hearing. He filed new evidence in support of his assertion that he had acted in a manner consistent with the practice of counsel generally, and he testified about what he perceived to be his professional obligations and his motivations in dealing with the trust funds. Based on the new evidence, the motions judge set aside her previous finding of contempt. The Court of Appeal allowed the appeal and restored the initial contempt finding.

Held: The appeal should be dismissed.

The law does not require that a person breach an injunction contumaciously or with intent to interfere with the administration of justice in order to satisfy the elements of civil contempt. All that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in breach of a clear order of which the alleged contemnor has notice. Contumacious intent or lack thereof goes to the penalty to be imposed following a finding of

contempt, not to liability. Furthermore, there is no principled reason to depart from the established elements of civil contempt in situations in which compliance with a court order has become impossible either because the act that constituted the contempt cannot be undone or because of a conflicting legal duty. Where a person's own actions contrary to the terms of a court order make further compliance impossible, it is neither logical nor just to require proof of some higher degree of fault in order to establish contempt. It also undermines one of the purposes of contempt findings — to deter violations of court orders — to treat with special charity people whose acts in violation of an order make subsequent compliance impossible. The fact that civil contempt is quasi-criminal in nature also provides no justification for carving out a distinct mental element for particular types of civil contempt cases. Nor does reliance on legal advice shield a party from a finding of contempt. The law should not permit lawyers to escape a finding of contempt because they have, in effect, relied on their own legal advice. Further still, where a lawyer acts for a client in relation to an order to which the client is a party, he or she should be held to the same standard of compliance with that order as the client.

In this case, C was in contempt. The *Mareva* injunction clearly prohibited dealing with money held in trust, and C's other conduct showed that he understood that. Even assuming that the existence of the funds was protected by solicitor-client privilege at the time of the transfer, C's assumed duty to guard that privilege did not conflict with his duty to comply with the order. C needed only to leave the funds in his trust account once they had been deposited there in order to fulfill both duties. Moreover, leaving the funds in his trust account would not have conflicted with his

other asserted professional obligations. It is also no answer for C to say that he breached the order so that he would avoid the possibility of a future ethical dilemma, in the event that L obtained judgment against his client and he might have to decide how to comply with any solicitor-client privilege obligations, with the *Mareva* injunction and with any duty to avoid assisting his client in evading execution arising from the judgment. In any event, even accepting that C believed that there was a true conflict, there were appropriate avenues open to him other than making a unilateral decision to breach the order.

While the *Rules of Civil Procedure* do not prescribe the form of contempt proceedings, as a general rule, they are bifurcated into a liability phase — where the case on liability proceeds and a defence is offered — and, if liability is established, a penalty phase. Once a finding of contempt has been made at the first stage, that finding is usually final and may only be revisited in certain circumstances, such as where the contemnor subsequently complies with the order or otherwise purges his or her contempt, or in exceptional circumstances, where new facts or evidence have come to light after the contempt finding was made. In this case, the motions judge erred in exercising her discretion to permit C to relitigate the initial contempt finding. C's attack on the motions judge's earlier finding was based on evidence he ought to have filed at the first hearing. Moreover, as the Court of Appeal stated, a party faced with a contempt motion is not entitled to present a partial defence at the liability stage and then, if the initial gambit fails, have a second "bite at the cherry" at the penalty stage. This would defeat the purpose of the first hearing.

Cases Cited

Referred to: *College of Optometrists (Ont.) v. SHS Optical Ltd.*, 2008 ONCA 685, 241 O.A.C. 225; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612; *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614; *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516; *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, 305 D.L.R. (4th) 655; *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686; *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217; *Jackson v. Honey*, 2009 BCCA 112, 267 B.C.A.C. 210; *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35; *Godin v. Godin*, 2012 NSCA 54, 317 N.S.R. (2d) 204; *Soper v. Gaudet*, 2011 NSCA 11, 298 N.S.R. (2d) 303; *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 CanLII 32262; *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463; *Sheppard v. Sheppard* (1976), 12 O.R. (2d) 4; *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65; *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, 2012 QCCA 1663; *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065; *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, [1991] R.D.J. 249; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81; *Morrow, Power v. Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334; *Sussex Group Ltd. v. Fangeat*, 42 C.P.C. (5th) 274; *Re Tyre Manufacturers' Agreement*, [1966] 2 All E.R. 849; *Canada Metal Co. v. C.B.C. (No. 2)* (1974), 48 D.L.R. (3d) 641, aff'd (1975), 65 D.L.R. (3d) 231; *Customs and Excise Commissioners v. Barclays Bank plc*, [2006] UKHL 28, [2007] 1 A.C.

181; *Attorney General v. Punch Ltd.*, [2002] UKHL 50, [2003] 1 A.C. 1046; *Z Ltd. v. A-Z*, [1982] 1 Q.B. 558; *Baker v. Paul*, [2013] NSWCA 426; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1991), 6 O.R. (3d) 188.

Statutes and Regulations Cited

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 60.11.

Authors Cited

Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf updated November 2014, release 23).

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Sharpe and Gillese JJ.A.), 2013 ONCA 530, 310 O.A.C. 209, 116 O.R. (3d) 641, 367 D.L.R. (4th) 415, 52 C.P.C. (7th) 144, [2013] O.J. No. 3891 (QL), 2013 CarswellOnt 11824 (WL Can.), setting aside a decision of Roberts J., 2012 ONSC 7252, [2012] O.J. No. 6596 (QL), 2012 CarswellOnt 17537 (WL Can.), and restoring her initial contempt order. Appeal dismissed.

Patricia D. S. Jackson and *Rachael Saab*, for the appellant.

Kevin Toyne and *John Philpott*, for the respondent.

The judgment of the Court was delivered by

Cromwell J. —

I. Introduction

[1] Contempt of court proceedings against lawyers are rare; so are situations in which judges reverse their own previous findings. But this case, which gives the Court the opportunity to clarify some aspects of the common law of civil contempt of court, has both of these unusual elements.

[2] The appellant, Peter Carey, is a lawyer who was the object of contempt proceedings for allegedly breaching the terms of an injunction. He was initially found in contempt by a judge of the Ontario Superior Court of Justice, but the judge revisited that finding and reversed it when the matter came back before her for consideration of the appropriate penalty. The Court of Appeal set the judge's second decision aside and found Mr. Carey in contempt. He now appeals to this Court, raising three questions:

1. To have committed contempt, did Mr. Carey have to intend to interfere with the administration of justice?

2. Was Mr. Carey in contempt?

3. Was it open to the judge to set aside her initial finding of contempt?

[3] I conclude that the Court of Appeal for Ontario was correct to answer the first and third questions in the negative and the second in the affirmative: to be in contempt, Mr. Carey did not need to intend to interfere with the administration of justice; Mr. Carey was in contempt and his obligations to his client did not justify or excuse his breaching the injunction; and it was not open to the judge to set aside her initial finding of contempt. I would therefore dismiss the appeal with costs.

[4] The factual and procedural context in which these issues arise is complicated and I will turn to that before getting into the legal analysis that has led me to these conclusions.

II. Background

A. *Overview*

[5] The appeal arises out of Mr. Carey's alleged breach of a so-called *Mareva* injunction that enjoined any person with knowledge of the order from "disposing of, or otherwise dealing with" any assets of various parties, including Peter Sabourin for whom Mr. Carey acted. The injunction was issued in the course of litigation between the respondent, Judith Laiken, and Mr. Sabourin and related parties. Ultimately, Ms. Laiken obtained a judgment against Mr. Sabourin and his companies for roughly $1 million and costs.

[6] Following the conclusion of this litigation, Ms. Laiken brought contempt proceedings against Mr. Carey, who unquestionably had knowledge of the injunction. She alleged he had breached its terms by returning to Mr. Sabourin over $400,000 that Mr. Carey was holding in trust for him. These contempt proceedings have led to the appeal before this Court.

B. *The Litigation Leading to the Injunction*

[7] Ms. Laiken retained Mr. Sabourin and his group of companies to conduct off-shore security trades on her behalf. To this end, she transferred approximately $885,000 to various bank accounts he and his businesses held. Ultimately, these funds were lost and, unsurprisingly, the business relationship between Ms. Laiken and Mr. Sabourin soured. In 2000, he sued her for $364,000, alleging a deficit in her margin account. She counterclaimed for over $800,000, alleging that he had defrauded her. Mr. Carey represented Mr. Sabourin and his business entities in these proceedings.

[8] Ms. Laiken obtained an *ex parte Mareva* injunction from the Ontario Superior Court of Justice freezing the assets of the defendants to her counterclaim, including Mr. Sabourin. The injunction had broad terms. It prohibited, among other things, Mr. Sabourin and any person with knowledge of the order from "disposing of, or otherwise dealing with" any of Mr. Sabourin's assets: Order of May 4, 2006, by Campbell J. (see A.R., vol. I, at p. 2). The injunction also directed any person with knowledge of it to "take immediate steps to prevent the . . . transfer" of the assets, including those held in "trust accounts" in that person's power, possession or control

(*ibid.*). The Superior Court of Justice continued the injunction on multiple occasions with the understanding that the parties needed to work out between themselves variations to it to allow for payment of legal fees and living expenses. However, the injunction was never formally amended.

[9] A few months after the initial order had been made Mr. Sabourin sent Mr. Carey a cheque for $500,000. No instructions accompanied the cheque and Mr. Carey could not reach Mr. Sabourin to obtain instructions. Pursuant to Law Society of Upper Canada by-law requirements, Mr. Carey deposited the cheque in his trust account, applying some of the money towards Mr. Sabourin's outstanding legal fees, since the parties had agreed that the injunction did not prohibit the payment of reasonable legal fees.

[10] Mr. Sabourin later called Mr. Carey and told him to use the rest of the funds to settle the claims of creditors represented by Bill Brown, who had invested in the Sabourin entities. Mr. Carey advised Mr. Sabourin that he could not do that because making a payment to a third-party creditor would breach the injunction. Mr. Sabourin then instructed Mr. Carey to attempt to negotiate a settlement with Ms. Laiken.

[11] A few days later, during a conference call with Messrs. Brown and Carey, Mr. Sabourin advised that Mr. Carey was holding some $500,000 in trust. The money, he said, was intended for Mr. Brown, but the injunction prohibited Mr. Carey from paying it to him.

[12] Mr. Carey could not reach a settlement with Ms. Laiken's lawyers. At no point did he reveal to them the existence of the trust money. After the failed settlement negotiations, Mr. Sabourin instructed Mr. Carey to return the balance of the funds to him, which Mr. Carey did after deducting an amount to cover future legal fees. Mr. Carey transferred a total of $440,000 back to Mr. Sabourin in October and November 2006.

[13] Early in 2007, Mr. Sabourin called Mr. Carey and terminated his retainer and instructed him to take no further steps until he had retained new counsel. Shortly after this call, Mr. Sabourin went out of business and vanished. Mr. Carey never received a notice of change of lawyers and remained counsel of record in the Laiken-Sabourin litigation.

[14] Later that year, Mr. Brown obtained judgment against Mr. Sabourin and receivership over his assets and those of his companies. Advised of the trust funds that Mr. Carey had held for Mr. Sabourin, the receiver demanded that Mr. Carey provide a full accounting of these funds. Mr. Carey replied that he had received $500,000 from Mr. Sabourin, returned $440,000 and that just over $6,000 remained in the trust account. Mr. Carey indicated that he felt he could provide this information without violating any solicitor-client privilege, but he refused to provide additional information or documents that he thought might be privileged. A further court order required Mr. Carey to give a "full accounting of all funds" from Mr. Sabourin, which he provided.

[15] In November 2007, Ms. Laiken obtained summary judgment dismissing Mr. Sabourin's claim against her and granting her over $1 million in damages and costs on her counterclaim for fraud.

C. *The Contempt Proceedings*

[16] Ms. Laiken applied to have Mr. Carey found in contempt. She alleged that he breached the *Mareva* injunction by returning the $440,000 in his trust account to Mr. Sabourin. The series of decisions related to this motion led ultimately to the appeal before us.

[17] In Ontario, civil contempt proceedings are governed by rule 60.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Under this rule, a party may move to obtain a contempt order: rule 60.11(1). A judge, in dealing with such a motion, can "make such order as is just" and, following "a finding" of contempt, he or she may order the contemnor to be imprisoned, pay a fine, do or refrain from doing an act, pay just costs, and comply with any other order the judge considers necessary: rule 60.11(5). Upon motion, "a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) . . . and may grant such other relief and make such other order as is just": rule 60.11(8).

[18] The *Rules* do not prescribe the form of contempt proceedings. However, as a general rule, proceedings are bifurcated into a liability phase — where the case on liability proceeds and a defence is offered — and, if liability is established, a

penalty phase. In contempt proceedings, liability and penalty are discrete issues: *College of Optometrists (Ont.) v. SHS Optical Ltd.*, 2008 ONCA 685, 241 O.A.C. 225, at paras. 72-75.

[19] It is within this procedural framework that the Ontario courts considered Ms. Laiken's motion to find Mr. Carey in contempt of the *Mareva* injunction.

(1) The First Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2011 ONSC 5892)

[20] The motions judge found Mr. Carey in contempt and issued an order to that effect. She was satisfied beyond a reasonable doubt that the *Mareva* order was clear and that Mr. Carey "knowingly and deliberately breached" it by transferring the funds from his trust account to Mr. Sabourin (para. 42 (CanLII)). The motions judge ordered the parties to appear before her at a later date for another hearing. She stated she would take into account any further evidence and testimony the parties submitted in making any order under rules 60.11(5) and 60.11(8).

(2) The Stay Application Decision: Ontario Court of Appeal (Sharpe J.A., 2011 ONCA 757, 286 O.A.C. 273)

[21] A judge of the Court of Appeal dismissed Mr. Carey's motion for a stay of the motions judge's order and any further proceedings pending appeal of that order. The court held that the contempt proceedings were not yet completed and that

until they were, the Court of Appeal would not know relevant information, including whether the judge considered the contempt to be trivial or serious.

(3) The Second Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2012 ONSC 7252, [2012] O.J. No. 6596 (QL))

[22] When the matter resumed before the motions judge, Mr. Carey moved to reopen the contempt hearing. He filed new evidence, including an affidavit sworn by Alan Lenczner, Q.C., stating that by returning the money in excess of that required to cover legal fees, Mr. Carey had acted in a manner consistent with the practice of counsel generally. Mr. Carey also proffered his own testimony about what he perceived to be his professional obligations and his motivations in dealing with the trust funds.

[23] The motions judge set aside her previous finding of contempt. Based on the new evidence, she doubted whether the terms of the order were clear and whether Mr. Carey's interpretation of it was deliberately and wilfully blind.

(4) The Appeal Decision: Ontario Court of Appeal (Sharpe J.A. (Rosenberg and Gillese JJ.A. concurring), 2013 ONCA 530, 367 D.L.R. (4th) 415)

[24] The Court of Appeal unanimously allowed the appeal and restored the initial contempt finding. The motions judge had erred, the Court of Appeal found, in setting it aside. Mr. Carey had inappropriately used the second stage of the contempt proceedings to attack the motions judge's earlier findings and based this attack on

evidence he ought to have filed at the first hearing. While the appeal could have been resolved on these procedural grounds, the court went on to hold that the motions judge erred in finding Mr. Carey was not in contempt.

[25] The Court of Appeal accepted that Mr. Carey did not desire or knowingly choose to disobey the order, but found that it is unnecessary to establish this in order to find him liable for civil contempt. Mr. Carey knew of a clear court order and he committed an act that violated it. This was sufficient to constitute civil contempt.

III. Analysis

A. *First Issue: To Have Committed Contempt, Did Mr. Carey Have to Intend to Interfere With the Administration of Justice?*

(1) Overview

[26] At the initial contempt hearing, Roberts J. stated, in my view correctly, that "civil contempt consists of the intentional doing of an act which is in fact prohibited by the order": 2011 ONSC 5892, at para. 24. However, she subsequently set aside her earlier finding of contempt. She held:

> Based on Mr. Carey's oral evidence, because of the protracted history between Mr. Carey's clients and the plaintiff and the way that Mr. Carey viewed the merits of the plaintiffs [*sic*] claim, the unusual form of the May 4, 2006 Mareva Order, and the variations discussed and agreed upon between counsel, which were not set out in one document by formal amendment, I have a reasonable doubt as to whether the terms of the May 4, 2006 Mareva Order were completely clear to Mr. Carey, and I am not satisfied beyond a reasonable doubt that Mr. Carey's interpretation of the

> May 4, 2006 Mareva Order was deliberately and willfully blind. [Emphasis added; 2012 ONSC 7252, at para. 36.]

[27] The Court of Appeal, however, held that it was an error of law to conclude that Mr. Carey could not be found in contempt because he did not deliberately breach the order. Ms. Laiken did not have to prove that Mr. Carey had "deliberately" breached the order or, as the court put it elsewhere in its reasons, to establish "contumacious intent": paras. 65 and 62. The order clearly prohibited dealing in trust funds belonging to Mr. Sabourin, yet Mr. Carey knew of the order and he intentionally transferred the funds, an act that was contrary to the order. This is all that is required to establish the elements of civil contempt.

[28] Before this Court, the parties devoted a substantial portion of their written submissions to the mental element of civil contempt. Mr. Carey's position is that in various circumstances — namely, where the alleged contemnor cannot "purge" his contempt, is a lawyer or is a third party to an order — proof of an intention to interfere with the administration of justice is required. In other words, in these circumstances contumacy or intent to breach the order is an element of the offence. Ms. Laiken frames the issue slightly differently. Rather than viewing the question as one turning on the elements of civil contempt, she submits that lack of contumacious intent is not a defence in civil contempt proceedings, regardless of the alleged contemnor's circumstances.

[29] However framed, the issue boils down to the required intent for a finding of civil contempt. Canadian jurisprudence clearly sets out the requirements for

establishing civil contempt, of which I provide an overview below. Contumacy — the intent to interfere with the administration of justice — is not an element of civil contempt and lack of contumacy is therefore not a defence. I do not accept Mr. Carey's position that a different rule should apply to individuals who cannot purge their contempt, to lawyers and to third parties.

(2) The Canadian Common Law of Civil Contempt

[30] Contempt of court "rest[s] on the power of the court to uphold its dignity and process. . . . The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect": *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931. It is well established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order": *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 35, cited in *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 20.

[31] The common law has developed to recognize two forms of contempt of court: criminal contempt and civil contempt. The distinction, which the parties to this appeal accept, rests on the element of public defiance accompanying criminal contempt: see, e.g., *United Nurses*, at p. 931; *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516, at p. 522. With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive": R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-

leaf)), at ¶ 6.100. However, one purpose of sentencing for civil contempt is punishment for breaching a court order: *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, 305 D.L.R. (4th) 655, at para. 117. Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct: Sharpe, at ¶ 6.100.

[32] Civil contempt has three elements which must be established beyond a reasonable doubt: *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27; *College of Optometrists,* at para. 71; *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, at pp. 224-25; *Jackson v. Honey*, 2009 BCCA 112, 267 B.C.A.C. 210, at paras. 12-13; *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35, at paras. 17 and 32; *Godin v. Godin*, 2012 NSCA 54, 317 N.S.R. (2d) 204, at para. 47; *Soper v. Gaudet*, 2011 NSCA 11, 298 N.S.R. (2d) 303, at para. 23. These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases: *Bell ExpressVu*, at para. 22; *Chiang*, at paras. 10-11.

[33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 CanLII 32262 (Ont. S.C.J.), at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu*, at para. 22. An order may be

found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.

[34] The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine (*ibid.*).

[35] Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Sheppard v. Sheppard* (1976), 12 O.R. (2d) 4 (C.A.), at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.

[36] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see, e.g., *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65, at para. 3. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, 2012 QCCA 1663, at para. 7. As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments": *Vidéotron Ltée v. Industries Microlec Produits*

Électroniques Inc., [1992] 2 S.C.R. 1065, at p. 1078, citing *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, [1991] R.D.J. 249 (Que. C.A.). Rather, it should be used "cautiously and with great restraint": *TG Industries*, at para. 32. It is an enforcement power of last rather than first resort: *Hefkey*, at para. 3; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81, at paras. 41-43; *Centre commercial Les Rivières ltée*, at para. 64.

[37] For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt: see, e.g., *Morrow, Power v. Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.), at para. 20; *TG Industries*, at para. 31. While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.

(3) The Required "Intent"

[38] It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice: *Prescott-Russell*, at para. 27; *College of Optometrists*, at para. 71; *Sheppard*, at p. 8; *TG Industries*, at paras. 17 and 32; *Bhatnager*, at pp. 224-25; Sharpe, at ¶

6.190. The Court of Appeal followed this approach. As it noted, to require a contemnor to have intended to disobey the order would put the test "too high" and result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" (para. 59). Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt: para. 62; see also *Sheppard*; and Sharpe, at ¶ 6.200.

[39] The appellant submits, however, that in situations in which the alleged contemnor cannot "purge" the contempt, is a lawyer or is a third party to the order, the intent to interfere with the administration of justice must be proved. I understand this to mean that "the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order" must be established: *TG Industries*, at para. 17. This is sometimes also referred to as "contumacious" intent.

[40] The appellant submits that the mental element of civil contempt must address at least one of the two goals of civil contempt: securing compliance with court orders or protecting the integrity of the administration of justice. Finding a party in contempt where he or she cannot purge (either because the act that constituted the contempt cannot be undone or because a conflicting legal duty prevents compliance with the order) furthers neither of these goals absent some heightened mental element for contempt. Only if the person is shown to have had the intent to interfere with the administration of justice would one of these purposes — protecting the integrity of the administration of justice — be served.

[41] I cannot accept this position. There is no principled reason to depart from the established elements of civil contempt in situations in which compliance has become impossible for either of the reasons referred to by the appellant. Where, as here, the person's own actions contrary to the terms of a court order make future compliance impossible, I fail to see the logic or justice of requiring proof of some higher degree of fault in order to establish contempt. The appellant's submission also overlooks the point that one of the purposes of the contempt power is to deter violations of court orders, thereby encouraging respect for the administration of justice. It undermines that purpose to treat with special charity people whose acts in violation of an order make subsequent compliance impossible. It seems to me that the existing discretion not to enter a contempt finding and the defence of impossibility of compliance provide better answers than a heightened degree of fault where a party is unable to purge his or her contempt for the reasons the appellant outlines: *Jackson*, at para. 14; *Sussex Group Ltd. v. Fangeat*, 42 C.P.C. (5th) 274 (Ont. S.C.J.), at para. 56.

[42] The appellant correctly notes that civil contempt is quasi-criminal in nature, which he says justifies a higher fault element where contempt cannot be purged. But civil contempt is always quasi-criminal, so this provides no justification for carving out a distinct mental element for particular types of civil contempt cases. As I have already discussed, requiring contumacious intent would open the door to mistakes of law providing a defence to an allegation of civil contempt. It could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.

[43] Further, adopting the appellant's proposal would in effect make the required mental element dependent on the nature of the order alleged to have been breached. Those who breach a prohibitory order would benefit from this heightened mental element disproportionately, due to subsequent impossibility of compliance, as compared to those who breach a mandatory order, with which the alleged contemnor will be able to subsequently comply absent a conflicting legal duty. I see no principled basis for creating this distinction.

[44] The appellant also submits that lawyers should benefit from a heightened fault requirement, but I do not agree. As the Court of Appeal recognized, reliance on legal advice does not shield a party from a finding of contempt: para. 61, citing *Re Tyre Manufacturers' Agreement*, [1966] 2 All E.R. 849 (R.P.C.), at p. 862; *Canada Metal Co. v. C.B.C. (No. 2)* (1974), 48 D.L.R. (3d) 641 (Ont. H.C.J.), at p. 661, aff'd (1975), 65 D.L.R. (3d) 231 (Ont. C.A.). Still less should the law permit lawyers to escape a finding of contempt because they have, in effect, relied on their own legal advice.

[45] As for third parties, the appellant points to some authority in the United Kingdom and Australia to the effect that intent to interfere with the administration of justice is a prerequisite for finding a third party in contempt: see, e.g., *Customs and Excise Commissioners v. Barclays Bank plc*, [2006] UKHL 28, [2007] 1 A.C. 181, at para. 29; *Attorney General v. Punch Ltd.*, [2002] UKHL 50, [2003] 1 A.C. 1046, at para. 87; *Z Ltd. v. A-Z*, [1982] 1 Q.B. 558 (C.A.), at p. 583; *Baker v. Paul*, [2013] NSWCA 426, at para. 19. It has also been noted that "[i]t would appear that a higher

degree of intention is required to make a non-party liable for contempt": Sharpe, at ¶ 6.210.

[46] The short answer to this point is that, even accepting this line of authority, Mr. Carey is not in the same category as the third parties discussed in this line of authority. I would respectfully adopt as my own the following excerpt on this point from the reasons of Sharpe J.A. in the Court of Appeal:

> The solicitor-client bond creates a community of interest between Carey and Sabourin that is plainly distinguishable from the situation of a stranger to the litigation who is apprised of the court order. As an officer of the court, a solicitor of record is duty-bound to take scrupulous care to ensure respect for court orders. . . . [A]s the solicitor of record in the case, Carey should be held to the same standard of compliance as his client who was a party. [para. 64]

(4) Conclusion

[47] I conclude that "contumacious" intent was not required in this case, and to the extent that the judge at first instance found otherwise in overturning her earlier finding of contempt, she erred in law.

B. *Second Issue: Was Mr. Carey in Contempt?*

[48] Mr. Carey submits that he was not in contempt, making two main points. He submits first that the payment of funds from his trust account to Mr. Sabourin was not a "transfer" within the meaning of the order, either because beneficial ownership of the funds did not change or because it amounted to a permissible return of an

overpayment of legal fees that informal variations to the order permitted. Second, he also says that his conduct complied with his solicitor-client obligations and that such compliance cannot be considered to have been in breach of the *Mareva* injunction. The existence of Mr. Sabourin's funds in his trust account attracted solicitor-client privilege and, as such, Mr. Carey was bound not to disclose that the funds were in his account. But, he submits, leaving the funds where they were and maintaining the privilege would have sheltered them from execution. He maintains that his only option that was consistent with both his professional obligations to his client and to the court was to return the funds to Mr. Sabourin as he did. The privileged nature of the funds precluded him from seeking advice about the proper course of action from the court.

[49] Respectfully, neither of these points withstands careful scrutiny.

(1) The "Transfer"

[50] Mr. Carey contends that there was no transfer of funds within the meaning of the order because there was no change in beneficial ownership when he returned them to Mr. Sabourin. As the Court of Appeal pointed out, the purpose of the order was to prevent dealings with Mr. Sabourin's assets that would defeat the court's process (para. 50). Mr. Carey's position, if accepted, would mean the order actually permitted trustees of assets held for Mr. Sabourin's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond the reach of the court in the event of execution, so long as Mr. Sabourin retained

beneficial ownership of the assets. An interpretation of the order that permitted this would be illogical: it would clearly defeat the purpose of the order and would also run counter to the plain language of the order specifically prohibiting those with knowledge of it from "dealing with" Mr. Sabourin's assets. For these reasons, I cannot accept Mr. Carey's position.

[51] Mr. Carey also submits that the return of the funds to Mr. Sabourin did not constitute a "transfer" within the meaning of the injunction because it amounted simply to returning an overpayment of reasonable legal fees, the payment of which was permitted by the informal variations to the order agreed to by counsel. Mr. Carey also contends that returning the overpayment was consistent with the standard of practice of the profession at the time. Moreover, if moving funds from the trust account to Mr. Sabourin did constitute a "transfer", then it actually corrected a violation of the order that would have occurred when Mr. Sabourin originally transferred funds to Mr. Carey and he deposited them in his trust account.

[52] Mr. Carey's characterization of the $500,000 in his trust account as an "overpayment" of "reasonable legal fees" in the circumstances of this case is artificial in the extreme. Moreover, even if I were to accept that characterization (and I do not), the clear terms of this order still prohibited any transfer of those "excess" funds. Further, while the question of whether Mr. Sabourin's initial transfer of the funds to Mr. Carey breached the order is not before us, I reject Mr. Carey's submission that if it were a breach, this justifies a subsequent violation of the order by returning the money to Mr. Sabourin.

[53] In my view, Mr. Carey's submissions on this issue rely on alleged uncertainty where none in fact exists. The order clearly prohibited, as the Court of Appeal held, at para. 49, dealing with money held in trust. Mr. Carey's other conduct showed that he understood that, even taking into account the variations informally agreed to by counsel to permit payment of legal and ordinary living expenses, the order was in full force and was binding on him. He unsuccessfully tried to vary the order to permit payments to third party creditors and he rightly declined, on the basis of the order, to carry out Mr. Sabourin's instructions to use the trust money to settle the Brown claims.

(2) Solicitor-Client Privilege

[54] I am not persuaded by Mr. Carey's arguments before this Court that there was a true conflict between the order and his professional duties such that he had no option but to transfer the trust funds back to Mr. Sabourin.

[55] I will assume, but not decide, that the existence of the funds was privileged at the time of the transfer. There are certainly arguments to be considered that the privilege never attached in the first place, or that it was waived by Mr. Sabourin's disclosure of the funds' existence to a third party adverse in interest, as Ms. Laiken submits was the case. Moreover, Mr. Carey's claim in this litigation that the funds' existence was privileged is undermined by his disclosure of that fact in response to a request from the receiver in the unrelated litigation for a full accounting

of trust funds, a disclosure which he indicated he believed could be made without even any danger of violating any privilege. Mr. Carey wrote:

> . . . I believe I can provide you with the following information without danger of violating any privilege: on September 21, 2006 our firm was provided with a cheque for $500,000.00 from Peter Sabourin. Subsequently, on October 25, 2006, at the request of Mr. Sabourin, we returned $400,000.00, by way of four (4) Bank Drafts, payable to Peter Sabourin. On November 30, 2006 we returned another $40,000.00 to Peter Sabourin. The balance of the monies were kept in the Trust account and used to pay legal fees resulting in the balance that is currently in our account. [Emphasis added; Letter from Mr. Carey to receiver, November 1, 2007; A.R., vol. IV, at p. 145.]

[56] Be that as it may, Mr. Carey's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with the order. To fulfill both, he needed only to leave the funds in his trust account once they had been deposited there. In doing so, he would have respected any obligations arising from solicitor-client privilege to maintain the confidentiality of the funds and he would have abided by the terms of the *Mareva* order not to transfer funds held in trust for Mr. Sabourin.

[57] In my view, leaving the funds in his trust account would not have conflicted with other asserted professional obligations. Mr. Carey expressed concern that if he left the funds where they were, he would be assisting in shielding them from execution in the event that Ms. Laiken succeeded in her action against Mr. Sabourin. This position is not only illogical, but ironic in view of the fact that returning them certainly had that effect. It is true that had Mr. Carey retained the funds, a conflict might have developed at the point when Ms. Laiken obtained judgment against Mr. Sabourin. Then Mr. Carey might have had an ethical dilemma on his hands: how

would he comply with any solicitor-client privilege obligations (assuming the existence of the funds in trust was privileged), with the *Mareva* order and with any duty to avoid assisting his client in evading execution arising from the judgment? But it is not an answer for Mr. Carey to say that he breached the order so that he would avoid the possibility of a future ethical dilemma.

[58] Accepting that Mr. Carey believed — albeit mistakenly — that there was a true conflict, there were appropriate avenues open to him other than making a unilateral decision to breach the order. The unilateral approach that he adopted gave no weight to the important principle that "a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed": *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599. See also *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1991), 6 O.R. (3d) 188 (C.A.), at p. 192: "It is elementary that so long as . . . an order of the court remains in force it must be obeyed."

[59] For one thing, Mr. Carey could have obtained a determination about whether the existence of the funds in trust was covered by solicitor-client privilege. Only if it was would a true conflict potentially exist. He himself at one point thought that information about the funds' existence could be released without any danger of violating solicitor-client privilege. He could have asked his client to waive any privilege over the existence of the funds. Had his client agreed, that would have put an end to any potential future conflict. Mr. Carey also could have sought a variation

of the order or direction from the court on an *ex parte* and *in camera* basis. But there is no evidence that Mr. Carey took or even considered taking any of these steps.

[60] In any event, we do not need to make any final pronouncements on what Mr. Carey should have done instead of unilaterally deciding to give the money back. One thing is crystal clear: there was no legal or ethical duty that compelled Mr. Carey to breach the injunction by transferring the trust funds back to Mr. Sabourin or that conflicted with obeying the order. Although I accept that Mr. Carey did not breach the order maliciously or with the intent to interfere with the administration of justice, the law does not require that he have done so in order to satisfy the elements of civil contempt.

C. *Third Issue: Was It Open to the Motions Judge to Set Aside Her Initial Contempt Finding?*

[61] The Court of Appeal held that the motions judge erred in setting aside her initial contempt finding. Neither the *Rules* nor the case law contemplates the procedure the motions judge followed. The interests of justice are best served when the principle of finality is respected. Mr. Carey used the second stage of the proceedings to attack the motions judge's findings and declaration of contempt. This was inappropriate (paras. 30-32).

[62] The court identified two qualifications to the general rule that a contempt finding at the first hearing is final. First, rule 60.11 contemplates that a judge may set aside a finding of contempt if the contemnor purges the contempt, since the contempt

proceedings have secured compliance with the court order. Second, contempt proceedings are subject to the standard principles that allow parties to reopen findings in exceptional circumstances to permit consideration of fresh evidence or new facts that were not before the court at the first hearing.

[63] The appellant submits that the Court of Appeal was wrong for two principal reasons: rule 60.11(8) grants the court discretion to set aside a contempt finding and the quasi-criminal nature of civil contempt proceedings demands that judges retain discretion to set aside a finding on the basis of new material evidence. The appellant submits that the motions judge properly exercised her discretion to set aside the contempt finding in this case.

[64] I do not accept these submissions and I agree with the Court of Appeal, for substantially the reasons it gave.

[65] The starting point is that, in civil contempt proceedings, once a finding of contempt has been made at the first stage of a bifurcated proceeding, that finding is usually final. As the Court of Appeal stated, "[a] party faced with a contempt motion is not entitled to present a partial defence [at the liability stage] and then, if the initial gambit fails, have a second 'bite at the cherry'" at the penalty stage (para. 32). This would defeat the purpose of the first hearing. This is what the judge at first instance erroneously permitted Mr. Carey to do.

[66] Without exhaustively outlining the circumstances in which a judge may properly revisit an initial contempt finding, I agree with the Court of Appeal that he or she may do so where the contemnor subsequently complies with the order or otherwise purges his or her contempt or, in exceptional circumstances, where new facts or evidence have come to light after the contempt finding was made.

[67] Although the motions judge was concerned that refusing to consider the new evidence would lead to a miscarriage of justice, I agree that neither Rule 60.11 nor the case law permitted her to revisit her earlier finding in the circumstances of this case. rule 60.11(8) allows a judge, on motion, to "discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and . . . grant such other relief and make such other order as is just". Relying on the Court of Appeal's comments in its stay decision, the motions judge thought that there was no need to "reopen" Ms. Laiken's motion for contempt, as it was not yet completed: 2012 ONSC 7252, at para. 8. I agree with the Court of Appeal that the motions judge misinterpreted this aspect of the stay decision. The Court of Appeal correctly held that in these circumstances, the motions judge erred in exercising her discretion to permit Mr. Carey to relitigate the initial contempt finding and erred in setting that finding aside.

IV. Disposition

[68] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Torys, Toronto.

Solicitors for the respondent: Brauti Thorning Zibarras, Toronto.

TAB C

FEB-03-1998 14:34 SUPREME COURT 613 947 5033 P 01/04

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REMARKS / REMARQUES: Please note that, following a rehearing, paras 39 and 40 of the reasons for judgment in *R v Lifchus*, S C C , No 25404, September 18, 1997, were amended These amendments, issued on January 30, 1998, are shaded Please note also three stylistic changes in paras. 39 and 40 of the French version These changes are indicated by the brackets These amendments will be included in the version of the judgment reported in the SCR.

Veuillez noter que, à la suite d'une nouvelle audition, les par 39 et 40 des motifs de jugement de l'arrêt *R c Lifchus*, C S.C , n° 25404, 18 septembre 1997, ont été modifies Ces modifications, déposees le 30 janvier 1998, sont ombragées Veuillez noter également trois changements de style dans la version française des par 39 et 40 Ces changements sont indiqués par les crochets Toutes ces modifications seront incluses dans la version du jugement publié dans le RCS

January 30, 1998 le 30 janvier 1998

JUDGMENT JUGEMENT

HER MAJESTY THE QUEEN v. WILLIAM LIFCHUS (Crim.) (Man) (25404)

CORAM The Chief Justice and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ

A re-hearing is ordered The reasons of the Court, in which judgment was rendered on September 18, 1997, are modified at paragraphs 39-40 as follows

39 Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of

the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt

40 This is not a magic incantation that needs to be repeated word for word It is nothing more than a suggested form that would not be faulted if it were used For example, in cases where a reverse onus provision must be considered, it would be helpful to jury to be informed of the juxtaposition of the evidence which might satisfy that onus or the absence of evidence applicable to it Any form of instruction which complied with the appropriate principles and avoided the pitfalls referred to would be satisfactory

[TRADUCTION]

Une nouvelle audition est ordonnée. Les paragraphes 39 et 40 des motifs de la Cour à l'égard du jugement rendu le 18 septembre 1997 sont modifiés de la façon suivante:

39 Les directives concernant la norme de la preuve hors de tout doute raisonnable applicable dans un procès pénal pourraient être formulées ainsi:

Au début du procès l'accusé est présumé innocent. Cette présomption demeure tant et aussi longtemps que le ministère public ne vous a pas convaincus hors de tout doute raisonnable de sa culpabilité à la lumière de la preuve qui vous est présentée

Que signifie l'expression «hors de tout doute raisonnable»?

L'expression «hors de tout doute raisonnable» est utilisée depuis très longtemps. Elle fait partie de l'histoire et des traditions de notre système judiciaire Elle est tellement enracinée dans notre droit pénal que certains sont

97 265 032

HER MAJESTY THE QUEEN

v

WILLIAM LIFCHUS

CORAM:

The Rt Hon Antonio Lamer, P C
The Hon Mr Justice La Forest
The Hon Madame Justice L'Heureux-Dube
The Hon Mr Justice Sopinka
The Hon Mr Justice Gonthier
The Hon Mr Justice Cory
The Hon Madam Justice McLachlin
The Hon Mr Justice Iacobucci
The Hon Mr Justice Major

Appeal heard.
May 29 1997

Judgment rendered:
September 18, 1997

Reasons for judgment by.
The Hon Mr Justice Cory

Concurred in by:
The Rt Hon Antonio Lamer, P C
The Hon Mr Justice Sopinka
The Hon Madam Justice McLachlin
The Hon Mr Justice Iacobucci
The Hon Mr Justice Major

Concurring reasons by:
The Hon Madame Justice L'Heureux-Dube

Concurred in by:

The Hon Mr Justice La Forest
The Hon Mr Justice Gonthier

SA MAJESTE LA REINE

c

WILLIAM LIFCHUS

CORAM:

Le tres honorable Antonio Lamer, c p
L'honorable juge La Forest
L'honorable juge L'Heureux-Dube
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Appel entendu
le 29 mai 1997

Jugement rendu
le 18 septembre 1997

Motifs de jugement par
L honorable juge Cory

Souscrivent à l'avis de l'honorable juge Cory:
Le tres honorable Antonio Lamer c p
L'honorable juge Sopinka
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Motifs au même effet par
L'honorable juge L'Heureux-Dube

Souscrivent à l'avis de l'honorable juge L'Heureux-Dubé:
L'honorable juge La Forest
L'honorable juge Gonthier

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Avocats à l'audıence.

Pour l'appelante
Gregg Lawlor

Pour l'ıntıme
Heather Leonoff, c r
Tımothy Kılleen

Citations	References
Man C A (1996), 110 Man R (2d) 199, 118 W A C 199, 107 C C C (3d) 226, 48 C R (4th) 256, [1996] 6 W W R. 577, [1996] M J No 280 (QL)	C A Man (1996), 110 Man R (2d) 199, 118 W A C 199, 107 C C C (3d) 226, 48 C R (4th) 256, [1996] 6 W W R. 577, [1996] M J No 280 (QL)
Man Q B *R. v Lifchus*, November 30, 1994 (Krindle J)	B R Man *R c Lifchus*, 30 novembre 1994 (le juge Krindle)

PARAGRAPH NUMBERING

The paragraph numbering will now appear in the SCR

NUMEROTATION DES PARAGRAPHES

La numerotation des paragraphes figurera desormais dans le RCS

r *v* lifchus

Her Majesty The Queen *Appellant*

v

William Lifchus *Respondent*

Indexed as: R. *v.* Lifchus

File No 25404

1997 May 29, 1997 September 18

Present Lamer C J and La Forest L'Heureux-Dube Sopinka Gonthier, Cory McLachlin, Iacobucci and Major JJ

on appeal from the court of appeal for manitoba

Criminal law -- Charge to jury -- Reasonable doubt -- Whether trial judge must provide jury with explanation of "reasonable doubt" -- If so, how concept should be explained to jury -- Whether trial judge in this case misdirected jury on meaning of reasonable doubt -- If so, whether curative proviso applicable -- Suggested charge on "reasonable doubt" -- Criminal Code, R S C , 1985, c C-46, s 686(1)(b)(iii)

The accused, a stockbroker, was charged with fraud The trial judge told the jury in her charge on the burden of proof that she used the words "proof beyond a reasonable doubt in their ordinary, natural every day sense", and that the words

"doubt" and "reasonable' are "ordinary, every day words that you understand" The accused was convicted of fraud On appeal he contended that the trial judge had erred in instructing the jury on the meaning of the expression "proof beyond a reasonable doubt" The Court of Appeal allowed the appeal and ordered a new trial

Held The appeal should be dismissed

Per Lamer C J and Sopinka, Cory, McLachlin, Iacobucci and Major JJ A jury must be provided with an explanation of the expression "reasonable doubt" This expression, which is composed of words commonly used in everyday speech, has a specific meaning in the legal context The trial judge must explain to the jury that the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused The jury should be instructed that a reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence While more is required than proof that the accused is probably guilty, a reasonable doubt does not involve proof to an absolute certainty Such a standard of proof is impossibly high Certain references to the required standard of proof should be avoided A reasonable doubt should not be described as an ordinary expression which has no special meaning in the criminal law context, and jurors should not be invited to apply to the determination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives, or even to the most important of these decisions Nor is it helpful to describe proof beyond a reasonable doubt simply as proof to a "moral certainty" As well, the word "doubt" should not be qualified other than by way of the adjective

"reasonable" To instruct a jury that a "reasonable doubt' is a "haunting" doubt, a "substantial" doubt or a "serious' doubt may have the effect of misleading the jury Lastly, it is only after proper instructions have been given as to the meaning of the expression "beyond a reasonable doubt" that jurors may be advised that they can convict if they are "certain" or "sure" that the accused is guilty The model charge set out in the reasons may be useful but any charge which is consistent with these principles will suffice regardless of the particular words used by the trial judge

Here, the trial judge failed to explain the standard of proof fully and properly to the jury He did not provide a definition of "reasonable doubt" and told the jurors to evaluate the concept of reasonable doubt as if these were "ordinary, every day words" This is an unacceptable direction In the context of a criminal trial the words "reasonable' and "doubt" have a specific meaning Since the trial judge did not provide any further guidance to the jury concerning the meaning of proof beyond a reasonable doubt, this serious error was not saved by further instructions and gave rise to the reasonable likelihood that the jury misapprehended the burden of proof which they were required to apply Section 686(1)(*b*)(iii) of the *Criminal Code* is not applicable The correct explanation of the requisite burden of proof is essential to ensure a fair criminal trial and a serious error was made on this fundamental principle of criminal law It cannot be said that, had the trial judge not erred, the verdict would necessarily have been the same

Per La Forest, **L'Heureux-Dubé** and Gonthier JJ Cory J 's approach and result on the question of reasonable doubt are agreed with Section 686(1)(*b*)(iii) of the *Criminal Code* is an inappropriate remedy in this case Given that the full trial record was not before the Court, and that the submissions on the "miscarriage of justice" aspect of the provision were insufficient, the Crown has failed to discharge its burden to satisfy

the Court "that the verdict would necessarily have been the same if the error had not been made".

Cases Cited

By Cory J.

Referred to: *R v Brydon*, [1995] 4 S C R 253, rev'g (1995), 95 C C C (3d) 509, *Victor v Nebraska*, 127 L Ed 2d 583 (1994), *R v Tyhurst* (1992), 79 C C C (3d) 238, *R v Jenkins* (1996), 107 C C.C (3d) 440, *R v Hrynyk* (1948), 93 C C C 100 *R v Girard* (1996), 109 C C C (3d) 545, *Boucher v The Queen*, [1955] S C R 16, *R v Bergeron* (1996) 109 C C C (3d) 571, *R v Ford* (1991), 12 W C B (2d) 576 *R v W (D)*, [1991] 1 S C R 742

By L'Heureux-Dubé J

Referred to: *R v Hebert*, [1996] 2 S C R 272, *Colpitts v The Queen*, [1965] S C R 739

Statutes and Regulations Cited

Criminal Code, R S C 1985, c C-46, s 686(1)(*b*)(iii) [am 1991, c 43, s 9 (Sch , item 8)]

Authors Cited

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Williams, Glanville *Textbook of Criminal Law*, 2nd ed London Stevens & Sons Ltd , 1983

Wigmore, John Henry *Evidence in Trials at Common Law*, vol 9 Revised by James H Chadbourn Boston Little, Brown & Co , 1981

APPEAL from a judgment of the Manitoba Court of Appeal (1996), 110 Man R (2d) 199, 118 W A C 199, 107 C C C (3d) 226, 48 C R (4th) 256, [1996] 6 W W R 577, [1996] M J No 280 (QL), allowing the accused's appeal from his conviction for fraud and ordering a new trial Appeal dismissed

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SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v

WILLIAM LIFCHUS

CORAM The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ

CORY J

1 Should the expression "beyond a reasonable doubt" be explained to a jury and if so, in what manner? These are the questions raised on this appeal

I Factual Background

2 The accused, a stockbroker, was charged with one count each of fraud and one of theft, both over $1 000 It was alleged the accused defrauded his employer of a large sum of money by misrepresenting the value of a bond in his personal Canadian margin account

3 The accused was tried before a judge and jury He was convicted of the fraud charge, but acquitted of theft The accused's main ground of appeal was that the trial judge erred in instructing the jury on the meaning of the expression "proof beyond a reasonable doubt" The Court of Appeal allowed the appeal, set aside the conviction

and ordered a new trial (1996), 110 Man R (2d) 199, 118 W A C 199, 107 C C C (3d) 226, 48 C R (4th) 256, [1996] 6 W W.R 577, [1996] M J No 280 (QL)

II The Courts Below

A *Manitoba Court of Queen's Bench (with a Jury)*

4 The trial judge provided the jury with the following explanation of the expression "reasonable doubt"

> When I use the words "proof beyond a reasonable doubt", I use those words in their ordinary, natural every day sense There isn't one of you who hasn't said gosh I've got a doubt about such and so Perfectly every day word There isn t one of you who doesn't have a notion of reasonable That, too, is a perfectly ordinary concept
>
> On your review of the evidence if you are left with a doubt as to whether the Crown has proved one of those essential elements and if that doubt is a reasonable one then the accused must be acquitted of the evidence
>
> On the other hand, if having reviewed all of the evidence, you are not left with a reasonable doubt as to whether any of those essential elements have been proved, in other words if you are satisfied beyond that point of reasonable doubt, the accused must be convicted The words "doubt the words "reasonable" are ordinary, every day words that I am sure you understand

5 Although the trial judge referred on other occasions during her charge to the requisite standard of proof "beyond a reasonable doubt", she proffered no other explanation of its meaning The jury found the accused guilty of fraud and he appealed

B *Manitoba Court of Appeal* (1996), 107 C C C (3d) 226

6 The accused contended that the trial judge failed to properly instruct the jury on the meaning of the expression "reasonable doubt" Scott C J M , writing for the court came to two conclusions which dictated the result of the appeal

7 First, he found (at p 231) that in Canada "jurors do need assistance and guidance" in understanding what reasonable doubt means It is therefore an error of law for a trial judge to fail to explain this concept

8 Second, Scott C J M adopted the definition of "reasonable doubt" set forth by Wood J A in *R v Brydon* (1995), 95 C C C (3d) 509 (B C C A), at p 525

> With respect to those of a contrary view it is difficult to think of a more accurate statement than that which defines reasonable doubt as a doubt for which one can give a reason so long as the reason given is logically connected to the evidence An inability to give such a reason for the doubt one entertains is the first and most obvious indication that the doubt held may not be reasonable

9 Applying these principles he held that the trial judge's charge to the jury amounted to both a non-direction and a misdirection There was non-direction arising from the failure to define "reasonable doubt" in a meaningful way There was misdirection because the trial judge equated "reasonable doubt" with "an ordinary every day phrase" when in fact it is far from a "perfectly ordinary concept" (p 234) Scott C J M observed that the standard by which everyday decisions are typically made is "a standard of probability and, often within that, at the low end of the scale" (p 234) and not a standard of proof "beyond a reasonable doubt"

10 He determined that these errors were so serious that s 686(1)(*b*)(iii) of the *Criminal Code*, R S C , 1985, c C-46, had no application He set aside the accused's conviction and ordered a new trial The Crown has appealed that decision

III Issues on Appeal

11 Four issues fall to be decided on this appeal

(1) Must a trial judge provide the jury with an explanation of the expression "reasonable doubt"?

(2) If so, how should this concept be explained to the jury?

(3) Did the charge in this case amount to a misdirection on the meaning of "reasonable doubt"?

(4) If the charge in this case was insufficient, ought this Court give effect to the curative proviso set out at subparagraph 686(1)(*b*)(iii) of the *Criminal Code*?

IV Analysis

12 At the outset I should like to express my appreciation of the consideration given to this issue by the Honourable G Gale former Chief Justice of Ontario, Houlden J A and his committee who have worked so diligently on instructions to juries and for the extensive and helpful reasons of Wood J A in *Brydon* Like Wood J A I think it would be of assistance to set out the principles for instructing juries on the duty of the Crown to prove the guilt of the accused beyond a reasonable doubt

A *The Fundamental Importance of Understanding the Onus Resting Upon the Crown*

13 The onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence That jurors clearly understand the meaning of the term is of fundamental importance to our criminal justice system It is one of the principal safeguards which seeks to ensure that no innocent person is convicted The Marshall, Morin and Milgaard cases serve as a constant reminder that our system, with all its protections for the accused, can still make tragic errors A fair trial must be the goal of criminal justice There cannot be a fair trial if jurors do not clearly understand the basic and fundamentally important concept of the standard of proof that the Crown must meet in order to obtain a conviction

14 No matter how exemplary the directions to the jury may be in every other respect if they are wanting in this aspect the trial must be lacking in fairness It is true the term has come echoing down the centuries in words of deceptive simplicity Yet jurors must appreciate their meaning and significance They must be aware that the standard of proof is higher than the standard applied in civil actions of proof based upon a balance of probabilities yet less than proof to an absolute certainty

(1) Should a Trial Judge Explain "Reasonable Doubt" to the Jury?

15 In both its written submissions and during the oral hearing of this appeal, the Crown very fairly and properly conceded that there is good authority for the proposition that Canadian juries should be given a definition of "reasonable doubt"

16 In some jurisdictions, most notably the United Kingdom, the position appears to be that there is no need to define "reasonable doubt" beyond telling jurors

that they cannot convict unless they are "sure" that the accused is guilty Indeed some very eminent jurists have espoused the view that, because the words "reasonable doubt" are readily understood by jurors, it may even be unwise to attempt a definition (Glanville Williams, *Criminal Law The General Part* (2nd ed 1961), at p 873, and *Textbook of Criminal Law* (2nd ed 1983), at p 43, *Wigmore on Evidence*, vol 9 (Chadbourn rev 1981), § 2497, at pp 412-15)

17 However, in a recent decision, the United States Supreme Court held that the expression "reasonable doubt" should be defined *Victor v Nebraska*, 127 L Ed 2d 583 (1994) In her separate concurring opinion Ginsberg J expressed the view (at p 603) that

> Because the trial judges in fact defined reasonable doubt in both jury charges we review, we need not decide whether the Constitution required them to do so Whether or not the Constitution so requires, however, the argument for defining the concept is strong While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining for jurors Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt," when that term is left undefined Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative -- refusing to define the concept at all -- is not obviously preferable

18 It is as well significant that Ginsberg J referred with approval to the Federal Judicial Centre's suggested direction on the subject and recommended its use

19 The majority of the Canadian decisions have held that juries should be provided with a definition of the words "reasonable doubt" In *R v Tyhurst* (1992), 79 C C C (3d) 238, the British Columbia Court of Appeal held, at p 250, that

> While it is tempting to conclude that the jury must have understood what reasonable doubt means because those words were used so frequently, it must not be forgotten that the principle of reasonable doubt in criminal law imports a great deal more than a lay person might attribute to them This is demonstrated by the fact that juries are always given a special definition of what reasonable doubt means It would clearly be legal error to fail to give a jury such a definition just because the words are commonly used

20 This approach was unanimously approved by a five-member panel of the Ontario Court of Appeal (*R v Jenkins* (1996) 107 C C C (3d) 440, at pp 459-60, see also *R v Hrynyk* (1948), 93 C C C 100 (Man C A), at pp 106-7)

21 Any doubt as to whether the jury must be provided with an explanation of the expression "reasonable doubt" was resolved by *R v Brydon* [1995] 4 S C R 253 This was an appeal from the judgment of the British Columbia Court of Appeal referred to earlier Writing for the Court Lamer C J stressed the importance of providing the jury with accurate instructions on the standard of proof He wrote (at para 18)

> In light of the importance of the burden of proof and reasonable doubt filter to the integrity and reliability of a verdict and to the fairness of an accused's trial and giving due weight to the reality, highlighted by Wood J A (at p 10), that
>
> > the application to the evidence of the law relating to the burden of proof in a criminal case can pose great difficulty, particularly for a jury of lay people who are confronted with that task for the first and probably the only, time in their lives
>
> a trial judge's instructions must be careful, lucid and scrupulously sound

22 The phrase ' beyond a reasonable doubt", is composed of words which are commonly used in everyday speech Yet, these words have a specific meaning in the legal context This special meaning of the words "reasonable doubt" may not

correspond precisely to the meaning ordinarily attributed to them In criminal proceedings, where the liberty of the subject is at stake, it is of fundamental importance that jurors fully understand the nature of the burden of proof that the law requires them to apply An explanation of the meaning of proof beyond a reasonable doubt is an essential element of the instructions that must be given to a jury That a definition is necessary can be readily deduced from the frequency with which juries ask for guidance with regard to its meaning It is therefore essential that the trial judge provide the jury with an explanation of the expression

(2) How Should the Expression "Reasonable Doubt" be Explained to the Jury?

(a) *What Should be Avoided?*

23 Perhaps a consideration of how to define the expression can begin by setting out common definitions which should be avoided For example, a reasonable doubt should not be described as an "ordinary" concept Jurors should not be invited to apply to the determination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives, or even to the most important of these decisions In this aspect, I agree with the comments of Scott C J M set out in the judgment below (at pp 234-35)

> Reasonable doubt, no matter how elusive the concept, cannot be equated to an ordinary everyday phrase It is not, as we have seen, a "perfectly ordinary concept" -- far from it The reason for this is that the word "reasonable" can, depending on the circumstances, have two very different meanings The first is the meaning thoroughly canvassed by Wood J A in *Brydon* The other more common use is that in ordinary parlance we hold "reasonable" views, we have "reasonable" opinions, and we make "reasonable" prognostications This is the standard by which we make our everyday decisions and by which we habitually govern

> ourselves It is a standard of probability and, often within that, at the low end of the scale It is very different from the criminal standard of proof which requires a much higher degree of certitude to arrive at a conclusion of guilt
>
> To instruct the jury that reasonable doubt means nothing more than the "every day sense" of the words is misleading and constitutes reversible error [Emphasis added]

24 Ordinarily even the most important decision of a lifetime are based upon carefully calculated risks They are made on the assumption that certain events will in all likelihood take place or that certain facts are in all probability true Yet to invite jurors to apply to a criminal trial the standard of proof used for even the important decisions in life runs the risk of significantly reducing the standard to which the prosecution must be held

25 Nor is it helpful to describe proof beyond a reasonable doubt simply as proof to a "moral certainty" I agree with Wood J A in *Brydon*, *supra*, and with Proulx J A in *R v Girard* (1996), 109 C C C (3d) 545, at p 554, that this expression although at one time perhaps clear to jurors, is today neither descriptive nor helpful Moreover as the United States Supreme Court recognized in *Victor supra*, at pp 596-97, there is great strength and persuasion in the position put forward that "moral certainty" may not be equated by jurors with "evidentiary certainty" Thus, if the standard of proof is explained as equivalent to "moral certainty", without more, jurors may think that they are entitled to convict if they feel "certain", even though the Crown has failed to prove its case beyond a reasonable doubt In other words, different jurors may have different ideas about the level of proof required before they are "morally certain" of the accused s guilt Like the United States Supreme Court, I think that this expression although not necessarily fatal to a charge on reasonable doubt, should be avoided

26 Finally, qualifications of the word "doubt", other than by way of the adjective "reasonable", should be avoided For instance instructing the jury that a "reasonable doubt" is a "haunting" doubt, a "substantial" doubt or a "serious" doubt may have the effect of misleading the jury (*Boucher v The Queen*, [1955] S C R 16) What may be considered to be "haunting", "substantial" or "serious" is bound to vary with the background and perceptions of each individual juror As a result of the use of these words jurors will be likely to understand that they should apply a standard of proof that could be higher or lower than that required Similarly, to advise jurors that a "reasonable doubt" is a doubt which is so serious as to prevent them from eating or sleeping is manifestly misleading (*Girard*, *supra*, *R v Bergeron* (1996), 109 C C C (3d) 571 (Que C A), at p 576) These words would lead a juror to set an unacceptably high standard of certainty

(b) *What Should be Included in the Definition?*

27 First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials the presumption of innocence The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused

28 It will be recalled that, in *Brydon*, Wood J A defined a "reasonable doubt" as "a doubt for which one can give a reason so long as the reason given is logically connected to the evidence" (p 525) This was the definition adopted in the Court below However the idea that jurors should be instructed that a reasonable doubt is a doubt "for which one can give a reason" is not without its forceful detractors Indeed it was expressly rejected by the Ontario Court of Appeal in *R v Ford* (1991), 12 W C B (2d) 576 The view has been expressed that this instruction works to the detriment of the "inarticulate juror In short the fear is that a juror who has a reasonable doubt which he or she is unable to concisely articulate to fellow jurors or even to herself, may erroneously conclude that the doubt is not reasonable Wood J A dismissed this objection stating (at p 525)

> I am not impressed by the notion that modern-day jurors are likely to be lacking in intelligence or "inarticulate" in the sense, or to the degree, that they would be unable either to engage in the limited reasoning process which such an instruction demands or be afraid to speak out and express their views in that respect to their fellow jurors
>
> However, assuming that there may be some jurors who will find it difficult to communicate their closely held personal views to their fellow jurors either because they are generally shy or because they have difficulty expressing themselves in conversation with others that difficulty can be overcome by an instruction cast in terms which does no more than require that they be able to give themselves a reason for the doubt they hold

29 Nonetheless there is still another problem with this definition It is that certain doubts, although reasonable, are simply incapable of articulation For instance, there may be something about a person's demeanor in the witness box which will lead a juror to conclude that the witness is not credible It may be that the juror is unable to point to the precise aspect of the witness's demeanor which was found to be suspicious and as a result cannot articulate either to himself or others exactly why the

witness should not be believed A juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration is the assessment of credibility

30 It follows that it is certainly not essential to instruct jurors that a reasonable doubt is a doubt for which a reason can be supplied. To do so may unnecessarily complicate the task of the jury It will suffice to instruct the jury that a reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence

31 It will be helpful in defining the term to explain to jurors those elements that should not be taken into consideration They should be instructed that a reasonable doubt cannot be based on sympathy or prejudice Further they should be told that a reasonable doubt must not be imaginary or frivolous As well they must be advised that the Crown is not required to prove its case to an absolute certainty since such an unrealistically high standard could seldom be achieved

32 Members of the jury panel may have heard of the "balance of probabilities" or sat on a civil case and been instructed as to the standard used in those cases It is important that jurors be told that they are not to apply that standard in the context of the criminal trial They should be told that proof establishing a probability of guilt is not sufficient to establish guilt beyond a reasonable doubt The instructions explaining what the standard is not will help jurors to understand what it is

33 In the United Kingdom juries are instructed that they may convict if they are "sure" or "certain" of the accused's guilt Yet, in my view that instruction standing

alone is both insufficient and potentially misleading Being "certain" is a conclusion which a juror may reach but it does not indicate the route the juror should take m order to arrive at the conclusion

34 It is only after proper instructions have been given as to the meaning of the expression "beyond a reasonable doubt" that a jury may be advised that they can convict if they are "certain" or "sure" that the accused is guilty

35 In some jurisdictions after the jury has been selected the trial judge will provide some brief basic instructions as to the nature of a criminal trial and the fundamental principles that will be applied This is such a sound, sensible and salutary practice that it should be undertaken in all jurisdictions Obviously it will be of great assistance to jurors if, at the beginning of the trial, they are advised of the applicable basic principles If that procedure is followed, it would be helpful to ad\ ise the jury at this time as well as at the conclusion of the trial of the presumption of innocence and the burden of proof beyond a reasonable doubt which the Crown must meet

(c) *Summary*

36 Perhaps a brief summary of what the definition should and should not contain may be helpful It should be explained that

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence,
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused,
- a reasonable doubt is not a doubt based upon sympathy or prejudice,

- rather, it is based upon reason and common sense,
- it is logically connected to the evidence or absence of evidence,
- it does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt, and
- more is required than proof that the accused is probably guilty – a jury which concludes only that the accused is probably guilty must acquit

37 On the other hand, certain references to the required standard of proof should be avoided For example

- describing the term "reasonable doubt" as an ordinary expression which has no special meaning m the criminal law context,
- inviting jurors to apply to the task before them the same standard of proof that they apph to important, or even the most important decisions in their own lives,
- equating proof "beyond a reasonable doubt" to proof "to a moral certainty",
- qualifying the word "doubt" with adjectives other than "reasonable", such as 'serious", "substantial" or "haunting", which may mislead the jury, and
- instructing jurors that they may convict if they are "sure" that the accused is guilty, before providing them with a proper definition as to the meaning of the words "beyond a reasonable doubt"

38 A charge which is consistent with the principles set out in these reasons will suffice regardless of the particular words used by the trial judge Nevertheless, it may, as suggested in *Girard, supra,* at p 556, be useful to set out a "model charge" which could provide the necessary instructions as to the meaning of the phrase beyond a reasonable doubt

(3) Suggested Charge

39 Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines

> The accused enters these proceedings presumed to be innocent That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice It is so engrained in our criminal law that some think it needs no explanation yet something must be said regarding its meaning
>
> A reasonable doubt is not an imaginary or frivolous doubt It must not be based upon sympathy or prejudice Rather it is based on reason and common sense It is logically derived from the evidence or absence of evidence
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so Such a standard of proof is impossibly high
>
> In short if, based upon the evidence or lack of evidence you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt

40 This is not a magic incantation that needs to be repeated word for word It is nothing more than a suggested form that would not be faulted if it were used Any form of instruction that complied with the applicable principles and avoided the pitfalls referred to would be satisfactory

41 Further, it is possible that an error in the instructions as to the standard of proof may not constitute a reversible error It was observed in *R v W (D)*, [1991] 1 S C R 742, at p 758, that the verdict ought not be disturbed "if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply" On the other hand, if the charge as a whole gives rise to the reasonable likelihood that the jury misapprehended the standard of proof, then as a general rule the verdict will have to be set aside and a new trial directed

(4) The Charge in this Case

42 The relevant part of the trial judge s charge was in these words

> When I use the words ' proof beyond a reasonable doubt' , I use those words in their ordinary, natural every day sense There isn't one of you who hasn't said, gosh I've got a doubt about such and so Perfectly every day word There isn't one of you who doesn't have a notion of reasonable That, too, is a perfectly ordinary concept
>
> On your review of the evidence if you are left with a doubt as to whether the Crown has proved one of those essential elements and if that doubt is a reasonable one then the accused must be acquitted of the evidence
>
> On the other hand, if having reviewed all of the evidence, you are not left with a reasonable doubt as to whether any of those essential elements have been proved, in other words if you are satisfied beyond that point of reasonable doubt, the accused must be convicted The words "doubt" the words "reasonable" are ordinary, every day words that I am sure you understand

43 Like Scott C.J M , I am of the view that this charge was insufficient To begin with, the trial judge did not provide a definition of ' reasonable doubt" This expression must be explained to the jury Further, the trial judge told the jurors to

evaluate the concept of reasonable doubt as if these were "ordinary, every day words For the reasons set out earlier, this is an unacceptable direction The expression "beyond a reasonable doubt" cannot be equated to the everyday use made in today's society of the words "reasonable" and "doubt" Rather, in the context of a criminal trial they have a specific meaning Unfortunately, the trial judge failed to explain the standard of proof fully and properly to the jury This failure constituted an error of law in a fundamentally important aspect of this criminal trial

44 It is true that the charge as a whole must be considered Yet, the trial judge did not provide any further guidance to the jury concerning the meaning of proof beyond a reasonable doubt It follows that this serious error was not saved by further instructions This is unfortunate, since the trial judge s charge in all other respects was, as Scott C J M observed 'a model of clarity and conciseness (p 235) Nevertheless, the error was serious and gave rise to the reasonable likelihood that the jury misapprehended the burden of proof which they were required to apply

B *Section 686(1)(b)(iii)*

45 The Crown contended that the proviso set out at subpara 686(1)(*b*)(iii) of the *Criminal Code* should be applied and the conviction restored on the basis that, despite the errors in the charge, "no substantial wrong or miscarriage of justice has occurred"

46 That position cannot be accepted A serious error was made on a fundamental principle of criminal law The correct explanation of the requisite burden of proof is essential to ensure a fair criminal trial To expect less is to alter one of the

basic concepts of the criminal trial process Indeed, Lamer C J in *Brydon*, at p. 257, sagely raised the very real concern whether "s. 686(1)(*b*)(iii) would ever be available to cure an erroneous instruction which may have misled a jury into improperly applying the burden of proof or reasonable doubt standard" It cannot be said that, had the trial judge not erred, the verdict would necessarily have been the same

V Disposition

47 In the result, the appeal is dismissed and the order directing the new trial is confirmed

SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

v

WILLIAM LIFCHUS

CORAM The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier Cory, McLachlin, Iacobucci and Major JJ

L'HEUREUX-DUBE J

48 I have read the reasons of Justice Cory, and agree with his approach on the question of reasonable doubt as well as the result he reaches I also agree but for different reasons, that s 686(1)(*b*)(iii) of the *Criminal Code*, R S C , 1985, c C-46, is an inappropriate remedy in this case

49 Given that we do not have the full trial record before us, and that the submissions on the "miscarriage of justice" aspect of the provision were insufficient, in my opinion, the Crown has failed to discharge its burden to satisfy the Court "that the verdict would necessarily have been the same if the error had not been made" See *R v Hebert*, [1996] 2 S C R 272, at p 276, citing *Colpitts v The Queen*, [1965] S C R 739

50 I would accordingly dismiss the appeal

TAB D

In the Court of Appeal of Alberta

Citation: HOOPP Realty Inc v Emery Jamieson LLP, 2020 ABCA 159

Date: 20200424
Docket: 1901-0032-AC
1901-0035-AC
Registry: Calgary

Between:

1901-0032-AC

HOOPP Realty Inc.

Respondent

- and -

Emery Jamieson LLP, W. Paul Sharek, Q.C. and G. Bruce Comba

Respondents

- and -

Dentons Canada LLP, David Loader and David Loader Professional Corporation

Appellants

And Between:

1901-0035-AC

HOOPP Realty Inc.

Appellant

- and -

Emery Jamieson LLP, W. Paul Sharek, Q.C. and G. Bruce Comba

Respondents

- and -

Dentons Canada LLP, David Loader and David Loader Professional Corporation

Not parties to this Appeal

The Court:

The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Elizabeth Hughes
The Honourable Madam Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice E.C. Wilson
Dated the 3rd day of January, 2019
Filed on the 28th day of January, 2019
(Docket: 1101-15259)

Memorandum of Judgment

The Court:

Overview

[1] These appeals relate to two summary dismissal applications in a lawyers' negligence action. HOOPP Realty Inc. (HOOPP) sued two of its former law firms and associated partners, referred to as collectively as the Emery Jamieson defendants and the Dentons defendants, for their handling of a lawsuit against a contractor, AG Clark Holdings Ltd. (Clark Builders).

[2] The basic facts are as follows: Clark Builders agreed to construct a warehouse for HOOPP in 1999. The floor of the warehouse was defective. The tenant of this building sued HOOPP in 2000 and later Clark Builders. HOOPP retained the Dentons defendants for this action and consulted the Dentons defendants about further claims against Clark Builders. A remediation agreement between Clark Builders and HOOPP was entered into in August 2000 wherein Clark Builders admitted fault for the floor and established a remediation plan.

[3] A conflict arose at the Dentons firm and HOOPP's Clark Builders file was transferred in the fall of 2000 to the Emery Jamieson defendants. The Emery Jamieson defendants, on behalf of HOOPP, sued Clark Builders in February 2002 claiming losses associated with the failed floor. They remained on the file until approximately 2004 when the conflict was resolved and the file transferred back to the Dentons defendants. In September 2004, a further remediation agreement was entered into.

[4] There was very little movement in the Clark Builders litigation. There were a number of without prejudice discussions. A standstill agreement was entered into in December 2004 so that Clark Builders could consider bringing an application to stay the action in favour of arbitration. In January 2005 Clark Builders filed an application although there was no supporting evidence and it was adjourned *sine die*.

[5] The parties entered into a tolling agreement dated November 2006, which preserved existing limitation periods. HOOPP terminated this agreement in October 2009 in an effort to move the matter forward.

[6] The 1999 design-build agreement between HOOPP and Clark Builders contained what would be found several years later to be a "mandatory" arbitration provision. This provision proved critical to the Clark Builders action as this Court held in 2005 in *Agrium Inc v Babcock*, 2005 ABCA 82 that if the parties have agreed that they must arbitrate a dispute, but one party has issued a statement of claim and has not commenced arbitration within the limitation period for arbitration, then the court must strike out the claim.

[7] Shortly after the tolling agreement was terminated in October 2009, Clark Builders capitalized on the decision in *Babcock*. On October 30, 2009 Clark Builders sent a letter to the Dentons defendants advising that it intended to apply to strike or stay the action on the basis that the proper forum was arbitration and the limitation period to commence arbitration had expired. This application was filed by Clark Builders on November 13, 2009.

[8] Clark Builder's application was initially unsuccessful, but in *AG Clark Holdings Ltd v HOOPP Realty Inc*, 2013 ABCA 101 this Court overturned the chambers judge and concluded the arbitration clause in the design-build agreement was indeed mandatory and HOOPP was not entitled to maintain a civil action against Clark Builders. This Court sent the matter back for further consideration of the limitation issue. In *HOOPP Realty Inc v AG Clark Holdings Ltd*, 2014 ABCA 20, this Court confirmed the striking of the action against Clark Builders because the mandatory arbitration had not been commenced within the limitation period. In the end, HOOPP was left with no recovery against Clark Builders, a cost liability, and significant legal fees.

[9] While Clark Builders' application was winding its way through the courts, HOOPP sued the Emery Jamieson defendants on November 9, 2011, which was just shy of two years to the day from when the Dentons defendants, on November 12, 2009, advised HOOPP about a potential problem arising from the mandatory arbitration provision. The following timeline is critical to the appeal. The Dentons defendants knew about the problem on October 30, 2009 when Clark Builders advised the Dentons defendants that it would be making the application. On November 2, 2009 internal research by the Dentons defendants concluded that the Clark Builders action ought to have been commenced as arbitration and the limitation period to do so had expired.

[10] Instead of notifying HOOPP immediately, the Dentons defendants consulted with the Emery Jamieson defendants on November 4, 2009 and then waited a few more days, until November 12, 2009, to disclose the problem to HOOPP. On December 2, 2009 the Dentons defendants advised HOOPP to seek independent legal advice. HOOPP sued the Dentons defendants sometime later.

[11] The Dentons defendants' knowledge and actions between October 30, 2009 and December 2, 2009 form a critical component of the Emery Jamieson defendants' limitation defence.

Claims against the Lawyers

[12] HOOPP's claims against the Emery Jamieson defendants are as follows:

(a) failing to advise of the arbitration clause and its implications;

(b) breaching the retainer agreement;

(c) breaching their obligations commensurate with a reasonably competent solicitor; and

(d) breaching their fiduciary duties.

[13] HOOPP alleged that as a result of the negligence, breach of contract and breach of fiduciary duty, HOOPP was not apprised of its legal position nor provided with appropriate and competent legal advice in a timely manner. But for the negligence, breach of contract and breach of fiduciary duty, HOOPP states that it could have considered other avenues of conduct, including directing the Emery Jamieson defendants to proceed pursuant to the mandatory arbitration provision.

[14] It sought damages against the Emery Jamieson defendants in the amount of the claim against Clark Builders ($12.85 million) and the wasted legal fees paid to the Emery Jamieson defendants.

[15] HOOPP's claims against the Dentons defendants were framed similarly in negligence, breach of contract and breach of fiduciary duty, although the allegations were complicated by Emery Jamieson's involvement and the numerous steps taken by the Dentons defendants after they took over the file in or about 2004. In this claim, HOOPP further alleged that the Dentons defendants failed to:

(a) advise or consult with HOOPP regarding the Clark Builders' January 2005 application;

(b) adequately protect HOOPP's interest by advising HOOPP to consider consenting to the relief sought by Clark Builders in the January 2005 application and proceed to arbitration;

(c) advise HOOPP to seek relief by arbitration rather than continuing with litigation; and

(d) advise HOOPP of the possibility of claims against either or both of Dentons or Emery Jamieson regarding the mandatory arbitration clause.

[16] HOOPP sought against the Dentons defendants the same $12.85 million claim and the wasted fees paid to both the Dentons defendants and the Emery Jamieson defendants.

[17] The claims against the Dentons defendants were grouped into three categories in the court below:

(a) the loss of opportunity to sue Clark Builders (the Loss of Opportunity Claim);

(b) the wasted expenses in pursuing the Clark Builders action (the Secondary Claims); and

(c) the loss of opportunity to sue the Emery Jamieson defendants if the claim was lost by virtue of the limitation expiring (the Limitations Advice Claim).

[18] The Dentons defendants' arguments on appeal relate to these same categories and the parties agree that they are a fair representation of the allegations.

Decisions Below

[19] The Emery Jamieson defendants sought summary dismissal of the claim against them on the basis that the limitation period expired. The Dentons defendants sought summary dismissal of the claim against them on the basis that there was no causation. Specifically, the Denton defendants asked the court to assume the Dentons defendants breached the standard of care, but find that the breach did not cause any losses. The Dentons defendants submitted HOOPP was unable to establish causation.

[20] A master heard two-and-a-half days of oral argument and issued a lengthy decision reported at 2018 ABQB 276. He made a number of findings.

[21] As for the claim against the Emery Jamieson defendants, the master held first that the limitation period expired against the Emery Jamieson defendants before HOOPP brought its claim against them. The master found that the injury was the failure to serve the arbitration notice in time. In his view, it may have been the case that the Dentons defendants ought to have recognized the problem much earlier, but by November 4, 2009 there was no question that the Dentons defendants actually knew of the possible claim. The Dentons defendants' knowledge was imputed to its client HOOPP such that HOOPP's claim against the Emery Jamieson defendants commenced on November 9, 2011 was out of time.

[22] Second, while it was not express, the master held that there was no duty on the Emery Jamieson defendants to advise HOOPP of its alleged negligence. The *Code of Conduct* did not extend a lawyer's ethical duty to inform former clients of possible errors. The Emery Jamieson defendants had ceased being HOOPP's lawyer in or about 2004 and they had no idea of the numerous steps that had been undertaken by the Dentons defendants in the Clark Builders action thereafter. They only became aware of the potential problem in November 2009 after their discussion with the Dentons defendants.

[23] As a result, the Emery Jamieson defendants' summary dismissal application was allowed.

[24] As for the claim against the Dentons defendants, the master found that the Dentons defendants' causation argument must be tempered with the consideration that HOOPP might have

been able to settle much earlier if it had known about the "Achilles tendon" in its case. Throughout the reasons, the master remarked on a few situations where the Dentons defendants could have avoided the problem entirely or could have fixed the problem in the Clark Builders action. He also suggested that if the Dentons defendants had become alert to the issue earlier, HOOPP might not have been faced with a limitation defence by Emery Jamieson. Similarly, he suggested that if the claim against Clark Builders would have been won but for the missing notice to arbitrate, then HOOPP may have a claim against the Dentons defendants for the lost opportunity to sue the Emery Jamieson defendants. All these comments suggest that the master turned his mind to what *effect*, if any, the advice of a reasonably competent lawyer would have had on the outcome in the circumstances.

[25] He concluded that the claim against the Dentons defendants was multi-faceted and expert evidence was required for both HOOPP and the Dentons defendants to set out their respective positions. He dismissed the Dentons defendants' application for summary dismissal.

[26] HOOPP also applied for certain declarations that the defendants were negligent, but that application was also dismissed and no appeal was taken.

[27] HOOPP appealed the master's decision on the limitation period and the Dentons defendants appealed the master's decision on the merits.

[28] Before the chambers judge, the parties agreed on all essential facts and no one suggested that the master erred in his fact finding or in stating the correct test for summary dismissal. Further, the parties conceded that by the fall of 2009, HOOPP was out of time to pursue the arbitration against Clark Builders.

[29] The chambers judge issued an oral decision finding that the master's decisions on both applications were correct in fact and law. He adopted much of the master's reasoning and also considered and distinguished a number of authorities the parties relied upon for their respective positions.

[30] HOOPP and the Dentons defendants further appeal to this Court raising a variety of the same arguments considered and rejected by both the master and the chambers judge.

Framework for Summary Dismissal

[31] Both these applications were brought for summary dismissal. *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 sets out at paragraph 47 a concise summary of the test and procedure in summary disposition applications:

> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[32] The chamber judge's assessment of the facts, the application of the law to those facts and the ultimate determination of whether summary dismissal was appropriate is entitled to deference on appeal: *Weir-Jones* at para 10.

HOOPP's Appeal of Emery Jamieson's Summary Dismissal Application

[33] On appeal, HOOPP raises the following errors in the chambers judge's decision:

(a) unduly deferring to the master and failing to treat the appeal as *de novo*;

(b) imputing knowledge of the Dentons defendants to be that of HOOPP to establish the limitation period;

(c) finding that HOOPP knew or ought to have known that it had suffered an injury attributable to the Emery Jamieson defendants that warranted bringing proceedings by at least November 4, 2009; and

(d) concluding that the Emery Jamieson defendants had no ethical obligation to inform HOOPP of a potential negligence claim against them.

Standard of Review

[34] The chambers judge's selection of the appropriate standard of review is a question of law, reviewable for correctness.

[35] Determining applicable limitations legislation, the proper tests to be applied, and the interpretation of limitations legislation generally are questions of law reviewable for correctness. Absent legal error, whether the limitation period has expired is a question of mixed fact and law to which this Court owes deference: *Hole v Hole*, 2016 ABCA 34 at para 32.

Analysis

1. Appeal of a Master's Decision

[36] On HOOPP's appeal of the master's decision dismissing the claims against the Emery Jamieson defendants, HOOPP asserted that the onus lay upon the Emery Jamieson defendants to satisfy the chambers judge that summary dismissal was the correct decision. The burdens were such because the appeal was *de novo*.

[37] The chambers judge rejected this approach concluding that HOOPP, as the appellant, bore the burden to satisfy the court that the master's decision was incorrect in fact and/or law. The master's order stood as a valid court order until overturned on appeal.

[38] HOOPP argues that the chambers judge failed to treat the appeal before him as a *de novo* hearing. In its view, a *de novo* hearing is not a true appeal but a rehearing of the original application. The chambers judge was required to consider the matter afresh and come to a decision independent of the master's fact findings and legal reasoning. As a result, HOOPP argues it was an error for the chambers judge to adopt portions of the master's reasons as his own.

[39] Rule 6.14 of the *Alberta Rules of Court*, Alta Reg 124/2010 governs appeals from a master's judgment. Rule 6.14(3) states:

> An appeal from a master's judgment or order is an appeal on the record of proceedings before the master and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

[40] "Record of proceeding" is defined in Rule 6.14(4) as:

> (a) the application before the master,
>
> (b) affidavits and other evidence filed by the parties respecting the application before the master,

(c) any transcript of proceedings before the master, …and

(d) the master's judgment or order and any written reasons given for the decision.

[41] Where an appeal from a master's decision to a chambers judge involves the same record and the same submissions, it is not an error for a chambers judge to summarily describe his or her analysis and conclusions with reference to the master's decision if he or she otherwise finds that it was correct in fact and law. In taking this approach, the chambers judge here did not defer to the masters' decision or apply any other standard of review.

[42] This ground of appeal is dismissed.

2. The *Limitations Act*

[43] Two of HOOPP's grounds of appeal relate to the interpretation and application of s. 3(1)(a) of the *Limitations Act* which states:

> **3(1)** Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> >
> > > (i) that the injury for which the claimant seeks a remedial order had occurred,
> > >
> > > (ii) that the injury was attributable to conduct of the defendant, and
> > >
> > > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
> > >
> > > …
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[44] Section 3(1)(a) requires the claimant to know or ought to know of three things: (1) they suffered an injury; (2) the injury was attributable to the defendant; and (3) the injury warrants bringing a proceeding: *De Shazo v Nations Energy Company Ltd*., 2005 ABCA 241 at para 28. The second requirement is not at issue in this appeal.

[45] The subjective test and the objective test in the *Limitations Act* are alternatives; time starts to run as soon as one of them is met. Once the claimant subjectively knows that they have a claim, it is irrelevant whether a reasonable person "ought to have known" that: *Gayton v Lacasse*, 2010 ABCA 123 at para 61 per Slatter JA.

[46] On appeal, HOOPP argues that it did not know of an injury that was sufficiently serious to warrant bringing a proceeding until July 2013 when the chambers judge struck the Clark Builders action.

a. Injury that Warrants bringing a Proceeding

[47] The master found, and the chambers judge agreed, that the "injury" occurred when the notice to arbitrate was not served in time. Injury is defined in the *Limitations Act* as follows:

> 1(e) "injury" means
>
> (i) personal injury,
>
> (ii) property damage,
>
> (iii) economic loss,
>
> (iv) non-performance of an obligation, or
>
> (v) in the absence of any of the above, the breach of a duty;

[48] While the master did not state which aspect of the definition he applied, the injury in this case could constitute either the "non-performance of an obligation" or a "breach of duty".

[49] The master did not make an express finding about what warranted bringing a proceeding, although he referred to "the problem" as being known by the Dentons defendants by November 4, 2009 at the latest. The chambers judge agreed with the master's reasoning and conclusions.

[50] According to the master's decision, by November 4, 2009 the following facts were known by the Dentons defendants:

> (a) the arbitration notice had not been filed by either the Emery Jamieson defendants or the Dentons defendants;
>
> (b) the tolling agreement was terminated effective November 2, 2009; and

(c) Clark Builders intended to file an application to dismiss the Clark Builders action on the basis that the arbitration had not been commenced and the limitation period to do so had expired.

[51] It is agreed that HOOPP did not know of these facts by November 4, 2009. Whether the Denton defendants' knowledge can be imputed to HOOPP for the purposes of the limitation period will be discussed in further detail below.

[52] On appeal, HOOPP argues that the master found that the "injury" was a "breach of duty". But given the definition of "injury", in s. 1(e), this conclusion was unavailable to the master because "breach of duty" only applies in the *absence* of any other type of injury.

[53] In addition, HOOPP states that there was merely a suspicion that Clark Builders intended to file an application to strike HOOPP's action and that the application might have resulted in injury to HOOPP. HOOPP states that the injury it suffered was "economic loss" when the Clark Builders action was struck in 2013. As a result, the "injury" occurred in 2013 not 2009.

[54] Alternatively, HOOPP states there were clear circumstances militating against the bringing of an action against the Emery Jamieson defendants, namely the chance that Clark Builders' application would not be successful.

[55] The *Limitations Act* is focused on knowledge of an injury, not the cause of action: *Sun Gro Horticulture Canada Ltd v Metal Building Sales Inc*., 2006 ABCA 243 at para 11.

[56] This Court has adopted the guidance from *Novak v Bond*, [1999] 1 SCR 808, 8 WWR 499 as to when an injury would warrant bringing a proceeding. This provision speaks not to the legal strength of a plaintiff's case for recovery, but to the circumstances of the plaintiff: *Nipshank v Trimble*, 2014 ABQB 120 at para 9. As set out in *N(J) v Kozens*, 2004 ABCA 394:

> [14] In ***Novak v. Bond***, ***supra***, Major, J. noted that the critical time is one "at which a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could - not necessarily should - bring an action. This approach is neither purely subjective nor purely objective. The question becomes: 'in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?'" (at para. 81) McLachlin, J. (as she then was), speaking for the majority in the same case, also espoused a variant of a "restrictive subjective/objective approach" that takes into account the plaintiff's "important and substantial interests." (at para. 38), adding that "[p]urely tactical considerations have no place in this analysis." (at para. 81) Time begins to run, she explained, when, "in light of the plaintiff's particular situation, the bringing of a suit is reasonably possible, not when it would be ideal from the plaintiff's perspective to do so." (at para. 84)

> [15] McLachlin, J. in ***Novak*** provided the following as examples of when a plaintiff may not reasonably be able to bring an action when viewed objectively but with regard to the plaintiff's own situation:
>
> > (a) the costs and strains of litigation would be overwhelming to him or her,
> >
> > (b) the possible damages recoverable would be minimal or speculative at best, or
> >
> > (c) other personal circumstances combined to make it unfeasible to initiate an action.

[57] HOOPP's arguments focus on the legal consequences of the facts known by the Dentons defendants, not the facts. Discovery relates to the facts, not the applicable law or any assurances of success: *Weir-Jones* at para 56. Similarly, discoverability does not require perfect knowledge or certainty that the claim will succeed: *Weir-Jones* at para 58.

[58] HOOPP sued the Emery Jamieson defendants in contract as well as tort and breach of fiduciary duty. The failure to serve the notice to arbitrate is a non-performance of an obligation and constitutes the "injury" under the legislation. As it relates to the claim against the Emery Jamieson defendants, all other losses flowed from that injury. Additionally, there was much more than merely a suspicion that an injury occurred by November 4, 2009 at the latest. There was no doubt that the arbitration notice had not been served by then.

[59] Finally, HOOPP has not put forward any personal circumstances which are serious, significant and compelling that made it unfeasible to initiate an action earlier. Waiting until the Clark Builders action was actually struck focuses on the strength of the claim against the Emery Jamieson defendants. These are tactical concerns that have no place in the "warrants bringing a proceeding" analysis.

[60] HOOPP has shown no reviewable error in the chambers judge's conclusion that the injury warranted bringing a proceeding by at least November 4, 2009.

[61] This ground of appeal is dismissed.

b. Imputed Knowledge

[62] The chambers judge agreed with the master's decision in fact and law that the Dentons defendants' actual knowledge was imputed to HOOPP for the purposes of determining the limitation period as against the Emery Jamieson defendants. He stated:

> Thus, the actual knowledge of the injury by the client will only suffice in some situations. In cases of alleged negligence on the part of the solicitor then acting for the client, actual knowledge of the injury by the client will always be the point of discoverability to trigger the limitations clock.
>
> But in other situations like the situation at Bar, it will be that actual knowledge on the part of the client is not required. That knowledge of previous counsel's negligence held by the client's current lawyer will be deemed to be or attributed or imputed to the client. I agree with the Master's holding in this regard and that the law he references supported the conclusion he came to…

[63] HOOPP states that this conclusion is wrong for the following reasons:

(a) the wording of the *Limitations Act* displaces any deemed attribution of knowledge; and

(b) a lawyer's knowledge is only attributable to a client in relation to matters within the scope of the retainer.

[64] Underlying this ground of appeal is the master's conclusion that the Emery Jamieson defendants were not HOOPP's lawyers after 2004:

> [69] However, events in late 2004 and early 2005 made it clear that after late 2004 no one was looking to Emery Jamieson for advice on dealing with Clark Builders. Critical decisions were made and an agreement was reached between HOOPP Realty and Clark Builders' lawyers, but Emery Jamieson was not even made aware of them.
>
> [70] Accordingly, although it was only much later when Dentons filed and served an amended statement of claim that showed it as the solicitors of record (no notice of change of solicitors was ever filed), Dentons clearly took over the conduct of the proceedings against Clark Builders in late 2004 and all parties knew that – HOOPP Realty, Emery Jamieson, Dentons, the property manager, and Clark Builders' lawyers.

[65] The chambers judge did not address the timing of the successive retainers expressly, although as set out above, for much of the analysis he merely adopted the master's reasons as his own.

[66] We have reviewed the record carefully and are satisfied that the Emery Jamieson retainer for the Clark Builders action concluded well before 2009.

[67] Once it is determined that the Emery Jamieson defendants were no longer acting for HOOPP, it is necessary to interpret the case law about imputing a solicitor's knowledge (in this case the Dentons defendants) to its client (HOOPP).

[68] We will address each one of HOOPP's arguments in turn.

i. Language of the *Limitations Act*

[69] HOOPP's argument under this ground of appeal focuses on the wording of s. 3(1)(a) of the *Limitations Act* which states that the two years runs from the date that *the claimant* knew, or in the circumstances ought to have known of the injury that warrants bringing a proceeding. HOOPP states that the knowledge must be personal to the claimant and it provides a number of cases to suggest that it is always the actual knowledge of the client that governs in solicitor negligence cases: *Tim's Meat, Deli & Grocery v Dubinsky*, 2010 ONSC 3829; *Lauesen v Silverman*, 2016 ONCA 327; *Gratton v Shaw*, 2011 ABCA 175; and *Ferrara, v Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851.

[70] The numerous cases that HOOPP relies upon are distinguishable.

[71] The common law has long held that notice to a solicitor is considered notice to their client: *Bank of British North America v St John & Quebec R. Co*, [1920] 52 DLR 557 at 561, 1920 CanLII 376 (NB Sup Ct AD) aff'd [1921] 62 SCR 346, 1921 CarswellNB 49; *Toth v Kancz*, [1975] 54 DLR (3d) 144, 1975 CarswellSask 110 at para 19 (QB); *Kirilenko and Kirilenko v Lavoie and Sinclair*, 1981 CanLII 2211 at para 30, [1981] 5 WWR 645, (Sask QB); *Stoimenov v Stoimenov*, 1985 CanLII 2166, 1985 CarswellOnt 234 at para 11 (CA); and *Burns v Kelly Peters & Associates Ltd*, 1988 CarswellBC 440 at para 23, [1988] BCJ No 2273 (Sup Ct).

[72] A number of cases have also held that knowledge of a solicitor may be imputed to their client for the purpose of calculating limitations periods: *Jack v Canada (Attorney General)*, 2004 CanLII 6217 at para 116, 2004 CarswellOnt 3255 (Sup Ct); *Soper (Guardian of) v Southcott*, 1998 CanLII 5359, 1998 CarswellOnt 2906 at para 21 (CA); *Fanshawe College v AU Optronics*, 2015 ONSC 2046 at para 59; and *Pepper v Sanmina-Sci Systems (Canada) Inc*, 2017 ONSC 1516 at para 62 rev'd on other grounds 2017 ONCA 730.

[73] That none of these cases concerned solicitor negligence is of no consequence. As of 2009, the Emery Jamieson defendants stood in the same position as any other third-party alleged tort-feasor as it related to the relationship between the Dentons defendants and HOOPP.

[74] The chamber judge's conclusion that the limitation period does not begin to run when a solicitor knows about *their own negligence* involving a client was not at issue before this Court. No party takes the position that Emery Jamieson's knowledge should be imputed to HOOPP for the purposes of determining the limitation period as against Emery Jamieson. Similarly, this is not

an appeal related to imputing the Dentons defendant's knowledge to HOOPP for the purposes of the limitation period against the Dentons defendants. These would be the situations where this principle would apply.

[75] The ability to impute knowledge, under the common law, is not unique to the solicitor-client relationship, but accords with general agency law, which states that knowledge of an agent is imputed to a principal in two situations: when notice is given to its agent, or when the agent gained the knowledge in the course of his duties: *Mah v Wawanesa Mutual Insurance Co*, 2013 ABCA 363 at para 13.

[76] Imputing knowledge in the context of the agency relationship is expressly addressed in s. 3(2)(b) of the *Limitations Act*. This section states that the limitation period under s. 3(1)(a) begins to run against a principal when either the (a) principal first acquired or ought to have acquired the knowledge in s. 3(1)(a); or (b) an agent with a duty to communicate the knowledge in s. 3(1)(a) to the principal first actually acquired that knowledge.

[77] As a result, the statutory language does not displace the common law's principle to impute knowledge from a solicitor to a client for the purposes of a limitation period; it expressly preserves it in s. 3(2)(b) of the *Limitations Act*.

[78] This ground of appeal is dismissed.

ii. Duty to Communicate

[79] The question remains whether the Dentons defendants' knowledge should be imputed to HOOPP in these circumstances.

[80] The rule that solicitor's knowledge is imputed to the client is founded upon the rebuttable presumption that this knowledge will be communicated to the client because it is the duty of the solicitor to do so: *Cameron v Hutchison*, 1869 CarswellOnt 121 at paras 11, [1869] OJ No 257 (QL). This presumption has since been held to be so strong that it cannot be rebutted: *St. John & Quebec* at 561. Furthermore, in 2009 the *Code of Conduct* imposed an express obligation upon a solicitor to inform a client as to the progress of the client's matter (Chapter 9, Rule 14).

[81] The general agency provision of the *Limitation Act* also concerns itself with whether there is a duty on behalf of the agent to communicate the knowledge to the principal.

[82] Knowledge held by a solicitor that is unrelated to the solicitor's retainer will not be imputed to the client: see for example, *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at paras 164-176. This is presumably because there is no duty to communicate such information; the retainer agreement stands as a reasonable proxy for determining what would affect the interests of the client "in the matter".

[83] HOOPP states that the Dentons defendants were retained to pursue Clark Builders for its deficient construction. They were not retained to investigate any potential claims as against third parties, including solicitors' negligence claims against the Emery Jamieson defendants. As a result, there was no duty to communicate information as it related to a claim against Emery Jamieson.

[84] While the retainer agreement is not before us, it is not disputed that the Dentons defendants were retained to pursue Clark Builders for the costs and expenses arising from the defective floor and invoices for legal services rendered describe the matter as "Dispute with Clark Builders". As set out above, it is clear that by November 4, 2009 the Dentons defendants knew the following:

(a) the arbitration notice had not been filed by either the Emery Jamieson defendants or the Dentons defendants;

(b) the tolling agreement was terminated effective November 2, 2009; and

(c) Clark Builders intended to file an application to dismiss the action on the basis that the arbitration had not been commenced and the limitation period to do so had expired.

[85] All of this information was critical to the "Dispute with Clark Builders" and thus, fell squarely within the Denton defendants' professional obligations to communicate to its client. The fact that this information *could also be used* by HOOPP to assess its claim against the Emery Jamieson defendants is beside the point.

[86] The requirements of the common law principle and s. 3(2)(b) of the *Limitations Act* were met. The chambers judge made no error in concluding that the Dentons defendants' knowledge is imputed to HOOPP for the purposes of the limitation period as against the Emery Jamieson defendants.

[87] This ground of appeal is dismissed.

3. Duty to Inform a Former Client about Errors

[88] HOOPP claims that the chambers judge erred in concluding that the Emery Jamieson defendants, as HOOPP's former counsel, had no ethical obligation under the *Code of Conduct* to inform HOOPP of a potential solicitors' negligence claim against them.

[89] In coming to his decision, the chambers judge relied upon the master's finding that the *Code of Conduct* was silent as to a lawyer's continuing obligation to inform former clients about errors as well as the Emery Jamieson defendant's submissions that their ethical obligations would have prevented them from contacting HOOPP given they were represented by the Dentons defendants.

[90] We find it unnecessary to address the ethical obligations under the *Code of Conduct* given the circumstances of this case. There is no dispute that the Dentons defendants discussed the problem with the Emery Jamieson defendants on November 4, 2009 and the Dentons defendants agreed to notify HOOPP. The Emery Jamieson defendants were entitled to rely upon the Dentons defendants, as HOOPP's current lawyers, to communicate the message. The result is no different since the Dentons defendants' knowledge is imputed to HOOPP regardless.

Conclusion on HOOPP's Appeal

[91] HOOPP has not identified any error in the chambers judge's reasons or conclusions that warrant appellate intervention. HOOPP's statement of claim against the Emery Jamieson defendants was filed out of time and the Emery Jamieson defendants are entitled to immunity under s. 3(1)(a) of the *Limitations Act*.

[92] This appeal is dismissed.

The Dentons defendants' Appeal of its Summary Dismissal Application

[93] On appeal, the Dentons defendants raise one error: the chambers judge failed to correctly cite and apply the principles of causation to the claims plead by HOOPP as against the Dentons defendants.

Standard of Review

[94] A failure to apply principles of causation, or a misapplication of those principles is an error of law reviewable for correctness: *Sorochan v Bouchier*, 2015 ABCA 212 at para 16. Any conclusion on causation is a factual inquiry and therefore reviewable on the palpable and overriding error standard: *KS v Willox*, 2018 ABCA 271 at para 35.

Analysis

[95] After highlighting a few of the master's conclusions on the Dentons defendants' application, the chambers judge accepted that the subtleties, the historical record and the incongruent conduct and advice on the part of the Dentons defendants, when viewed together and individually, raised triable issues and prevented relief by summary dismissal.

[96] While the language chosen by the chambers judge could have been more express, we do not find that he failed to correctly cite and apply the principles of causation.

[97] We agree with this summary of the principles of causation from *DD v Wong Estate*, 2019 ABQB 171 at paras 239-241:

> A plaintiff must establish that a defendant's substandard acts or omissions were the "cause-in-fact" of the injuries. That is, "but for" or "if not for" or "without" the defendant's acts or omissions, the injuries would not have occurred. Put another way, the defendant's acts or omissions were a necessary cause of the injuries.
>
> *The determination of factual causation is an inference from all the evidence.*
>
> …
>
> The "but for" test applies whether the substandard conduct was an act or an omission. Practically, proving what would have happened if what should have been done had been done may be challenging.... [references omitted, emphasis added]

[98] The causation analysis also requires the court to consider whether the injuries suffered were foreseeable or not too remote in law. We understand the Dentons defendants' position to rely on factual causation alone and not on legal causation.

[99] Like other professional negligence actions, where the claims turn on an omission, the factual causation is the difference that a competent lawyer would have likely made to the outcome: *Wong Estate* at para 242.

[100] The Dentons defendants framed the appeal as answering this sole question: when should new legal counsel be liable for a mistake made by a predecessor counsel that caused the loss of the client's claim. This fundamentally misstates the issue and fails to give any meaning to the numerous alleged breaches of contract, tort and fiduciary duty set out the in the statement of claim that primarily relate to omissions. At trial, for its tort claim to succeed, HOOPP is only required to prove that the Dentons defendants were "a" cause not "the" cause of its loss.

[101] While counsel for the Dentons defendants did an admirable job in his attempt to distill the several discrete tort pathways under the three categories of claims, the reality is that the record is not that simple and, in some cases, these pathways are predicated on factual findings not yet made. As noted by the master, there were a number of different "off-ramps" that could have been taken.

[102] The Dentons defendants' simplistic "cause-effect" formula does not work in this case because there are a number of forces relevant to the injury and the outcome: see for example, *McArdle (Estate of) v Cox*, 2003 ABCA 106 at para 24.

[103] As set out in *Weir-Jones* at paragraph 47, in order to grant summary disposition, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise judicial discretion to summarily resolve the dispute. The master was alive to the multi-faceted nature of the claim against the Dentons defendants and the interrelationship between the claims against both law firm parties. With all the unknowns and possibilities, he could

not fairly resolve the dispute on a summary basis. The chambers judge was similarly satisfied that the record raised triable issues and prevented summary dismissal. The Dentons defendants have not identified a reviewable error in this conclusion.

[104] This appeal is also dismissed.

Appeal heard on January 15, 2020

Memorandum filed at Calgary, Alberta
this 24th day of April, 2020

Veldhuis J.A.

Authorized to sign for: Hughes J.A.

Authorized to sign for: Antonio J.A.

Appearances:

R.D. Bell/K.D. Marlowe/T.N. Russell
for Hoopp Realty Inc.

V.A. Engel, Q.C./E. Scrimshaw
for Emery Jamieson LLP, W. Paul Sharek, Q.C. and G. Bruce Comba

C.G. Jensen, Q.C./D.J. Marshall
for Dentons Canada LLP, David Loader and David Loader Professional Corporation

TAB E

CITATION: Chiang (Re) , 2009 ONCA 3
DATE: 20090107
DOCKET: C47106

COURT OF APPEAL FOR ONTARIO

09 014 050

Laskin, Simmons and Armstrong JJ.A.

In the Matter of the Bankruptcy of Jay Tien Chiang
of the Town of Richmond Hill, in the Regional Municipality of York
in the Province of Ontario

BETWEEN

Mendlowitz & Associates Inc. in its capacity as trustee in
bankruptcy of Jay Tien Chiang, Korea Data Systems, Co. Ltd.,
also known as K.D.S. Korea, and Korea Data Systems (USA), Inc.

Applicants (Respondents)

and

Jay Tien Chiang, Christina Chiang, also known as Suh Mei Tasi,
Chun Chun Wu, Jie Chu Wu, Chen Cheng Yueh Tsai
Yu Chang Chiang, also known as Y.C. Chiang, En Fu Chiang,
Brenda Chang, Samson Chang, David Cheng, Everview Inc.,
961266 Ontario Inc., 1204360 Ontario Inc., 1243723 Ontario Inc.,
Aamazing Technologies Inc., Wen Wang Chiang also known as Wen Chiang
also known as Wen Wang, Crystalview Technology Corp.,
E.C. Holdings Ltd., Telepower International (Canada) Inc.
and Best Buy Electronics Inc., Su Feng Tsai also known as Tsai Su Feng
Tsai Zheng Li, Tsai Zheng Ying, Asia Pacific Gateway (H.K) Ltd.,
Century Group Holdings Ltd., and Albany Investments Ltd.

Defendants (Appellants)

AND BETWEEN

Mendlowitz & Associates Inc. in its capacity as trustee in bankruptcy of Jay Tien Chiang, Korea Data Systems, Co. Ltd., also known as K.D.S. Korea and Korea Data Systems (USA), Inc.

Applicants (Respondents)

and

Jay Tien Chiang, also known as Jay Chiang, also known as Tienchien Chiang, and Ontario Parole and Earned Release Board

Defendants (Appellants)

J. Thomas Curry and Marguerite Ethier, for the appellants

Christopher D. Bredt and Aaron A. Blumenfeld, for the respondents

Malliha Wilson and Christopher Thompson, for the intervener, the Attorney General of Ontario

Heard: February 11 and 12, 2008

On appeal from the orders of Justice Joan L. Lax of the Superior Court of Justice dated April 17, 2007 and reported at 2007 CanLII 12203 (Ont. S.C.), May 14, 2007 and reported at (2007), 85 O.R. (3d) 425 (Ont. S.C.), April 30, 2007 and September 26, 2007.

By the Court:

A. INTRODUCTION

[1] This is one of the worst cases of civil contempt to come before this court. In 1993, Jay Chiang acknowledged that he owed the respondents, Korea Data Systems Co. Ltd. and Korea Data Systems (USA) Inc. ("KDS"), over $8 million. Since that time, he

has not paid any money to KDS. Instead, over the past 15 years he and his wife, Christina Chiang, have engaged in a concerted course of conduct to frustrate KDS's efforts to collect its debt.

[2] The Chiangs' conduct has included transferring millions of dollars to their parents in California and Taiwan; receiving money back from their parents when needed to maintain their lavish lifestyle in Toronto; and continually breaching court orders requiring them to disclose the whereabouts of their assets.

[3] In July, 2003, the Chiangs consented to a finding and a declaratory order that they were in contempt of six previous orders of the Superior Court. Under the terms of this consent order, the Chiangs were given an opportunity to purge their contempt by complying with a series of undertakings, each of which required disclosure of financial information. Failing compliance, they were each to be incarcerated for seven days, and faced the prospect of further sanctions for continued non-compliance.

[4] After a trial in 2005, Farley J. found that the Chiangs had answered some undertakings, but had not fully complied. He gave them a further 90 days to do so.

[5] In 2007, after a seven-day trial, Lax J. concluded that the Chiangs still had not fulfilled their undertakings and therefore, remained in contempt of the previous court orders. She sentenced Jay Chiang to imprisonment for one year and Christina Chiang to imprisonment for eight months. When Ontario's Parole and Earned Release Board granted Jay Chiang parole, the trial judge quashed the order of the Board and issued a replacement warrant of committal to ensure that Jay Chiang serve his entire sentence in custody.

[6] The Chiangs appeal all orders of the trial judge. They submit that the trial judge misunderstood the nature of her inquiry and erroneously placed the burden on them to show that they had purged their contempt. They submit that they have used all reasonable means to answer their undertakings to disclose the whereabouts of their assets but that their family refuses to cooperate with them. They also submit that the trial judge erred in imposing the sentences she did either because the July, 2003 consent order precluded her from imposing sentences of greater than seven days or because sentences of one year and eight months are excessive. Finally, the Chiangs submit that the Parole Board had jurisdiction to grant parole and that the trial judge had no jurisdiction to issue a replacement warrant of committal.

[7] KDS submits that this court should not even entertain the Chiangs' appeal until they have purged their contempt. This appeal therefore, raises the following six issues:

(1) Should this court hear the Chiangs' appeal?

(2) Did the trial judge misunderstand the nature of the proceedings before her and misapply the onus of proof?

(3) Did the trial judge err in finding that the Chiangs had not fulfilled their undertakings?

(4) Did the trial judge err in sentencing Mr. Chiang to one year imprisonment and Mrs. Chiang to eight months imprisonment?

(5) Did the trial judge err in concluding that the Parole Board did not have jurisdiction to grant parole to Jay Chiang?

(6) Did the trial judge err in issuing a replacement warrant of committal?

B. CIVIL CONTEMPT OF COURT

[8] To give context to the issues on this appeal, we briefly review the law of contempt of court. The parties agree on the main principles.

[9] Our law has distinguished between civil and criminal contempt of court. A person who breaches a court order, other than an order for payment of money, commits civil contempt of court: see rule 60.11(1) of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194. The contempt here is breach of orders requiring financial disclosure. Where the breach is accompanied by an element of public defiance or public depreciation of the court's authority, the contempt becomes criminal: see *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901.

[10] The distinction between civil and criminal contempt is not always clear cut. Both have a common root: only by having the ability to exercise the power of contempt can judges maintain respect for our courts and for the rule of law. Moreover, recent case law has recognized that even in purely private litigation, the breach of a court order and the resulting sanction for contempt invariably reflect public disrespect for the authority of the court: see *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065 and *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612. Nonetheless, the distinction persists and the case before us is undoubtedly a case of civil contempt of court.

[11] In civil contempt, the court's emphasis is less about punishment and more about coercion – attempting to obtain compliance with the court's order. Still, civil contempt bears the imprint of the criminal law. Civil contempt must be made out to the criminal standard of proof beyond a reasonable doubt. And, a person found in civil contempt of court may be committed to jail or face any other sanction available for a criminal offence, such as a fine or community service: see *Pro Swing*, at paras. 34-35.

C. BACKGROUND FACTS

[12] The history of these proceedings is extensively reviewed in the reasons of the trial judge. Here, we summarize the main events.

(1) Origins of the Dispute

[13] In the late 1980's, Jay Chiang (in Canada) and his brother Julius Chiang (in the United States) started a computer monitor business, Aamazing Technologies Inc. In less than five years, Aamazing's sales exceeded $40 million.

[14] KDS was Aamazing's largest supplier. In the early 1990's, KDS delivered over $10 million worth of computer monitors to Aamazing. However, Aamazing refused to pay for them. In 1993, to settle the dispute, Jay and Julius Chiang personally agreed to pay KDS $8.5 million. But they did not do so. Their refusal to pay KDS spawned litigation both in California and Ontario.

(2) The California Proceedings

[15] KDS obtained two California judgments against the Chiang family. The first arose from an action that KDS began in 1994 against Jay and Julius Chiang, and Aamazing. Soon after being served with the complaint in that action, Jay Chiang transferred $390,000 in securities and $240,000 US to his mother-in-law, $310,000 to his father and a house that he owned to an aunt and uncle.

[16] In 1998, after a trial at which Julius Chiang testified and Jay Chiang did not but defended through counsel, KDS obtained a judgment against all three defendants for $9.7 million. The California court made findings of fraud and breach of fiduciary duty against Jay Chiang and his brother.

[17] Soon after KDS obtained this judgment, Jay Chiang filed for bankruptcy in Ontario, and Julius Chiang did the same in California. Both claimed to have no assets or income. As Jay Chiang remains an undischarged bankrupt, his property remains vested in his trustee in bankruptcy, the respondent Mendlowitz & Associates.

[18] The second California judgment arose from an action KDS started in 1999 against Jay and Julius Chiang's parents. In early 2000, Christina Chiang was added as a defendant. In 2004, KDS obtained a judgment against the three defendants for $5 million. The court found that Jay and Christina Chiang and some of their family had transferred money and assets among each other to frustrate KDS's attempts to collect on its judgment.

[19] The Chiangs appealed the 2004 judgment. The California Court of Appeals upheld the trial court on liability; the sole issue still under appeal is the basis for the $5 million damages award.

[20] KDS has obtained judgments in Ontario enforcing its 2004 California judgment against Christina Chiang and Jay Chiang's parents. Over $6 million is now owing on this judgment.

(3) The Ontario Proceedings

[21] Over a period of eight years of litigation in this province (1999 – 2007), Jay and Christina Chiang have established a long and unenviable track record of deliberately disobeying court orders for disclosure, and at the same time transferring millions of dollars of assets out of the province in breach of those orders. They have done so for one purpose only: to frustrate KDS's attempt to collect the debt it is legitimately owed.

[22] By July 2003, the Chiangs had admittedly breached six previous orders of the Superior Court:

- On September 28, 1999, Ferrier J. ordered that Jay and Christina Chiang be examined under the *Bankruptcy Act* and produce documents relating to their business and financial affairs. They did not comply. Instead, a few days after the order was made, Christina Chiang placed mortgages of $642,000 on her house and wired $600,000 to her father-in-law.

- On November 1, 1999, Farley J. also ordered the Chiangs to be examined and produce documents. Although they were examined, they refused to produce any documents. Instead, Jay Chiang took $742,000 US out of a lucrative telecom business that he controlled, and wired it to his father. Then he transferred over $1 million to accounts in his wife's name in Singapore.

- On September 22, 2000, Farley J. granted a *Mareva* injunction and an *Anton Pillar* order against Jay and Christina Chiang and their parents. The order (i) required the Chiangs to permit KDS to search their house; (ii) precluded the Chiangs and their parents from dealing with their assets, wherever located; and (iii) required the Chiangs and their parents to provide affidavits of their assets.

- On October 5, 2000, Swinton J. continued the September 22, 2000 order of Farley J. It remains in force today.

In the months leading up to the *Mareva* order, Jay Chiang had transferred over $1.7 million US to his parents and his mother-in-law.

After the *Mareva* order was made, the Chiangs did not comply with it. Instead, the very next day Jay Chiang emptied a safety deposit box, and a few days later, Christina wired the remaining $800,000 in her bank account in Singapore to her mother. Jay Chiang did file an affidavit of assets, but made no mention of his interest in the telecom business.

- On May 7, 2003, Farley J. ordered Christina Chiang to produce account statements and records of transactions of all accounts that she controlled in Taiwan. He also ordered her to produce documents relating to a specific transfer in February, 2000 of $340,000 US to another relative. Christina Chiang did not comply with this order either.

- On June 24, 2003, Farley J. ordered Christina Chiang to disclose the whereabouts of over $500,000 US transferred from her accounts immediately after she was added as a defendant in California or immediately after the *Mareva* order. This order was made on consent but again Christina Chiang did not give any meaningful disclosure.

[23] The Chiangs' breach of these six orders formed the basis for KDS's motion for contempt.

(4) The July 16, 2003 Contempt Order and the Chiangs' Undertakings

[24] On July 16, 2003, Farley J. found the Chiangs in contempt of the six court orders. That finding was made on consent. The Chiangs acknowledged their contempt, and negotiated terms under which they could purge their contempt. They gave seventeen undertakings to disclose to KDS financial information about them and their families. The consent order provided that if they did not comply with their undertakings within 90 days, they would each be incarcerated for seven days. If they continued not to comply, they faced a further period of incarceration. The terms of this consent order are especially relevant on this appeal.

[25] Two trials have now been held to determine whether the Chiangs have answered all their undertakings: the first before Farley J. in 2005, and the second before Lax J. in 2007.

(5) The 2005 Trial Before Farley J.

[26] After the Chiangs had given answers to the undertakings, KDS sought a declaration that they still had not complied. The Chiangs brought a cross-motion to set aside or vary the July 16, 2003 order on the ground that their families had refused to cooperate in disclosing financial information.

[27] Farley J. heard the motions by conducting a trial of the issue. He found that the Chiangs had complied with some of the undertakings but that they still had a long way to go. He gave them a further 90 days to answer their undertakings. He did not incarcerate them but warned of severe consequences if they did not comply within 90 days. He dismissed the Chiangs' cross-motion.

(6) The 2007 Trial Before Lax J.

[28] In February, 2007, Lax J. tried the issue whether the Chiangs had finally complied with all of the undertakings that they gave in July, 2003. In her decision dated April 17, 2007, she concluded that the Chiangs had not complied.

[29] The trial judge's decision is detailed, well written and well reasoned. She focused principally on the undertakings the Chiangs gave to disclose the flow of money from them to their parents and back, and what happened to the assets of the lucrative telecom business Jay Chiang controlled. She made strong findings that in neither case did the Chiangs make meaningful disclosure of their assets.

(7) The 2007 Sentencing Decision

[30] On May 14, 2007, the trial judge sentenced Jay Chiang to imprisonment for one year and Christina Chiang to imprisonment for eight months. She gave lengthy reasons for her sentencing decision. She concluded that the Chiangs' "wilful and deliberate contempt" and their "total disrespect and disregard for the justice system" disentitled them to leniency. As the Chiangs have young children, she ordered the sentences to be served consecutively. She directed that upon Mr. Chiang's release, both he and his wife are to be brought back before her. If the trial judge was satisfied that each of the undertakings had been fulfilled, she would consider releasing Christina Chiang earlier.

(8) The Stay Motions Before Doherty J.A.

[31] The Chiangs appealed both the trial judge's finding that they had not fulfilled their undertakings and their sentence. They sought a stay of Jay Chiang's sentence pending their appeal. Juriansz J.A. granted an interim stay. However, two days later, on May 18, 2007, Doherty J.A. heard and dismissed the motion for a stay pending the appeal. He concluded that "the public interest in the integrity of the justice system strongly favours immediate enforcement of the committal order against Jay Chiang." The Chiangs then gave further answers to their undertakings, and in July, renewed their motion for a stay. On July 12, 2007, Doherty J.A. dismissed this motion. He concluded that the new answers did not demonstrate substantial compliance.

(9) The September 2007 Proceedings Before Lax J.

[32] In July 2007, the Ontario Earned Release and Parole Board granted Mr. Chiang parole for the last eight months of his sentence. KDS immediately applied before Lax J. for an order quashing the Parole Board's decision for lack of jurisdiction, and for a replacement warrant of committal to implement her intention that Jay Chiang serve his entire sentence in custody. Lax J. quashed the Parole Board's decision and signed a replacement warrant.

(10) The Chiangs' Lifestyle

[33] Throughout these proceedings, the Chiangs have filed affidavits claiming to be impecunious. Their claim stands in stark contrast of the lavish lifestyle they maintain. They still live in a 10,000 square-foot house on which they pay a large mortgage. They still drive expensive cars. And they still spend $50,000 annually to send their children to a private school.

D. ANALYSIS

Issue 1: Should this court hear the Chiangs' Appeal?

[34] KDS submits that we should refuse to hear Mr. and Mrs. Chiang's appeal until they have purged their contempt by answering their outstanding undertakings.

[35] Undoubtedly this court has discretion to refuse to hear the appeal of a party who continues to deliberately flout court orders by refusing to provide any meaningful financial disclosure: see *Dickie v. Dickie*, [2007] 1 S.C.R. 346. However, we decided to entertain the Chiangs' appeal for three reasons.

[36] First, whether the Chiangs have complied with their undertakings and provided meaningful disclosure is an important issue on this appeal. We cannot resolve that issue without hearing the appeal itself.

[37] Second, we decided to consider the Chiangs' appeal because their liberty interests are at stake. They have appealed their sentences of imprisonment.

[38] And finally, by hearing this appeal we can bring a measure of certainty, if not finality, to what, on any objective assessment, have been unduly protracted proceedings.

Issue 2: Did the trial judge misunderstand the nature of the proceedings before her and misapply the onus of proof?

[39] The Chiangs submit that the trial judge misunderstood the proceedings before her, and consequently failed to apply the correct onus of proof.

[40] In essence, the Chiangs say the trial judge failed to recognize that their contempt ended with the consent order in July, 2003. Instead, she conducted an inquiry into whether the Chiangs were still in contempt of the 2003 order. That inquiry, however, according to the Chiangs, should have required KDS to establish a fresh contempt to the accepted standard of proof beyond a reasonable doubt. Yet, the trial judge placed the onus on the Chiangs to show on a balance of probabilities that they had purged their contempt. In support of this submission, the Chiangs rely on the judgment of the Alberta Court of Appeal in *Re Braun* (2006), 262 D.L.R. (4^{th}) 611.

[41] We do not accept the Chiangs' submission. The trial judge embarked on an inquiry to determine two interconnected matters: first, whether the Chiangs had answered their undertakings, thus purging the contempt they agreed, in 2003, that they had committed; and second, if they had not purged their contempt, what sanctions were warranted under the terms of the July 2003 order. There could have been no confusion about the nature of the trial judge's inquiry. The parties agreed to it.

[42] The Chiangs' submission really amounts to a misunderstanding of the 2003 order in which they consented to a declaration and finding beyond a reasonable doubt that they

were in contempt of six previous court orders and to the implication of appropriate sentences. In the hearing before the trial judge the Chiangs were given an opportunity to purge their contempt by demonstrating compliance with their undertakings. Until they did so, they remained in contempt of the earlier court order, and subject to additional sanctions in accordance with its terms.

[43] We accept that *Re Braun* appears to reject the idea that a civil contempt may warrant successive orders imposing incremental penal sanctions. In that case, Ms. Braun was repeatedly sentenced to periods of incarceration for civil contempt arising from her failure to provide an affidavit and attend examinations for discovery as ordered by the court. The Alberta Court of Appeal found these repeated penal sanctions to be wrong. Berger J.A., writing for the panel, held that the continued failure to comply amounted to one contempt, which cannot be the subject of repeated periods of incarceration. In effect, Ms. Braun's contempt crystallized at the moment of her non-compliance. Further penal sanctions would be warranted only if a fresh contempt order was obtained. Berger J.A. did, however, allow for further non-penal sanctions if the contempt continued after the period of imprisonment, and "if the unpurged contempt affects the fair adjudication of the suit".

[44] We are reluctant to endorse the reasoning in *Re Braun* for two reasons. First, its reasoning seems at odds with the coercive purpose of civil contempt. To permit only one penal sanction for the ongoing breach of an order deprives the court of the ability to impose measured, but incremental, sanctions to obtain compliance with that order. In other words, if the court can impose only one period of incarceration for a civil contempt, then it cannot address, in any meaningful way, a contemnor's continuing defiance. If repeated penal sanctions are permitted, the court can always address a concern that these sanctions may become oppressive.

[45] Second, and equally important, Ontario's *Rules of Civil Procedure* appear to provide more flexibility in sentencing for civil contempt than Alberta's *Rules of Court*, Alta. Reg. 390/68. In Ontario, rule 60.11(5)(a) permits the court to impose a sentence of imprisonment "for such a period and on such terms as are just". This flexibility is incorporated into rule 60.11(5)(b), which provides that a contemnor may "be imprisoned if the person fails to comply with a term of the order".

[46] By contrast, in Alberta, rule 704(1) provides that a person in civil contempt is liable to "imprisonment until he has purged his contempt" or to "imprisonment for not more than 2 years". These provisions may restrict the sentencing power of the court to a single term of imprisonment for civil contempt.

[47] However, we need not decide whether to apply *Re Braun* because on this record it is distinguishable. Unlike the orders in question in *Re Braun*, the July 16, 2003 order expressly provides for a further period of incarceration if the Chiangs continue to refuse

to comply with their undertakings. Thus, the order itself gives the court the authority to impose an additional penal sanction if one is warranted.

[48] Moreover, the concern addressed in *Re Braun* – repeated penal sanctions for the same contempt – does not arise here. The sentences imposed by the trial judge were the first sentences of imprisonment for the Chiangs' admitted contempt. Whether the sentences should be seven days or longer, we address later in these reasons.

[49] Therefore, in our view, nothing in *Re Braun* suggests that KDS was required to establish a new contempt at the hearing before the trial judge – or that the trial judge was hearing a fresh motion for contempt. As she correctly noted at para. 33 of her reasons, she was conducting an inquiry into the appropriate sanction. A vital consideration on the appropriate sanction was whether the Chiangs had purged their contempt by answering their undertakings.

[50] A finding of contempt must be established beyond a reasonable doubt. That finding had already been made in 2003. The question the trial judge had to determine was who had the onus to show compliance with the undertakings, and to what standard of proof. In answering that question the trial judge analogized to sentencing in criminal proceedings. She treated purging one's contempt by showing compliance with an undertaking as equivalent to proving a mitigating factor on sentence. As an accused in a sentencing proceeding bears the onus of establishing a mitigating factor on a balance of probabilities, she held that the Chiangs, too, had to show on a balance of probabilities they had purged their contempt.

[51] The trial judge recognized that little authority existed on this question. However, she drew support from the reasons of Cullity J. in *Ryan v. Maljkovich*, [2001] O.J. No. 1268 (S.C.) and from s. 724(3) of the *Criminal Code*. She wrote, at paras. 37-40:

> Mr. Justice Cullity found that on its motion, the plaintiff had the onus of proving the defendant's contempt beyond a reasonable doubt. With respect to the defendant's cross-motion, however, he stated:
>
> > For the purpose of purging the contempt pursuant to paragraph 8 of the judgment of Juriansz J., the defendant must have shown that he has complied with – among other things – the orders made by the learned judge with respect to an itemized list of assets and the transfer of available funds from abroad. No authorities were cited on the question of the

> onus or standard of proof for this purpose but compliance must, I believe, be demonstrated by the defendant on at least a balance of probabilities. [Footnote omitted.]

Because purging contempt is a mitigating factor, the onus and standard of proof used for mitigating factors under the sentencing provisions of the *Criminal Code* can be of some guidance. This court has drawn from sentencing principles found in the *Criminal Code* when sentencing for civil contempt. For example, in *Sussex Group Ltd. v. 3933938 Canada Inc.*, Mr. Justice Cumming relied on the provisions under the *Criminal Code* that govern the imposition of conditional sentences to fashion an appropriate remedy under Rule 60.11(5)(f). [Footnotes omitted.]

Section 724(3) of the *Criminal Code* provides for the resolution of "disputed facts" in a sentencing hearing. Of particular relevance are subsections (b) and (d):

> 724(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence ...
>
> (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it ...
>
> (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
>
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

In addition to the clear language of section 724(3), judicial consideration of the above provisions confirms that a defendant has the onus to prove mitigating factors on a balance of probabilities. Further, it seems wrong that

> contemnors could require the victims of their contempt to prove beyond a reasonable doubt that they have not complied with their undertakings. This would not only require the plaintiffs to prove a negative, but it would tend to discourage contemnors from complying with their undertakings. [Footnote omitted]

[52] We agree with the trial judge's approach and with her reasons. Accordingly, we decline to give effect to this ground of appeal.

Issue 3: Did the trial judge err in finding that the Chiangs had not fulfilled their undertakings?

[53] The trial judge found that Mr. and Mrs. Chiang had not fulfilled the six undertakings that were in issue at the trial, and therefore had not purged their contempt. The Chiangs submit that she erred in this finding. Alternatively, they seek leave to introduce fresh evidence to show that they have now complied with their undertakings.

[54] At the time of the hearing before the trial judge, the Chiangs still had not fulfilled six of their original seventeen undertakings. These, however, were the critical undertakings because they focused on the two most important aspects of the Chiangs' unexplained conduct: the disappearance of approximately $4.6 million from the telecom business that Jay Chiang controlled, and the whereabouts of between $8 million to $10 million that the Chiangs had sent to their family members in California and Taiwan.

[55] The trial judge found that the Chiangs had not answered these undertakings because they had not given any real disclosure of their assets. The evidence overwhelmingly supports her finding.

(a) The telecom business

[56] Mr. Chiang described the telecom business as a business that "moves voice traffic" between North America and the Far East, and sells that capacity to telephone companies. It was operated through two companies. The trial judge found that Jay Chiang was "the controlling mind and effective owner of the companies." In 2000, his interest in the telecom business was worth between $7.1 million and $12.1 million. The Chiangs do not challenge these findings.

[57] Undertaking 14 required the Chiangs to make full disclosure of documents and information in connection with the telecom business:

> Provide to the plaintiffs full disclosure in regard to the telecom business (as defined in the Mendlowitz affidavit affirmed June 12, 2002), including:
>
> (a) Producing to the plaintiffs all records, books of accounts, contracts, correspondence, documents regarding equipment and assets owned, and all other documents;
>
> (b) Tracing the whereabouts, from the date of removal up until today, of all money removed out of the ordinary course of the telecom business, including the $2.12 million USD removed from the Asia Pacific Gateway account, consisting of the transfer of $720,000 USD to Y.C. Chiang on November 9, 1999, $900,000 USD to Tsai Chen Cheng Yueh on June 30, 2000 and $500,000 USD to Suzie Wu on April 7, 2000.

[58] Through the *Anton Pillar* order permitting KDS to search the Chiangs' house, KDS discovered that Jay Chiang had been operating his telecom business since approximately 1996. The trial judge extensively reviewed the Chiangs' supposed efforts to comply with undertaking 14. She concluded that they had not complied. In support of that conclusion, she made these strong findings, which we quote verbatim:

> - Mr. Chiang admitted that no business records of the telecom business have been produced.
>
> - The Chiangs' responses and production of documents with respect to the telecom business and alleged efforts in that regard are completely inadequate. They are nothing more than an appearance of compliance and are not *bona fide*.
>
> - The second part of this undertaking, 14(b), required the tracing of the whereabouts of all money removed out of the ordinary course of the telecom business [over $6.7

> million] ... With one exception, it is not disputed that no information has been provided as to what happened with any of these sums.
>
> - ... Mr. Chiang had a very lucrative telecom business. I find that he controlled and beneficially owned the telecom business. He had the ability to comply with the undertakings to produce its books and records and disclosed what became of it. He did not do this.
>
> - Perhaps the most egregious example [of non-compliance] is the telecom business. Mr. Chiang was able to make an apparently successful multi-million dollar business disappear overnight by transferring its considerable assets into accounts in the names of family members and related parties. I believe that they continue to hold these assets somewhere for the benefit of Jay and Christina Chiang.

[59] In this court, the Chiangs did not make a serious effort to overturn these findings. That is not surprising. The trial judge's findings and the evidence supporting them are unanswerable. What became of the telecom business remains a mystery.

(b) Assets sent to family members

[60] The Chiangs have admitted to transferring over $8 million and perhaps as much as $10 million to members of their family, all of whom reside outside this court's jurisdiction. Some of that money was sent back to the Chiangs to support their obviously lavish lifestyle. Undertakings 7 and 13 provide that the Chiangs must:

> Co-operate fully to provide absolute and complete detail and documentation of all assets in the names of family members and related entitles that the undersigned know about, whether the undersigned claim ownership thereof, or not, and including all such assets that the undersigned can identify having made reasonable inquiries and investigations of family members. The family members referred to herein include Christina Chiang's mother, her sister Su Feng Tsai, Jay

> Chiang's parents, his siblings, their spouses and their children.
>
> Provide full disclosure with supporting documentation of all money or other assets received by Jay Chiang or Christina Chiang, or for the benefit of them or their family, from anyone including family members and related entities, since September 25, 2000.

[61] These undertakings must be read in conjunction with para. 4 of the consent order of July 16, 2003 and undertaking 17, each of which required the Chiangs to "use all reasonable means necessary to compel their family members to assist them" in complying with their undertakings.

> 4. THIS COURT ORDERS THAT Jay Chiang and Christina Chiang are to use all reasonable means necessary to compel their family members to assist them in complying with this order and the attached undertakings. It is this Court's expectation that Jay and Christina Chiang's family members will provide their full co-operation in assisting Jay and Christina Chiang in complying with the attached undertakings. This Court requests the assistance of all courts with jurisdiction over Jay Chiang and Christina Chiang and their family members and related entities to assist Jay Chiang and Christina Chiang in complying with their obligations hereunder. This Court stands ready to reciprocate in full.
>
> 17. The undersigned acknowledged that this Court has expressed its expectation that our family members will provide their full co-operation in assisting us in complying with the above undertakings. We intend to use all reasonable means necessary to compel our family members to assist us.

[62] The Chiangs contend that they have complied with undertakings 7 and 13 to the best of their ability – in effect they have used their best efforts – but that their family refuses to cooperate with them. The trial judge flatly rejected this contention. At para. 148 of her reasons she said:

> Throughout this lengthy proceeding, Mr. and Mrs. Chiang have selectively disclosed information so as to give the appearance of compliance with the undertakings and then

> relied on the supposed lack of family cooperation to explain their inability to go further. They have not provided any credible or admissible evidence to support this position. Their assertion that family members refuse to cooperate is designed to conceal their dishonest conduct. It is clear that they control and direct the actions of their family and the accounts in the names of family members and others and could disclose the whereabouts of the millions of dollars if they so chose.

[63] The Chiangs submit that the trial judge's rejection of their position reflects two legal errors: first, the trial judge misinterpreted the Chiangs' obligation under the term of the July 16, 2003 order by turning an obligation to use reasonable means into an unequivocal obligation to disclose; second, the trial judge wrongly equated her rejection of the Chiangs' evidence with proof of their control over the members of their family. We do not accept either submission.

[64] On the Chiangs' first submission we agree with the trial judge. As she pointed out, the context in which the Chiangs gave the undertaking shows that they unequivocally agreed to disclose their assets and, in doing so, fully expected their family to cooperate. In the words of the trial judge, the "excuses of the past will no longer be accepted". Failing all else, the Chiangs were obliged to take court proceedings to compel members of their family to assist them, which they have never done.

[65] Further, the nature of an undertaking supports the trial judge's view of the Chiangs' obligation. Typically, an undertaking is a promise given by a party or his counsel to the court in the course of legal proceedings as a condition of obtaining a concession from the court or the opposite party. Here the Chiangs gave these undertakings in order to avoid imprisonment or another sanction for their admitted contempt. When a party gives an undertaking to the court, that party implicitly represents to the court that it is able to fulfill its undertaking. Both the court and the opposite party are entitled to rely on that implicit representation: see *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.), at para. 63.

[66] Finally, this representation gains added force when the undertaking obliges the party giving it to obtain information from close family members. As Doherty J.A. said on the second stay motion before him:

> The appellant continues to operate as though he has no control over his family members, particularly his parents. He wants the court to accept that premise. I do not. Lax J. made very strong factual findings to the contrary. In my view, steps

> to obtain the necessary information which may support a finding of compliance if a party was at arms' length cannot do so in a case like his where [there] is a close family personal and financial connection.

[67] We entirely agree with Doherty J.A.'s observations. Especially in the context of the admittedly close relationship between the Chiangs and their family, these undertakings were not best efforts undertakings; they were undertakings that unequivocally required the Chiangs to declare the whereabouts of the assets they sent to their family members in California and Taiwan.

[68] The Chiangs' relationship with their family, especially their parents, undermines their second submission: that the trial judge turned her rejection of their evidence into positive proof that they had control over their family. Had the trial judge done that, she may well have been in error: see *R. v. Coutts* (1998), 126 C.C.C. (3d) 545 (Ont. C.A.), leave to appeal to S.C.C. dismissed, [1998] S.C.C.A. No. 450. However, in our view, she did not do so.

[69] The trial judge's conclusion that the Chiangs directly controlled the actions of their family is supported by a large body of evidence. All of this evidence is unchallenged, and all of it has at its core the very close relationship that exists between the Chiangs and their family. This body of evidence includes the following:

- Both Jay Chiang and Christina Chiang admitted that they have a close and loving relationship with their parents. Indeed, over the two year period leading up to the hearing before the trial judge, Christina Chiang called her mother daily.

- The Chiangs have sent millions of dollars to their parents.

- The Chiangs' parents and other family members are holding significant assets as nominees for the Chiangs.

- After the *Mareva* order the Chiangs' parents have transferred hundreds of thousands of dollars back to the Chiangs to fund their daily expenses. For example, Mrs. Chiang's mother transferred over $900,000 to her daughter and son-in-law to fund their living and legal expenses. The Chiangs' parents paid over $300,000 for the education of the Chiang children. Jay Chiang's

parents funded his credit card charges and permitted him to use over $65,000 in a bank account in their name.

- The Chiangs have met with their family for vacations and family events in Toronto, Mexico, Taiwan and California.

[70] From their evidence, the trial judge was reasonably entitled to infer that the Chiangs had control over their family and could obtain from them information about the assets they had received from Jay and Christina Chiang. To infer otherwise, to accept the Chiangs' claim that they have no control over their family and that their family refused to cooperate, would defy credulity. Accordingly, on the record before her, the trial judge was correct in concluding that the Chiangs have failed to fulfill their undertakings to disclose the whereabouts of the assets sent to their family.

[71] We turn now to the Chiangs' fresh evidence motion.

Should leave be granted to admit fresh evidence?

[72] In support of their appeal, the Chiangs sought leave of this court to introduce fresh evidence. The proposed fresh evidence consists of affidavits from their Ontario and California counsel and falls into three categories: the history of Jay Chiang's custody; some of the procedural background of the Ontario and California litigation; and, the Chiangs' supposed efforts since the order of the trial judge to purge their contempt by answering their undertakings. The first two categories of proposed evidence, whether "fresh" or not, add nothing to this appeal. Even if admitted, they do not bear on any potentially decisive issue.

[73] The third category of proposed evidence – the Chiangs' attempts to purge their contempt – is contentious. Under s. 134(4)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 this court "may, in a proper case, receive further evidence". In deciding motions under s. 134(4)(b) this court has used two different tests: either the test in *R. v. Palmer*, [1980] 1 S.C.R. 759, which is the basic test for the admission of fresh evidence in criminal cases, or the test in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.). The *Palmer* test has four parts. The party seeking to introduce the fresh evidence must show:

- The evidence could not, through due diligence, have been adduced at trial;

- The evidence is relevant in that it bears on a decisive or potentially decisive issue;
- The evidence is credible; and
- The evidence, if believed and taken with the other evidence, could be expected to affect the result.

[74] See the following cases where this court has used the *Palmer* test: *Oakwell Engineering Limited v. Enernorth Industries Inc.* (2006), 82 O.R. (3d) 500; *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equipcap Limited Partnership* (2008), 90 O.R. (3d) 561; *Country Style Food Services Inc. (Re)*, 2002 CanLII 41751; *Zesta Engineering Ltd. v. Cloutier*, 2007 ONCA 471 (CanLII); *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198.

[75] The *Sengmueller* test has three parts. Under this test, the party seeking to introduce fresh evidence must show:

- The evidence is credible;
- The evidence could not have been obtained by the exercise of reasonable diligence before trial; and
- The evidence, if admitted, will likely be conclusive of an issue in the appeal.

[76] See the following cases where this court used the *Sengmueller* test: *Kefeli v. Centennial College of Applied Arts and Technology*, 2002 CanLII 45008; *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155; *Shapiro, Cohen, Andrews, Finlayson v. Enterprise Rent-a-Car Co.* (1998), 38 O.R. (3d) 257; *Werner v. Warner Auto-Marine Inc.*, [1996] O.J. No. 3368.

[77] On this appeal it is unnecessary to decide which is the proper test. The two tests are quite similar, though the last branch of the *Sengmueller* test may be more stringent than the last branch of the *Palmer* test: see *R. v. Taillefer*, [2003] 3 S.C.R. 307. On either test, the Chiangs' motion to introduce fresh evidence must fail.

[78] Although we doubt that the Chiangs can meet the due diligence requirement (which is common to both tests), we need not address it, or the second and third branches of the *Palmer* test, or the first branch of the *Sengmueller* test. Even if they are met, the proposed evidence fails to satisfy the last branch of the *Palmer* test: it could not be

expected to affect the result. And, therefore, equally, the proposed fresh evidence fails the last branch of the *Sengmueller* test: it will not likely be conclusive of an issue in the appeal.

[79] As we have said, the critical undertakings relate to the disappearance of the telecom business and the disclosure of the whereabouts of assets sent to family members. None of the proposed evidence provides any new information about either of these undertakings.

[80] The Chiangs produced a file on the telecom business from a Hong Kong law firm. KDS already had the documents in this file. Moreover, most if not all of the documents were before Doherty J.A. on the second stay motion. He found that the production of these documents did not amount to meaningful compliance with the Chiangs' undertaking 14 "to provide a full disclosure in regard to the telecom business". We agree. These documents would not have affected the result at trial.

[81] In their proposed evidence, the Chiangs seek to show efforts to compel their family members to disclose the whereabouts of the assets sent to them. Yet the evidence shows that their efforts are pitiful or non-existent. Since the order of the trial judge the Chiangs have not examined a single family member. They took perfunctory steps to examine one member of the family and then abandoned the effort. Undoubtedly most of the information about the whereabouts of the assets in the hands of the family members lies within the Chiangs' own knowledge. Tellingly, however, neither Jay nor Christina Chiang has filed an affidavit in support of the fresh evidence motion.

[82] The affidavits from the lawyers may present a picture of apparent compliance. But they show no real compliance. The motion to introduce fresh evidence is dismissed.

Issue 4: Did the trial judge err in sentencing Mr. Chiang to one year imprisonment and Mrs. Chiang to eight months imprisonment?

[83] This submission has two branches: the Chiangs contend that the trial judge was not entitled to exceed the sentence of seven days imprisonment the parties agreed to in the consent order of Farley J. dated July 16, 2003. Alternatively, the Chiangs contend that even if the trial judge was entitled to impose sentences greater than seven days, the sentences that she did impose – one year for Mr. Chiang and eight months for Mrs. Chiang – are excessive. We will deal with the Chiangs' second contention first.

(1) If the trial judge was entitled to impose sentences greater than seven days, are the sentences that she imposed excessive?

[84] The trial judge concluded that she was not confined to the sanction the parties agreed to in 2003. Instead, she concluded that she was entitled to impose a sanction appropriate to the circumstances existing at the time of the hearing before her.

[85] Assuming that she was right in that conclusion, we see no reviewable error in the sentences the trial judge did impose. Indeed, although sentencing is an exercise of judicial discretion and, therefore, a sentence imposed by the trial judge is entitled to deference from an appellate court, we need not rely on the principle of deference. But for the order of July 16, 2003, these sentences of one year for Mr. Chiang and eight months for Mrs. Chiang are entirely fit. In saying this, we can do no better than quote from the reasons of the trial judge.

[86] The trial judge recognized that a sentence for civil contempt like any sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The Chiangs are in their forties. Their conduct is not the product of "youthful exuberance". They bear full responsibility for what they have done. And, in the trial judge's view, the gravity of the Chiangs' contempt has been "significant". She summarized her view of their conduct at para. 38 of her reasons on sentence:

> Mr. and Mrs. Chiang have repeatedly breached and frustrated the court orders. They have consistently undermined the objectives of the order in order to shield their assets. Their contempt is blatant, deliberate, wilful, and as I will come to, unrepentant. The gravity of their conduct is compounded by the repeated acts of contempt and the large number of orders breached, which have had serious adverse and prejudicial consequences for the plaintiffs and has impaired the dignity and integrity of the justice system. The gravity of their offence is significant.

We agree with this paragraph of her reasons.

[87] The trial judge also recognized that both an apology and a guilty plea can be mitigating factors on sentence. However, she considered neither to be a mitigating factor in this case. Again, we agree with her. She correctly characterized the Chiangs' apology as "hollow and insincere", and she fairly viewed their 2003 consent to a finding of contempt not as an act of contrition but as purely "tactical".

> [42] In my view, this is a case where the consent to the finding of contempt cannot be seen as an act of contrition and must be seen as one where the plaintiffs acquiesced due to the overwhelming evidence of their dishonesty that demonstrated,

> among other things, that they had lied during examinations, sworn false affidavits, transferred large sums of money from their accounts, provided no meaningful disclosure, dissipated assets by gambling, by unauthorized use of credit cards for travel, and by removal of the contents of safety deposit boxes. They were clearly in contravention of the six court orders. The finding of contempt was inevitable and their consent was purely tactical.

[88] Weighed against the absence of any mitigating factors, the trial judge listed an array of aggravating factors:

> [45] I have already discussed some of the aggravating factors in this case in considering the gravity of the offence. They include the following:
>
> (a) There was a deliberate course of conduct over a lengthy period of time.
>
> (b) There were numerous breaches of six court orders.
>
> (c) The Chiangs were found in contempt of fresh orders made while the contempt motion was pending.
>
> (d) The Chiangs have benefited financially from their contempt and have caused extreme prejudice to the plaintiffs.
>
> (e) The Chiangs have shown disrespect to the court by lying to it, offering an insincere apology, and giving only the appearance of complying with the courts' orders.
>
> (f) The Chiangs have been given numerous opportunities and a lengthy period of time to demonstrate their obedience to court orders, but continue to act in breach of the courts' orders.
>
> (g) The Chiangs have continued with a lifestyle of relative luxury and comfort in spite of and in defiance of orders that restrict the use of their assets.

[89] Each of these aggravating factors is fully supported by the record. Together they demonstrate, in the trial judge's words, "a long and woeful record of deliberate disobedience to the court". The Chiangs' disobedience – their wilful disobedience – has left the court and KDS without any explanation for what happened to the $4.6 million gone from the telecom business or the $8 million to $10 million siphoned off to family members.

[90] Custodial sentences for civil contempt are rare. Lengthy custodial sentence are even rarer. Canadian courts have tended to punish contempt of court leniently. Ordinarily the mere conviction for contempt together with a modest fine suffices to obtain compliance and protect the court's authority. Ordinarily incarceration is a sanction of last resort: see Robert J. Sharpe, *Injunctions and Specific Performance*, 3d. ed. (Aurora: Canada Law Book, 2000) at para. 6.120.

[91] In the trial judge's view, however, the Chiangs' contempt was not deserving of leniency. Both to denounce their actions and to deter others by showing that the court will not tolerate this kind of conduct, the trial judge concluded that lengthy periods of incarceration were required.

> [48] This is not a case deserving of leniency. There are no mitigating factors. There has been no genuine apology and no compliance. The contempt has not been purged. The conduct of Mr. and Mrs. Chiang must have concrete consequences in order to 'repair the depreciation of the authority of the court' and to send a message to litigants and the public that this kind of conduct will not be tolerated. Undertakings given to a court are to be fulfilled; apologies tendered to a court are to be genuinely remorseful; court orders are to be obeyed in every respect. Mr. and Mrs. Chiang have made a mockery of the system of justice. The prospect of a short period of incarceration did not deter them in 2003. The strong and denouncing language of the court and the prospect of a lengthier period of incarceration did not deter them in 2005.

[92] But for the terms of the July 16, 2003 consent order and the 2005 proceeding before Farley J., we would agree with the trial judge and with the sentences that she imposed.

(2) Was the trial judge entitled to impose sentences greater than seven days?

[93] The trial judge delivered three excellent and persuasive sets of reasons. We entirely agree with all of her reasons, save on this one issue. Our disagreement has its roots in the terms of the July 16, 2003 order and the court's failure to amend that order in 2005.

[94] The July 16, 2003 order was a consent order. In para. 1 of that order the court found both Jay and Christina Chiang in contempt of six previous court orders. In para. 2 the court ordered that the Chiangs be given the opportunity to purge their contempt by apologizing to the court and fulfilling the undertakings they gave. Paragraph 3 of the consent order addressed the court's sanction if the Chiangs failed to fulfill their undertakings. Its terms are instructive.

> 3. THIS COURT ORDERS THAT
>
> (a) failing the fulfillment of each of the undertakings within 90 days hereof, each of Jay Chiang and Christina Chiang shall be incarcerated for a period of seven days, to be served consecutively, beginning with Jay Chiang, followed by Christina Chiang.
>
> (b) If there is a finding that the undertakings have not been fulfilled, then after the above incarceration, Jay Chiang and Christina Chiang will have a further period of time in which to purge their continuing contempt (the length of such additional time to be then determined at a further hearing).
>
> (c) If this Court then finds that Jay Chiang and/or Christina Chiang have still not purged their contempt by the conclusion of the additional time referred to in paragraph 3(b) above, then they may be incarcerated for a further period or time, if same is then warranted, as determined at that further hearing.

[95] In short, para. 3 contemplates that failing compliance within 90 days, the Chiangs will each be incarcerated for seven days. Only if they have first served a seven-day sentence and still have not complied with their undertakings, will they face a longer period of incarceration.

[96] The Chiangs did not fulfill their undertakings within 90 days. Indeed, on May 13, 2005, nearly two years after the consent order, Farley J. found that the Chiangs still largely had not purged their contempt. Yet, he did not, as contemplated by para. 3(a) of the July 16, 2003 order, incarcerate the Chiangs for seven days. Instead, he gave them a further 90 days to comply. In doing so he did warn them that they could not expect similar treatment in the future and that he would deal with their continued failure to fulfill their undertakings "severely".

> With respect to the sincerity of apologies, I trust that the apology was sincere but the proof of that will be in the eating of the pudding, not in their words. And if I determine later that there is no effective compliance with purging of the contempt or the fulfillment of the undertakings in any way then I would have to assume that the apologies were insincere, hollow, and in fact making a mockery of the system of justice. And therefore would have to be severely dealt with.

[97] Still, Farley J. did not amend the terms of the July 16, 2003 order or issue a new order signalling to the Chiangs that they could face a period of incarceration greater than seven days. In saying this we intend no criticism of Farley J. He was trying to coerce compliance, and hoped that he could do so by giving the Chiangs both more time and a strong warning. Regrettably, his "carrot and stick" approach failed to achieve its purpose. Thus, another two years later, when the hearing came on before the trial judge, the Chiangs still had not purged their contempt.

[98] The trial judge quite properly concluded that the Chiangs' continued refusal to fulfill their undertakings merited jail sentences. But, in sentencing the Chiangs to imprisonment for the first time, the trial judge was faced with the argument that she was limited by para. 3(a) of the July 16, 2003 order to a seven-day sentence. She rejected this argument. In the trial judge's view, in 2005, by his "carrot and stick" approach, Farley J. effectively varied the 2003 consent order. She wrote at para. 11 of her reasons on sentence:

> The underlying premise of the 2003 order, which was carefully crafted, was: (a) to encourage the Chiangs through fulfillment of the undertakings to purge their contempt; and (b) to coerce them through the prospect of incarceration if they did not. In submissions, Mr. Blumenfeld characterized what Mr. Justice Farley did in 2005 as a "carrot and stick" approach. This is an apt characterization. He extended the time for the Chiangs to answer the undertakings by a further

> 90 days but he also gave the Chiangs a stern warning in the event of continued non-compliance. In effect, he varied paragraph 3 of the order by balancing the 90-day extension with a potentially more serious period of incarceration than the initial seven days in the order, thereby reopening the remedy that the court could grant in a future hearing. This was quite clearly Mr. Justice Farley's intent ....

[99] Moreover, the trial judge said that having obtained a further extension to answer their undertakings, the Chiangs could not claim that she was limited by the terms of the 2003 order. Rule 60.11(5)(a) of the *Rules of Civil Procedure* gave her the discretion to imprison a contemnor "for such period and on such terms as are just". Thus, she concluded that "[t]he court is not deprived now of the ability to impose a sanction that is appropriate to the circumstances" of the case.

[100] Respectfully, we do not agree. In our opinion the trial judge was bound by the terms of the order the parties agreed to and the court approved on July 16, 2003. As we have said, that order was made on consent. KDS agreed, and the court agreed, that the first sentence of imprisonment the Chiangs would serve for failing to fulfill their undertakings would be seven days. Although Farley J. could have varied that term in 2005, he did not do so. We do not view his stern warning of severe consequences to amount to a variation of the consent order. He did not imprison the Chiangs at that time, even though their non-compliance had extended well beyond 90 days, indeed for nearly two years.

[101] Put differently, we think it appropriate to ask whether in 2007 the Chiangs were on fair notice that for their continued non-compliance they faced a term of imprisonment greater than seven days. We do not think that they were. Paragraph (c) of the July 16, 2003 order contemplated a sentence beyond seven days only after the Chiangs had first served a seven-day sentence.

[102] Accordingly, we set aside the sentence imposed by the trial judge and substitute a sentence of seven days imprisonment for each of Jay Chiang and Christina Chiang. In addition, Jay Chiang is entitled to a declaration that he has served this sentence.

[103] The Chiangs, however, should not view our order in any sense as a victory. Their undertakings remain unfulfilled. Their contempt of court remains shocking and disgraceful. They remain under the supervision of the court. The terms of para. 3(a) of the July 16, 2003 have now been satisfied for Jay Chiang. Should the Chiangs' contempt continue, the Superior Court is free to impose on him whatever sentence it considers fit.

Issue 5: Did the trial judge err in concluding that the Parole Board did not have jurisdiction to grant parole to Jay Chiang?

[104] We will address this issue together with issue 6, because the two issues are interrelated.

Issue 6: Did the trial judge err in issuing a replacement warrant of committal?

[105] These two issues arise because in July 2007, the Ontario Earned Release and Parole Board granted parole to Jay Chiang. Parole was to begin on September 13, 2007, four months after the trial judge had sentenced Jay Chiang to one year imprisonment.

[106] KDS immediately brought an application before the trial judge seeking two things: an order quashing the decision of the Parole Board for lack of jurisdiction, and a replacement warrant of committal specifying that on his release from custody Jay Chiang was to return to court to appear before the trial judge. The trial judge both granted the order and issued a replacement warrant. The Chiangs submit that she erred in doing so. They also submit that the trial judge's decision even to hear KDS's application raised a reasonable apprehension of bias. The allegation of bias is groundless and we do not propose to consider it further.

(1) Did the Parole Board have jurisdiction to grant parole to Jay Chiang?

[107] The Parole Board is created under the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22 (MCSA). Its decisions are protected by a strong privative clause in s. 36 of the MCSA:

> The Board has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by application under judicial review or otherwise into any court.

[108] Nonetheless, where the Board acts without jurisdiction, its decisions are reviewable. That, in our opinion, is the case here. In fairness to the Board, we point out

that when it released Mr. Chiang on parole it did not have the trial judge's reasons on sentence.

[109] Parole for inmates – those serving a sentence in custody – is statutorily authorized under the federal *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) and the MCSA. Under these complementary statutory regimes, a provincial parole board has no jurisdiction to grant parole to a person serving a custodial sentence for civil contempt of court if the sentence includes a requirement that the offender return to court.

(a) The federal regime

[110] Section 112(1) of the CCRA gives provincial parole board legislative authority to grant parole.

> ... a provincial parole board for a province shall exercise jurisdiction in accordance with this Part in respect of the parole of offenders serving sentences in provincial correctional facilities in that province ...

[111] The Ontario Earned Release and Parole Board is a "provincial parole board", and Jay Chiang was serving his sentence in a provincial correctional facility. However, to be eligible for parole, he must be an "offender", and "offender" is a defined term. Section 99(1) of the CCRA states in part:

> "offender" means
>
> (a) a person ... who is under a sentence imposed before or after the coming into force of this section ...
>
> (ii) on conviction for criminal or civil contempt of court if the sentence does not include a requirement that the offender return to that court ...

[112] Thus, because Jay Chiang was convicted of civil contempt of court, under the federal statutory regime he would not be eligible for parole if his sentence included a requirement that he return to the Superior Court. The original warrant of committal under which he was sent to custody did not include this requirement. Its absence precipitated KDS's application for a replacement warrant of committal, which the trial judge issued. We will discuss the trial judge's authority to do so after discussing the provincial regime for granting parole.

(b) The provincial regime

[113] The provincial regime achieves the same result as the federal regime, although by a different route. Section 35 of the MCSA authorizes the Parole Board to grant parole:

> Subject to the regulations, the Board may order the release from custody on parole of any inmate convicted of an offence under any Act of the Legislature, any Act of the Parliament of Canada, or against a municipal by-law upon such conditions as the Board may determine.

[114] Jay Chiang is an "inmate". However, to be eligible for parole under this section he must be convicted of an "offence" under a provincial or federal statute. Even if civil contempt of court can be considered an "offence" under s. 35 – a point we need not decide – it is not a statutory offence.

[115] The Chiangs submit that civil contempt is an offence under s. 96(1) of Ontario's *Courts of Justice Act*: "[c]ourts shall administer concurrently all rules of equity and the common law." We do not agree. Section 96 does not create an offence. Indeed, civil contempt of court is not codified in any statute. It is a common law offence: see *Untied Nurses of Alberta*. Thus, although civil contempt bears the imprint of the criminal law, it remains outside the ambit of s. 35 of the MCSA. Accordingly, Jay Chiang is not eligible for parole under the provincial statute.

[116] Both the federal and provincial regimes recognize that civil contemnors remain under the jurisdiction of the court, not the Parole Board. The court, not the Board, shall determine when a person convicted of civil contempt of court is eligible for release from custody: see *Turkawski v. 738675 Alberta Ltd.*, 2006 ABQB 360 (CanLII) (Alta. Q.B.).

[117] Removing the Board's jurisdiction to grant parole for civil contempt of court has a sound rationale. It lies in the purposes of sentencing for civil contempt. One purpose is admittedly punishment for a breach of a court order. But the main purpose is coercive: to promote compliance with the court's orders. As Doherty J.A. said in his endorsement on the first stay motion, "[u]nlike a criminal case in which incarceration is imposed exclusively as a punishment for prior criminal conduct, Mr. Chiang's incarceration serves both as a punishment and as an incentive to purge his ongoing contempt." Parole is at odds with this coercive or incentive-based purpose of sentencing for civil contempt: see Sharpe, *Injunctions and Specific Performance* at para. 6.100.

[118] The statutory regimes, which leave jurisdiction over a civil contemnor with the court, dovetail with the wide discretion given the court under rule 60.11 of the *Rules of Civil Procedure*. Under rule 60.11(5)(a) "where a finding of contempt is made, the judge

may order the person in contempt, (a) be imprisoned for such period and on such terms as are just". And under rule 60.11(8) "a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5)". These rules give to the court an ongoing supervisory role over a civil contemnor together with the discretion to vary or even discharge a contempt order if the contemnor purges the contempt.

[119] The legislative provisions that remove the Parole Board's jurisdiction to grant parole to a civil contemnor may be usefully contrasted with the provisions conferring on the Board jurisdiction to grant temporary absence permits. Both under s. 7.3(1) of the federal *Prison and Reformatories Act*, R.S.C. 1985, c. P-20 and s. 27(1) of the MCSA, any inmate is eligible for a temporary absence permit. Unlike eligibility for parole, eligibility for a temporary absence permit is not qualified in any way. Jay Chiang was therefore eligible for a temporary absence permit and was given one to enable him to work.

[120] However, the trial judge was correct in concluding that the Board lacked jurisdiction to grant Jay Chiang parole. Because of the definition of "offender" in s. 99(1) of the CCRA, that conclusion depended, at least in part, on her requiring Jay Chiang to return before the court after serving his sentence. That requirement did not appear in the original warrant of committal. The trial judge added it in the replacement warrant that she issued. The Chiangs submit that she erred in doing so.

(2) Did the trial judge err in issuing a replacement warrant of committal?

[121] In May, 2007, the trial judge signed the original warrant committing Jay Chiang to custody. She used the form typically used for criminal warrants of committal. That form does not contain a provision that the contemnor be brought back before the court on release. The replacement warrant that the trial judge issued in September, 2007 ordered all correctional officers "to return Jay Chiang to this court to appear before the Honourable Madam Justice Lax upon his release from custody".

[122] The Chiangs submit that the trial judge had no jurisdiction to issue a replacement warrant. They contend that by September, 2007 she was *functus officio* – that is, she had performed her function – and that the new warrant improperly interfered with the intervening decision of the Parole Board. KDS submits that the trial judge did have jurisdiction to issue a replacement warrant, and that she properly exercised her jurisdiction so that the warrant of committal would conform to her original intention in sentencing Jay Chiang to one year in custody. We agree with KDS's submission.

[123] The issuance of a warrant is an administrative act. The issuing judge can amend the warrant after it has been issued to ensure that it reflects the judge's original intention:

see *Ewing v. Mission Institution* (1994), 92 C.C.C. (3d) 484 (B.C. C.A.) and *R. v. Malicia* (2006), 82 O.R. (3d) 772 (C.A.), per MacPherson J.A. That is all that happened here.

[124] In her reasons on sentence, the trial judge rejected Mr. Chiang's request that he serve his sentence in the community. Instead, she sentenced him to one year in custody, and importantly for this ground of appeal, directed that upon his release he and his wife be brought before her with a view to deciding whether Mrs. Chiang should be released earlier. Obviously, the trial judge intended that Mr. Chiang serve his entire sentence in custody, and that once he had served his sentence, she would determine whether to make a further order.

[125] We accept that it would be inappropriate for a judge to issue a new or replacement warrant in order to change the sentence the judge had imposed. However, the replacement warrant issued by the trial judge in this case did not change her original sentence, but gave effect to it. Accordingly, we decline to give effect to these grounds of appeal.

E. CONCLUSION

[126] Jay and Christina Chiang have appealed the trial judge's finding that they still have not fulfilled all their undertakings and therefore, have not purged their contempt. They have also appealed their sentences of imprisonment of one year for Jay Chiang and eight months for Christina Chiang. Finally, they have appealed the trial judge's decision to quash Jay Chiang's parole and to issue a replacement warrant of committal.

[127] We set aside the sentences imposed by the trial judge, and in their place substitute a sentence of seven days imprisonment for each of Jay and Christina Chiang. We also declare that Jay Chiang has served this sentence. We do so on the sole ground that the terms of the July 16, 2003 consent order did not entitle the trial judge to impose a first sentence of imprisonment greater than seven days. In all other respects, we dismiss the Chiangs' appeal.

[128] The parties may make written submissions on the costs of this appeal within 30 days of the release of these reasons.

RELEASED: January 7, 2009
"JL"

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"John Laskin J.A."
"Janet Simmons J.A."
"Robert P. Armstrong J.A."

Date: 20190806
Docket: CI 18-01-15026
(Winnipeg Centre)
Indexed as: 6165347 Manitoba Inc. et al.
v. The City of Winnipeg et al.
Cited as: 2019 MBQB 121

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

6165347 MANITOBA INC. and 7138793 MANITOBA LTD.,	)	Counsel:
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- and -	)	for the applicants
THE CITY OF WINNIPEG and CITY CENTRE COMMUNITY COMMITTEE,	)	VIVIAN LI SARAH RENTZ
respondents.	)	for the respondents
	)	JUDGMENT DELIVERED:
	)	August 6, 2019

GRAMMOND J.

INTRODUCTION

[1] This decision relates to a contempt motion filed by the applicants, regarding an order signed on October 12, 2018 (the "Order"), granting a *mandamus* application.

BACKGROUND INFORMATION

[2] The applicants own a parcel of land in Winnipeg (the "Land") which they are seeking to redevelop. On September 19, 2018, I issued reasons for decision (*6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.*, 2018 MBQB 153) granting the applicants' request to require the respondent City Centre Community Committee (the "Committee") to hear, on November 13, 2018, two applications filed by the applicants: a secondary plan application in file no. SP1/2018 (the "Secondary Plan Application") and a rezoning application in DASZ file no. 12/2018 (the "Zoning Application"), (collectively the "Applications").

[3] On November 13, 2018, the Committee convened. The applicants allege that the Committee did not hold a public meeting regarding the Secondary Plan Application. Rather, it endorsed the City's recommendations that a by-law was required and that City Council should not give first reading to the proposed by-law.

[4] The applicants seek a finding of contempt as against the respondents on the following bases:

a) the Secondary Plan Application was considered pursuant to a statutory (by-law) approach, not a non-statutory (policy) approach;

b) the Zoning Application was rejected on the basis that a secondary plan was required; and

c) the Committee did not have before it all of the documents submitted by the applicants in support of the Applications.

[5] The respondents submitted that the Applications were heard and decided in accordance with the Order, pursuant to the Committee's legislative function.

RELEVANT LEGAL PRINCIPLES

[6] Court of Queen's Bench Rule 60.10 provides, among other things, that a judge may grant a contempt order to enforce an order requiring a person to do an act, and in doing so may make such order as is just.

[7] Pursuant to the common law, contempt is a discretionary remedy to be used "cautiously and with great restraint" (*Carey v. Laiken*, 2015 SCC 17, at para. 36). It is an enforcement power of last rather than first resort.

[8] As set out in *Carey*, the applicable test on a contempt motion is:

> [33] … the order alleged to have been breached 'must state clearly and unequivocally what should and should not be done' …
>
> [34] … the party alleged to have breached the order must have had actual knowledge of it …
>
> [35] … the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels …

[9] In this case, the respondents conceded that the second branch of the test has been met.

[10] The Court in *Carey* also stated:

> [37] … where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt.

[11] Contempt must be established on a high standard of proof. In *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, the Court stated:

> [11] In civil contempt, the court's emphasis is less about punishment and more about coercion -- attempting to obtain compliance with the court's order. Still, civil contempt bears the imprint of the criminal law. Civil contempt must be made out to the criminal standard of proof beyond a reasonable doubt.

[12] In *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al*, 2011 ONSC 3650, stated:

> [26] Any reasonable doubt must be resolved in favour of the alleged contemnor. A reasonable doubt is not to be an imaginary or frivolous doubt, nor may it be based on sympathy or prejudice. It must be based on reason and common sense, logically derived from the evidence or absence of evidence. But the court recognizes that it is virtually impossible to prove anything to an absolute certainty and the moving party is not required to do so.

ISSUES

[13] The two issues to be determined on this motion are:

a) Whether the Order was clear and unequivocal?; and

b) Whether the Order was breached by an intentional act or omission?

ISSUE 1: WAS THE ORDER CLEAR AND UNEQUIVOCAL?

[14] The Court in *Carey* stated that:

> [33] … [The] requirement of clarity ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
>
> [citations omitted]

[15] It is helpful to consider what document(s) constitute the "order" for the purposes of this analysis. In ***Gurtins v. Goyert,*** 2008 BCCA 196, the Court stated:

> [15] … it is of paramount importance that persons who are subject to court orders be able to readily determine their obligations and responsibilities. They do this by having regard to what is on the face of the formal order setting out what they are required to do, or refrain from doing.
>
> [citations omitted]
>
> [16] A concise and most helpful summary of the principles applicable to the interpretation of an order in contempt proceedings is found in *R. (Mark Dean Harris) v. The Official Solicitor to the Supreme Court*, [2001] EWHC Admin 798 (Q.B.D.), wherein Mr. Justice Munby stated (at para. 68):
>
> (i) No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing.
>
> …
>
> (iii) An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what it is that he must not do.
>
> (iv) It follows from this that, as Jenkins J said in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 at p 390,
>
> a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.
>
> [emphasis added in original]

[16] I note also the following comments in ***Fettes v. Culligan Canada Ltd.***, 2010 SKCA 151:

> [20] In *Baumung*, [*Baumung v. 8 & 10 Cattle Co-operative Ltd.,* 2005 SKCA 108] the Court referred to numerous authorities to illustrate the statement that 'in order to ground a contempt finding, a court order must be clear or, to put the

> point in another way, that an ambiguity in an order should be resolved to the benefit of the alleged contemnor' (at para. 27).

[17] In ***Sweda***, the Court stated:

> [21] The order 'must state clearly and unequivocally what should and should not be done.' It must be directive and not simply permissive… the alleged contemnor… must obey the order in letter and spirit with every diligence. A person who is subject to an order should not be permitted to 'finesse' it or to 'hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and of the administration of justice.'
>
> [emphasis added]

Statutory v. Non-Statutory

[18] Throughout the *mandamus* hearing process, the parties drew a distinction between a public "meeting" and a public "hearing" relative to the Secondary Plan Application. The applicants argued that the Secondary Plan Application should proceed pursuant to a non-statutory (policy) approach, which would include a public meeting. The respondents argued that the Secondary Plan Application should proceed pursuant to a statutory (by-law) approach, which would require a first reading by City Council, followed by a public hearing.

[19] My reasons for decision reflect:

> [21] … I have concluded that there is no statutory or other requirement that a secondary plan must be implemented by by-law. Accordingly, the Secondary Plan Application can proceed pursuant to a policy adopted by Council.

[20] After issuance of my reasons for decision, I received a written inquiry from counsel for the respondents as follows:

> [I]s the Committee being ordered to conduct a public hearing on November 13 with respect to the secondary plan, which would require that Council give first reading to the secondary plan by-law prior to that date, or is it sufficient for the secondary plan to be considered by way of a policy approach, which would not require a public hearing on November 13?

[21] My answer to the inquiry was as follows:

> Council can comply with my decision by proceeding with the secondary plan application pursuant to a non-statutory (policy) approach, involving a public assembly or meeting. Council is not required to give first reading prior to November 13, 2018.

[22] The respondents posed no other questions and sought no other clarifications with respect to my reasons for decision.

[23] Pursuant to the authorities referenced above, I must consider whether the language of the Order was clear and unequivocal. My reasons for decision and the subsequent exchange of correspondence with counsel do not form part of the Order. Having said that, those documents provide context for the language of the Order

[24] In addition, on October 9 and 10, 2018, I received written correspondence from counsel advising that they were unable to agree as to wording of the Order.

[25] The applicants proposed the following language:

> 2. THIS COURT FURTHER ORDERS THAT the respondent City Centre Community Committee hear Applications SP1/2018 and DASZ File No. 12/2018 at its meeting on November 13, 2018.

[26] The respondents proposed the following language:

> 1. THIS COURT HEREBY ORDERS that the Respondent City Centre Community Committee consider Development Application SP 1/2018 and conduct a public hearing in respect of Development Application No. DASZ 12/2018 at its meeting on November 13, 2018.

[27] On October 10, 2018, I advised counsel that the following language would be included in the Order:

> 2. THIS COURT FURTHER ORDERS THAT the respondent City Centre Community Committee conduct a public <u>meeting</u> regarding Application SP1/2018 and conduct a public <u>hearing</u> regarding DASZ File No. 12/2018 at its meeting on November 13, 2018.
>
> [emphasis added]

[28] This language, which was included in the Order, is more specific than that proposed by either party. The applicants' proposed wording reflected that the Committee would "hear" the Applications, which mirrors both the notice of application and my reasons for decision. The respondents' proposed wording reflected that the Committee would "consider" the Secondary Plan Application and "hear" the Zoning Application. I note this evolution because not only is the language of paragraph 2 of the Order clear and unequivocal, it was the collective work product of counsel and the Court. Although no other document needs to be reviewed to understand the meaning of paragraph 2, the exchange of information that preceded its issuance underscores the specificity of the language used.

[29] Neither the word "meeting" nor the word "hearing" are defined in the Order, but a Committee "meeting" with respect to the Secondary Plan Application could take place only pursuant to the non-statutory (policy) approach. Conversely, a Committee "hearing" with respect to the Secondary Plan Application could take place only pursuant to the statutory (by-law) approach, after first reading by City Council. Accordingly, the Order is clear that the respondents were ordered to follow the non-statutory (policy) approach, and not the statutory (by-law) approach, with respect to the Secondary Plan Application.

[30] Moreover, it is apparent that at least one City employee understood the meaning of paragraph 2 of the Order, and acknowledged that the Secondary Plan Application was to proceed by way of the non-statutory (policy) approach. I am referring to Mr. Michael Robinson, who authored an administrative report in consultation with

others, relative to the Zoning Application (the "Zoning Report"). The respondents did not file evidence sworn by Mr. Robinson in response to the contempt motion, but the affidavit of his colleague Mr. James Platt reflects:

> 18. … I spoke to Michael Robinson who advised that in consideration of the Judgment and the Order, he specifically used the term 'secondary plan' as opposed to 'secondary plan by-law' throughout the DASZ Report.

[31] For all of these reasons, I reject the submissions of the respondents that the wording of the Order was overly broad or unclear, or that there was more than one potential interpretation of paragraph 2 of the Order.

Conclusion

[32] The language of paragraph 2 of the Order was clear and unequivocal. The Secondary Plan Application was to proceed at a public meeting pursuant to a non-statutory (policy) approach.

Zoning Application

[33] The Order is silent as to whether an approved secondary plan must be in place for the Zoning Application to proceed. This is so because I did not decide that question in the context of the *mandamus* application. Accordingly, the Order cannot be said to be either clear or unequivocal on this point and a finding of contempt cannot be made on this basis.

[34] Having said that, I will comment on two points related to this issue.

[35] First, my reasons for decision provide:

> [22] I will also comment upon the approval process for the Zoning Application, which is set out in both the *Charter* and the Development Procedures By-Law No. 160/2011. Pursuant to Section 275(2) of the *Charter*, the Zoning Application must conform with Plan Winnipeg or a secondary plan. There is no requirement

> that a secondary plan by-law be enacted prior to a zoning application being accepted.

[36] In addition, there was a direction by the City's Municipal Council in 2009 that the City Public Service "be directed to prepare a developer led secondary plan for the… [Land]".

[37] In other words, it was and is my understanding, and I thought the parties' understanding also, that a secondary plan would accompany the Zoning Application. The Applications were filed together and at all times the applicants have sought to pursue them concurrently.

[38] Second, as I read the minutes of the November 13, 2018 Committee meeting, the Zoning Application was not rejected because no secondary plan was in place. Rather, the reasons cited by the Committee were:

a) a lack of collaboration and consultation with the neighbourhood;

b) the Committee did not have some "good information" that was submitted (namely the October 29 Delivery, as defined below);

c) changes to the concept plan regarding density; and

d) the parking requirement.

[39] I acknowledge, however, that the Zoning Report reflected a recommendation that "an approved Secondary Plan is needed prior to this application proceeding", and that the Committee's decision reflected the general statement that it "concurred in the recommendation … that the … [Zoning Application] be rejected. It is certainly possible that the lack of an approved secondary plan was an ancillary reason for the

Committee's acceptance of the City's recommendations, which would have been consistent with the parties' expectations.

Conclusion

[40] The Order is not clear and unequivocal as to whether an approved secondary plan must be in place for the Zoning Application to proceed, so no finding of contempt can be made on that basis.

Material Available to Committee

[41] The Order provided:

> 3. THIS COURT FURTHER ORDERS THAT the City through its administration is required to take all steps necessary to have the required material in relation to the Applications available to the said Committee for its consideration on November 13, 2018.

[42] On October 29, 2018, the applicants delivered a letter and enclosures (the "October 29 Delivery") to each of three City employees, including Mr. Ludwig Lee. The October 29 Delivery included a proposed "minor" amendment to the applicants' development, in response to comments made by the City on October 19, 2018 to the applicants' engineering consultants.

[43] On November 1, 2018, the applicants delivered other materials (the "November 1 Delivery") to both the City Clerk's office and the City's Chief Administrative Officer.

[44] On November 2, 2018, counsel for the City advised the applicants that the October 29 Delivery "was not received in time to be incorporated into the Administration Report for this matter. However, you are welcome to present this information directly to the Community Committee at the public hearing on November 13, 2018".

[45] On November 7, 2018, the City Clerk's office distributed the November 1 Delivery to the offices of the Committee members.

[46] I note that the phrase "required material in relation to the Applications" is neither defined nor particularized in the Order. In addition, the Order does not reflect either a schedule or a deadline for further materials to be submitted by the applicants or distributed to the Committee. This is so despite discussion at the hearing of the *mandamus* application on September 10, 2018 regarding specific additional information to be submitted by the applicants in short order.

[47] The respondents submitted that the October 29 Delivery was a "late submission", because the public notice relative to the Applications was issued on October 25, 2018, and on the same date the Applications were made available for public inspection. In addition, the respondents contended that the October 29 Delivery could not be incorporated into the Zoning Report, because the group that reviewed and commented upon the Zoning Application had met on September 26, 2018, and could not be reconvened sufficiently in advance of the November 13, 2018 Committee meeting. The respondents argued also that since the October 29 Delivery was not contemplated when the Order was finalized, it was unclear what the City should do with it. The respondents stated for all of these reasons that the October 29 Delivery obscured the meaning of paragraph 3 of the Order, as contemplated in ***Carey***.

[48] The applicants submitted that the contents of the October 29 Delivery resolved certain issues to the City's satisfaction. They also argued that it is difficult to understand how the applicants' submissions in response to the City's comments,

including a proposed amendment to the development, could not be characterized as "required material in relation to the Applications". I agree with the latter point.

[49] Having said that, any ambiguity in the language of paragraph 3 of the Order must be resolved in favour of the City. It is apparent that after the Order was granted, discussions and exchanges continued as between the parties, and it is not clear to me from the record what, if any, additional filings were discussed or contemplated. Regardless, the Order should have reflected more detail as to:

a) what was included in the phrase "required material in relation to the Applications";

b) what additional materials would be forthcoming; and

c) what timetable would apply to the exchange of information.

[50] Since the Order reflected no timetable, I cannot determine whether the October 29 Delivery was a "late submission".

[51] For all of these reasons, the language of paragraph 3 of the Order does not reflect clearly and unequivocally what is included in "required material in relation to the Applications", and a finding of contempt cannot be made on this basis.

[52] I will make some additional comments, however, that may assist the parties going forward. In my view, the real issue does not relate to whether the applicants' submissions could be responded to in the administrative reports. The issue is why the City refused to distribute the October 29 Delivery to the Committee, and instead suggested to the applicants that they present the documents to the Committee at the

meeting, which would provide the least effective opportunity for review by the Committee members.

[53] The City has provided no explanation for its refusal to distribute the October 29 Delivery, except that it was not filed with the City Clerk's office. I am also mindful of the City's acknowledgement that "it is standard practice for all unsolicited materials related to an active [Zoning] application to be forwarded to the Zoning Development Officer responsible for the application, which in this instance was Ludwig Lee". I note both that Mr. Lee was a recipient of the October 29 Delivery, and that according to the applicants, the content of the October 29 Delivery would have addressed some of the concerns raised in the Zoning Report.

[54] I am troubled by the City's approach, particularly given the issuance of the Order, and the applicants' warning that the Committee would not be informed fully without the October 29 Delivery. I would have anticipated that the City would act vigilantly and with caution, particularly give the applicants' previous allegations of bad faith against it. Instead, it seems to have chosen to be uncooperative with respect to distribution of the October 29 Delivery.

Conclusion

[55] The Order is not clear and unequivocal relative to what material was required to be available to the Committee for its November 13, 2018 meeting, so no finding of contempt can be made on that basis.

ISSUE 2: WAS THE ORDER BREACHED BY AN INTENTIONAL ACT OR OMISSION?

[56] The Court in *Carey* stated:

> 38 It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice… to require a contemnor to have intended to disobey the order would put the test 'too high' and result in 'mistakes of law [becoming] a defence to an allegation of civil contempt …'.

Statutory v. Non-Statutory

[57] The City prepared an Administrative Report relative to the Secondary Plan Application (the "Secondary Plan Report"), which was submitted to the Committee on November 5, 2018.

[58] The Secondary Plan Report was prepared by Mr. James Platt, in consultation with many others, and contained the following statements:

a) "The proponent submitted a development application on January 12, 2018 for adoption of the proposed Parker Lands Secondary Plan (the 'Plan'). The Plan is inadequate as a secondary plan by-law for the following key reasons";

b) "If the recommendations of this report are concurred in, the … Committee will not conduct a Public Hearing on the proposed by-law"; and

c) "The applicant has submitted a proposal for Council to adopt a secondary plan by-law…"

[emphasis added]

[59] The Secondary Plan Report contained the following recommendations, among others:

a) "That any land use plan related to the Parker Lands… resulting from a planning process… be adopted as a secondary plan by-law"; and

b) "That Council not give first reading to the proposed secondary plan by-law (draft bylaw attached to this report as Schedules 'A' and 'B') for the reasons outlined in this report".

[emphasis added]

[60] On November 7, 2018, counsel for the applicants advised counsel for the respondents that the Secondary Plan Report was "essentially identical" to the report prepared in July 2018, which also recommended that the Secondary Plan Application be considered as a by-law. Counsel for the applicants stated that "[s]uch a recommendation is directly contrary to the Order of Madam Justice Grammond dated October 12, 2018." He called upon the Committee to "immediately rectify the situation by following exactly the Order of Madam Justice Grammond as clarified." Counsel for the respondents acknowledged this warning, but advised that the respondents disagreed with the position taken.

[61] The foregoing excerpts of the Secondary Plan Report are troubling, because they reflect that the Secondary Plan Application was proceeding pursuant to the statutory (by-law) approach, which is not what the Order provided. With respect, it is difficult to understand how the respondents concluded that proceeding in the fashion set out in the Secondary Plan Report would accord with the Order.

[62] In addition, the respondents have provided no explanation for the inclusion of these statements in the Report. Clearly, Mr. Platt was aware of the view of Mr. Robinson, as set out in the Zoning Report, that the Secondary Plan Application was to proceed by way of non-statutory (policy) approach.

[63] The City submitted that the Order did not require it to make any specific recommendations to the Committee, and that is correct, but as I have already found, the Order provided clearly and unequivocally that the Committee was to hold a meeting with respect to the Secondary Plan Application, pursuant to the non-statutory (policy) approach. The City's recommendations relative to the statutory (by-law) approach started the process on the wrong track, and set up the Committee to fail to comply with the Order by proceeding under that approach. I accept that the Committee could have rejected the City's recommendations, and identified a distinction between the non-statutory (policy) and the statutory (by-law) approaches, but it did not do so. The unanimous decision of the Committee to concur in the recommendations set out in the Secondary Plan Report compounded the City's failure to comply with the Order in its recommendations. Thereafter, and but for this proceeding, the Applications would have advanced to the Standing Policy Committee, the Executive Policy Committee, and to City Council, the final decision maker, on the statutory (by-law) approach, contrary to the Order.

[64] The City submitted that if it had proceeded with the statutory (by-law) approach, a first reading would have preceded the November 13, 2018 meeting, which was dispensed with in this case. In addition, the respondents noted that the Secondary Plan

Application was treated as a regular agenda item at the Committee meeting. I accept that the first reading was dispensed with, but that was done following my specific direction to counsel to do so. Even in the face of that direction, the City referred repeatedly to the Secondary Plan Application as a by-law application. Whether the Secondary Plan Application was treated as a regular agenda item or not, the contents of the Secondary Plan Report reflect clearly how the City intended to proceed.

[65] I recognize that had the non-statutory (policy) approach been pursued as ordered, the substantive outcome of the November 13, 2018 meeting may have been no different. The respondents submitted that neither my reasons for decision nor the Order required them to take to "take a particular position on the Applications", and that is correct.

[66] It was very clear throughout the *mandamus* application process that the applicants did not ask the Court to order a particular substantive outcome of the Applications. In other words, the *mandamus* application was a judicial review of the process by which the Applications would be decided from a procedural standpoint, both in terms of the timing and the steps to be followed. I was not asked to direct the public service to provide particular recommendations with respect to the Applications, and I did not do so.

[67] To the contrary, it was stated plainly in open Court that I was not being asked to direct the respondents to address the merits of the Applications in any particular way. Rather, I was being asked to order that the Applications move forward. I gave no

directions with respect to the content of the Secondary Plan Report *per se*, but I did direct the process to be followed. Unfortunately, that direction was not complied with.

[68] I am convinced beyond a reasonable doubt that the City intended to proceed with the Secondary Plan Application pursuant to the statutory (by-law) approach. The Secondary Plan Report ignored the non-statutory (policy) approach, and the City held to its position even after warnings from the applicants' counsel. The respondents neither complied with the letter and spirit of the Order nor exercised every diligence in their approach to the Secondary Plan Application. They cannot now "finesse" their actions or hide behind a restrictive interpretation of the Order.

[69] I have considered the decision in ***Kuchma v. Rural Municipality of Tache***, [1945] S.C.R. 234, at para. 5, and in particular the notion that a municipal council "is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established."

[70] That principle may apply in many cases, but ***Kuchma*** did not involve an allegation of contempt. As I have already stated, the issue in this case does not relate to the substantive outcome of the Applications. It is about process, and ***Kuchma*** does not exempt any municipal authority from complying with orders of the Court.

[71] I have also considered the fact that the respondents are government bodies. The applicants relied upon ***Re Axelrod et al. and City of Toronto*** (1984), 48 O.R. (2d) 586, where a finding of contempt was made against a municipality relative to its refusal to issue a demolition permit. A similar decision was made in ***W.J. Holdings***

Limited v. City of Toronto, 2011 ONSC 6315. I am satisfied, on the strength of those decisions, and in the absence of any submissions to the contrary, that a finding of contempt can be made against the respondents irrespective of their status as government bodies.

[72] Last, I have considered my residual discretion to decline to make a finding of contempt, but I do not accept that the respondents, on the whole, acted in good faith or that they took reasonable steps to comply with the Order. Accordingly, I will not exercise my discretion to avoid a finding of contempt.

Conclusion

[73] The respondents' intentional acts breached the Order and they are in contempt of the Order.

REMEDY

[74] As provided in *Carey*, the applicants proposed a two-step process with respect to their motion: the liability phase and, if liability is established, the penalty phase, to be addressed at a later date. The respondents did not oppose this approach.

[75] The applicants requested interim relief if a finding of contempt was made, namely that the November 13, 2018 decisions of the Committee be set aside, that it be prohibited from conducting any further business until the contempt is purged, and that it be ordered to purge the contempt within 30 days.

[76] Given the finding of contempt, I agree that the decisions should be set aside, and I so order. Given that the Applications are to proceed concurrently, the respondents' failure to comply with the Order relative to the Secondary Plan Application

may have impacted the Committee's decision relative to the Zoning Application, so I am satisfied that both decisions should be set aside.

[77] I will not prohibit, however, the Committee from conducting business until the contempt is purged. I do not have evidence as to the volume and scope of the Committee's business, which I would require before I would consider making an order with such potentially far-reaching consequences. I make this conclusion in large part because the respondents are government bodies, and there could be many third parties affected if the Committee's business came to a halt.

[78] Given the specialized nature of the work of the Committee, I will not fix a time frame within which the contempt must be purged. I expect that the Secondary Plan Report will be revised to accord with the Order prior to the Applications returning to the Committee, and I encourage the parties to discuss a reasonable schedule on which that process will unfold. If my assistance is needed, counsel can set time before me to discuss next steps and a timetable. An appearance will be required relative to the penalty phase of the motion in any event, which counsel should take steps to schedule.

CONCLUSION

[79] The respondents are in contempt of the Order.

[80] The decisions of the Committee made on November 13, 2018 are set aside.

[81] If the parties cannot agree on costs, counsel may set time to make submissions.

_____

J.

TAB G

SUPREME COURT OF CANADA

CITATION: Moore *v.* Sweet, 2018 SCC 52, [2018] 3 S.C.R. 303

APPEAL HEARD: February 8, 2018
JUDGMENT RENDERED: November 23, 2018
DOCKET: 37546

BETWEEN:

Michelle Constance Moore
Appellant

and

Risa Lorraine Sweet
Respondent

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 96)	Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown and Martin JJ. concurring)
JOINT DISSENTING REASONS: (paras. 97 to 144)	Gascon and Rowe JJ.

Michelle Constance Moore *Appellant*

v.

Risa Lorraine Sweet *Respondent*

Indexed as: Moore *v.* Sweet

2018 SCC 52

File No.: 37546.

2018: February 8; 2018: November 23.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Equity — Restitution — Unjust enrichment — Remedy — Constructive trust — Husband and wife separating and entering into contractual agreement pursuant to which wife will pay husband's life insurance policy premiums in order to remain named sole beneficiary of policy — Husband subsequently naming new common law spouse as beneficiary without wife's knowledge — Insurance proceeds payable to common law spouse on husband's death despite wife having continued to pay premiums — Whether common law spouse unjustly enriched at wife's expense — If so, whether constructive trust is appropriate remedy.

Insurance — Life insurance — Beneficiary designation — Wife designated as revocable beneficiary of husband's life insurance policy — After separation, wife agreeing to continue to pay policy premiums to maintain beneficiary designation — Husband subsequently designating new common law spouse as irrevocable beneficiary without wife's knowledge — Insurance proceeds payable to common law spouse on husband's death — Whether designation of common law spouse as irrevocable beneficiary in accordance with statute precludes recovery for wife with prior claim to benefit of policy — Insurance Act, R.S.O. 1990, c. I.8, ss. 190, 191.

During L and M's marriage, L purchased a term life insurance policy and designated M as revocable beneficiary. They later separated, and entered into an oral agreement whereby M would pay all of the policy premiums and, in exchange, L would maintain M's beneficiary designation. Unbeknownst to M, L subsequently designated his new common law spouse, R, as the irrevocable beneficiary of the policy. When L passed away, the proceeds were therefore payable to R and not to M. At the time of L's death, his estate had no significant assets. M, who had paid about $7,000 in policy premiums since separation, commenced an application regarding her entitlement to the $250,000 policy proceeds. The application judge held that R had been unjustly enriched at M's expense and impressed the proceeds with a constructive trust in M's favour. The Court of Appeal allowed R's appeal and set aside the judgment of the application judge.

Held (Gascon and Rowe JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.: R was enriched, M was correspondingly deprived, and both the enrichment and deprivation occurred in the absence of a juristic reason. Therefore, a remedial constructive trust should be imposed for M's benefit.

A constructive trust is understood primarily as an equitable remedy that may be imposed at a court's discretion. A proper equitable basis, such as a successful claim in unjust enrichment, must first be found to exist. A plaintiff will succeed on the cause of action in unjust enrichment if he or she can show three elements: (1) that the defendant was enriched; (2) that the plaintiff suffered a corresponding deprivation; and (3) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

Regarding the first element, the parties do not dispute the fact that R was enriched to the full extent of the insurance proceeds in the amount of $250,000, by virtue of her right to receive them as the designated irrevocable beneficiary of L's policy.

The second element focuses on what the plaintiff actually lost and on whether that loss corresponds to the defendant's enrichment, such that the latter was enriched at the expense of the former. The measure of deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of loss also captures a benefit that was never in the plaintiff's possession but that the court finds would have accrued for his or her benefit had it not

been received by the defendant instead. This element does not require that the disputed benefit be conferred directly by the plaintiff on the defendant. In this case, the extent of M's deprivation is not limited to the $7,000 she paid in premiums. She stands deprived of the right to receive the entirety of the insurance proceeds, a value of $250,000. It is also clear that R's enrichment came at M's expense. Not only did M's payment of the premiums make R's enrichment possible, but R's designation gave her the statutory right to receive the insurance proceeds. Because R received the benefit that otherwise would have accrued to M, the requisite correspondence exists: the former was enriched at the expense of the latter.

To establish the third element, it must be demonstrated that both the enrichment and corresponding deprivation occurred without a juristic reason. The juristic reason analysis proceeds in two stages. The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the established categories of juristic reasons, such as disposition of law or statutory obligations. A plaintiff's claim will necessarily fail if a legislative enactment justifies the enrichment and corresponding deprivation. In this case, a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* does not provide a juristic reason for R's enrichment at M's expense. Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. The legislature is presumed not to depart from prevailing law without expressing its intention to do so with irresistible clearness. While the *Insurance Act* provides the

mechanism by which beneficiaries become statutorily entitled to receive policy proceeds, no part of the Act operates with the necessary irresistible clearness to preclude the existence of contractual or equitable rights in those proceeds once they have been paid to the named beneficiary. Furthermore, the *Insurance Act* provisions applicable to irrevocable beneficiary designations do not require, either expressly or implicitly, that a beneficiary keep the proceeds as against a plaintiff in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death. Accordingly, an irrevocable designation under the Act cannot constitute a juristic reason for R's enrichment and M's deprivation. Neither by direct reference nor by necessary implication does the *Insurance Act* either foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment claim against the designated beneficiary — revocable or irrevocable — or preclude the imposition of a constructive trust in circumstances such as these. Therefore, no established category of juristic reason applies.

Once the plaintiff has successfully demonstrated that no category of juristic reason applies, a *prima facie* case is established and the analysis proceeds to the second stage. At this stage, the defendant must establish some residual reason why the enrichment should be retained. Considerations such as the parties' reasonable expectations and moral and policy-based arguments come into play. In the present case, it is clear that both parties expected to receive the proceeds of the life insurance policy. However, the residual considerations favour M, given that her contribution towards the

payment of the premiums actually kept the policy alive and made R's entitlement to receive the proceeds upon L's death possible.

Once each of the three elements of the cause of action in unjust enrichment is made out, the remedy is restitutionary in nature and can take one of two forms: personal or proprietary. A personal remedy is essentially a debt or a monetary obligation and can be viewed as the default remedy for unjust enrichment. In certain cases, however, a plaintiff may be awarded a remedy of a proprietary nature. The most pervasive and important proprietary remedy for unjust enrichment is the constructive trust. Courts will impress the disputed property with a constructive trust only if the plaintiff can establish that a personal remedy would be inadequate; and that there is a link between his or her contributions and the disputed property. Ordinarily, a personal award would be adequate in cases such as this one where the property at stake is money. In the present case, however, the disputed insurance money has been paid into court and is readily available to be impressed with a constructive trust. Moreover, M's payment of the premiums was causally connected to the maintenance of the policy under which R was enriched. A constructive trust to the full extent of the proceeds should therefore be imposed in M's favour.

Per Gascon and Rowe JJ. (dissenting): There is disagreement with the majority that M has established a claim in unjust enrichment on these facts and therefore, that a constructive trust should be imposed.

M had a contract with L to be maintained the named beneficiary of his life insurance policy while she paid the premiums. However, this contract does not create a proprietary or equitable interest in the policy's proceeds and simply being named as a beneficiary does not give one a right in the proceeds before the death of the insured. The right to claim the proceeds only crystalizes upon the insured's death. Further, as a revocable beneficiary, M had no right to contest L's redesignation of R as an irrevocable beneficiary outside of a claim against L for breach of contract. Thus, at the time of L's death, the only rights that M possessed in relation to the life insurance contract were her contractual rights.

While M would have a claim against L's estate for breach of contract, the estate's lack of assets has rendered any such recourse fruitless. Instead, M's claim is to reverse the purported unjust enrichment of R. In an action for unjust enrichment, a plaintiff must show that their deprivation corresponds to the defendant's enrichment. The correspondence between the deprivation and the enrichment, while seemingly formalistic, is fundamental. Correspondence is the connection between the parties — a plus and a minus as obverse manifestations of the same event — that uniquely identifies the plaintiff as the proper person to seek restitution against a particular defendant.

In this case, it is clear that but for M's payments, the policy would have lapsed, and but for L's breach of contract, M would have been the beneficiary at the time of his death. But these facts are not enough to establish that the deprivation and the enrichment are corresponding. R's enrichment was not at the expense of M because

R's enrichment is not dependent on M's deprivation. What R received (a statutory entitlement to proceeds) is different from M's deprivation (the inability to enforce her contractual rights) — they are not two sides of the same coin.

Even if a corresponding deprivation could be established, M's claim in unjust enrichment would fail at the first stage of the juristic reason analysis, because the *Insurance Act* establishes a juristic reason for R's enrichment. Section 191(1) of the *Insurance Act* provides that an insured may designate an irrevocable beneficiary under a life insurance policy, and thereby provide special protections to that beneficiary. From the moment an irrevocable beneficiary is designated, they have a right in the policy itself: the insurance money is not subject to the control of the insured or to the claims of his or her creditors, and the beneficiary must consent to any subsequent changes to beneficiary designation. As it is undisputed that R was the validly designated irrevocable beneficiary of the policy, she is entitled to the proceeds free of the claims of L's creditors.

The fact that M had an agreement with L for the proceeds of the policy pursuant to which she paid its premiums does not undermine the presence of this juristic reason. As M's rights are contractual in nature, she is a creditor of L's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds. The *Insurance Act* explicitly protects irrevocable beneficiaries from the claims of the deceased's creditors and provides that the insurance proceeds do not form part of the insured's estate. Thus,

the *Insurance Act* precludes the existence of contractual rights in those insurance proceeds.

The *Insurance Act*'s legislative history further supports R's retention of the insurance proceeds notwithstanding M's claim. The provisions of the *Insurance Act* were designed to protect the interests of beneficiaries in retaining the proceeds and provide no basis whatsoever for a person paying the premiums to assume she would have any claim to the eventual proceeds. The *Insurance Act* is deliberately indifferent to the source of the premium payments and renders the actions of the payers irrelevant as far as the beneficiaries are concerned.

In immunizing beneficiaries from the claims of the insured's creditors, the *Insurance Act* does not distinguish between types of creditors. Creditors of the insured's estate simply do not have a claim to the insurance proceeds. There is no basis to carve out a special class of creditor who would be exempt from the clear wording of the *Insurance Act*. Neither M's contributions to the policy, nor her contract with L are sufficient to take her outside the comprehensive scheme and grant her special and preferred status.

Even if the *Insurance Act* did not establish a juristic reason for R's enrichment, the policy considerations at the second stage of the juristic reason analysis weigh against allowing M's claim of unjust enrichment. It is an unfortunate reality that a person's death is sometimes accompanied by litigation that can tie up funds that the deceased intended to support loved ones for a significant period of time, adding

financial hardship to personal tragedy. In an attempt to ensure that life insurance proceeds could be free from such strife, the Ontario legislator empowered policy holders to designate an irrevocable beneficiary under s. 191(1) of the *Insurance Act*. Such a designation ensures that the proceeds can be disbursed free from claims against the estate, giving certainty to insured, insurer and beneficiary alike. This provision should be given full effect.

Cases Cited

By Côté J.

Applied: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Shannon v. Shannon* (1985), 50 O.R. (2d) 456; **distinguished:** *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325; **referred to:** *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660; *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Cie Immobilière Viger Ltée v. Lauréat*

Giguère Inc., [1977] 2 S.C.R. 67; *Lacroix v. Valois*, [1990] 2 S.C.R. 1259; *Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127; *Saskatchewan Crop Insurance Corp. v. Deck*, 2008 SKCA 21, 307 Sask. R. 206; *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273; *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3; *Chanowski v. Bauer*, 2010 MBCA 96, 258 Man. R. (2d) 244; *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506; *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65, aff'd [1991] 3 S.C.R. 593; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38.

By Gascon and Rowe JJ. (dissenting)

Air Canada v. British Columbia, [1989] 1 S.C.R. 1161; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504; *Holowa Estate v. Stell-Holowa*, 2011 ABQB 23, 330 D.L.R. (4th) 693; *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65; *Roberts v. Martindale* (1998), 55 B.C.L.R. (3d) 63; *Milne Estate v. Milne*, 2014 BCSC 2112, 54 R.F.L. (7th) 328; *Ladner v. Wolfson*, 2011 BCCA 370, 24 B.C.L.R. (5th) 43; *Schorlemer Estate v. Schorlemer* (2006), 29 E.T.R. (3d) 181; *Steeves v. Steeves* (1995), 168 N.B.R. (2d) 226; *Gregory v. Gregory* (1994), 92 B.C.L.R. (2d) 133; *Shannon v.*

Shannon (1985), 50 O.R. (2d) 456; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660; *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Chanowski v. Bauer*, 2010 MBCA 96, 258 Man. R. (2d) 244; *Fraser v. Fraser* (1995), 9 E.T.R. (2d) 136; *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2004), 70 O.R. (3d) 61; *Snider v. Mallon*, 2011 ONSC 4522, 3 R.F.L. (7th) 228; *Bielny v. Dzwiekowski*, [2002] I.L.R. ¶I-4018, aff'd [2002] O.J. No. 508 (QL); *Kang v. Kang Estate*, 2002 BCCA 696, 44 C.C.L.I. (3d) 52; *Ladner Estate, Re*, 2004 BCCA 366, 40 B.C.L.R. (4th) 298.

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APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J. and Blair and Lauwers JJ.A.), 2017 ONCA 182, 134 O.R. (3d) 721, 409 D.L.R. (4th) 312, 65 C.C.L.I. (5th) 175, 32 C.C.P.B. (2nd) 254, [2017] O.J. No. 1129 (QL), 2017 CarswellOnt 2958 (WL Can.), setting aside a decision of Wilton-Siegel J., 2015 ONSC

3914, [2015] O.J. No. 7761 (QL), 2015 CarswellOnt 20995 (WL Can.). Appeal allowed, Gascon and Rowe JJ. dissenting.

Ian M. Hull, *Suzana Popovic-Montag* and *David M. Smith*, for the appellant.

Jeremy Opolsky and *Jonathan Silver*, for the respondent.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ. was delivered by

CÔTÉ J. —

I. Overview

[1] This appeal involves a contest between two innocent parties, both of whom claim an entitlement to the proceeds of a life insurance policy.

[2] The appellant, Michelle Constance Moore ("Michelle"), and the owner of the policy, Lawrence Anthony Moore ("Lawrence"), were former spouses. They entered into a contractual agreement pursuant to which Michelle would pay all of the policy's premiums and, in exchange, Lawrence would maintain Michelle as the sole beneficiary thereunder — and she would therefore be entitled to receive the proceeds of the policy upon Lawrence's death. While Michelle held up her end of the bargain,

Lawrence did not. Shortly after assuming his contractual obligation, and unbeknownst to Michelle, Lawrence designated his new common law spouse — the respondent, Risa Lorraine Sweet ("Risa") — as the *irrevocable* beneficiary of the policy. When Lawrence passed away several years later, the proceeds were payable to Risa and not to Michelle.

[3] Should these proceeds be impressed with a constructive trust in Michelle's favour? A majority of the Ontario Court of Appeal found that they should not. I disagree; in my view, Risa was enriched, Michelle was correspondingly deprived, and both the enrichment and the deprivation occurred in the absence of a juristic reason. In these circumstances, a remedial constructive trust should be imposed for Michelle's benefit. I would therefore allow the appeal.

II. Context

[4] Michelle and Lawrence were married in 1979. Together, they had three children. In October 1985, Lawrence purchased a term life insurance policy from Canadian General Life Insurance Company, the predecessor of RBC Life Insurance Company ("Insurance Company"). He purchased this policy, with a coverage amount of $250,000, and initially designated Michelle as the beneficiary — but not as an *irrevocable* beneficiary. The annual premium of $507.50 was paid out of the couple's joint bank account until 2000.

[5] In December 1999, Michelle and Lawrence separated. Shortly thereafter, they entered into an oral agreement ("Oral Agreement") whereby Michelle "would pay the premiums and be entitled to the proceeds of the Policy on [Lawrence's] death" (Superior Court decision, 2015 ONSC 3914, at para. 13 (CanLII)). The effect of this agreement was therefore to require that Michelle remain designated as the sole beneficiary of Lawrence's life insurance policy.

[6] In the summer of 2000, Lawrence began cohabiting with Risa. They remained common law spouses and lived in Risa's apartment until Lawrence's death 13 years later.

[7] On September 21, 2000, Lawrence executed a change of beneficiary form designating Risa as the *irrevocable* beneficiary of the policy. Risa testified that Lawrence did so because he did not want her to worry about how she would pay the rent or buy medication, and wanted to make sure that she would be able to continue living in the building where she had resided for the preceding 40 years.

[8] The change in beneficiary designation was made through, and after consultation with, Lawrence's insurance broker, who also happened to be Michelle's brother-in-law. The new designation was recorded by the Insurance Company on September 25, 2000. Although Lawrence did not change the beneficiary designation

surreptitiously, he did not advise Michelle that she was no longer named as beneficiary.[1]

[9] Michelle and Lawrence entered into a formal separation agreement in May 2002. This agreement dealt with a number of issues as between them, but was silent as to the policy and anything related to it. They finalized their divorce on October 3, 2003.

[10] Pursuant to her obligation under the Oral Agreement, and without knowing that Lawrence had named Risa as the irrevocable beneficiary, Michelle continued to pay all of the premiums on the policy until Lawrence's death. By then, a total of $30,535.64 had been paid on account of premiums; about $7,000 had been paid since 2000.

[11] Lawrence died on June 20, 2013. His estate had no significant assets.

[12] Michelle was advised by the Insurance Company that she was not the designated beneficiary of the policy on July 5, 2013, around two weeks after Lawrence's death. On February 12, 2014, Michelle commenced an application seeking the opinion, advice and direction of the Ontario Superior Court of Justice as to her entitlement to the proceeds of the policy. Pursuant to a court order dated

[1] There is no dispute between the parties that the Oral Agreement was entered into sometime prior to the date on which Lawrence designated Risa as irrevocable beneficiary (transcript, at pp. 6-7).

December 19, 2013, the Insurance Company paid the proceeds of the policy into court pending the resolution of the dispute.

[13] Part V of the *Insurance Act*, R.S.O. 1990, c. I.8, sets out a comprehensive scheme that governs the rights and obligations of parties to a life insurance policy. It applies to all life insurance contracts "[d]espite any agreement, condition or stipulation to the contrary" (s. 172(1)), which means that the parties cannot contract out of its provisions.

[14] Of particular relevance for the purposes of this appeal are the provisions of the *Insurance Act* that deal with the designation of beneficiaries. A "beneficiary" of a life insurance policy is defined as "a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration" (s. 171(1)). A beneficiary designation therefore identifies the intended recipient of the proceeds under the life insurance policy upon the death of the insured person, in accordance with the terms of the policy.

[15] Part V of the *Insurance Act* recognizes two types of beneficiary designations: those that are *revocable* and those that are *irrevocable*. A revocable beneficiary designation is one that can be altered or revoked by the insured without the beneficiary's knowledge or consent (s. 190(1) and (2)). An irrevocable beneficiary designation, by contrast, can be altered or revoked only if the designated beneficiary consents (s. 191(1)). When a valid irrevocable beneficiary designation is made, s. 191 of the *Insurance Act* makes clear that the insurance money ceases to be subject to the

control of the insured, is not subject to the claims of the insured's creditors and does not form part of the insured's estate.

[16] It is clear that the interest of an irrevocable beneficiary is afforded much more protection than that of a revocable beneficiary; the former has a "statutory right to remain as the named beneficiary entitled to receive the insurance moneys unless he or she consents to being removed" (Court of Appeal decision, 2017 ONCA 182, 134 O.R. (3d) 721, at para. 82). The legislation contemplates only one situation where insurance money can be clawed back from a beneficiary, regardless of whether his or her designation is irrevocable: to satisfy a support claim brought by a dependant against the estate of the now-deceased insured person (*Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 58 and 72(1)(f)). No such claim has been brought in this case.

[17] Part V of the *Insurance Act* also deals with the assignment of a life insurance policy. A life insurance contract entails a promise by the insurer "to pay the contractual benefit when the insured event occurs" (*Norwood on Life Insurance Law in Canada* (3rd ed. 2002), by D. Norwood and J. P. Weir, at p. 359). It can therefore be understood as creating a chose in action against the insurer, which is transferrable from one person to another through the mechanism of an assignment. The statute provides that where the assignee gives written notice of the assignment to the insurer, he or she assumes all of the assignor's rights and interests in the policy. Pursuant to s. 200(1)(b) of the *Insurance Act*, however, an assignee's interest in the policy will not have priority over that of an irrevocable beneficiary who was designated prior to the time the

assignee gave notice to the insurer — unless the irrevocable beneficiary consents to the assignment and surrenders his or her interest in the policy.

[18] The relevant provisions of the *Insurance Act* read as follows:

> **190** (1) Subject to subsection (4),[2] an insured may in a contract or by a declaration designate the insured, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable.
>
> (2) Subject to section 191, the insured may from time to time alter or revoke the designation by a declaration.
>
> . . .
>
> **191** (1) An insured may in a contract, or by a declaration other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate.
>
> (2) Where the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.
>
> **200** (1) Where an assignee of a contract gives notice in writing of the assignment to the insurer at its head or principal office in Canada, the assignee has priority of interest as against,
>
> (a) any assignee other than one who gave notice earlier in like manner; and
>
> (b) a beneficiary other than one designated irrevocably as provided in section 191 prior to the time the assignee gave notice to the insurer of the assignment in the manner prescribed in this subsection.

[2] The exception in subs. (4) does not apply in the circumstances of this case.

> (2) Where a contract is assigned as security, the rights of a beneficiary under the contract are affected only to the extent necessary to give effect to the rights and interests of the assignee.
>
> (3) Where a contract is assigned unconditionally and otherwise than as security, the assignee has all the rights and interests given to the insured by the contract and by this Part and shall be deemed to be the insured.

. . .

III. Decisions Below

A. *Ontario Superior Court of Justice (Wilton-Siegel J.) — 2015 ONSC 3914*

[19] The application judge, Wilton-Siegel J., held that Risa had been unjustly enriched at Michelle's expense, and therefore impressed the proceeds of the policy with a constructive trust in Michelle's favour. He began his reasons by addressing a preliminary matter: the Oral Agreement that Lawrence and Michelle had entered into during their separation. He held that Michelle and Lawrence "each had an equitable interest in the proceeds of the Policy from the time that it was taken out" and that the Oral Agreement had effectively resulted in the "equitable assignment to [Michelle] of [Lawrence's] equitable interest in the proceeds in return for [Michelle's] agreement to pay the premiums on the Policy" (para. 17) (CanLII). According to the application judge, this equitable interest "took the form of a right to determine the beneficiary of the Policy" (para. 18).

[20] The application judge then turned to Michelle's unjust enrichment claim. He found that the first two elements of the cause of action in unjust enrichment — an

enrichment of the defendant and a corresponding deprivation suffered by the plaintiff — were easily met in this case: Risa had been enriched by virtue of her valid designation as irrevocable beneficiary, and Michelle had suffered a corresponding deprivation to the extent that she paid the premiums and to the extent that the proceeds had been payable to Risa "notwithstanding the prior equitable assignment of such proceeds to her" (para. 27). With respect to the third and final element — the absence of a juristic reason for the enrichment — the application judge held that Risa's designation as beneficiary under the policy did not constitute a juristic reason that entitled her to retain the proceeds in the particular circumstances of this case (para. 46). This was because Risa's entitlement to the proceeds would not have been possible if Michelle had not performed her obligations under the Oral Agreement, and because the Oral Agreement itself amounted to an equitable assignment of the proceeds to Michelle (para. 48).

B. *Ontario Court of Appeal (Strathy C.J.O. and Blair J.A., Lauwers J.A. dissenting) — 2017 ONCA 182, 134 O.R. (3d) 721*

[21] The Ontario Court of Appeal allowed Risa's appeal and set aside the judgment of the application judge. It ordered that the $7,000 Michelle had paid in premiums between 2000 and 2013 be paid out of court to her and that the balance of the insurance proceeds be paid to Risa.

(1) Majority Reasons

[22] Writing for himself and for Strathy C.J.O., Blair J.A. held that it was not open to the application judge to find that the Oral Agreement amounted to an equitable assignment, since the doctrine of equitable assignment had not been placed in issue by the parties before him.

[23] Turning to Michelle's unjust enrichment claim, Blair J.A. accepted the application judge's finding that Risa was enriched. He found it unnecessary to resolve the issue of whether the corresponding deprivation element had been made out as he found there was a juristic reason justifying the receipt by Risa of the proceeds. Specifically, Blair J.A. held that the application judge had erred in his approach to the juristic reason element of the unjust enrichment framework — first, by failing to recognize the significance of Risa's designation as an *irrevocable* beneficiary, and second, by failing to apply the two-stage analysis mandated by this Court in *Garland v. Consumers' Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629. In Blair J.A.'s view, "the existence of the statutory regime relating to revocable and irrevocable beneficiaries . . . falls into an existing recognized category of juristic reason", constituting "both a disposition of law and a statutory obligation" (para. 99).

[24] Blair J.A. declined to decide whether a constructive trust can be imposed only to remedy unjust enrichment and wrongful acts or can also be based on the more elastic concept of "good conscience". He took the position that there was nothing in the circumstances of this case that put it in some "good conscience" category beyond what was captured by unjust enrichment and wrongful act.

(2) Dissenting Reasons

[25] In dissent, Lauwers J.A. agreed with the majority that the application judge had erred in relying on the equitable assignment doctrine. However, he disagreed with the majority as to the disposition of Michelle's unjust enrichment claim and the propriety of imposing a constructive trust over the proceeds in these circumstances. He would therefore have dismissed the appeal.

[26] Lauwers J.A. began by considering this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, and held that it leaves open four routes by which a constructive trust may be imposed: (1) as a remedy for unjust enrichment; (2) for wrongful acts; (3) in circumstances where its availability has long been recognized; and (4) otherwise where good conscience requires it. According to Lauwers J.A., in relation to the fourth route, the *Soulos* court anticipated that the law of remedial trusts would continue to develop in a way that accommodates the changing needs and mores of society.

[27] On the issue of unjust enrichment, Lauwers J.A. concluded that Michelle had made out each of the requisite elements and that a constructive trust ought therefore to be imposed over the proceeds in her favour. With respect to the corresponding deprivation element, he rejected the submission that Michelle's financial contribution was the correct measure of her deprivation, and instead found that the asset for which she had paid and of which she stood deprived was the full payout of the life insurance proceeds — not just the amount she had paid in premiums.

[28] Lauwers J.A. also rejected the proposition that the applicable *Insurance Act* provisions provided a juristic reason for Risa's retention of the proceeds. In his view, Michelle's entitlement to the insurance proceeds as against Risa was neither precluded nor affected by the operation of the *Insurance Act*. He also held that a juristic reason could not be found based on the parties' reasonable expectations or public policy considerations.

[29] Finally, regarding to the imposition of a constructive trust, Lauwers J.A. considered a number of other cases that involved disappointed beneficiaries. Noting that these cases fit awkwardly under the unjust enrichment rubric, he observed that:

> . . . the disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* — circumstances where the availability of a trust has previously been recognized — and the fourth route — where good conscience otherwise demands it, quite independent of unjust enrichment. [para. 276]

IV. Issues

[30] The issues in this case are as follows:

A. Has Michelle made out a claim in unjust enrichment by establishing:

(1) Risa's enrichment and her own corresponding deprivation; and

(2) the absence of any juristic reason for Risa's enrichment at her expense?

B. If so, is a constructive trust the appropriate remedy?

V. Analysis

[31] In the present case, Michelle requests that the insurance proceeds be impressed with a constructive trust in her favour. The primary basis on which she seeks this remedy is unjust enrichment. In the alternative, she submits that the circumstances of her case provide a separate good conscience basis upon which a court may impose a constructive trust.

[32] A constructive trust is a vehicle of equity through which one person is required by operation of law — regardless of any intention — to hold certain property for the benefit of another (*Waters' Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at p. 478). In Canada, it is understood primarily as a *remedy*, which may be imposed at a court's discretion where good conscience so requires. As McLachlin J. (as she then was) noted in *Soulos*:

> . . . under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. . . . Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate. [Emphasis added; para. 43.]

[33] What is therefore crucial to recognize is that a proper equitable basis *must* exist before the courts will impress certain property with a remedial constructive trust.

The cause of action in unjust enrichment may provide one such basis, so long as the plaintiff can also establish that a monetary award is insufficient and that there is a link between his or her contributions and the disputed property (*Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 997; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at paras. 50-51). Absent this, a plaintiff seeking the imposition of a remedial constructive trust must point to some other basis on which this remedy can be imposed, like breach of fiduciary duty.[3]

[34] I now turn to consider Michelle's claim in unjust enrichment.

A. *Unjust Enrichment*

[35] Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff. As recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788, "At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain."

[36] Historically, restitution was available to plaintiffs whose cases fit into certain recognized "categories of recovery" — including where a plaintiff conferred a

[3] Whether the availability of a remedial constructive trust is limited to cases involving unjust enrichment or wrongful acts need not be decided in the present case (see para. 95).

benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request (*Peel*, at p. 789; *Kerr*, at para. 31). Although these discrete categories exist independently of one another, they are each premised on the existence of some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense.

[37] In the latter half of the 20th century, courts began to recognize the common principles underlying these discrete categories and, on this basis, developed "a framework that can explain all obligations arising from unjust enrichment" (L. Smith, "Demystifying Juristic Reasons" (2007), 45 *Can. Bus. L.J.* 281, at p. 281; see also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, and *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, per Laskin J., dissenting). Under this principled framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.

[38] This principled approach to unjust enrichment is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore

a benefit to another. Recovery is therefore not restricted to cases that fit within the categories under which the retention of a conferred benefit was traditionally considered unjust (*Kerr*, at para. 32). As observed by McLachlin J. in *Peel* (at p. 788):

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

[39] Justice and fairness are at the core of the dispute between Michelle and Risa, both of whom are innocent parties. Moreover, and to complicate matters, resolution of this dispute requires this Court to consider the elements of an unjust enrichment claim as they apply in a context that involves several parties. Pursuant to her Oral Agreement with Lawrence, Michelle paid around $7,000 in premiums to the Insurance Company between 2000 and 2013 in exchange for the right to remain named as beneficiary of the policy. When Lawrence passed away, however, the insurance proceeds (which totalled $250,000) were payable by the Insurance Company not to Michelle, but to Risa — the person whom Lawrence had subsequently named the irrevocable beneficiary, contrary to the contractual obligation he owed to Michelle. The result of this arrangement was that Risa's enrichment was significantly greater than Michelle's out-of-pocket loss. Moreover, Risa was entitled to receive the proceeds from the Insurance Company by virtue of her designation as irrevocable beneficiary, pursuant to ss. 190 and 191 of the *Insurance Act*.

[40] These unusual circumstances raise two distinct questions respecting the law of unjust enrichment. First, what is the proper measure of Michelle's deprivation, and in what sense does it "correspond" to Risa's gain? Second, does the legislative framework at issue provide a juristic reason for Risa's enrichment and Michelle's corresponding deprivation — and if not, can such a juristic reason be found on some other basis? I will deal with each of these questions in turn.

(1) Risa's Enrichment and Michelle's Corresponding Deprivation

[41] The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis (*Kerr*, at para. 37; *Garland*, at para. 31). To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a "tangible benefit" — passed from the latter to the former (*Kerr*, at para. 38; *Garland*, at para. 31; *Peel*, at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 ("*PIPSC*"), at para. 151) and thus as being "essentially two sides of the same coin" (*Peter*, at p. 1012).

[42] The parties in the present case do not dispute the fact that Risa was enriched to the full extent of the $250,000 by virtue of her right to receive the insurance proceeds as the designated irrevocable beneficiary. The application judge found as much (at para. 27), and this finding is not contested on appeal.

[43] In addition to an enrichment of the defendant, a plaintiff asserting an unjust enrichment claim must also establish that he or she suffered a corresponding deprivation. According to Professor McInnes, this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 149; see also *Peel*, at pp. 789-90, and *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380 (C.A.), at pp. 393 and 400). Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant's gain. Instead, the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two (*Pettkus*, at p. 852). Put simply, the transaction that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched *at the plaintiff's expense* (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. Professor McInnes

explains that "the Canadian conception of a 'corresponding deprivation' rightly emphasizes the crucial connection between the defendant's gain and the plaintiff's loss" (*The Canadian Law of Unjust Enrichment and Restitution*, at p. 149).

[44] The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the court finds *would* have accrued for his or her benefit had it not been received by the defendant instead (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at para. 30). This makes sense because in either case, the result is the same: the defendant becomes richer in circumstances where the plaintiff becomes poorer. As was succinctly articulated by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 669-70:

> When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, [the respondent] never in fact owned the [disputed] property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by [the appellant], [the respondent] would have acquired the property. In *Air Canada* . . . , at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." (Emphasis added.) In my view the fact that [the respondent in this case] never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. [The appellant]

> has therefore been enriched at the expense of [the respondent]. [Emphasis in original.]

While *Lac Minerals* turned largely on the defendant's breach of confidence and breach of fiduciary duty, the above comments were made in the context of La Forest J.'s analysis of the tripartite unjust enrichment framework as it was applied in that case. My view is thus that these comments are applicable to the analysis in the present case.

[45] The foregoing also indicates that the corresponding deprivation element does not require that the disputed benefit be conferred *directly* by the plaintiff on the defendant (see McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 155, but also see pp. 156-83; Maddaugh and McCamus, *The Law of Restitution*, at p. 35-1). This understanding of the correspondence between loss and gain has also been accepted under Quebec's civilian approach to the law of unjust enrichment:

> The theory of unjustified enrichment does not require that the enrichment pass directly from the property of the impoverished to that of the enriched party . . . . The impoverished party looks to the one who profited from its impoverishment. It is then for the enriched party to find a legal justification for its enrichment.

(*Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 79; see also *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at pp. 1278-79.)

[46] Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence exists

between this deprivation and Risa's gain. With respect to the extent of Michelle's deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon Lawrence's death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.

[47] To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the *full* value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have

suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 42).

[48] My colleagues, Gascon and Rowe JJ., approach Michelle's loss differently. They take the position that unjust enrichment cannot be invoked by a claimant to protect his or her "contractual expectations against innocent third parties" (para. 104). While they agree that the Canadian principle against unjust enrichment operates where a plaintiff has lost wealth that was either in his or her possession or that would have accrued for his or her benefit, they take the position that "awards for expected property have generally been where there was a breach of an equitable duty", and they distinguish that situation from cases where the plaintiff held "a valid contractual expectation" of receiving certain property (para. 104).

[49] My view is that it is not useful, in the context of unjust enrichment, to distinguish between expectations based on a contractual obligation and expectations where there was a breach of an equitable duty (see my colleagues' reasons, at para. 104). Rather, a robust approach to the corresponding deprivation element focuses simply on what the plaintiff *actually* lost — that is, property that was in his or her possession or that would have accrued for his or her benefit — and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched *at the expense* of the former. As was observed by Professors Maddaugh and McCamus in *The Law of Restitution*, one source of difficulty in these kinds of disappointed beneficiary cases is

> a rigid application of the "corresponding deprivation" or "expense" element as if it requires that the benefit in the defendant's hands must have been transferred from, or constitute an out-of-pocket expense of, the plaintiff. . . . [R]estitution of benefits received from third parties may well provide a basis for recovery. In this particular context, the benefit received can, in any event, normally be described as having been received at the plaintiff's expense in the sense that, but for the mistaken failure to implement the arrangements in question, the benefit would have been received by the plaintiff. [Emphasis added; p. 35-21.]

I agree. In this case, given the fact that Michelle held up her end of the bargain, kept the policy alive by paying the premiums, did not predecease Lawrence, and still did not get what she actually contracted for, it seems artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds.

[50] From this perspective, it is equally clear that Risa's enrichment came at Michelle's expense. It is not only that Michelle's payment of the premiums made Risa's enrichment possible — something which the application judge found to be the case: "The change of designation, and [Risa's] later receipt of the proceeds of the Policy, would not have been possible but for [Michelle's] performance of her obligations under the agreement" (para. 48). What is more significant is that Risa's designation gave her the statutory right to receive the insurance proceeds, the necessary implication being that Michelle would have no such right *despite* the fact that she had a contractual entitlement, by virtue of the agreement with Lawrence, to remain named as beneficiary. Because Risa received the benefit that otherwise would have accrued to Michelle, the requisite correspondence exists: the former was enriched at the expense of the latter.

[51] My colleagues also dispute this proposition. They say that any deprivation suffered by Michelle is attributable to the fact that she lacks the practical ability to recover anything against Lawrence's insolvent estate. The result, in their view, is that what Risa received — a statutory entitlement to the proceeds — is different than what Michelle lost — which they characterize as the ability to enforce her contractual rights against Lawrence's estate (para. 111). Again, I disagree; since Risa was given the very thing that Michelle had contracted to receive *and was otherwise entitled to receive* (given that she held up her end of the bargain), it seems evident to me that Risa was enriched at Michelle's expense. To be clear, it is not simply that Risa gained a benefit with a value equal to the amount of Michelle's deprivation. Rather, what Risa gained is the precise benefit that Michelle lost: the right to receive the proceeds of Lawrence's life insurance policy. I would also add that the insolvency of Lawrence's estate simply means that Michelle would be unable to recover the value of her loss by bringing an action against Lawrence's estate in breach of contract; it does not affect her ability to bring an unjust enrichment claim against Risa. The fact that a plaintiff has a contractual claim against one defendant does not preclude the plaintiff from advancing his or her case by asserting a separate cause of action against another defendant if it appears most advantageous (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 206).

[52] I would therefore conclude that the requisite enrichment and corresponding deprivation are both present in this case. The payability of the insurance proceeds by the Insurance Company for Risa's benefit did in fact impoverish Michelle "to the full

extent of the insurance payout in [Risa's] favour" (Court of Appeal decision, at para. 208 (Lauwers J.A., dissenting)).

[53] In light of this, the Court of Appeal's order — which was made on the consent of the parties, and which requires that $7,000 of the proceeds be paid to Michelle and that the balance be paid to Risa — cannot be upheld on a principled basis. If there is a juristic reason for Risa's retention of the insurance money, then Michelle's claim will necessarily fail and Risa will be entitled to the full $250,000. If there is no such juristic reason, however, then Michelle's unjust enrichment claim will succeed and she will be entitled to a restitutionary remedy totalling that amount.

(2) Absence of Any Juristic Reason

[54] Having established an enrichment and a corresponding deprivation, Michelle must still show that there is no justification in law or equity for the fact that Risa was enriched at her expense in order to succeed in her claim. As observed by Cromwell J. in *Kerr* (at para. 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 . . . . [Emphasis added.]

[55] This understanding of juristic reason is crucial for the purposes of the present appeal. The third element of the cause of action in unjust enrichment is

essentially concerned with the justification for the defendant's retention of the benefit conferred on him or her at the plaintiff's expense — or, to put it differently, with whether there is a juristic reason for the transaction that resulted in both the defendant's enrichment and the plaintiff's corresponding deprivation. If there is, then the defendant will be justified in keeping or retaining the benefit received at the plaintiff's expense, and the plaintiff's claim will fail accordingly. At its core, the doctrine of unjust enrichment is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis. As McLachlin J. stated 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'."

[56] In *Garland*, this Court shed light on exactly what must be shown under the juristic reason element of the unjust enrichment analysis — and in particular, on whether this third element requires that cases be decided by "finding a 'juristic reason' for a defendant's enrichment" or instead by "asking whether the plaintiff has a positive reason for demanding restitution" (para. 41, citing *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127 (C.A.), at para. 105). In an effort to eliminate the uncertainty between these competing approaches, Iacobucci J. formulated a juristic reason analysis that proceeds in two stages.

[57] The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a

donative intent, and other valid common law, equitable or statutory obligations (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (*Garland*, at para. 43).

[58] If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).

[59] This two-stage approach to juristic reason was designed to strike a balance between the need for predictability and stability on the one hand, and the importance

of applying the doctrine of unjust enrichment flexibly, and in a manner that reflects our evolving perception of justice, on the other.

(a) *First Stage — None of the Established Categories Applies in These Circumstances*

[60] The first stage of the *Garland* framework asks whether a juristic reason from an established category operates to deny recovery. Michelle submits that none of these categories applies in the circumstances of this case. Risa takes the position that the *Insurance Act* required the proceeds of the policy to be paid exclusively to her as the validly designated beneficiary, such that the applicable legislation constitutes a juristic reason to deny the recovery sought by Michelle.

[61] The main issue at this stage of the analysis is therefore whether a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* — which, when coupled with Lawrence's insurance policy, makes it clear that Risa is the one to whom the insurance proceeds are payable — provides a juristic reason for Risa to retain those proceeds in light of Michelle's claim to the money. Put differently, the question can be framed as follows: is there any aspect of this statutory framework that justifies the fact that Risa was enriched *at Michelle's expense*? If so, Michelle's claim will necessarily fail.

[62] My colleagues dispute this proposition. In their view, it is sufficient to show that there is some juristic reason for the fact that the defendant was enriched, and

there is thus no need to demonstrate that the enrichment *and the corresponding deprivation* occurred without a juristic reason. With respect, this proposition is at odds with the clear guidance provided by this Court in *Kerr* (para. 40, reproduced at para. 54 of these reasons) and disregards the work already done by the recognized categories of juristic reasons identified in *Garland*. Each of these categories points to a *relationship* between the plaintiff and the defendant that justifies the fact that a benefit passed from the former to the latter. To focus exclusively on the reason why the defendant was enriched is to ignore this key aspect of the law of unjust enrichment.

[63] Two categories of juristic reasons might be said to apply in the circumstances of this case: disposition of law and statutory obligations. Disposition of law is a broad category that applies in various circumstances, including "where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery" (*Kerr*, at para. 41 (emphasis added)). The statutory obligations category operates in a substantially similar manner, precluding recovery where a legislative enactment expressly or implicitly mandates a transfer of wealth from the plaintiff to the defendant. Although there is undoubtedly a degree of overlap between these two distinct categories, what matters for the purposes of this appeal is that a plaintiff's claim will necessarily fail if a legislative enactment provides a reason for the enrichment and corresponding deprivation, so as to preclude recovery in unjust enrichment. As Professors Maddaugh and McCamus note in *The Law of Restitution*:

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

> expense is required by law. The payment of validly imposed taxes may be considered unjust by some but their payment gives rise to no restitutionary right of recovery. [Emphasis added; footnotes omitted; p. 3-28.]

[64] The jurisprudence provides ample support for this proposition. Among the issues in *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), was whether suppliers registered under the *Excise Tax Act*, R.S.C. 1985, c. E-15, that incurred costs in collecting the Goods and Services Tax on behalf of the federal government could recover those costs from the government on the basis of restitution. For a majority of this Court, Lamer C.J. answered this question in the negative:

> Under the GST Act the expenses involved in collecting and remitting the GST are borne by registered suppliers. This certainly constitutes a burden to these suppliers and a benefit to the federal government. However, this is precisely the burden contemplated by statute. Hence, a juridical reason for the retention of the benefit by the federal government exists unless the statute itself is *ultra vires*. [Emphasis added; p. 477.]

[65] A similar issue arose in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325. In that case, the respondents were charged under the *Fisheries Act*, R.S.C. 1970, c. F-14, for harvesting and attempting to sell large quantities of herring spawn. The Department of Fisheries and Oceans seized and sold the herring spawn, and the appellant Crown in Right of Canada held the proceeds pending the outcome of the proceedings. The proceedings were eventually stayed and the net proceeds paid to the respondents. Because the Crown refused to pay interest or any other additional amount, however, the respondents sought restitution in the amount

of $132,000, on the ground that the Crown had been unjustly enriched by its retention of the proceeds during the time of seizure. Writing for a unanimous Court, Major J. denied that claim on the following basis:

> Here, Parliament has enacted a statutory regime to regulate the commercial fishery. It has provided an extensive framework dealing with the seizure and return of things seized. This regime specifically provides for the return of any fish, thing, or proceeds realized. This was followed. Interest or some other additional amount might have been gratuitously included, but it was not. The validity of the *Fisheries Act* was not, nor could have been, successfully challenged. Therefore, the Act provides a juristic reason for any incidental enrichment which may have occurred in its operation. As a result, the unjust enrichment claim fails. [para. 22]

In short, it was Major J.'s position that the statutory regime, by specifying what had to be returned, made it clear that anything falling outside of the specified categories was to be retained by the Crown. In other words, the *Fisheries Act* stipulated that, in certain circumstances, a benefit would be retained by the Crown.

[66] These cases are examples of situations where a statute precluded recovery on the basis of unjust enrichment. It is to be noted that in each case, recovery was denied because the legislation in question expressly or implicitly required the transfer of wealth between the plaintiff and the defendant and therefore justified the defendant's retention of the benefit received at the plaintiff's expense. It is in this way that the applicable legislation can be understood as "denying" or "barring" recovery in restitution and therefore as supplying a juristic reason for the defendant's retention of the benefit.

[67] What, then, should we make of ss. 190(1) and 191(1) of the *Insurance Act*? The former permits the insured to identify the person to whom or for whose benefit the insurance money is payable when the insured passes away. Coupled with the insurance contract, it directs the insurer to pay the proceeds to the person so designated. The latter provides that such a designation may be made irrevocably.

[68] Given the fact that a statute will preclude recovery for unjust enrichment where it requires (either explicitly or by necessary implication) that the defendant be enriched to the detriment of the plaintiff, the provisions of the *Insurance Act* may therefore provide a juristic reason for the beneficiary's enrichment vis-à-vis any corresponding deprivation that may have been suffered *by the insurer* at the time the insurance money is eventually paid out. For this reason, an unjust enrichment claim brought by the insurer against the designated beneficiary (revocable or irrevocable) would necessarily fail at this stage; the rights and obligations that exist in that context — both statutory and contractual — justify the beneficiary's enrichment at the insurer's expense (*Saskatchewan Crop Insurance Corp. v. Deck*, 2008 SKCA 21, 307 Sask. R. 206, at paras. 47-54).

[69] A valid beneficiary designation under the *Insurance Act* has also been found to constitute a juristic reason that defeats a third party's claim for the entirety of the death benefit in circumstances where that party paid some of the premiums under the erroneous belief that he or she was the named beneficiary. In *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65, the deceased had maintained

his first wife as the designated beneficiary under a life insurance policy. His second wife, who did not have a contractual right to be named as beneficiary, wrongly believed that he had executed a change of beneficiary designation in her favour, and paid some of the policy premiums — initially from a joint bank account she shared with the deceased and later from her own bank account. She sought the imposition of a constructive trust in her favour over the policy proceeds, arguing that there was no juristic reason for the first wife's enrichment. Even accepting that the second wife could be said to have suffered a corresponding deprivation, the Ontario Court of Appeal upheld the motion judge's finding that a valid beneficiary designation under the *Insurance Act* amounted to a juristic reason that defeated the second wife's claim for the insurance money that was payable to the first wife. I would observe that the claimant in that case sought a constructive trust over the entire death benefit, and not merely the return of any payments made on the basis of her erroneous belief; the Court of Appeal did not decide whether she would be entitled to the return of those payments, and that question is not before us today.

[70] At issue in this case, however, is whether a designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* provides any reason in law or justice for Risa to retain the disputed benefit notwithstanding Michelle's prior contractual right to remain named as beneficiary and therefore to receive the policy proceeds. In other words, does the statute preclude recovery for a plaintiff, like Michelle, who stands deprived of the benefit of the insurance policy in circumstances such as these? In my view, it does not. Nothing in the *Insurance Act* can be read as ousting the common law

or equitable rights that persons other than the designated beneficiary may have in policy proceeds. As this Court explained in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at p. 90, the "legislature is presumed not to depart from prevailing law 'without expressing its intentions to do so with irresistible clearness'" (see also *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298). In *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273, for example, the British Columbia Court of Appeal found that the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, provided a "complete set of priority rules" that was "designed to replace convoluted common law, equitable and statutory rules that beset personal property security law with complexity and uncertainty" (paras. 27 and 21, citing *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3). In those circumstances, there was no "room for priorities to be determined on the basis of common law or equitable principles" (para. 22). By contrast, while the *Insurance Act* provides the mechanism by which beneficiaries can be designated and therefore become statutorily entitled to receive policy proceeds, no part of the *Insurance Act* operates with the necessary "irresistible clearness" to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary.

[71] The reasoning put forward by McKinlay J. (as she then was) of the Ontario High Court of Justice in *Shannon v. Shannon* (1985), 50 O.R. (2d) 456, is particularly instructive in this regard. Like Michelle, the plaintiff in *Shannon* was the former spouse of an insured person who had contractually agreed to maintain the plaintiff as the sole

beneficiary of the life insurance policy in his name and "not to revoke such beneficiary designation at any time in the future" (p. 458). Shortly thereafter, and in breach of his contractual obligation, the insured person surreptitiously changed the beneficiary designation in favour of his niece and nephew. He passed away several years later, and when the plaintiff discovered the change in beneficiary designation, she commenced an action asserting her entitlement to the proceeds of her former spouse's insurance policy. McKinlay J. found in her favour and made the following observations (at p. 461):

> It would appear from s. 167(2) [i.e. the predecessor of s. 190(2) of the *Insurance Act*] that the insured may at any time before the filing of an irrevocable declaration alter or revoke an existing designation by way of a declaration.
>
> The position of the defendant is that this is precisely what the insured did, and that any finding of the court of a trust in favour of the plaintiff would have the effect of the court's attempting to overrule a clear statutory provision.
>
> But the *Insurance Act* provides a statutory framework for the protection of the insured, the insurer and beneficiaries; equity imposes duties of conscience on parties based on their relationship and dealings one with another outside the purview of the statute. When he concluded the separation agreement with his wife, the deceased bound himself to maintain the policy in good standing, which he did; he also bound himself to maintain it for the benefit of his wife, which he did not. [Emphasis added.]

[72] *Shannon* therefore supports the proposition that while the *Insurance Act* may provide for the beneficiary's entitlement to payment of the proceeds, it "does not specifically preclude the existence of rights outside its provisions" (p. 461). Similarly, in *Chanowski v. Bauer*, 2010 MCBA 96, 258 Man. R. (2d) 244, the Manitoba Court of

Appeal recognized that courts have readily accepted that contractual rights to policy proceeds may operate to the detriment of named beneficiaries:

> Generally, the courts have imposed remedial constructive trusts in factual circumstances where the deceased has breached an agreement regarding life insurance benefits. These have arisen most commonly in cases where the husband executed a separation agreement promising to retain his former wife as the beneficiary of his life insurance policy and, in contravention of that promise, before his death, the deceased changed the designation of his beneficiary to that of his present wife or another family member. [para. 39]

[73] Accepting that contractual rights to claim policy proceeds can exist outside of the *Insurance Act*, can an irrevocable designation under the *Insurance Act* nonetheless constitute a juristic reason for Michelle's deprivation? In my view, it cannot. This is because the applicable statutory provisions do not require, either expressly or implicitly, that a beneficiary keep the proceeds *as against a plaintiff, in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death*. By not ousting prior contractual or equitable rights that third parties may have in such proceeds, the *Insurance Act* allows an irrevocable beneficiary to take insurance money that may be subject to prior rights and therefore does not give such a beneficiary any absolute entitlement to that money (*Shannon*, at p. 461). Put simply, the statute required that the Insurance Company pay Risa, but it did not give Risa a right to keep the proceeds as against Michelle, whose contract with Lawrence specifically provided that she would pay all of the premiums exclusively for her own benefit. Neither by direct reference nor by necessary implication does the statute either (a) foreclose a third party who

stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment claim against the designated beneficiary — whether revocable or irrevocable — or (b) preclude the imposition of a constructive trust in circumstances such as these (see *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (C.A.); see also *KBA Canada*).

[74] On this basis, the applicable *Insurance Act* provisions are distinguishable from other legislative enactments that have been found to preclude recovery, such as valid statutory provisions requiring the payment of taxes to the government (see *GST Reference*, at pp. 476-77; *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65 (C.A.), at p. 69, aff'd [1991] 3 S.C.R. 593). In that context, the plaintiff's unjust enrichment claim must fail because the legislation permits the defendant to be enriched even when the plaintiff suffers a corresponding deprivation. The same cannot be said about the statutory framework at issue in this case, however; there is nothing in the *Insurance Act* that justifies the fact that Michelle, who is contractually entitled to claim the policy proceeds, is nevertheless deprived of this entitlement for Risa's benefit.

[75] Moreover, in my view, the fact that *Shannon* was decided prior to *Soulos* and *Garland* is of no moment (Court of Appeal decision, at paras. 84 and 89). While those cases add to our understanding of the law on constructive trusts and unjust enrichment, they do not in any way undermine the holding in *Shannon* with respect to the effect of the *Insurance Act* in circumstances such as these.

[76] The majority below came to the opposite conclusion on this issue. Having considered the legislative regime governing beneficiary designations in Ontario, Blair J.A. held that the *Insurance Act* framework "lean[s] heavily in favour of payment of the proceeds of life insurance policies to those named as irrevocable beneficiaries, whereas it continues to recognize the right of an insured, at any time prior to such a designation, to alter or revoke a beneficiary who does not fall into that category" (para. 83). On this basis, he concluded that the legislative regime under which Risa had been designated as the irrevocable beneficiary of Lawrence's life insurance policy supplied a juristic reason for her receipt of the proceeds, since it constituted both a disposition of law and a statutory obligation (para. 99).

[77] With respect, I disagree with two aspects of Blair J.A.'s reasons. First, he framed the issue as being whether the applicable *Insurance Act* provisions, pursuant to which Risa had been designated as irrevocable beneficiary, provided a juristic reason for her receipt of the insurance proceeds (paras. 26(iii) and 83). This, in my view, is the wrong perspective from which to approach this third stage of the unjust enrichment analysis. As stated above, the authorities indicate that the court's inquiry should focus not only on why the defendant received the benefit, but also on whether the statute gives the defendant the right to retain the benefit against a correspondingly deprived plaintiff — in this case, whether the *Insurance Act* extinguishes an unjust enrichment claim brought by a plaintiff at whose expense the named beneficiary was enriched (*GST Reference*, at p. 477; *Kerr*, at para. 31). And given the view expressed earlier in these reasons, it seems to me that the *Insurance Act* does not.

[78] Second, Blair J.A. placed a significant degree of emphasis on the distinction between revocable and irrevocable beneficiaries, and on the certainty and predictability associated with the statutory regime governing irrevocable designations. While it is clear that an irrevocably designated beneficiary has a "statutory right to remain as the named beneficiary" and is therefore "entitled to receive the insurance moneys unless he or she consents to being removed" (para. 82), I am still not persuaded that s. 191 of the *Insurance Act* can be interpreted as barring the possibility of restitution to a third party who establishes that this irrevocable beneficiary cannot, in good conscience, retain those monies in the face of that third party's unjust enrichment claim. To borrow the words of Professors Maddaugh and McCamus, "the fact that the insurer is directed by statute, implicitly if not directly, to pay the insurance monies to the irrevocable beneficiary, does not preclude recovery by the other intended beneficiary where retention of the monies by the irrevocable beneficiary would constitute an unjust enrichment" (*The Law of Restitution*, at p. 35-16). Therefore, the fact that Risa was designated pursuant to s. 191(1) of the *Insurance Act*, as opposed to s. 190(1), does not assist her against Michelle in the circumstances of this case.

[79] I would also observe that the majority below declined to "go so far as to say that the designation of a beneficiary as an irrevocable beneficiary under the *Insurance Act* invariably trumps a prior claimant" (para. 91), but nevertheless found that it did in this case. It is with this latter statement that I would disagree; as outlined above, my view is that the statutory scheme does not prevent a claimant with a prior

contractual entitlement from succeeding in unjust enrichment against the designated beneficiary.

[80] My colleagues take the position that the *Insurance Act* provides a juristic reason for Risa's enrichment because it specifically provides that the proceeds, once paid to the irrevocable beneficiary, are immune from attack by the insured's creditors. They say that because "Michelle's rights are contractual in nature, she is a creditor of Lawrence's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds" (para. 122). While there is no dispute that Michelle may have a claim against Lawrence's estate, my view is that she is *also* a person at whose expense Risa has been enriched — and therefore a plaintiff with standing to claim against Risa in unjust enrichment. And while the *Insurance Act* specifically precludes claims by creditors suing on the basis of some obligation owed by the insured's estate, it does not state "with irresistible clearness" that a claim *in unjust enrichment* — i.e. a claim based on a different cause of action — brought by a plaintiff who also has a contractual entitlement to claim the insurance proceeds must necessarily fail as against the named beneficiary.

[81] For all of the foregoing reasons, I would echo the conclusion arrived at by Lauwers J.A., dissenting in the court below, that "[Michelle's] entitlement to the insurance proceeds as against [Risa] is neither precluded nor affected by the operation of the *Insurance Act*", with the result that this case "falls outside the category of

disposition of law as a juristic reason to permit [Risa] to retain the life insurance proceeds" (para. 229).

[82] Since there is no suggestion that any other established category of juristic reason would apply in these circumstances, my conclusion at this first stage is that Michelle has made out a *prima facie* case.

(b) *Second Stage — Policy Reasons Militate in Favour of Michelle*

[83] The second stage of the juristic reason analysis affords the defendant an opportunity to rebut the plaintiff's *prima facie* case by establishing that there is some residual reason to deny recovery. At this stage, various other considerations come into play, like the parties' reasonable expectations and moral and policy-based arguments — including considerations relating to the way in which the parties organized their relationship (*Garland*, at paras. 45-46; *Pacific National Investments*, at para. 25; *Kerr*, at paras. 44-45).

[84] It is clear that both parties expected to receive the proceeds of the life insurance policy. Pursuant to the Oral Agreement, Michelle had a contractual right to remain designated as beneficiary so long as she continued to pay the premiums and kept the policy alive for the duration of Lawrence's life. Although she could have better safeguarded her interests by requiring Lawrence to designate her irrevocably, her expectation with respect to the insurance money — rooted in the Oral Agreement — is clearly reasonable and legitimate.

[85] Risa, by contrast, expected to receive the insurance money upon Lawrence's death by virtue of the fact that she had been validly designated as irrevocable beneficiary. Because Risa was designated after Lawrence and Michelle entered into the Oral Agreement, however, I am of the view that her expectation cannot take precedence over Michelle's *prior contractual right* to remain named as beneficiary, regardless of whether Risa knew that this was actually the case. To echo the findings of the application judge:

> While there is no evidence that [Risa] knew that [Michelle] was paying the premiums on the Policy, she was aware that [Lawrence] was not in a position to do so. She says that she believed that [Lawrence's] brother was paying the premiums, but there is nothing in the record regarding the brother's motivation or intentions that would make [Risa's] belief in such action reasonable. [para. 49]

[86] Moreover, I am not persuaded that the oral nature of the agreement between Michelle and Lawrence undermines Michelle's expectation or serves as a public policy reason that favours Risa's retention of the proceeds. The legal force of unwritten agreements has long been recognized by common law courts. And while "kitchen table agreements" may in some cases result in situations where parties neither understand nor intend the legal significance of their agreement, this is not such a case; the parties do not dispute the finding that Michelle and Lawrence did in fact have an Oral Agreement that the former would pay the premiums on the policy and, in exchange, would be entitled to the proceeds of the policy upon the latter's death (Superior Court decision, at para. 17; Court of Appeal decision, at para. 22). Indeed, the existence of

the Oral Agreement is quite clearly corroborated by Michelle's payment of the premiums following her separation from Lawrence.

[87] As a final point, it appears to me that the residual considerations that arise at this stage of the *Garland* analysis favour Michelle, given that her contribution towards the payment of the premiums actually kept the insurance policy alive and made Risa's entitlement to receive the proceeds upon Lawrence's death possible. Furthermore, it would be bad policy to ignore the fact that Michelle was effectively tricked by Lawrence into paying the premiums of a policy for the benefit of some other person of his choosing.

[88] For the foregoing reasons, I would conclude that Risa has not met the burden of rebutting Michelle's *prima facie* case. It follows, therefore, that Michelle has made out each of the requisite elements of the cause of action in unjust enrichment.

B. *Appropriate Remedy: Imposition of a Constructive Trust*

[89] The remedy for unjust enrichment is restitutionary in nature and can take one of two forms: personal or proprietary. A personal remedy is essentially a debt or a monetary obligation — i.e. an order to pay damages — that may be enforced by the plaintiff against the defendant (*Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, at p. 47). In most cases, this remedy will be sufficient to achieve restitution, and it can therefore be viewed as the "default" remedy for unjust enrichment (*Lac Minerals*, at p. 678; *Kerr*, at para. 46).

[90] In certain cases, however, a plaintiff may be awarded a remedy of a proprietary nature — that is, an entitlement "to enforce rights against a particular piece of property" (McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 1295). The most pervasive and important proprietary remedy for unjust enrichment is the constructive trust — a remedy which, according to Dickson J. (as he then was),

> is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement.

(*Pettkus*, at pp. 843-44)

[91] While the constructive trust is a powerful remedial tool, it is not available in *all* circumstances where a plaintiff establishes his or her claim in unjust enrichment. Rather, courts will impress the disputed property with a constructive trust only if the plaintiff can establish two things: first, that a personal remedy would be inadequate; and second, that the plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed (*PIPSC*, at para. 149; *Kerr*, at paras. 50-51; *Peter*, at p. 988). And even where the court finds that a constructive trust would be an appropriate remedy, it will be imposed only to the extent of the plaintiff's proportionate contribution (direct or indirect) to the acquisition, preservation, maintenance or improvement of the property (*Kerr*, at para. 51; *Peter*, at pp. 997-98).

[92] The application judge concluded that Michelle had established an entitlement to the entirety of the proceeds of the life insurance policy on the basis of unjust enrichment, and he accordingly ordered that Risa held those proceeds on constructive trust for Michelle (para. 52). He specifically found that Michelle had demonstrated a "clear 'link or causal connection' between her contributions and the proceeds of the Policy that continued for the entire duration of the Policy" (para. 50).

[93] While my analysis of Michelle's right to recover for unjust enrichment differs from that of the application judge, I see no reason to disturb his conclusion regarding the propriety of a remedial constructive trust in these circumstances. Ordinarily, a monetary award would be adequate in cases where the property at stake is money. In the present case, however, the disputed insurance money has been paid into court and is readily available to be impressed with a constructive trust. Furthermore, ordering that the money be paid out of court to Risa, and then requiring Michelle to enforce the judgment against Risa personally, would unnecessarily complicate the process through which Michelle can obtain the relief to which she is entitled. It would also create a risk that the money might be spent or accessed by other creditors in the interim.

[94] Moreover, the application judge found that Michelle's payment of the premiums was causally connected to the maintenance of the policy under which Risa was enriched. Because each of Michelle's payments kept the policy alive, and given that Risa's right as designated beneficiary necessarily deprived Michelle of her

contractual entitlement to receive the entirety of the insurance proceeds, I would impose a constructive trust to the full extent of those proceeds in Michelle's favour.

[95] This disposition of the appeal renders it unnecessary to determine whether this Court's decision in *Soulos* should be interpreted as precluding the availability of a remedial constructive trust beyond cases involving unjust enrichment or wrongful acts like breach of fiduciary duty. Similarly, the extent to which this Court's decision in *Soulos* may have incorporated the "traditional English institutional trusts" into the remedial constructive trust framework is beyond the scope of this appeal. While recognizing that these remain open questions, I am of the view that they are best left for another day.

VI. Conclusion

[96] I would therefore allow the appeal without costs and order that the proceeds of the policy, with accrued interest, be impressed with a constructive trust in favour of Michelle and accordingly be paid out of court for her benefit.

The following are the reasons delivered by

GASCON AND ROWE JJ. (dissenting) —

I. Introduction

[97] This appeal is, without question, a difficult one. Michelle and Risa are both innocent victims of Lawrence's breach of contract and they equally invite substantial sympathy. Michelle paid approximately $7,000 to keep alive an insurance policy on the promise she would receive the proceeds if Lawrence died within its term. Risa cared for and supported Lawrence for 13 years and expected, as irrevocable beneficiary, that she would receive support should he die. With Lawrence's broken promise now discovered, Michelle claims a constructive trust over the proceeds on the basis of unjust enrichment or "good conscience", while Risa insists her irrevocable beneficiary designation is unassailable.

[98] It is an unfortunate reality that a person's death is sometimes accompanied by uncertainty and conflict over the wealth that has been left behind. The resulting litigation can tie up funds that the deceased intended to support loved ones for a significant period of time, adding financial hardship to personal tragedy. In an attempt to ensure that life insurance proceeds could be free from such strife, the Ontario legislator empowered life insurance policy holders to designate an "irrevocable beneficiary" (*Insurance Act*, R.S.O. 1990, c. I.8, s. 191(1)). Such a designation ensures that the policy proceeds could be disbursed free from claims against the estate, giving certainty to insured, insurer, and beneficiary alike. This provision should be given full effect.

[99] There is no basis to impose a constructive trust in the circumstances of this case. We agree with Blair J.A. of the Ontario Court of Appeal that Michelle has not

established that a "good conscience" constructive trust should be imposed (2017 ONCA 182, 134 O.R. (3d) 721). We rely on his reasons to dispose of this ground of appeal. We also agree that Michelle has failed to establish a claim in unjust enrichment. On this issue, we respectfully part ways with the majority of this Court on whether unjust enrichment can be made out on these facts. Michelle has only asserted contractual rights to the proceeds and has not established a proprietary or equitable interest in the proceeds themselves. In our view, there is no correlative deprivation between Michelle's failed contractual expectations and Risa's enrichment. In addition, the *Insurance Act* provides clear juristic reason for any enrichment Risa could have received through Michelle's loss as a creditor of Lawrence's insolvent estate. Opening up irrevocable beneficiary designations to challenges by an insured's creditors risks a recipe for litigation — a situation the legislator clearly intended to avoid. As such, for the reasons that follow, we would dismiss the appeal.

II. Analysis

A. *Characterizing Michelle's Claim*

[100] The majority of the Ontario Court of Appeal was correct in characterizing Michelle's claim as being that she had a contract with Lawrence for the policy proceeds and that she was using this contract to be entitled to restitution of the funds on the principle of unjust enrichment. According to Michelle's affidavit, the contract was to ensure that she would be "entitled to receive the Policy benefits" in exchange for paying the premiums (A.R., at p. 138). However, it is difficult to see how the contract she has

put into evidence creates a proprietary right in the proceeds. Simply being named as a beneficiary does not give one a right in the proceeds before the death of the insured. The right to claim the proceeds only crystalizes upon the insured's death. Further, as a revocable beneficiary, Michelle had no right to contest the redesignation outside of a claim against Lawrence for breach of contract. Thus, at the time of Lawrence's death, the only rights that Michelle possessed in relation to the life insurance contract were her contractual rights.

[101] On different pleadings and a more developed record, Michelle may have been able to establish that the contract gave her a proprietary interest in the proceeds through an equitable assignment of Lawrence's chose in action. The Ontario Court of Appeal correctly found that this avenue was never properly put to the application judge, and Michelle has not otherwise pursued this line of argument. It follows that, with only contractual rights asserted, Michelle cannot be understood to have a proprietary right in the proceeds. Rather, her agreement with Lawrence must be understood as limited to a contractual right to be maintained the named beneficiary of the policy while she paid the premiums. If Lawrence had died while she was designated as a beneficiary, Michelle would consequently receive the proceeds, but the contract itself cannot be seen to give Michelle a right in the proceeds themselves.

[102] Of course, Lawrence breached his contractual obligations by redesignating Risa as an irrevocable beneficiary, entitling her to the policy proceeds on his death. While Michelle would have a claim against Lawrence's estate for breach of contract,

the estate's lack of assets has rendered any such recourse fruitless. Instead, Michelle's claim before this Court is to reverse the purported unjust enrichment of Risa, an innocent beneficiary of Lawrence's breach of contract.

[103] Risa has argued that unjust enrichment should not be a vehicle for protecting expectation interests in a valid contract. Indeed, the availability of unjust enrichment for indirect claims against the innocent beneficiaries of a breach of contract is a matter of significant academic controversy. Professor Birks, while a general proponent of the availability of indirect claims, has posited that there is a general rule against "leap-frogging" out of an initially valid contract through unjust enrichment (P. Birks, *Unjust Enrichment* (2nd ed. 2005), at p. 90). One reason he suggests for this rule is that a contracting party "must not wriggle round the risk of insolvency" inherent in contractual relations (p. 90). Professor Burrows also recognizes such a rule, given the logical difficulty of establishing a causal link between the claimant's deprivation and the defendant's benefit (A. Burrows, *The Law of Restitution* (3rd ed. 2011), at pp. 70-71). In a similar vein, Professor Virgo has identified a "privity principle" to unjust enrichment that means indirect recipients of a benefit will generally not be liable for restitution (G. Virgo, *The Principles of the Law of Restitution* (3rd ed. 2015), at p. 105). The leading text on restitution from Lord Goff and Professor Jones, by contrast, suggests that there is no such general prohibition and that causation can be made out on a simple "but for" causation analysis (*Goff & Jones: The Law of Unjust Enrichment* (9th ed. 2016), by C. Mitchell, P. Mitchell and S. Watterson, at pp. 77 and 176). Yet, they also caution that courts should be hesitant to make such awards where they would

have the effect of undermining an insolvency regime or avoid the contractual allocation of risk (p. 77).

[104] There is sparse Canadian authority on this matter, and we see no support for the view that unjust enrichment protects an individual's contractual expectations against innocent third parties. Certainly, this Court has recognized that the law of restitution ensures that where a plaintiff has been deprived of wealth that is either in their possession or would have accrued for their benefit, it is restored to them (*Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-3). However, restitution awards for expected property have generally been where there was a breach of an equitable duty by a defendant (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 668-70). In these cases, a defendant, through some wrongdoing, intercepts the property otherwise destined for the plaintiff. In the words of *Lac Minerals*: "but for [the defendant's] interception", the plaintiff "would have acquired the property" (p. 669). Critically, the plaintiff has no recourse against the third party. Its only claim is to the very thing in the defendant's hands. In our view, this is distinguishable from where the plaintiff holds a valid contractual expectation vis-à-vis the third party (here, Lawrence) that they would receive property, but that expectation was frustrated by an insolvency that prevents full compensation for a breach of contract. Our takeaway from *Lac Minerals* is encapsulated concisely by Professor McInnes' views on expected property awards:

> The plaintiff is entitled to demand receipt of a benefit which, as a matter of legal certainty, would have been obtained from a third party, <u>but for the</u>

> defendant's intervention. The situation will be much different, however, if relief is available merely because the defendant realized a gain through the non-wrongful exploitation of an earning opportunity. [Emphasis added.]

(M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 179)

To allow plaintiffs to wield contractual expectations against innocent third parties risks "drift[ing] dangerously away from reversing unjustified transfers and toward stripping non-wrongful profits" (McInnes, at p. 183).

[105] Michelle has raised a number of so-called "disappointed beneficiary" cases in support of her claim. While many of these involved such indirect claims for unjust enrichment, none support using unjust enrichment to indirectly enforce a failed contractual expectation to receive policy proceeds. In many of these cases, the insured was alleged to have intended to redesignate the beneficiary but failed to do so before they died (see, e.g., *Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 10; *Holowa Estate v. Stell-Holowa*, 2011 ABQB 23, 330 D.L.R. (4th) 693, at para. 14; *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65, at para. 18; *Roberts v. Martindale* (1998), 55 B.C.L.R. (3d) 63 (C.A.), at para. 17). Where courts have made awards for unjust enrichment, it has been where the defendant renounced their right to any benefit (*Holowa*, at paras. 23 and 25; *Roberts*, at para. 26). In our view, the defendant's renunciation of rights to the proceeds render these cases distinguishable and of little assistance.

[106] More germane to this appeal are cases where the insured redesignated the beneficiary in breach of an equitable or legal obligation (see, e.g., *Milne Estate v. Milne*, 2014 BCSC 2112, 54 R.F.L. (7th) 328, at para. 3; *Ladner v. Wolfson*, 2011 BCCA 370, 24 B.C.L.R. (5th) 43, at para. 3; *Schorlemer Estate v. Schorlemer* (2006), 29 E.T.R. (3d) 181 (Ont. S.C.J.), at para. 5; *Steeves v. Steeves* (1995), 168 N.B.R. (2d) 226 (Q.B.), at para. 29; *Gregory v. Gregory* (1994), 92 B.C.L.R. (2d) 133 (C.A.); *Shannon v. Shannon* (1985), 50 O.R. (2d) 456 (H.C.)). In these cases, courts have generally awarded the proceeds where the insured was found to have been bound by an equitable obligation or where the insured's rights were otherwise held in trust for the plaintiff's benefit. For instance, in *Schorlemer* the insured had designated the defendant as the beneficiary in breach of a written separation agreement, and the Ontario Superior Court of Justice found that the insured's rights were held in trust for the plaintiff. Similarly, in *Gregory*, *Milne* and *Steeves*, where the insured redesignated the beneficiary in breach of a court order, the court order was found to have imposed a trusteeship on the insured for the benefit of the plaintiff. *Shannon* did involve a broken contractual agreement; however, as we detail below, we understand McKinlay J.'s reasons as most consistent with having found that the written separation agreement itself created a trust. Regardless, the serious issues with enforcing contractual rights through unjust enrichment were not given consideration in *Shannon*.

[107] As such, the present appeal presents this Court with difficult questions about both the nature of how a transfer of wealth is measured in unjust enrichment and how such claims should be treated in the juristic reason analysis. To be clear, we do

not wish to make any general statements regarding so-called "leap-frogging" cases. But in applying the facts of this case, as pled and proven, to the current law of unjust enrichment, we remain unconvinced that Michelle is entitled to a constructive trust for the whole of the proceeds.

B. *Corresponding Deprivation*

[108] In an action for unjust enrichment, a plaintiff must show that they suffered a corresponding deprivation. To establish a corresponding deprivation, there must be a transfer of wealth on a straightforward economic basis (*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 35; *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 990). While the clearest examples of such transfers are where there is payment and receipt of money (e.g. *Garland*, *Air Canada*), it can also be made out to the extent of the plaintiff's expenditure for the defendant's benefit (e.g. *Peter*) or where the defendant has received property destined for the plaintiff but for their wrongdoing (e.g. *Lac Minerals*). In these types of cases, the issue of correspondence may pass without comment, but the importance of this structure must be kept firmly in mind when examining other cases where the nexus between the plaintiff and defendant is less obvious. Whatever factual matrix gives rise to an apparent transfer of wealth from the plaintiff to the defendant, it is crucial that a defendant's enrichment in fact corresponds to the plaintiff's deprivation. As explained by this Court in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, "the enrichment and detriment elements are the same thing from different

perspectives" (para. 151). Enrichment and deprivation are "essentially two sides of the same coin" (*Peter*, at p. 1012).

[109] The importance of the bilateral nature of unjust enrichment is highlighted by the fact that, unlike for many other causes of action, unjust enrichment will permit a plaintiff to recover from a defendant without any wrongdoing on the latter's part. For example, a defendant will be liable to return to the plaintiff any payments made to them by mistake. Where liability attaches to the defendant without any wrongdoing, the normative basis for such liability is strictly limited. As Professor Smith explains:

> Strict liability in unjust enrichment depends on both a material gain to the defendant and a material loss to the plaintiff. Moreover, the loss and the gain must be two sides of the same coin; there must always be a transfer of wealth from plaintiff to defendant. Only in this way can we justify liability through a one-sided normative flaw in the transaction. . . . Mere causal connection between plaintiff and defendant is not enough — any more than it is in negligence — because it does not carry enough normative force.

("Restitution: The Heart of Corrective Justice" (2001), 79 *Tex. L. Rev.* 2115, at p. 2156)

The correspondence between the deprivation and the enrichment, while seemingly formalistic, is fundamental. Proper correspondence, Professor McInnes notes, "is th[e] connection between the parties — a plus and a minus as obverse manifestations of the same event — that uniquely identifies the plaintiff as the proper person to seek restitution" (p. 149).

[110] The logic that permits recovery in the circumstances of unjust enrichment also conditions the measurement of any restitution. The defendant cannot be required

to "return" to the plaintiff more than what they have received, even if the plaintiff suffered a loss greater than the defendant's gain. As an innocent party, there is no basis to require the defendant to return anything more. Inversely, the plaintiff cannot collect more from the defendant than they have lost. It does not matter that the defendant benefited more than the plaintiff lost. The plaintiff only has standing in respect of losses they have suffered. Liability for unjust enrichment is limited to "the lesser of the two amounts, the enrichment or the impoverishment" (*Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 77, cited in McIness, at p. 183).

[111] It is sufficiently clear that but for Michelle's payments, the policy would have lapsed, and but for Lawrence's breach of contract, she would have been the beneficiary at the time of his death. But, in our view, these facts are not enough to establish that the deprivation and the enrichment are corresponding. Risa's enrichment was not *at the expense of* Michelle. This is best illustrated by a hypothetical: suppose that Lawrence's estate was solvent. In that case, Risa would have retained her enrichment — the insurance proceeds — and Michelle would have suffered no deprivation, as she would hold a cause of action for breach of contract that is worth the equivalent of the proceeds. How can there then be correspondence if the enrichment and the deprivation could, in theory, co-exist? Risa's enrichment is not *at the expense of* Michelle because Risa's enrichment is not dependent on Michelle's deprivation. What Risa received (a statutory entitlement to proceeds) is different from Michelle's deprivation (the inability to enforce her contractual rights) — they are not "two sides of the same coin". It is not enough for Michelle's impoverishment to be equal to Risa's

gain — they must be "necessarily equal" such that it is a "zero-sum game" (L. D. Smith, "Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991), 11 *Oxford J. Leg. Stud.* 481, at pp. 482-83 (emphasis added)).

[112] In this regard, we note that the majority seeks to establish a correspondence between Risa's enrichment and Michelle's deprivation on the basis that Michelle's contributions to the premium payments kept the policy alive. But the fact that Michelle preserved the policy does not inform whether her deprivation corresponds to Risa's enrichment. And even if Michelle's premium payments could generate sufficient correspondence, Michelle's deprivation should be limited to the extent of her contributions, not to her contractual expectations. Her deprivation is not measured by the value of the agreement that motivated her to pay the premiums. This principle is illustrated in this Court's decision in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575. In that case, the appellant sought to uphold an unjust enrichment claim against the City of Victoria for improvements it had made to public works pursuant to an agreement with the latter. The respondent city rezoned the appellant's development mid-project, which, the appellant argued, undermined the reason for having made the improvements. The fact that the appellant performed the work as a result of an agreement did not change the measure of the appellant's deprivation. The appellant's measure of restitution was not its expected profits under the agreement but rather only the cost of performing the work, which was effectively given gratuitously to the respondent. As such, even on the majority's understanding of

correspondence, Michelle's claim should be limited to the return of the premium payments.

[113] On our view of the matter, Michelle has not established a corresponding deprivation between Risa's entitlement to the policy proceeds and her failed contractual expectation to be named beneficiary. As Risa has admitted liability for the approximately $7,000 in policy premiums, there is no need for us to consider whether Michelle would have been able to properly establish a corresponding deprivation for that amount.

C. *Juristic Reason*

[114] Even if a corresponding deprivation is assumed, we do not come to the conclusion that Risa was unjustly enriched at Michelle's expense. This is because there is a juristic reason for Risa's enrichment: the provisions of the *Insurance Act*.

[115] In *Garland*, this Court made a choice as to the threshold for when a transfer of wealth should be reversed. Prior to *Garland*, Canadian courts had either followed this Court's direction in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, which prescribed a juristic reasons approach, or they applied the English approach, searching for an unjust factor to reverse an impugned transfer of wealth (*Garland*, at paras. 40-41). Faced with this division, Iacobucci J. affirmed the "distinctive Canadian approach" to juristic unjust enrichment (para. 42). Along with his clear preference for the juristic reason approach, Iacobucci J. was responsive to the criticisms of it. Recognizing the difficulty

of proving a negative — the absence of any juristic reason for a defendant's enrichment — Iacobucci J. formulated a two-stage approach to juristic reasons. At the first stage of the analysis, the plaintiff must show the absence of a juristic reason from a closed list of established categories. These include a disposition of law and a statutory obligation, among others. If the plaintiff establishes that there is no juristic reason from one of the established categories, there is a *prima facie* case for restitution. At the second stage of the analysis, the defendant may rebut the *prima facie* case by demonstrating that there is some other reason to deny recovery. While courts should look to "all of the circumstances of the transaction" in order to determine whether recovery should be denied, they are to have regard to two factors: ". . . the reasonable expectations of the parties and public policy considerations" (paras. 45-46).

[116] While the test is intended to be flexible and have the capacity to accommodate "changing perceptions of justice" (*Garland*, at para. 43; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788), it must be borne in mind that what prompted this articulation of the test was the need "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'" (*Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 43, citing *Garland*, at para. 40). As such, the reasonable expectations of the parties and public policy considerations must only be taken into account at the second stage of the analysis, provided that no established juristic reason is found (*Kerr*, at paras. 44-45). Simply put, if an established category of juristic reason applies, the analysis ends

and the claim for unjust enrichment fails. Reasonable expectations and public policy cannot oust an established category of juristic reason where it is found to apply.

[117] The unique circumstances of Michelle's restitutionary claim — being an indirect claim involving third parties — demands a sharper examination of the object of the juristic reason. That is, a juristic reason *for what*? The majority suggests at various points that a juristic reason must simultaneously provide a reason for the defendant's enrichment, and a reason why that enrichment must occur *at the expense of* the plaintiff. It is this approach that appears to lead the majority to place great weight on the distinction between the receipt and retention of a benefit. We remain unconvinced this is a helpful tack to take. Rather, we would simply say that a juristic reason need only provide reason for the defendant's enrichment, as has been consistently stated in past jurisprudence (*Kerr*, at para. 32; *Garland*, at para. 30; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 66; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848).

[118] One can readily see how this important aspect of juristic reason can be easily overlooked and has been largely unaddressed. In the paradigmatic cases of unjust enrichment where only two parties are involved, and a transfer is made directly between them, the questions of enrichment and impoverishment may be one and the same. For example, if a transfer occurs by way of a gift from the plaintiff to the defendant, the plaintiff's donative intent is both a juristic reason for the defendant's retention of the wealth, and a reason for the defendant's enrichment *at the expense of* the plaintiff. After

all, it was the plaintiff who intended the gift from their assets. In our view, the fact that in many cases the juristic reason for the defendant's enrichment simultaneously explains why that enrichment occurs at the expense of the plaintiff does not render this a requirement of the test for unjust enrichment.

[119] The situation is of course very different where multiple parties are involved and wealth is not transferred directly from one to another. In these cases, despite there being a reason that explains why each person is entitled to a particular thing and why another no longer is, it will be near impossible to find an explanation that can simultaneously capture both. The following example, while not a case of unjust enrichment, is instructive. A person who is given a car could sell it to another, who bears no relation to the original donor. The donor and purchaser are in effect legal strangers. In these situations, demanding a reason that simultaneously explains why the purchaser is entitled to the car and why the donor is no longer entitled to it imposes an impossible burden. Simply put, the reason the purchaser has the car is not the same reason the donor doesn't. The legal relationships of these individuals are mediated through other legal frameworks and actors and are not amenable to a single explanation. If the unjust enrichment analysis requires that juristic reasons have this kind of explanatory power, plaintiffs will almost always be successful in proving their absence in cases involving multiple parties and indirect transfers of wealth.

(1) The *Insurance Act* Establishes a Juristic Reason for Risa's Enrichment

[120] In this case, the issue at the first stage of the analysis is whether a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* provides a juristic reason for Risa's receipt and retention of the insurance proceeds. Arriving at an answer to this question requires an examination of the provisions of the *Insurance Act* and the legal relationships surrounding the (alleged) transfer. In our view, not only does the *Insurance Act* — in conjunction with the deceased's policy — specifically direct the payment of the proceeds to Risa, but it expressly contemplates doing so even in light of the very kind of claim advanced by Michelle.

[121] Section 191(1) of the *Insurance Act* provides that an insured may designate an irrevocable beneficiary under a life insurance policy, and thereby provide special protections to that beneficiary. From the moment an irrevocable beneficiary is designated, they have a right in the policy itself: the insurance money is not subject to the control of the insured or to the claims of his or her creditors and the beneficiary must consent to any subsequent changes to beneficiary designation. As it is undisputed that Risa was the validly designated irrevocable beneficiary of the policy, Risa is entitled to the proceeds free of all of the claims of Lawrence's creditors. Simply put, the direction of this comprehensive statutory scheme, in conjunction with the deceased's policy, constitutes a juristic reason for Risa's enrichment (*Chanowski v. Bauer*, 2010 MBCA 96, 258 Man. R. (2d) 244; *Richardson*; *Love*).

[122] The fact that Michelle had an agreement with Lawrence for the proceeds of the policy does not undermine the presence of this juristic reason. As Michelle's

rights are contractual in nature, she is a creditor of Lawrence's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds. Indeed, the *Insurance Act* explicitly protects irrevocable beneficiaries from the claims of the deceased's creditors. Section 191(1) provides that where an insured designates an irrevocable beneficiary, the insurance money "is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate". Thus, contrary to the suggestion of the majority, the *Insurance Act* does, with irresistible clarity, "preclude the existence of contractual . . . rights in those insurance proceeds" (Majority Reasons, at para. 70 (emphasis added)). The French version of s. 191(1) of the Act is equally clear stating that the proceeds "*ne peuvent être réclamées par les créanciers de l'assuré et ne font pas partie de sa succession*".

[123] The *Insurance Act*'s legislative history further supports Risa's retention of the insurance proceeds notwithstanding Michelle's claim. This history illustrates that the provisions of the *Insurance Act* were designed to protect the interests of beneficiaries in retaining the proceeds, and provide no basis whatsoever for a person paying the premiums to assume she would have any claim to the eventual proceeds. From the earliest days, the purpose of insurance statutes was in large part to securely provide for an insured's beneficiaries. In 1865, the then Province of Canada (which included what is now Ontario) passed legislation enabling any person to enter into a contract to insure his life for the benefit of his wife and children, with the proceeds free from the claims of any of their creditors (*An Act to secure to Wives and Children the benefit of Assurances on the lives of their Husbands and Parents*, S. Prov. C. 1865, 29

Vict., c. 17, ss. 3 and 5). Subsequently in 1884, as outlined in Risa's factum, "the legislation permitted a class of beneficiaries who were close family members of the insured (later known as 'preferred beneficiaries') to enforce the contract and to sue in their own right. This was effected by means of a statutory trust in favour of the preferred beneficiaries" (R.F., at para. 73; see also *An Act to Secure to Wives and Children the Benefit of Life Insurance*, S.O. 1884, c. 20, s. 5; E. H. McVitty, *A Commentary on the Life Insurance Laws of Canada* (1962), at p. 36). Subsequent versions of the insurance statutes in the province also provided protection to "beneficiaries for value", people who gave valuable consideration to the insured in exchange for designation as the beneficiary (*The Insurance Act*, R.S.O. 1960, c. 190). However, even under this regime, beneficiaries for value were only protected if a written description of the designation had been made (ss. 164(1) and 165).

[124] In 1962, significant principled changes were made to the *Insurance Act*, including the abolition of statutory trusts and beneficiaries for value (McVitty, at pp. 36-39 and 137-38). Rather than protect beneficiaries' interests by means of a statutory trust, the modern *Insurance Act* provided revocable beneficiaries with a statutory cause of action to enforce insurance contracts for their own benefit against the insurer (*Insurance Act*, s. 195). The modern *Insurance Act* also "shifted the regime away from granting beneficiaries any control or proprietary interests in the proceeds. The sole exceptions were those beneficiaries validly designated by the insured as irrevocable beneficiaries — a status newly introduced in 1962 — and valid assignees" (R.F., at para. 75). These changes to the insurance scheme in Ontario represent the legislature's

continued intention to protect beneficiaries from the claims of the insured's creditors, and to underline that a beneficiary's entitlement to the proceeds is not undermined by her status as a "mere volunteer". A beneficiary is not more or less entitled on the basis of her contribution to the policy's premiums. The *Insurance Act* is deliberately indifferent to the source of the premium payments, and renders the actions of the payers irrelevant as far as the beneficiaries are concerned.

[125] Of course, beneficiaries who pay the premiums are not left completely vulnerable by the Act. These beneficiaries — like any beneficiary — can secure their priority over the insurance proceeds by requesting either designation as the irrevocable beneficiary of a policy, or requesting an assignment of the policy. This allows a promisee to protect themselves from the risk of contractual breach. Absent these steps, there are no guarantees for beneficiaries who pay premiums: the *Insurance Act* is explicitly and deliberately indifferent to the source of the premium payments.

[126] Consistent with the scheme, courts have declined to order restitution of insurance proceeds where plaintiffs pay the policy premiums under the mistaken belief that they are the named beneficiary. In *Richardson*, a plaintiff disputed the payment of her husband's insurance policy proceeds to his former wife, the defendant, who had remained the named beneficiary on the policy. The plaintiff argued that she had paid the premiums of the policy under the mistaken belief that she was in fact the named beneficiary, and therefore, that the defendant was unjustly enriched by the retention of the proceeds. The Ontario Court of Appeal upheld the motion judge's decision denying

the plaintiff's claim in unjust enrichment. The plaintiff's contribution to the premium payments did not render the defendant's enrichment unjust. There was a juristic reason for her enrichment: the designation of the defendant as the beneficiary of the policy.

[127] If we were to impose on juristic reasons a requirement that they explain simultaneously a defendant's enrichment *and* a plaintiff's loss, it is unclear to us how the *Insurance Act* could then ever constitute a juristic reason in a third-party dispute relating to insurance proceeds. If plaintiffs can establish some correspondence in relation to a portion of the proceeds — e.g. through mistaken premium payments — the *Insurance Act* will likely never bar their claim to unjust enrichment. In our view, this is an especially troubling result in respect of the legislative history of the *Insurance Act*; it would undermine a deliberate legislative choice to divorce entitlement to the proceeds from the payment of the premiums.

[128] On the basis of this view of juristic reason, the majority disagrees that the *Insurance Act* constitutes a juristic reason in this case. On their view, this is because the *Insurance Act* does not explicitly oust the prior contractual claims of third parties to the policy proceeds. They rely on the Ontario High Court of Justice's decision in *Shannon*, finding that it supports the proposition "that while the *Insurance Act* may provide for the beneficiary's entitlement to payment of the proceeds, it 'does not specifically preclude the existence of rights outside its provisions'", including contractual entitlements such as Michelle's (Majority Reasons, at para. 72).

[129] We agree with Blair J.A., that it is unclear what proposition *Shannon* actually supports. In that case, the plaintiff argued that the provisions of the separation agreement became impressed with a trust, and that the designation of other beneficiaries in breach of that agreement constituted a disposition of trust property. We would note that the only way the designation of another beneficiary could constitute a disposition of trust property is if the trust arose at the time the agreement was concluded. Justice McKinlay explained that it would be unjust for the "plaintiff's clear rights under an agreement with her husband for good consideration [to] be taken away in favour of a niece and nephew who have given no consideration for those rights" (p. 461). She found that the proceeds of the insurance policy were impressed with a trust in favour of the plaintiff. She did not specify whether the trust was intentional (constituted at the time of formation) or constructive (remedial). To the extent the reasons suggest that the designation of beneficiaries according to the *Insurance Act* does not constitute a juristic reason because the beneficiaries are mere volunteers, we reject this argument. The very purpose of the *Insurance Act* is to distribute the policy proceeds to beneficiaries because of their designation as such, irrespective of their contribution directly to premiums or to the insured.

[130] Instead, *Shannon* and the jurisprudence that has followed can be understood to support the proposition that on the facts of a given case a separation agreement can be found to create either a trust over, or an equitable obligation in, the insurance proceeds. Indeed, this is the proposition for which *Shannon* is consistently cited. In *Fraser v. Fraser* (1995), 9 E.T.R. (2d) 136, the British Columbia Supreme

Court, citing *Shannon*, found that "the covenant to maintain the beneficiary in the separation agreement is tantamount to an irrevocable designation of the beneficiary under the provisions of the *Insurance Act*" (para. 18). In *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2004), 70 O.R. (3d) 61, the Ontario Court of Appeal found that pre-retirement death benefits in a vested Ontario Teachers' Pension Plan were validly assigned to a former spouse of the plan member under a separation agreement and that "a subsequent spouse who marries after a valid assignment of a pre-retirement death benefit to a former spouse should not reasonably expect to receive the already-assigned interest" (para. 62 (emphasis added)). In *Snider v. Mallon*, 2011 ONSC 4522, 3 R.F.L. (7th) 228, the Ontario Superior Court, citing *Shannon*, declared that "[i]t is therefore a well settled principle that an undertaking in a separation agreement creates a trust interest which will operate to protect the beneficiary should the undertaking party fail to honour his or her commitment" (para. 13). So too in *Bielny v. Dzwiekowski*, [2002] I.L.R. ¶I-4018 (Ont. S.C.J.), where the court found that the "law relating to the irrevocable designations of beneficiaries in separation agreements has been settled for some time" (para. 8), aff'd [2002] O.J. No. 508 (QL) (C.A.). Unlike these cases, Michelle's interest in the policy does not arise from the contract itself, but from its breach.

[131] Therefore, we do not take *Shannon* to be authority for the proposition that a prior agreement to be designated the beneficiary of an insurance policy, without more, is sufficient to undermine the operation of an established juristic reason. A contractual entitlement is insufficient to create this kind of interest in the policy or its proceeds.

This principle is illustrated in *Milne*: prior to passing away, a deceased, in breach of an order from a family law proceeding, changed the beneficiary designation from the plaintiff, his former spouse, to his current spouse. The former spouse argued that as a result of the breach of the order, which she likened to a contract in the family law context, she was entitled to the proceeds. The court found that while she was not entitled to the proceeds, she was entitled to damages for the contractual breach in the amount of the proceeds. While this case differs from the present appeal in that the estate's solvency was not in issue, it is nonetheless instructive. Similarly, in *Kang v. Kang Estate*, 2002 BCCA 696, 44 C.C.L.I. (3d) 52, the appellant claimed that her husband promised to name her as the designated beneficiary on his life insurance policy if she came with him to Canada. She accompanied her husband to Canada, but he retained his sister as the designated beneficiary under his policy of life insurance. The Court of Appeal rejected the appellant's claims, distinguishing the case from others in which "trial judges have imposed a constructive trust to remedy a husband's breach of fiduciary duty owed to his wife after separation" flowing from the covenant in a separation agreement (para. 9). On its own, the agreement was not sufficient to give the plaintiff any entitlement to the proceeds, and ground a claim in unjust enrichment.

[132] The majority attaches significance to the fact that Michelle specifically contracted for the proceeds of the policy. She continued to pay the policy's premiums on this basis. Put another way, in the view of the majority, Michelle is not an ordinary creditor of Lawrence's estate; rather, she is in a special position vis-à-vis the policy proceeds. Respectfully, we cannot agree that this changes the nature of Michelle's

claim to the policy proceeds. In immunizing beneficiaries from the claims of the insured's creditors, the *Insurance Act* does not distinguish between types of creditors. Creditors of the insured's estate simply do not have a claim to the insurance proceeds. There is no basis to carve out a special class of creditor who would be exempt from the clear wording of the *Insurance Act*. Bearing in mind the history of the relevant provisions of the *Insurance Act* and their clarity, neither Michelle's contributions to the policy, nor her contract with Lawrence are sufficient to take her outside the comprehensive scheme and grant her special and preferred status.

[133] That being said, we do not dispute Blair J.A.'s statement that the "designation of a beneficiary as an irrevocable beneficiary under the *Insurance Act* [does not] invariably trum[p] a prior claimant" (para. 91). Whether the *Insurance Act* fails to trump a prior claimant depends on the character of that prior claim. Where by some agreement, or otherwise, the insured has "placed the policy or its proceeds beyond his or her ability to deal with them, and, therefore, beyond his or her ability to make the purported irrevocable designation", the *Insurance Act* will not constitute a juristic reason for a beneficiary's enrichment (para. 91). For example, if a claimant successfully established the existence of a trust over the policy or its proceeds prior to the designation of an irrevocable beneficiary, her beneficial or proprietary interest in the policy would have prevented the insured from designating an irrevocable beneficiary. Any such designation would be invalid. In those circumstances the *Insurance Act* could not constitute a juristic reason for a defendant's enrichment.

[134] But in the normal course, a contract between two parties does not at the time of the contract formation, be it for legal or equitable reason, prevent a promisor from dealing with the property that is the subject matter of the contract. In *Ladner Estate, Re*, 2004 BCCA 366, 40 B.C.L.R. (4th) 298, the British Columbia Court of Appeal considered the appropriate remedy for the deceased's breach of his covenants in a separation agreement to pay permanent spousal support to the appellant, and to maintain insurance to secure payment of that support. Instead of acting in accordance with the agreement, the deceased made the insurance proceeds of his policies payable to his estate, and thus available for estate administration costs, and vulnerable to the claims of unsecured creditors. The appellant argued that contract law does not permit a party (or their estate) to gain an advantage from wrongful conduct. The Court of Appeal was unpersuaded, finding that a promisor's wrongdoing "does not confer a property right or priority on the other party to the contract" (para. 23).

[135] This is indeed reflected in the reasons of the majority, which acknowledge that in the regular course, Michelle could pursue a remedy for breach of contract against Lawrence's estate. It is only because Lawrence's estate has no significant assets to satisfy an order for payment that any claim is being made to the insurance proceeds. As such, even on their view, Michelle's interest specifically in the policy proceeds does not crystallize until Lawrence's death, that is, long after Lawrence designated Risa as the irrevocable beneficiary. Thus, contrary to Lauwers J.A.'s dissenting reasons at the court below, the agreement did not place the policy or its proceeds beyond Lawrence's ability to deal with them.

[136] We note that the thrust of the cases on which Michelle seeks to rely for her position recognize either explicitly or implicitly that unjust enrichment is available only where there is some proprietary or equitable entitlement to the insurance proceeds. In *Steeves*, the New Brunswick Queen's Bench found that the insured "held the inchoate proceeds of the insurance policy in the event of his death in trust for the plaintiff" (para. 36). In *Schorlemer*, the Ontario Superior Court of Justice summarized the relevant legal principles as follows: ". . . where an insured is obligated under a separation agreement to designate the other party or their children as a beneficiary, that agreement will prevent the designation of another person as beneficiary . . ." (para. 48). These cases confirm, in our view, that a claim in unjust enrichment for the proceeds of a life insurance policy cannot be rooted in a mere contractual entitlement.

[137] Still, the majority does not accept that the *Insurance Act*'s clear bar of creditor claims against beneficiaries is sufficient to oust Michelle's claim against Risa. While acknowledging that Michelle's breach of contract claim renders her a creditor of Lawrence's estate, they nonetheless insist that this has no bearing on a potential claim in unjust enrichment. Respectfully, we cannot agree. Framed in either contract or unjust enrichment, Michelle has not shown a proprietary or equitable entitlement to the proceeds. Michelle relies on her rights as a contractual creditor to anchor a claim in unjust enrichment. In our view, the *Insurance Act* explicitly ousts claims of this character.

[138] In sum, we consider that the *Insurance Act* reflects a deliberate policy choice to channel the insurance proceeds directly to the designated beneficiary free from any and all creditor claims. The Act is a juristic reason for the transfer to Risa. The relevant jurisprudence, including *Shannon*, does not dislodge or undercut the clear statutory language. Instead, the cases confirm that, absent some proprietary or equitable entitlement to the insurance proceeds, creditors cannot use unjust enrichment claims to undermine the *Insurance Act* and an insured's valid designation.

(2) Policy Considerations Weigh Against Allowing Michelle's Claim for Unjust Enrichment

[139] Even if the *Insurance Act*, on its own, did not establish a juristic reason for Risa's enrichment, we add that the policy considerations at the second stage of the juristic reason analysis would nevertheless favour the denial of restitution to Michelle.

[140] The legislature's choice for intended beneficiaries to receive the proceeds is rooted in the sound policy considerations underpinning that choice. Estate distributions are subject to frequent disputes, leading to lengthy and expensive litigation. Tying up insurance proceeds in litigation can create immense hardship for beneficiaries, many of whom stare at financial instability without support from their now-deceased spouse. Where there is a significant delay between an insured's death and the receipt of the insurance proceeds, designated beneficiaries may struggle to take care of household expenses or meet basic needs. Such is the case with Risa.

[141] The *Insurance Act* is structured in large part to minimize these hardships. Irrevocable beneficiary designations are meant to provide the insured and beneficiary alike with the certainty that the insurance proceeds will be received in a timely manner free of creditor claims. As per s. 196(1) of the *Insurance Act*, "Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured." The *Insurance Act* provides even greater protection of the policy and proceeds where an irrevocable beneficiary is designated. In that case, from the moment such a designation is made, the policy and its proceeds are not subject to the claims of any of the insured's creditors and are immune from any attempted redesignations. The inability of creditors and the insured to access or control the policy proceeds provides certainty to the insured and beneficiary that the latter will be provided the support that they were intended to have.

[142] At the expense of the above considerations, the majority seems to stress the *Insurance Act*'s interest in certainty for insurers, but not the insured or their chosen beneficiaries. The *Insurance Act* purportedly outlines who should *receive* the proceeds, but not who should *retain* them. Michelle makes the same argument. While it is true that the insurance scheme benefits when insurers can identify with certainty the person who is entitled to receive a policy's proceeds, the provisions of the *Insurance Act* go beyond this. If the interests protected by the beneficiary provisions were principally those of the insurers, there would be no need for the proceeds to be free from creditor claims, or to bypass the insured's estate. A statute could achieve certainty for the

insurer by merely directing that the proceeds be paid to the insured's estate, to be distributed according to the insured's testamentary dispositions. The function of these provisions is not merely to ensure that a beneficiary *receive* the proceeds, and they should not be treated as such.

[143] In fact, if Risa only has a right to receive but not retain the proceeds, it would seem to follow that all insurance proceeds would be subject to the claims of creditors, contrary to the express wording of the provisions. As such, if one were to accept — which we do not — that there is a principled basis to distinguish between creditors like Michelle and other creditors of an insured's estate, insurance proceeds would still end up being the subject of disputes and litigation. Various creditors would argue that they, too, have preferred status that should exempt them from the operation of the *Insurance Act*. Regardless of whether these creditors would ultimately be successful in their claims for unjust enrichment, the result reached by the majority invites them to nonetheless attempt to collect on the insured's policy proceeds and tie up the proceeds in potentially protracted and expensive litigation, contrary to the intention of the *Insurance Act*. Even worse, this could leave designated beneficiaries vulnerable not just to creditors, but also to those who have sustained the policy for any period. Beneficiaries and insureds will thus be denied the certainty that the *Insurance Act* would otherwise provide.

III. Conclusion

[144] Death is sometimes accompanied by much uncertainty and strife. To the extent that it is possible, the *Insurance Act* moderates such uncertainty by creating a comprehensive regime for all those involved in a life insurance contract. Notwithstanding our view that there is no corresponding deprivation of Michelle, there is also a juristic reason for the transfer to Risa; we would not attenuate the sensible regime put forward by the legislature. As Michelle's claim of unjust enrichment is not made out, we would dismiss the appeal.

Appeal allowed, GASCON *and* ROWE JJ. *dissenting.*

Solicitors for the appellant: Hull & Hull, Toronto.

Solicitors for the respondent: Torys, Toronto.

Gordon Garland *Appellant*

v.

Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited *Respondent*

and

Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited *Interveners*

Gordon Garland *Appelant*

c.

Enbridge Gas Distribution Inc., auparavant connue sous le nom de Consumers' Gas Company Limited *Intimée*

et

Procureur général du Canada, procureur général de la Saskatchewan, Toronto Hydro-Electric System Limited, Fondation du droit de l'Ontario et Union Gas Limited *Intervenants*

Indexed as: Garland *v.* Consumers' Gas Co.

Neutral citation: 2004 SCC 25.

File No.: 29052.

2003: October 9; 2004: April 22.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Répertorié : Garland *c.* Consumers' Gas Co.

Référence neutre : 2004 CSC 25.

Nº du greffe : 29052.

2003 : 9 octobre; 2004 : 22 avril.

Présents : Les juges Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Restitution — Unjust enrichment — Late payment penalty — Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code — Whether customers have claim for unjust enrichment — Defences that can be mounted by utility to resist claim — Whether other ancillary orders necessary.

Restitution — Enrichissement sans cause — Pénalité pour paiement en retard — Action en restitution pour enrichissement sans cause intentée par les clients d'une entreprise de distribution de gaz réglementée à la suite de l'infliction, par cette dernière, de pénalités pour paiement en retard représentant un taux d'intérêt supérieur à la limite prescrite par l'art. 347 du Code criminel — L'action pour enrichissement sans cause des clients est-elle fondée? — Moyens de défense que l'entreprise peut opposer à l'action — D'autres ordonnances accessoires sont-elles requises?

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant

L'entreprise de distribution de gaz intimée, dont les tarifs et les politiques de paiement sont régis par la Commission de l'énergie de l'Ontario (« CEO »), envoie chaque mois à ses clients une facture qui fixe une date d'échéance pour le paiement du montant dû. Les clients qui n'ont pas acquitté leur facture à la date d'échéance se voient infliger une pénalité pour paiement en retard (« PPR ») qui correspond à 5 pour 100 du montant en souffrance pour le mois en question. Cette pénalité est calculée une seule fois; elle ne comporte aucun intérêt

commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Criminal Code*. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

Held: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the *Code* after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment

composé et n'augmente pas avec le temps. Entre 1983 et 1995, l'appelant et son épouse ont versé une somme approximative de 75 $ à titre de PPR. L'appelant a intenté un recours collectif en vue d'obtenir la restitution pour enrichissement sans cause des PPR perçues par l'intimée en contravention de l'art. 347 du *Code criminel*. Il a également sollicité une ordonnance de conservation. Dans le cadre d'un pourvoi antérieur, notre Cour a conclu que les PPR constituaient des intérêts à un taux criminel au sens de l'art. 347 et a renvoyé l'affaire devant le tribunal de première instance pour qu'il en poursuive l'examen. En l'absence de contestation des faits, les parties ont déposé des motions incidentes en vue d'obtenir un jugement sommaire. Le juge qui a examiné les motions a accueilli celle de l'intimée visant à obtenir un jugement sommaire, concluant que l'action représentait une contestation indirecte de l'ordonnance de la CEO. La Cour d'appel n'était pas du même avis, mais elle a rejeté l'appel pour le motif que l'appelant n'avait pas établi le bien-fondé de son action pour enrichissement sans cause.

Arrêt : Le pourvoi est accueilli. Il est ordonné à l'intimée de rembourser à l'appelant, selon le montant fixé par le juge de première instance, les sommes qu'il a versées, après l'introduction de l'instance en 1994, pour acquitter les PPR qui représentaient un taux d'intérêt supérieur à la limite prescrite par l'art. 347 du *Code*.

Le critère applicable en matière d'enrichissement sans cause comporte trois volets : (1) l'enrichissement du défendeur, (2) l'appauvrissement correspondant du demandeur et (3) l'absence de motif juridique justifiant l'enrichissement. Il convient de scinder en deux étapes l'analyse du motif juridique. Le demandeur doit démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie de refuser le recouvrement. Parmi les catégories établies, il y a le contrat, la disposition légale, l'intention libérale et les autres obligations valides imposées par la common law, l'equity ou la loi. S'il n'existe aucun motif juridique appartenant à une catégorie établie, le demandeur a alors établi une preuve *prima facie*. La preuve *prima facie* est cependant réfutable si le défendeur parvient à démontrer qu'il existe un autre motif de refuser le recouvrement. Les tribunaux doivent ici tenir compte de deux facteurs : les attentes raisonnables des parties et les considérations d'intérêt public.

En l'espèce, l'appelant a droit à la restitution. L'intimée a reçu les sommes d'argent représentées par les PPR et elle pouvait utiliser cet argent pour exploiter son entreprise. Le transfert de ces fonds confère un avantage à l'intimée. Les parties conviennent que le deuxième volet du critère est respecté. Quant au troisième volet, le seul motif juridique appartenant à une catégorie établie qui pourrait justifier l'enrichissement, en l'espèce,

in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The appellant has thus made out a *prima facie* case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the respondent was charged under s. 347 of the *Code*. However, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the *Criminal Code*, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the *Ontario Energy Board Act* should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally

est l'existence des ordonnances de la CEO établissant la PPR, qui relèvent de la catégorie des « dispositions légales ». Toutefois, les ordonnances de la CEO ne constituent pas un motif juridique justifiant l'enrichissement étant donné qu'elles sont inopérantes dans la mesure où elles sont incompatibles avec l'art. 347 du *Code criminel.* L'appelant a donc établi une preuve *prima facie* de l'enrichissement sans cause.

À l'étape de l'analyse du motif juridique consistant à réfuter la preuve *prima facie*, le fait que l'intimée se soit fondée sur les ordonnances est pertinent pour déterminer les attentes raisonnables des parties, mais l'intimée ne pourrait pas pour autant invoquer ce fait comme moyen de défense si elle était accusée en vertu de l'art. 347 du *Code*. Toutefois, la considération d'intérêt public dominante en l'espèce est le fait que les PPR ont été perçues en contravention du *Code criminel*. Pour des raisons d'intérêt public, un criminel ne doit pas être autorisé à conserver le produit de son crime. L'examen de ces considérations permet de conclure que le fait qu'à partir de 1981 jusqu'en 1994, avant l'introduction de la présente action, l'intimée se soit fondée sur les ordonnances inopérantes de la CEO est un motif juridique qui justifie l'enrichissement. Après que l'action eut été intentée et qu'elle eut été informée de la possibilité sérieuse que les PPR contreviennent au *Code criminel*, l'intimée ne pouvait plus raisonnablement se fonder sur les ordonnances tarifaires de la CEO pour justifier les PPR. Compte tenu de cette conclusion, il n'est nécessaire d'examiner les moyens de défense qu'à l'égard de la période postérieure à 1994.

L'intimée ne peut invoquer aucun moyen de défense. Un défendeur fautif ne peut pas invoquer le moyen de défense fondé sur le changement de situation. L'intimée ne peut pas invoquer ce moyen de défense en l'espèce étant donné qu'elle s'est enrichie grâce à sa propre inconduite criminelle. Il faut donner à l'art. 18 (maintenant l'art. 25) de la *Loi sur la Commission de l'énergie de l'Ontario* une interprétation atténuée selon laquelle il n'offre aucune protection contre les actions en responsabilité civile découlant d'une infraction au *Code criminel*. En conséquence, le moyen de défense ne peut pas être invoqué en l'espèce et il n'est pas nécessaire d'examiner la constitutionnalité de la disposition qui le prévoit.

La présente action ne constitue pas une contestation indirecte inacceptable de l'ordonnance de la CEO. La CEO n'a pas compétence exclusive à l'égard du présent litige, qui porte sur une question de droit privé relevant de la compétence des tribunaux civils, et elle n'a pas non plus le pouvoir d'ordonner la réparation sollicitée par l'appelant. En outre, l'action a pour objet précis non pas d'invalider ou de rendre inopérantes les ordonnances

collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The *de facto* doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, and because *Amax* can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

Cases Cited

Applied: *Peter v. Beblow*, [1993] 1 S.C.R. 980; **explained:** *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; **referred to:** *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112; *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31; *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107; *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690; *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470; *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249,

de la CEO, mais plutôt de recouvrer les sommes que l'intimée a perçues illégalement à la suite de ces ordonnances. Pour que l'intimée puisse invoquer le moyen de défense fondé sur la réglementation de l'activité, il aurait fallu que le législateur indique, soit expressément ou par déduction nécessaire, que l'art. 347 du *Code* accorde la liberté de le faire à ceux qui agissent conformément à un régime de réglementation provincial valide. L'article 347 ne contient aucune indication de cette nature.

Le principe de la validité *de facto* est inapplicable en l'espèce étant donné qu'il s'applique au gouvernement et à ses fonctionnaires afin de protéger et de maintenir la primauté du droit et l'autorité du gouvernement. L'application du principe à une société privée réglementée par un organisme gouvernemental n'est pas étayée par la jurisprudence et ne favorise pas la réalisation de son objet fondamental.

Il ne convient pas de prononcer une ordonnance de conservation en l'espèce. L'intimée ne perçoit plus des PPR à un taux criminel, de sorte qu'une ordonnance de conservation ne pourrait s'appliquer à aucune autre PPR versée par la suite. Même en ce qui concerne les PPR versées depuis 1994, auxquelles elle pourrait s'appliquer, il n'y a pas lieu de prononcer une ordonnance de conservation du fait que cette ordonnance ne serait d'aucune utilité, que l'appelant n'a pas satisfait aux critères énoncés dans les *Règles de procédure civile* de l'Ontario et que l'affaire *Amax* peut être distinguée de la présente affaire. Un jugement déclarant qu'il n'est pas nécessaire de payer les PPR ne serait d'aucune utilité et il n'y a pas lieu de le rendre.

Jurisprudence

Arrêt appliqué : *Peter c. Beblow*, [1993] 1 R.C.S. 980; **arrêts interprétés :** *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762; **arrêts mentionnés :** *Garland c. Consumers' Gas Co.*, [1998] 3 R.C.S. 112; *Sprint Canada Inc. c. Bell Canada* (1997), 79 C.P.R. (3d) 31; *Ontario Hydro c. Kelly* (1998), 39 O.R. (3d) 107; *Mahar c. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690; *Berardinelli c. Ontario Housing Corp.*, [1979] 1 R.C.S. 275; *Sharwood & Co. c. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470; *Rural Municipality of Storthoaks c. Mobil Oil Canada, Ltd.*, [1976] 2 R.C.S. 147; *RBC Dominion Securities Inc. c. Dawson* (1994), 111 D.L.R. (4th) 230; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Mack c. Canada (Attorney General)* (2002), 60 O.R. (3d) 737; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961; *Transport North American Express Inc. c. New*

2004 SCC 7; *Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22; *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

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Solutions Financial Corp., [2004] 1 R.C.S. 249, 2004 CSC 7; *Oldfield c. Cie d'Assurance-Vie Transamerica du Canada*, [2002] 1 R.C.S. 742, 2002 CSC 22; *Lipkin Gorman c. Karpnale Ltd.*, [1992] 4 All E.R. 512; *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307; *R. c. Jorgensen*, [1995] 4 R.C.S. 55; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576.

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D.L.R. (4th) 536, [2000] O.J. No. 1354 (QL). Appeal allowed.

Michael McGowan, *Barbara L. Grossman*, *Dorothy Fong* and *Christopher D. Woodbury*, for the appellant.

Fred D. Cass, *John D. McCamus* and *John J. Longo*, for the respondent.

Christopher M. Rupar, for the intervener the Attorney General of Canada.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Alan H. Mark and *Kelly L. Friedman*, for the intervener Toronto Hydro-Electric System Limited.

Mark M. Orkin, *Q.C.*, for the intervener the Law Foundation of Ontario.

Patricia D. S. Jackson and *M. Paul Michell*, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

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

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

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution

D.L.R. (4th) 536, [2000] O.J. No. 1354 (QL). Pourvoi accueilli.

Michael McGowan, *Barbara L. Grossman*, *Dorothy Fong* et *Christopher D. Woodbury*, pour l'appelant.

Fred D. Cass, *John D. McCamus* et *John J. Longo*, pour l'intimée.

Christopher M. Rupar, pour l'intervenant le procureur général du Canada.

Thomson Irvine, pour l'intervenant le procureur général de la Saskatchewan.

Alan H. Mark et *Kelly L. Friedman*, pour l'intervenante Toronto Hydro-Electric System Limited.

Mark M. Orkin, *c.r.*, pour l'intervenante la Fondation du droit de l'Ontario.

Patricia D. S. Jackson et *M. Paul Michell*, pour l'intervenante Union Gas Limited.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Le présent pourvoi concerne une action en restitution pour enrichissement sans cause que les clients d'une entreprise de services publics réglementée ont intentée à la suite de l'infliction, par cette dernière, de pénalités pour paiement en retard représentant un taux d'intérêt supérieur à la limite prescrite par l'art. 347 du *Code criminel*, L.R.C. 1985, ch. C-46. Il s'agit plus précisément de déterminer à quelles conditions peut être intentée une action pour enrichissement sans cause, quels moyens de défense peuvent être opposés à une telle action et si d'autres ordonnances accessoires sont requises.

Pour les motifs qui suivent, je suis d'avis de confirmer la validité de l'action pour enrichissement sans cause intentée par l'appelant et, par conséquent, d'accueillir le pourvoi.

I. Les faits

L'intimée Consumers' Gas Company Limited, maintenant connue sous le nom d'Enbridge Gas

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

Distribution Inc., est une entreprise de services publics réglementée qui fournit du gaz naturel à des clients résidentiels et commerciaux partout en Ontario. Ses tarifs et ses politiques de paiement sont régis par la Commission de l'énergie de l'Ontario (« CEO » ou « Commission ») conformément à la *Loi sur la Commission de l'énergie de l'Ontario*, L.R.O. 1990, ch. O.13 (« *LCEO* »), et à la *Loi sur les concessions municipales*, L.R.O. 1990, ch. M.55. L'intimée ne peut vendre du gaz ou facturer des services connexes que conformément aux ordonnances tarifaires de la Commission.

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

4 Chaque mois, les clients de Consumers' Gas reçoivent une facture qui fixe une date d'échéance pour le paiement du montant dû. Les clients qui n'ont pas acquitté leur facture à la date d'échéance se voient infliger une pénalité pour paiement en retard (« PPR ») qui correspond à 5 pour 100 du montant en souffrance pour le mois en question. Cette pénalité est calculée une seule fois; elle ne comporte aucun intérêt composé et n'augmente pas avec le temps.

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

5 La PPR a été établie en 1975 à la suite d'une série d'audiences tarifaires de la CEO. En accédant à la demande de Consumers' Gas visant l'infliction de la PPR, la Commission a fait remarquer que cette pénalité a pour objet premier d'inciter les clients à acquitter leurs factures sans tarder, de manière à réduire les frais qu'entraîne pour Consumers' Gas le report des comptes clients. La Commission a aussi conclu que ces frais, ainsi que les frais de recouvrement spéciaux résultant des paiements en retard, devaient être supportés par les clients qui en sont à l'origine plutôt que par l'ensemble de la clientèle. En approuvant une pénalité uniforme de 5 pour 100, la CEO a rejeté la solution de rechange consistant à percevoir des frais d'intérêt quotidiens sur les comptes en souffrance. La Commission a estimé que la perception de frais d'intérêt ne suffirait pas pour inciter les gens à payer au plus tard à une date déterminée, accorderait peu d'importance aux frais de recouvrement et pourrait sembler trop compliquée. La Commission a reconnu que, dans le cas d'une facture acquittée rapidement après la date d'échéance, la pénalité, calculée sous forme de frais d'intérêt, représenterait un taux d'intérêt très

bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co*., [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

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

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

II. Relevant Statutory Provisions

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

18. An order of the Board is a good and sufficient defence to any proceeding brought or taken against any

élevé. Elle a toutefois fait observer que les clients pourraient éviter ces frais en payant leurs factures à temps et que, de toute façon, le montant de la pénalité ne serait pas très élevé dans le cas d'une facture moyenne.

L'appelant Gordon Garland réside en Ontario et est un client de Consumers' Gas depuis 1983. Entre 1983 et 1995, son épouse et lui ont versé une somme approximative de 75 $ à titre de PPR. Dans un recours collectif intenté au nom de plus de 500 000 clients de Consumers' Gas, Garland a affirmé que les PPR contreviennent à l'art. 347 du *Code criminel*. Cette affaire a également été soumise à la Cour suprême du Canada, qui a conclu que les PPR constituaient des intérêts à un taux criminel au sens de l'art. 347 et a renvoyé l'affaire devant le tribunal de première instance pour qu'il en poursuive l'examen (*Garland c. Consumers' Gas Co.*, [1998] 3 R.C.S. 112 (« *Garland n^o 1* »)). Chacune des parties a déposé une motion incidente en vue d'obtenir un jugement sommaire.

L'appelant demande maintenant la restitution pour enrichissement sans cause des PPR perçues par l'intimée en contravention de l'art. 347 du *Code*. Il sollicite également une ordonnance de conservation enjoignant à Consumers' Gas de conserver, en vue d'un éventuel remboursement, les PPR perçues pendant l'instance.

Le juge qui a examiné les motions a accueilli celle de l'intimée visant à obtenir un jugement sommaire, concluant que l'action représentait une contestation indirecte de l'ordonnance de la CEO. Il a rejeté la demande d'ordonnance de conservation. La Cour d'appel, à la majorité, n'a pas souscrit aux motifs du juge des motions, mais elle a rejeté l'appel pour le motif que l'appelant n'avait pas établi le bien-fondé de son action pour enrichissement sans cause.

II. Les dispositions législatives pertinentes

Loi sur la Commission de l'énergie de l'Ontario, L.R.O. 1990, ch. O.13

18 Une ordonnance de la Commission constitue un moyen de défense valable à l'encontre de toute instance

person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

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

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

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

15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

347. (1) Notwithstanding any Act of Parliament, every one who

(*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or

(*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

dans la mesure où l'acte ou l'omission qui fait l'objet de l'instance est conforme à l'ordonnance.

Loi de 1998 sur la Commission de l'énergie de l'Ontario, L.O. 1998, ch. 15, ann. B

25. Une ordonnance de la Commission constitue un moyen de défense valable à toute instance introduite contre qui que ce soit dans la mesure où l'acte ou l'omission qui en fait l'objet y est conforme.

Code criminel, L.R.C. 1985, ch. C-46

15. Nul ne peut être déclaré coupable d'une infraction à l'égard d'un acte ou d'une omission en exécution des lois alors édictées et appliquées par les personnes possédant *de facto* le pouvoir souverain dans et sur le lieu où se produit l'acte ou l'omission.

347. (1) Nonobstant toute autre loi fédérale, quiconque, selon le cas :

a) conclut une convention ou une entente pour percevoir des intérêts à un taux criminel;

b) perçoit, même partiellement, des intérêts à un taux criminel,

est coupable :

c) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;

d) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'une amende maximale de vingt-cinq mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

III. Judicial History

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

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

III. Historique des procédures judiciaires

A. *Cour supérieure de justice de l'Ontario* (2000), 185 D.L.R. (4th) 536

10 En l'absence de contestation des faits, toutes les parties ont convenu de l'opportunité de procéder par voie de jugement sommaire. Le juge Winkler a conclu que l'action de l'appelant était non fondée en droit et qu'il n'y avait aucune question sérieuse à juger. En tirant cette conclusion, il a estimé que le « moyen de défense fondé sur la réglementation de l'activité » n'était pas suffisant pour contrer l'action. Selon son interprétation de la jurisprudence

language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

pertinente, il s'agissait principalement de savoir si la loi confère expressément une certaine souplesse à l'organisme de réglementation provincial. L'article 347 ne confère pas cette souplesse, de sorte que ce moyen de défense ne peut pas être invoqué.

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

Selon le juge Winkler, l'art. 15 du *Code criminel* ne pouvait pas non plus être invoqué en défense. Cette disposition d'application très limitée visait, au départ, à soustraire les personnes servant le monarque *de facto* aux poursuites pour trahison découlant de leur fidélité à la personne ayant prétendu sans succès au trône. En dépit de la possibilité de l'appliquer d'une manière plus contemporaine, l'article était à première vue limité aux actes ou omissions autorisés par une personne ou entité possédant un pouvoir souverain. L'article ne s'appliquait pas du fait que la CEO ne possédait pas un pouvoir souverain.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect

Le juge Winkler a estimé que l'action projetée était une contestation indirecte des ordonnances de la CEO. La *LCEO* précisait, à maintes reprises, que la CEO a le contrôle exclusif des questions relevant de sa compétence. En outre, les parties intéressées étaient libres de participer aux audiences de la CEO, dont les ordonnances pouvaient faire l'objet d'un contrôle judiciaire. L'appelant a laissé passer toutes ces occasions, préférant contester devant les tribunaux la validité des ordonnances de la CEO. Le juge Winkler a conclu qu'à moins d'être contestées directement les ordonnances de la CEO sont valides et lient l'intimée et ses clients. La CEO n'était pas une partie aux procédures devant le tribunal et ses ordonnances n'étaient pas en cause. Le juge Winkler a fait remarquer que la tarification est un exercice de pondération dans le cadre duquel la PPR est l'un des facteurs à considérer. Appliquant les décisions *Sprint Canada Inc. c. Bell Canada* (1997), 79 C.P.R. (3d) 31 (C. Ont. (Div. gén.)), *Ontario Hydro c. Kelly* (1998), 39 O.R. (3d) 107 (Div. gén.), et *Mahar c. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Div. gén.), le juge Winkler a estimé que, bien qu'elle ait été intentée sous forme de litige privé entre deux parties contractantes, l'action dont il était saisi était, en réalité, une contestation indirecte inacceptable de la

to s. 347 provided the OEB with ample legal guidance to deal with the matter.

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

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

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

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

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

validité des ordonnances de la CEO. Il ne convenait pas que le tribunal tranche des questions qui relèvent directement de la compétence de la CEO. De plus, l'arrêt *Garland n^o^ 1* de notre Cour relatif à l'art. 347 fournissait à la CEO suffisamment de repères juridiques pour régler la question.

13 Au cas où il aurait tort de tirer cette conclusion, le juge Winkler a ajouté que l'art. 18 de la *LCEO* constituait un moyen de défense suffisant pour contrer l'action projetée. Selon lui, l'art. 18 était constitutionnel parce qu'il n'empiétait pas sur la compétence fédérale en matière d'intérêts et de droit criminel, ou que tout empiétement qu'il pouvait avoir sur celle-ci était incident. Bien qu'elle ne se soit pas strictement conformée à l'ordonnance de la CEO en renonçant à infliger à certains clients des PPR, cela n'empêchait pas l'intimée d'invoquer l'art. 18.

14 Au cas où cette conclusion serait également erronée, le juge Winkler s'est ensuite demandé si l'action en restitution de l'appelant était valide. Les parties avaient reconnu que l'appelant avait subi un appauvrissement, et le juge Winkler était persuadé que l'intimée avait tiré un avantage. Il a toutefois conclu que l'ordonnance tarifaire de la CEO était un motif juridique justifiant l'enrichissement de l'intimée.

15 Après avoir tiré ces conclusions, le juge Winkler a refusé de prononcer l'ordonnance de conservation sollicitée par l'appelant, a accueilli la motion de l'intimée visant à obtenir un jugement sommaire et a rejeté l'action de l'appelant, en plus de le condamner aux dépens dans un jugement manuscrit.

B. *Cour d'appel de l'Ontario* (2001), 208 D.L.R. (4th) 494

16 Le juge en chef McMurtry a statué, au nom des juges majoritaires, que le juge Winkler avait eu tort de conclure qu'il y avait eu contestation indirecte inacceptable d'une décision de la CEO, du fait que l'appelant ne contestait ni le bien-fondé ni la légalité de l'ordonnance de la CEO, ou ne tentait pas de soulever une question déjà tranchée par la CEO. Au contraire, le recours collectif projeté était fondé sur les principes de l'enrichissement sans cause et

jurisdiction. As such, the courts had jurisdiction over the proposed class action.

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

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

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the

soulevait des questions échappant à la compétence de la CEO. Par conséquent, les tribunaux étaient compétents pour entendre l'affaire.

Le juge en chef McMurtry a ajouté que l'art. 25 de la *LCEO* de 1998 (qui correspond à l'art. 18 de la *LCEO* de 1990) ne justifiait pas le rejet de l'action de l'appelant. Il n'était pas d'accord pour dire que l'art. 25 était inapplicable en raison de l'omission de l'intimée de se conformer strictement aux ordonnances de la CEO. Il estimait plutôt que, même si l'art. 25 peut être invoqué comme moyen de défense à l'encontre de toute instance dans la mesure où l'action ou l'omission en cause est conforme à l'ordonnance de la CEO, les dispositions législatives qui restreignent les droits d'action des citoyens doivent être interprétées d'une manière restrictive (*Berardinelli c. Ontario Housing Corp.*, [1979] 1 R.C.S. 275). Il n'était pas raisonnable de croire que le législateur avait prévu qu'une ordonnance de la CEO pourrait commander une conduite criminelle, et même un libellé aussi général que celui de l'art. 25 ne pouvait pas servir de moyen de défense à l'encontre d'une action en restitution résultant d'une ordonnance de la CEO autorisant une conduite criminelle. Il a fait remarquer que cette décision était fondée sur les principes d'interprétation des lois et non sur la règle de la prépondérance fédérale.

L'intimée ne pouvait pas non plus invoquer comme moyen de défense l'art. 15 du *Code criminel*. Cette disposition d'application limitée est généralement dépourvue de pertinence de nos jours. Quant au « moyen de défense fondé sur la réglementation de l'activité », il était inopposable du fait que la jurisprudence n'indiquait pas qu'une société dont les activités étaient réglementées pouvait enfreindre directement le *Code criminel*.

Le juge en chef McMurtry a néanmoins décidé que l'appelant n'avait pas réussi à établir le bien-fondé de son action pour enrichissement sans cause. Les parties avaient reconnu que l'appelant avait subi un appauvrissement, mais le juge en chef McMurtry a considéré que celui-ci n'avait pas démontré l'existence des deux autres conditions nécessaires pour pouvoir intenter une action pour enrichissement sans cause. Bien que le versement d'une somme d'argent

respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

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

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

représente normalement un avantage, le juge en chef McMurtry a conclu qu'en l'espèce les pénalités pour paiement en retard n'avaient conféré aucun avantage à l'intimée. Appliquant aux deux premiers éléments de l'enrichissement sans cause la méthode de l'« analyse économique simple » recommandée dans l'arrêt *Peter c. Beblow*, [1993] 1 R.C.S. 980, le juge en chef McMurtry a souligné que les tarifs fixés par la CEO ont pour objet de permettre à l'intimée de subvenir à ses besoins globaux en matière de revenus. Une baisse des revenus susceptibles d'être tirés des PPR aurait entraîné une majoration des autres tarifs. Par conséquent, la perception des PPR ne constituait pas un enrichissement donnant ouverture à une action en restitution.

20 Au cas où cette conclusion serait erronée, le juge en chef McMurtry a ajouté qu'un motif juridique justifiait quelque présumé enrichissement. Dans l'examen de cet aspect du critère, des questions de morale et de politique générale pouvaient être prises en considération et il était nécessaire de déterminer ce qui était juste à la fois pour le demandeur et pour le défendeur. Il était donc nécessaire d'examiner le régime législatif auquel l'intimée était assujettie. Le juge en chef McMurtry a fait observer que l'intimée était légalement tenue d'infliger des PPR; la perception des PPR était obligatoire et la CEO en avait tenu compte dans ses ordonnances tarifaires. Il estimait qu'en l'espèce il serait contraire aux principes d'equity d'obliger l'intimée à rembourser toutes les PPR qu'elle avait perçues depuis 1981. Une telle ordonnance aurait une incidence sur tous les clients de l'intimée, y compris la vaste majorité de ceux qui paient toujours à temps.

21 L'appelant a soutenu que, même si son argumentation concernant la restitution était rejetée, une ordonnance de conservation était nécessaire étant donné qu'il était toujours possible que sa prétention que l'intimée ne pouvait pas exiger le paiement des PPR soit retenue. Étant donné qu'il avait conclu que rien ne justifiait d'ordonner la restitution, le juge en chef McMurtry ne voyait pas l'utilité de prononcer une ordonnance de conservation. De plus, l'ordonnance sollicitée n'aurait été d'aucune utilité vu qu'elle aurait donné à l'intimée le droit de dépenser les sommes en cause. Il a rejeté l'appel et l'action de

claims for declaratory and injunctive relief should not be granted.

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

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

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

l'appelant. Ce faisant, il a souscrit à l'avis du juge des motions qu'il n'y avait pas lieu d'accueillir les demandes de jugement déclaratoire et d'injonction présentées par l'appelant.

Quant aux dépens, le juge en chef McMurtry a décidé que plusieurs facteurs justifiaient l'annulation de l'ordonnance enjoignant à l'appelant de payer les dépens de l'intimée. Premièrement, l'ordonnance l'obligeait à payer les dépens du pourvoi qu'il avait formé avec succès devant la Cour suprême du Canada. Deuxièmement, même si l'intimée a finalement eu gain de cause, deux des moyens de défense qu'elle avait invoqués à l'étape des motions et trois de ceux qu'elle avait invoqués en Cour d'appel n'ont pas été retenus. Troisièmement, l'instance soulevait des questions nouvelles. Le juge en chef McMurtry a conclu que chaque partie devait supporter ses propres dépens.

Le juge Borins, dissident, aurait accueilli l'appel. Il a souscrit à la majeure partie des motifs du juge en chef McMurtry, mais il a estimé que les membres du groupe de demandeurs avaient droit à la restitution. Selon lui, la conclusion du juge des motions selon laquelle les PPR ont permis à l'intimée d'augmenter ses revenus et, ainsi, de s'enrichir était étayée par la preuve et par la jurisprudence et la doctrine. Il considérait qu'en l'absence d'erreur importante cette conclusion ne donnait pas lieu à révision.

Le juge Borins a toutefois décidé que le juge des motions avait commis une erreur de droit en concluant qu'un motif juridique justifiait l'enrichissement. Le juge des motions n'avait pas tenu compte de l'incidence de l'arrêt de la Cour suprême du Canada voulant que les frais constituent des intérêts à un taux criminel et que l'art. 347 du *Code criminel* interdise la perception de tels intérêts. Le juge Borins a estimé qu'en raison de cet arrêt les ordonnances tarifaires avaient perdu tout effet juridique et ne pouvaient pas constituer un motif juridique justifiant l'enrichissement. Conclure que les ordonnances tarifaires étaient un motif juridique justifiant une contravention à l'art. 347 permettait aussi aux ordonnances d'un organisme de réglementation provincial de l'emporter sur le droit criminel fédéral et

to retain the LPPs was contrary to the federal paramountcy doctrine.

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

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

It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative

supprimait une raison importante de respecter cette disposition. Il estimait donc que permettre à l'intimée de conserver les PPR violait la règle de la prépondérance fédérale.

25 Selon le juge Borins, la conclusion que les ordonnances de la CEO constituent un motif juridique irait aussi à l'encontre de la jurisprudence dans laquelle l'art. 347 a été appliqué en matière d'obligations commerciales. Ce courant de jurisprudence exige de tenir compte du moment où la restitution aurait dû être ordonnée et de la partie de la somme versée qui aurait alors dû être restituée. Enfin, cette conclusion permettrait à l'intimée de tirer avantage de ses propres actes répréhensibles.

26 Le juge Borins n'a pas accueilli favorablement l'argument de l'intimée selon lequel son changement de situation devait lui permettre de conserver les sommes perçues en contravention de l'art. 347, même si elle avait pu recouvrer les mêmes sommes grâce à une structure tarifaire modifiée. Il a aussi mentionné qu'à son avis la question de la possibilité de recouvrement aurait dû être examinée dans le cadre du recours collectif et non dans celui de la réclamation de 75 $ soumise par le représentant des demandeurs. Le juge Borins aurait accueilli l'appel, infirmé le jugement rejetant l'action de l'appelant, accordé en partie un jugement sommaire et rejeté la motion de l'intimée visant à obtenir un jugement sommaire. L'appelant aurait dû retourner devant le tribunal de première instance en ce qui concerne les dommages-intérêts. Le juge Borins aurait également déclaré que l'infliction et la perception par l'intimée des PPR contreviennent à l'al. 347(1)*b*) du *Code criminel* et que l'appelant n'est pas tenu de les payer. Il aurait, en outre, ordonné à l'intimée de rembourser, selon le montant fixé par le juge de première instance, les PPR perçues auprès de l'appelant. Il aurait enfin condamné l'intimée aux dépens.

27 Il y a lieu de noter que, le 9 janvier 2003, la juge en chef McLachlin a formulé la question constitutionnelle suivante :

Les articles 18 de la *Loi sur la Commission de l'énergie de l'Ontario*, L.R.O. 1990, ch. O.13, et 25 de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, L.O.

by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

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

IV. Issues

28

1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?

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

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?

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

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

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

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

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?

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

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

1998, ch. 15, ann. B, sont-ils inopérants, du point de vue constitutionnel, en raison de la primauté de l'art. 347 du *Code criminel*, L.R.C. 1985, ch. C-46?

Comme l'indiqueront clairement les motifs qui suivent, j'estime qu'il n'est pas nécessaire de répondre à la question constitutionnelle.

IV. Les questions en litige

1. L'appelant a-t-il droit à la restitution?

a) L'intimée s'est-elle enrichie?

b) Un motif juridique justifie-t-il l'enrichissement?

2. L'intimée peut-elle invoquer quelque moyen de défense?

a) Le moyen de défense fondé sur le changement de situation peut-il être invoqué?

b) L'article 18 (maintenant art. 25) de la *LCEO* (« art. 18/25 ») exonère-t-il l'intimée de toute responsabilité?

c) L'appelant se livre-t-il à une contestation indirecte des ordonnances de la Commission?

d) Le moyen de défense fondé sur la « réglementation de l'activité » disculpe-t-il l'intimée?

e) Le principe de la validité *de facto* disculpe-t-il l'intimée?

3. Les autres ordonnances sollicitées par l'appelant

a) Notre Cour devrait-elle prononcer une ordonnance de conservation?

b) Notre Cour devrait-elle rendre un jugement déclarant qu'il n'est pas nécessaire de payer les PPR?

c) Quelle ordonnance notre Cour devrait-elle prononcer en matière de dépens?

V. Analysis

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

A. *Unjust Enrichment*

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

(a) Enrichment of the Defendant

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

In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward

V. Analyse

29 J'effectuerai mon analyse de la façon suivante. Premièrement, j'examinerai l'action pour enrichissement sans cause intentée par l'appelant. Deuxièmement, je déciderai si l'intimée peut opposer quelque moyen de défense à l'action de l'appelant. Enfin, j'aborderai la question des autres ordonnances sollicitées par l'appelant.

A. *Enrichissement sans cause*

30 En général, le critère applicable en matière d'enrichissement sans cause est bien établi au Canada. La cause d'action comporte trois éléments : (1) l'enrichissement du défendeur, (2) l'appauvrissement correspondant du demandeur et (3) l'absence de motif juridique justifiant l'enrichissement (*Pettkus c. Becker*, [1980] 2 R.C.S. 834, p. 848; *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 784). En l'espèce, les parties conviennent que le deuxième volet du critère est respecté. J'examinerai donc successivement les premier et troisième volets du critère.

a) Enrichissement du défendeur

31 Dans l'arrêt *Peel*, précité, p. 790, la juge McLachlin (maintenant Juge en chef) a souligné que le mot « enrichissement » connote un avantage tangible conféré au défendeur. Cet avantage, écrit-elle, peut être soit positif, tel le versement d'une somme d'argent, soit négatif en ce sens, par exemple, qu'il épargne au défendeur une dépense à laquelle il aurait par ailleurs été tenu. Habituellement, les arguments d'ordre moral et de politique générale ne sont pas pris en considération relativement à cet élément du critère. Au contraire, comme l'écrit la juge McLachlin dans l'arrêt *Peter*, précité, p. 990, « [n]otre Cour a toujours utilisé une analyse économique simple relativement aux deux premiers éléments du critère » de l'enrichissement sans cause. Elle conclut que c'est dans le cadre du troisième élément, à savoir l'absence de motif juridique, que les autres facteurs peuvent le mieux être examinés.

32 En l'espèce, les opérations en cause sont les paiements que les clients dont le compte était en souffrance ont fait à l'intimée. À cet égard, il me

economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

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

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

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains

semble que l'« analyse économique simple » relative à l'avantage permet de conclure qu'un avantage a effectivement été conféré. Après avoir procédé à cette analyse, le juge Winkler était persuadé que l'intimée avait tiré un avantage. Il a écrit, au par. 95 : [TRADUCTION] « Les PPR ont tout simplement permis à Consumers' Gas d'augmenter ses revenus et, par conséquent, de s'enrichir. »

Les juges majoritaires de la Cour d'appel de l'Ontario n'étaient pas de cet avis. Le juge en chef McMurtry a estimé qu'en l'espèce le versement d'une somme d'argent ne représentait pas un avantage, comme ce serait le cas normalement. Tout en affirmant qu'il procédait à l'« analyse économique simple » recommandée dans l'arrêt *Peter*, précité, il a retenu l'argument de l'intimée voulant qu'elle ne soit pas vraiment enrichie à cause de la structure tarifaire de la CEO. Vu que les PPR s'inscrivaient dans un régime destiné à permettre à l'intimée de subvenir à ses besoins globaux en matière de revenus, toute augmentation de celles-ci était compensée par une réduction correspondante des tarifs réguliers. Le juge en chef McMurtry a donc conclu que [TRADUCTION] « [l]'enrichissement résultant de la perception des PPR est transmis, sous forme de réduction des tarifs de livraison du gaz, à tous les clients [de Consumers' Gas] » (par. 65). Par conséquent, c'est en réalité l'ensemble de la clientèle de l'intimée qui bénéficie de ce régime, et non pas l'intimée elle-même.

Dans ses motifs dissidents, le juge Borins a exprimé son désaccord avec cette analyse. Selon lui, lorsqu'il y a versement d'une somme d'argent, la question de savoir si un avantage a été conféré suscite peu de controverses et, en l'espèce, l'intimée a tiré un avantage étant donné qu'elle a touché une somme d'argent.

L'intimée fait valoir qu'il ne suffit pas que le demandeur ait effectué un paiement; au contraire, il faut aussi démontrer que le défendeur est [TRADUCTION] « en possession d'un avantage ». Elle soutient que le juge en chef McMurtry a eu raison de conclure que l'avantage a été transmis aux clients de l'intimée, de sorte qu'on ne peut pas dire que cette dernière l'a conservé. Pour sa part,

that the "straightforward economic approach" from *Peter*, *supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

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

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

l'appelant affirme qu'il y a lieu de procéder à l'« analyse économique simple » recommandée dans l'arrêt *Peter*, précité, et que toute autre question de morale ou de politique générale devrait être examinée à l'étape de l'analyse du motif juridique.

36 Je souscris à l'analyse du juge Borins sur ce point. Le droit applicable en la matière est relativement clair. Lorsqu'une somme d'argent passe du demandeur au défendeur, il y a enrichissement. Il est si évident que le transfert d'une somme d'argent confère un avantage que les tribunaux et les commentateurs s'en servent comme exemple typique d'opération où un avantage est conféré (voir *Peel*, précité, p. 790; *Sharwood & Co. c. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), p. 478; P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (1990), p. 38; lord Goff et G. Jones, *The Law of Restitution* (6e éd. 2002), p. 18). Il n'y a simplement aucun doute que Consumers' Gas a reçu les sommes d'argent représentées par les PPR et qu'elle pouvait utiliser cet argent pour exploiter son entreprise. La disponibilité de ces fonds représente un avantage pour Consumers' Gas. À ce stade, nous ne nous intéressons pas à la question de savoir où est passé cet avantage dans le cadre de l'application du régime de réglementation.

37 Bien que l'intimée signale à bon droit que l'expression « reçu et retenu » a été utilisée relativement à l'exigence d'un avantage (voir, par exemple, l'arrêt *Peel*, précité, p. 788), il n'est pas logique d'exiger que l'avantage soit conservé de façon permanente. En fait, la jurisprudence reconnaît qu'il pourrait être inéquitable d'ordonner la restitution dans le cas où l'avantage n'a pas été conservé, mais elle le fait en retenant le moyen de défense fondé sur un « changement de situation », une fois qu'il est établi que les trois conditions justifiant l'introduction d'une action pour enrichissement sans cause sont remplies (voir, par exemple, *Rural Municipality of Storthoaks c. Mobil Oil Canada, Ltd.*, [1976] 2 R.C.S. 147; *RBC Dominion Securities Inc. c. Dawson* (1994), 111 D.L.R. (4th) 230 (C.A.T.-N.)). Dans son commentaire de l'arrêt rendu en l'espèce par la Cour d'appel de l'Ontario, intitulé « Criminal Usury, Class Actions and Unjust Enrichment in Canada » (2002), 18 *J. Cont. L.*

in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

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

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

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

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

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a

121, p. 126, le professeur J. S. Ziegel affirme qu'en s'appuyant sur le cadre réglementaire de la PPR pour conclure qu'aucun avantage n'avait été conféré, le juge en chef McMurtry évoquait [TRADUCTION] « en réalité le moyen de défense fondé sur le changement de situation ». Je suis du même avis. La question de savoir si le fait que l'avantage a été transmis aux autres clients de l'intimée doit empêcher le recouvrement devrait être examinée au regard du moyen de défense fondé sur le changement de situation.

b) Absence de motif juridique

(i) *Principes généraux*

Lorsqu'il a formulé, pour la première fois, le critère applicable à l'enrichissement sans cause dans l'arrêt *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, p. 455 (adopté dans l'arrêt *Pettkus*, précité, p. 844), le juge Dickson (plus tard Juge en chef) a conclu, dans ses motifs minoritaires, que, pour qu'une action pour enrichissement sans cause soit accueillie,

> . . . les faits doivent démontrer un enrichissement, un appauvrissement correspondant et l'absence de tout motif juridique — tel un contrat ou une disposition légale — à l'enrichissement.

Dans ses formulations ultérieures du critère, notre Cour a élargi les catégories de facteurs pouvant être pris en considération dans le cadre de l'analyse du motif juridique. Dans l'arrêt *Peter*, précité, p. 990, la juge McLachlin conclut ceci :

> C'est à cette étape que le tribunal doit vérifier si l'enrichissement et le désavantage, moralement neutres en soi, sont « injustes ».
>
> . . . Le critère est souple, et les facteurs peuvent varier selon la situation sur laquelle doit se prononcer le tribunal.

L'aspect « motif juridique » du critère applicable à l'enrichissement sans cause fait l'objet de commentaires et de critiques de la part de nombreux auteurs. Le débat tient en bonne partie à la façon différente dont la cause d'action en matière d'enrichissement sans cause est conceptualisée au Canada et en Angleterre. Dans les deux cas, il doit y avoir enrichissement du défendeur et

corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell*, *supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel*, *supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

appauvrissement correspondant du demandeur. Alors qu'au Canada l'[TRADUCTION] « absence de motif juridique justifiant l'enrichissement » est requise, les tribunaux anglais, pour leur part, exigent « que l'enrichissement soit injuste » (voir l'analyse de L. Smith, intitulée « The Mystery of "Juristic Reason" » (2000), 12 *S.C.L.R.* (2d) 211, p. 212-213). Bien qu'il ne soit pas très utile de conjecturer sur ce qui a poussé le juge Dickson, dans l'arrêt *Rathwell*, précité, à énoncer l'absence de motif juridique comme troisième condition, je crois qu'il a peut-être voulu empêcher que le critère applicable relatif à l'enrichissement sans cause soit purement subjectif, et ainsi repousser la critique formulée dans les motifs du juge Martland, selon laquelle l'application de la règle de l'enrichissement sans cause envisagée par le juge Dickson nécessiterait l'exercice d'un « pouvoir discrétionnaire incommensurable » (p. 473). Dans l'arrêt *Peel*, précité, p. 802, la juge McLachlin a, elle aussi, souligné l'importance d'éviter l'adoption d'une norme purement subjective en écrivant que l'application du critère relatif à l'enrichissement sans cause ne devait pas se faire « au cas par cas ».

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

41

Peut-être est-ce à cause de ces deux formulations de cet aspect du critère que les tribunaux et les commentateurs canadiens n'interprètent pas de la même façon la notion du motif juridique. Comme le fait remarquer le juge Borins, dans ses motifs dissidents (par. 105), [TRADUCTION] « certains juges ont interprété littéralement la formulation de l'arrêt *Pettkus* et ont tenté de trancher des affaires en concluant à l'existence d'un "motif juridique" justifiant l'enrichissement du défendeur », alors que d'autres « ont tranché des affaires en se demandant si le demandeur avait une raison concrète d'exiger la restitution ». Dans son article intitulé « The Mystery of "Juristic Reason" », *loc. cit.*, amplement cité par le juge Borins, le professeur Smith affirme qu'on ne sait pas clairement s'il faut interpréter littéralement l'exigence d'« absence de motif juridique » comme obligeant les demandeurs à démontrer que le défendeur n'a aucune raison de conserver ce dont il s'est enrichi, ou si, conformément au modèle anglais, le demandeur doit démontrer l'existence d'un motif d'annulation du transfert de richesse. D'autres

Enrichment — Restitution — Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

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

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in

commentateurs ont prétendu qu'en fait la seule différence qui existe entre les critères canadien et anglais est d'ordre sémantique (voir, par exemple, M. McInnes, « Unjust Enrichment — Restitution — Absence of Juristic Reason : *Campbell* v. *Campbell* » (2000), 79 *R. du B. can.* 459).

Le professeur Smith fait valoir que, si elle existe vraiment, la façon canadienne d'interpréter le motif juridique pose un problème étant donné qu'elle oblige le demandeur à prouver ce qui n'est pas, c'est-à-dire l'absence de motif juridique. Il ajoute que, puisque cette preuve est presque impossible à faire, il serait préférable que le Canada adopte le modèle anglais qui oblige le demandeur à démontrer de manière positive pourquoi il serait injuste que le défendeur conserve ce dont il s'est enrichi. J'estime cependant qu'il y a une façon proprement canadienne d'interpréter le motif juridique qui doit être maintenue tout en étant susceptible de tenir compte de la critique formulée par Smith.

Rappelons-nous que le critère applicable à l'enrichissement sans cause est relativement nouveau dans la jurisprudence canadienne. Il exige que les tribunaux aient la souplesse nécessaire pour élargir les catégories de motifs juridiques lorsque les circonstances l'exigent et pour refuser le recouvrement lorsqu'il serait inéquitable de l'autoriser. Comme la juge McLachlin l'a écrit dans l'arrêt *Peel*, précité, p. 788, bien qu'elle procède des catégories traditionnelles de recouvrement, l'interprétation que la Cour donne de l'enrichissement sans cause peut « les déborder de manière à ce que le droit puisse évoluer avec la souplesse qui s'impose pour tenir compte des perceptions changeantes de la justice ». Toutefois, il doit, en même temps, y avoir des lignes directrices qui donnent aux juges de première instance et autres des indications sur les limites de la cause d'action. L'objectif est d'éviter des lignes directrices générales et subjectives qui empêchent toute uniformité.

Les parties et les commentateurs ont souligné que la jurisprudence et la doctrine ne règlent pas explicitement cette question. Cependant, tout en rappelant qu'il s'agit d'un recours en equity qui fait nécessairement intervenir un pouvoir discrétionnaire et des questions d'équité, je crois qu'une redéfinition et

my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

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

une reformulation s'imposent. J'estime donc qu'il convient de scinder en deux étapes l'analyse du motif juridique. Le demandeur doit d'abord démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie de refuser le recouvrement. En circonscrivant la liste des catégories que le demandeur doit examiner pour démontrer l'absence de motif juridique, on répond à l'objection soulevée par le professeur Smith voulant que la formulation canadienne du critère oblige à prouver ce qui n'est pas. Parmi les catégories établies susceptibles de constituer un motif juridique, il y a le contrat (*Pettkus*, précité), la disposition légale (*Pettkus*, précité), l'intention libérale (*Peter*, précité) et les autres obligations valides imposées par la common law, l'equity ou la loi (*Peter*, précité). S'il n'existe aucun motif juridique appartenant à une catégorie établie, le demandeur a alors établi une preuve *prima facie* en ce qui concerne le volet « motif juridique » de l'analyse.

45 La preuve *prima facie* est cependant réfutable si le défendeur parvient à démontrer qu'il existe un autre motif de refuser le recouvrement. En conséquence, le défendeur a l'obligation *de facto* de démontrer pourquoi il devrait conserver ce dont il s'est enrichi. À cette étape de l'analyse, le défendeur peut donc recourir à une catégorie de moyens de défense résiduels qui permettent aux tribunaux d'examiner toutes les circonstances de l'opération afin de déterminer s'il existe un autre motif de refuser le recouvrement.

46 Lorsque le défendeur tente de réfuter la preuve en question, les tribunaux doivent tenir compte de deux facteurs : les attentes raisonnables des parties et les considérations d'intérêt public. Il se peut qu'en examinant ces facteurs le tribunal découvre qu'une nouvelle catégorie de motifs juridiques est établie. Dans d'autres cas, l'examen de ces facteurs indiquera que, dans les circonstances particulières d'une affaire, il existait un motif juridique qui ne donne toutefois pas naissance à une nouvelle catégorie de motifs juridiques qui devrait s'appliquer dans d'autres circonstances. Dans une troisième catégorie d'affaires, l'examen de ces facteurs amène à conclure qu'aucun motif juridique ne justifiait l'enrichissement. Dans ces cas, il y a lieu d'accueillir la demande de

that further cases will add additional refinements and developments.

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

(ii) *Application*

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

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

recouvrement. Il faut comprendre ici que ce domaine est en évolution et que d'autres précisions et innovations résulteront d'affaires ultérieures.

À mon avis, cette conception de l'analyse du motif juridique est compatible avec l'interprétation générale de l'enrichissement sans cause à laquelle la juge McLachlin a souscrit dans l'arrêt *Peel*, précité, lorsqu'elle a déclaré que les tribunaux doivent établir un équilibre entre l'approche traditionnelle fondée sur des « catégories », selon laquelle une demande de restitution ne sera accueillie que si elle entre dans une catégorie établie de recouvrement, et l'approche moderne « fondée sur des principes » qui consiste à appliquer des principes généraux pour déterminer la réparation à accorder. Comme l'a dit le professeur Smith, *loc. cit.*, cette conception est aussi généralement compatible avec celle de l'enrichissement injustifié que l'on trouve dans le droit civil du Québec (voir, par exemple, les art. 1493 et 1494 du *Code civil du Québec*, L.Q. 1991, ch. 64).

(ii) *Application*

En l'espèce, le seul motif juridique appartenant à une catégorie établie qui pourrait justifier l'enrichissement est l'existence des ordonnances de la CEO établissant la PPR, qui relèvent de la catégorie des « dispositions légales ». Toutefois, les ordonnances de la CEO ne constituent pas un motif juridique justifiant l'enrichissement étant donné qu'elles sont inopérantes dans la mesure où elles sont incompatibles avec l'art. 347 du *Code criminel.* Le demandeur a donc établi une preuve *prima facie* de l'enrichissement sans cause.

Les dispositions légales forment une catégorie bien établie de motifs juridiques. Dans l'arrêt *Rathwell*, précité, le juge Dickson a donné comme exemples de motifs juridiques « un contrat ou une disposition légale » (p. 455). Dans le *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445 (« *Renvoi relatif à la TPS* »), le juge en chef Lamer a conclu qu'une loi valide est un motif juridique qui empêche le recouvrement pour enrichissement sans cause. Cette conclusion a été confirmée dans l'arrêt *Peter*, précité, p. 1018. Tout récemment, dans l'arrêt *Mack c. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, la Cour d'appel de

enrichment. In the leading Canadian text, *The Law of Restitution*, *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating, at p. 46:

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

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

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

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

As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the

l'Ontario a statué que la loi obligeant les immigrants chinois à acquitter un droit d'entrée au pays constituait un motif juridique qui empêchait de recouvrer ce droit au moyen d'une action pour enrichissement sans cause. Dans le principal ouvrage canadien en la matière, *The Law of Restitution*, *op. cit.*, p. 46, McCamus et Maddaugh analysent l'expression « disposition légale » tirée de l'arrêt *Rathwell*, précité :

> [TRADUCTION] . . . il va peut-être de soi que, dans tous les cas où la loi prescrit l'enrichissement du défendeur au détriment du demandeur, il n'y a pas d'enrichissement sans cause.

Il semble donc clair qu'une loi valide peut constituer un motif juridique qui empêche le recouvrement par voie de restitution.

50 Consumers' Gas soutient que les PPR étaient autorisées par les ordonnances tarifaires de la Commission qui constituent des dispositions légales. Il me semble que cet argument suppose que ce régime est valide et opérant. L'appelant a contesté la validité du régime en faisant valoir qu'il contrevient à l'art. 347 du *Code criminel* et qu'il est donc inopérant en raison de la règle de la prépondérance. Dans le *Renvoi relatif à la TPS*, précité, le juge en chef Lamer a statué que la loi constitue un motif juridique « à moins que [s]es dispositions elles-mêmes ne soient *ultra vires* » (p. 477). Étant donné qu'une loi qui excède la compétence de la province ne peut pas constituer un motif juridique, le même principe devrait s'appliquer dans le cas où la loi provinciale est inopérante en raison de la règle de la prépondérance. C'est le point de vue qu'exprime le juge Borins, dissident, lorsqu'il écrit, au par. 149 :

> [TRADUCTION] À mon avis, on aurait tort d'affirmer que [Consumers' Gas] ne peut pas invoquer les ordonnances tarifaires comme moyen de défense en application de l'art. 18 de la *LCEO*, parce qu'elles sont inopérantes en raison de la règle de la prépondérance fédérale, pour ensuite leur redonner vie dans le but de conclure qu'elles constituent un motif juridique justifiant l'enrichissement de [Consumers' Gas].

51 Par conséquent, le cadre législatif pourra servir de motif juridique pourvu qu'il ne soit pas jugé inopérant. Si les ordonnances de la CEO sont

OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

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

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment

constitutionnelles et opérantes, elles constituent un motif juridique qui empêche le recouvrement. À l'inverse, si le régime est inopérant en raison de son incompatibilité avec l'art. 347 du *Code criminel*, il y a alors absence de motif juridique. À mon avis, les ordonnances tarifaires de la CEO sont inopérantes du point de vue constitutionnel dans la mesure où elles sont incompatibles avec l'art. 347 du *Code criminel*.

Les ordonnances tarifaires de la CEO requièrent la perception de PPR qui, dans bien des cas, constituent des intérêts à un taux criminel. L'article 347 du *Code criminel* interdit la perception de tels intérêts. Les ordonnances tarifaires de la CEO et l'art. 347 du *Code criminel* sont conformes à la compétence de l'ordre de gouvernement qui les a édictés. Les ordonnances tarifaires sont conformes à la compétence de la province en vertu du par. 92(13) (propriété et droits civils) de la *Loi constitutionnelle de 1867*. L'article 347 du *Code criminel* est conforme à la compétence fédérale en vertu des par. 91(19) (intérêts) et 91(27) (droit criminel).

Notons que les ordonnances de la Commission qui sont en cause n'obligeaient pas Consumers' Gas à percevoir la PPR dans un délai de 38 jours. On pourrait alors soutenir qu'il ne s'agissait pas d'un conflit d'application explicite. Toutefois, je considère que cet argument est quelque peu artificiel, et ce, parce qu'au fond les ordonnances de la CEO impliquent nécessairement que le paiement doit être fait dans ce délai. À cet égard, elles devraient être traitées comme des ordonnances explicites pour les besoins de l'analyse de la prépondérance. Par conséquent, il existe un conflit d'application explicite entre les ordonnances tarifaires et l'art. 347 du *Code criminel* en raison de l'impossibilité pour Consumers' Gas de se conformer aux deux en même temps. Lorsqu'il y a conflit d'application véritable, il est bien établi que la loi provinciale est inopérante dans la mesure de ce conflit (*Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191; *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961). Par conséquent, les ordonnances de la Commission sont inopérantes du point de vue constitutionnel et ne constituent pas, de ce fait, un motif juridique. Pour réfuter la preuve *prima*

outside the established categories in order to rebut the *prima facie* case made out by the appellant.

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

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

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

Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11;

facie de l'appelant, Consumers' Gas doit donc démontrer qu'un motif juridique n'appartenant pas aux catégories établies justifiait l'enrichissement.

54 La deuxième étape de l'analyse du motif juridique exige de tenir compte des attentes raisonnables des parties et des considérations d'intérêt public.

55 Quant aux attentes raisonnables des parties, l'argumentation de Consumers' Gas paraît de prime abord convaincante. Consumers' Gas fait valoir, d'une part, que les clients dont le compte était en souffrance ne pouvaient pas raisonnablement s'attendre à échapper à toute pénalité pour ne pas avoir payé leur facture à temps et, d'autre part, qu'elle-même pouvait raisonnablement s'attendre à ce que la CEO refuse d'autoriser un régime de PPR qui enfreint le *Code criminel*. Étant donné que Consumers' Gas exerce ses activités dans un environnement réglementé, il y a lieu d'accorder du poids au fait qu'elle s'est fondée sur les ordonnances de la CEO. Si Consumers' Gas ne pouvait pas se fonder sur ces ordonnances, il lui serait très difficile, voire impossible, de fonctionner dans cet environnement. Il convient ici de souligner qu'il serait conforme aux attentes raisonnables des parties et à l'arrêt de notre Cour *Transport North American Express Inc. c. New Solutions Financial Corp.*, [2004] 1 R.C.S. 249, 2004 CSC 7, que la PPR respecte la limite prescrite par l'art. 347 du *Code criminel*.

56 Si elle était accusée en vertu de l'art. 347 du *Code criminel*, Consumers' Gas ne pourrait pas invoquer les ordonnances de la CEO comme moyen de défense, étant donné qu'elles sont inopérantes dans la mesure où elles sont incompatibles avec l'art. 347. Toutefois, dans le cadre de cette deuxième étape de l'analyse du motif juridique, le fait qu'elle se soit fondée sur ces ordonnances est pertinent pour déterminer les attentes raisonnables des parties.

57 Enfin, la considération d'intérêt public dominante en l'espèce est le fait que les PPR ont été perçues en contravention du *Code criminel*. Pour des raisons d'intérêt public, un criminel ne doit pas être autorisé à conserver le produit de son crime (*Oldfield c. Cie d'Assurance-Vie Transamerica du Canada*, [2002] 1 R.C.S. 742, 2002 CSC 22, par. 11; *New Solutions*,

New Solutions, *supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

précité). Dans ses motifs dissidents, le juge Borins a mis l'accent sur cette considération d'intérêt public. Il a estimé que, compte tenu de l'arrêt *Garland n^o^ 1* de notre Cour, autoriser Consumers' Gas à conserver les PPR perçues en contravention de l'art. 347 reviendrait à lui permettre de tirer avantage d'un crime et de ses propres actes répréhensibles.

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

L'examen de ces considérations permet de conclure que le fait qu'à partir de 1981 jusqu'en 1994, Consumers' Gas se soit fondée sur les ordonnances inopérantes de la CEO est un motif juridique qui justifie l'enrichissement. Comme les parties l'ont fait valoir, l'enrichissement sans cause peut se calculer à partir de trois dates possibles : 1981, année au cours de laquelle l'art. 347 du *Code criminel* a été adopté; 1994, année au cours de laquelle la présente action a été intentée, et 1998, année pendant laquelle notre Cour a conclu, dans l'arrêt *Garland n^o^ 1*, que les PPR devaient respecter la limite prescrite par l'art. 347 du *Code criminel*. Quant à la période comprise entre 1981 et 1994, année pendant laquelle la présente action a été intentée, rien n'indique que Consumers' Gas savait que les PPR contrevenaient à l'art. 347 du *Code criminel*. Cela joue en faveur de Consumers' Gas en ce qui concerne cette période. Le fait que Consumers' Gas se soit fondée sur les ordonnances de la CEO, sans savoir véritablement ou vraisemblablement qu'elles étaient inopérantes, suffit pour qu'il y ait un motif juridique justifiant l'enrichissement pendant cette première période.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer

Cependant, au moment où l'action a été intentée en 1994, Consumers' Gas a été informée de la possibilité sérieuse que ses PPR contreviennent au *Code criminel*. Cette possibilité est devenue réalité lorsque notre Cour a conclu que les PPR excédaient la limite prescrite par l'art. 347. Consumers' Gas aurait pu demander à la CEO de modifier sa structure tarifaire en attendant le règlement de l'affaire afin de s'assurer qu'elle n'enfreignait pas le *Code criminel*, ou elle aurait pu solliciter des mesures d'urgence. Comme l'a souligné l'avocat de l'appelant dans sa plaidoirie, elle a pris un « risque » en s'abstenant de le faire. Après que l'action eut été intentée et qu'elle eut été informée de la possibilité sérieuse que les PPR contreviennent au *Code criminel*, Consumers' Gas ne pouvait plus raisonnablement se fonder sur

reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

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

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

les ordonnances tarifaires de la CEO pour justifier les PPR.

60 En outre, puisque notre Cour a conclu à l'irrégularité des PPR, il est logique et juste, en ce qui a trait à l'enrichissement sans cause, de choisir la date à laquelle l'action visant à obtenir une réparation a débuté. Il serait inéquitable pour l'intimée d'ordonner la restitution à partir de 1981 étant donné qu'elle pouvait raisonnablement se fonder sur les ordonnances de la CEO jusqu'à l'introduction de la présente action en 1994. Il serait inéquitable pour l'appelant d'ordonner la restitution à partir de 1998, étant donné que l'intimée pourrait alors conserver les PPR perçues en contravention de l'art. 347 après 1994, alors qu'elle ne pouvait plus raisonnablement se fonder sur les ordonnances de la CEO et qu'il y a lieu de présumer qu'elle savait que les PPR contrevenaient au *Code criminel*. En outre, ordonner la restitution des PPR perçues depuis 1998 dérogerait à la règle générale selon laquelle les réparations pécuniaires, tels les dommages-intérêts, sont calculées à compter de la date de la contravention ou de la date de l'introduction de l'action, plutôt qu'à compter de la date du jugement.

61 La restitution à partir de 1994 établit un juste équilibre entre le fait que l'intimée se soit fondée sur les ordonnances de la CEO entre 1981 et 1994 et le fait que l'appelant s'attendait à recouvrer des sommes perçues en contravention du *Code Criminel* après qu'eut été soulevée la possibilité sérieuse que les ordonnances de la CEO soient inopérantes. Par conséquent, après l'introduction de la présente action en 1994, Consumers' Gas ne pouvait plus raisonnablement compter sur les ordonnances de la CEO pour échapper, dans le cadre d'une telle action civile, à la responsabilité résultant de la perception de PPR contrevenant au *Code criminel*. Ainsi, après l'introduction de l'action en 1994, plus aucun motif juridique ne justifiait l'enrichissement de l'intimée, de sorte que l'appelant a droit à la restitution des sommes versées pour acquitter les PPR qui représentaient un taux d'intérêt supérieur à la limite de 60 pour 100 prescrite par l'art. 347 du *Code criminel*.

B. *Defences*

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

(a) Change of Position Defence

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

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position

B. *Moyens de défense*

Après avoir conclu que l'action pour enrichissement sans cause de l'appelant était fondée en ce qui concerne les PPR versées après 1994, il reste à déterminer si l'intimée peut invoquer l'un ou l'autre des moyens de défense soulevés. Il n'est nécessaire d'examiner ces moyens de défense qu'à l'égard de la période postérieure à 1994, au sujet de laquelle l'existence des éléments de l'enrichissement sans cause a été établie. Par conséquent, je ne me demanderai pas si les moyens de défense auraient pu être invoqués s'il y avait eu enrichissement sans cause avant 1994. J'examinerai ces moyens de défense l'un après l'autre.

a) Moyen de défense fondé sur le changement de situation

Même dans le cas où l'existence des éléments de l'enrichissement sans cause est établie, la restitution sera refusée si un défendeur innocent démontre qu'à la suite d'un enrichissement il a modifié sa situation à un point tel qu'il serait inéquitable de l'obliger à rendre l'avantage qu'il a reçu (*Storthoaks*, précité). Dans la présente affaire, l'intimée affirme que tout « avantage » qu'elle a tiré des frais illégaux a été transmis, sous forme de réduction des tarifs de livraison du gaz, aux autres clients. Elle prétend que, puisqu'elle a « transmis » l'avantage, elle ne devrait pas avoir à en restituer (une seconde fois) le montant aux clients comme l'appelant qui se sont vu infliger des frais excessifs. Toutefois, il ne s'agit pas de savoir où a abouti, en fin de compte, dans le système de réglementation, le montant d'argent résultant des frais excessifs, ni de connaître le résultat net que ces frais excessifs ont eu sur la situation financière de l'intimée. La question est de savoir si, du point de vue de l'intimée qui inflige ces frais et de l'appelant qui se les voit infliger, la transmission de l'avantage aux autres clients peut excuser l'intimée d'avoir infligé des frais excessifs à l'appelant.

L'appelant fait valoir qu'un défendeur fautif ne peut pas invoquer le moyen de défense fondé sur le changement de situation et que l'intimée ne peut pas invoquer ce moyen de défense en l'espèce étant donné qu'elle s'est enrichie grâce à sa propre inconduite criminelle. Je suis d'accord. Le moyen

defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

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

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

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

de défense fondé sur le changement de situation paraît reposer sur des considérations d'équité. G. H. L. Fridman écrit, dans *Restitution* (2e éd. 1992), p. 458, qu'[TRADUCTION] « [u]n cas où il semblerait inéquitable d'obliger le défendeur à restituer l'avantage qu'il a reçu du demandeur sans accomplir quelque acte répréhensible serait celui où sa situation s'est détériorée à la suite de la réception de la somme d'argent en question ». Dans l'arrêt de principe britannique concernant ce moyen de défense, *Lipkin Gorman c. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), lord Goff affirme (p. 533) :

> [TRADUCTION] [I]l est juste que nous nous demandions pourquoi il nous semblerait inéquitable de permettre la restitution dans des cas comme ceux-là [lorsque le défendeur a modifié sa situation]. Il faut répondre que, lorsque la situation d'un défendeur innocent a changé à un point tel qu'il subirait une injustice si on l'obligeait à rembourser en partie ou en totalité ce qu'il a reçu, l'injustice qu'il subirait si on l'obligeait à effectuer ce remboursement l'emporte sur celle qui résulterait du refus d'ordonner la restitution au demandeur.

65 Si le moyen de défense fondé sur le changement de situation a pour objet d'éviter qu'une injustice soit causée, il doit alors être possible d'examiner attentivement l'ensemble de la conduite que le demandeur et le défendeur ont respectivement adoptée au cours de l'opération afin de décider lequel a la meilleure thèse. Le défendeur qui s'est enrichi en accomplissant des actes répréhensibles ne peut pas prétendre qu'il serait injuste de l'obliger à restituer au demandeur ce dont il s'est enrichi. En l'espèce, l'intimée ne peut pas invoquer ce moyen de défense parce que les PPR qu'elle a perçues contreviennent au *Code criminel* et, de ce fait, il ne peut pas être injuste de l'obliger à en restituer le montant.

66 Par conséquent, le moyen de défense fondé sur le changement de situation n'est d'aucun secours à l'intimée en l'espèce. Même en supposant qu'elle aurait satisfait aux autres exigences énoncées dans l'arrêt *Storthoaks*, précité, l'intimée ne peut pas invoquer ce moyen de défense parce qu'elle n'est pas un défendeur « innocent » du fait que la réception de l'avantage résulte d'une infraction au *Code criminel*. Il n'est donc pas nécessaire de procéder à

fuller development of the other elements of this defence to future cases.

une analyse complète du changement de situation, et je reporte à une autre occasion le soin d'approfondir la question des autres éléments de ce moyen de défense.

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

b) Article 18/25 de la *Loi sur la Commission de l'énergie de l'Ontario*

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

L'intimée invoque un moyen de défense prévu auparavant à l'art. 18 et maintenant à l'art. 25 de la *LCEO* de 1998. Les deux dispositions identiques sont ainsi rédigées :

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

Une ordonnance de la Commission constitue un moyen de défense valable à toute instance introduite contre qui que ce soit dans la mesure où l'acte ou l'omission qui en fait l'objet y est conforme.

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

Je suis d'accord avec le juge en chef McMurtry pour donner à ce moyen de défense une interprétation atténuée selon laquelle il n'offre aucune protection contre les actions en responsabilité civile découlant d'une infraction au *Code criminel*. En conséquence, le moyen de défense ne peut pas être invoqué en l'espèce et nous n'avons pas à examiner la constitutionnalité de la disposition qui le prévoit.

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

Le juge en chef McMurtry a eu raison de conclure qu'il y a lieu d'interpréter d'une manière restrictive les dispositions législatives censées restreindre les droits d'action des citoyens (*Berardinelli*, précité). Là encore, en l'espèce, je souscris à l'opinion du juge en chef McMurtry selon laquelle, malgré le libellé général de la disposition, il n'est pas raisonnable de croire que le législateur a prévu qu'une ordonnance de la CEO pourrait commander une conduite criminelle. L'article 18/25 ne peut donc pas servir de moyen de défense à l'encontre d'une action en restitution résultant d'une ordonnance de la CEO autorisant une conduite criminelle. Par conséquent, à l'instar du juge en chef McMurtry, j'estime non convaincant l'argument relatif à l'art. 18/25.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the

Étant donné que le législateur n'a pas pu, selon moi, avoir l'intention d'interdire les actions civiles découlant d'actes qui enfreignent le *Code criminel*, l'art. 18/25, interprété d'un manière restrictive, ne saurait protéger Consumers' Gas contre

provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

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

In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked

ce type d'actions. Si le législateur provincial avait voulu écarter de tels recours, il aurait dû l'indiquer expressément dans la disposition. En l'absence d'une telle disposition expresse, il faut considérer que l'art. 18/25 n'offre aucune protection contre les actions civiles découlant d'une infraction au *Code criminel* et que l'intimée ne peut donc pas, en l'espèce, l'invoquer comme moyen de défense.

c) Compétence exclusive et contestation indirecte

70 Le juge en chef McMurtry a également eu raison de conclure que la CEO n'a pas compétence exclusive à l'égard du présent litige. Bien qu'il soit question d'ordonnances tarifaires, le litige porte principalement sur une question de droit privé qui relève de la compétence des tribunaux civils, de sorte que la Commission n'a pas le pouvoir d'ordonner la réparation sollicitée par l'appelant.

71 En outre, le juge en chef McMurtry a eu raison de décider que la présente action ne constitue pas une contestation indirecte inacceptable de l'ordonnance de la CEO. La règle interdisant les contestations indirectes empêche une partie d'attaquer les ordonnances antérieures d'un tribunal judiciaire ou administratif (voir l'arrêt *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), p. 369-370). En général, cette règle est invoquée lorsqu'une partie tente de contester la validité d'une ordonnance exécutoire devant un tribunal non compétent en la matière, c'est-à-dire lorsque la validité de l'ordonnance est contestée dans le cadre de procédures autres que celles dont cette partie disposait pour la contester directement (c.-à-d. l'appel ou le contrôle judiciaire). Dans l'arrêt *Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 599, notre Cour a ainsi décrit la règle interdisant les contestations indirectes :

Selon un principe fondamental établi depuis longtemps, une ordonnance rendue par une cour compétente est valide, concluante et a force exécutoire, à moins d'être infirmée en appel ou légalement annulée. De plus, la jurisprudence établit très clairement qu'une telle

collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

ordonnance ne peut faire l'objet d'une attaque indirecte; l'attaque indirecte peut être décrite comme une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement.

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

Simplement en la lisant, on constate que la règle interdisant les contestations indirectes ne s'applique pas en l'espèce parce que l'action de l'appelant a pour objet précis non pas d'invalider ou de rendre inopérantes les ordonnances de la Commission, mais plutôt de recouvrer les sommes que l'intimée a perçues illégalement à la suite de ces ordonnances. Par conséquent, la règle interdisant les contestations indirectes ne s'applique pas.

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

Le cas de l'appelant ne comporte pas non plus d'autres caractéristiques de la contestation indirecte. Comme le souligne le juge en chef McMurtry, au par. 30 de ses motifs, dans tous les cas où il y a contestation indirecte, il y a une partie liée par une ordonnance qui tente d'éviter les effets de cette ordonnance en en contestant la validité devant un tribunal non compétent en la matière. En l'espèce, l'appelant n'est pas lié par les ordonnances de la Commission, de sorte que la raison d'être de cette règle n'est pas en cause. La règle interdisant les contestations indirectes a pour objet fondamental de « maintenir la primauté du droit et [de] préserver la considération dont jouit l'administration de la justice » (*R. c. Litchfield*, [1993] 4 R.C.S. 333, p. 349). On estime que l'intégrité du système de justice serait compromise si une partie pouvait échapper aux conséquences d'une ordonnance prononcée contre elle en s'adressant à un autre tribunal. La règle vise donc à empêcher une partie de contourner les effets d'une décision prononcée contre elle.

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

En l'espèce, l'appelant n'est pas visé par les ordonnances et il n'est donc pas question pour lui de chercher à s'y soustraire en intentant la présente action. Par conséquent, l'intégrité du système n'est pas compromise étant donné que l'appelant n'est pas légalement tenu de se conformer à ces ordonnances. Ainsi, la présente action ne paraît pas constituer, dans les faits, une contestation indirecte des ordonnances de la Commission.

(d) The Regulated Industries Defence

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

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

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

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

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the

d) Le moyen de défense fondé sur la réglementation de l'activité

74 L'intimée soutient que, pour empêcher le recouvrement par voie de restitution, elle peut invoquer le « moyen de défense fondé sur la réglementation de l'activité » étant donné que l'acte autorisé par un régime de réglementation provincial valide ne peut pas être contraire à l'intérêt public ni constituer une infraction contre l'État, et qu'on ne peut donc pas considérer que la perception des PPR fondée sur les ordonnances de la CEO est contraire à l'intérêt public et, ainsi, contraire à l'art. 347 du *Code criminel*.

75 Le juge Winkler a estimé que l'objectif qui sous-tend le moyen de défense, à savoir la réglementation des activités monopolistiques destinée à assurer aux consommateurs une tarification [TRADUCTION] « juste et raisonnable », serait atteint dans les circonstances et qu'il était donc normalement possible d'invoquer le moyen. Cependant, en raison du libellé de l'art. 347, le juge Winkler a décidé que ce moyen ne pouvait pas être invoqué en l'espèce. Il a écrit ceci, au par. 34 : [TRADUCTION] « Le défendeur est incapable d'indiquer quelque décision où ce moyen de défense a pu être invoqué sans que les termes "indûment" ou "dans l'intérêt public" soient présents dans la loi fédérale en cause ». Sans une telle reconnaissance dans la loi d'« intérêt public », a-t-il conclu, il n'y a aucune marge de manœuvre qui permet à la loi provinciale de faire exception.

76 Je suis d'accord avec l'approche du juge Winkler. Le principe qui sous-tend la possibilité d'invoquer le moyen de défense est décrit dans l'arrêt *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 356 :

> Chaque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit.

Le juge Estey est arrivé à cette conclusion après avoir étudié les affaires dans lesquelles le moyen de défense fondé sur la réglementation de l'activité avait été invoqué. Dans tous les cas, il y avait conflit entre une loi fédérale en matière de concurrence

defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

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

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

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

et un régime de réglementation provincial, mais la possibilité d'invoquer le moyen de défense tenait au libellé particulier des lois en question. Bien que je ne voie aucune raison logique de ne pas l'étendre aux affaires qui débordent le droit de la concurrence, il reste que la possibilité d'invoquer ce moyen de défense doit émaner du principe susmentionné.

Le juge Winkler a eu raison de conclure que, pour que l'intimée puisse invoquer le moyen de défense fondé sur la réglementation de l'activité, il aurait fallu que le législateur indique, soit expressément ou par déduction nécessaire, que l'art. 347 du *Code criminel* accorde la liberté de le faire à ceux qui agissent conformément à un régime de réglementation provincial valide. Si une telle indication avait été donnée, il faudrait, selon moi, l'interpréter conformément au principe susmentionné, c'est-à-dire de manière qu'elle n'entre pas en conflit avec le régime de réglementation provincial. Cependant, l'art. 347 ne contient pas l'indication requise pour qu'un régime provincial échappe à son application.

Ce point de vue est également étayé par l'arrêt de notre Cour *R. c. Jorgensen*, [1995] 4 R.C.S. 55. Dans cette affaire, l'accusé avait été inculpé d'avoir vendu « "sciemment" du matériel obscène "sans justification ni excuse légitime" » (par. 44). L'accusé a soutenu que la Commission de contrôle cinématographique de l'Ontario avait approuvé les vidéocassettes et qu'il avait donc une justification ou une excuse légitime. Notre Cour s'est demandé si l'approbation donnée par un organisme provincial permettait d'échapper à des accusations criminelles. S'exprimant au nom des juges majoritaires, le juge Sopinka a conclu que, si le législateur a l'intention de soustraire à l'application du droit criminel les actes autorisés par un organisme de réglementation provincial, il doit exprimer clairement cette intention dans la disposition législative en cause (par. 118) :

> Bien que le Parlement ait le pouvoir d'introduire dans ses lois criminelles des dispenses ou des immunités en déterminant ce qui est et ce qui n'est pas criminel et qu'il puisse le faire en autorisant un organisme provincial, ou un fonctionnaire agissant en application d'une loi provinciale, à délivrer des permis ou des choses semblables, son intention de le faire doit être évidente.

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

(e) *De Facto* Doctrine

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

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

79 La question de savoir si l'intimée peut invoquer le moyen de défense fondé sur la réglementation de l'activité revient, en fait, à se demander si l'art. 347 du *Code criminel* peut étayer l'idée qu'un régime de réglementation provincial valide ne peut pas être contraire à l'intérêt public ni constituer une infraction contre l'État. Dans la jurisprudence où le moyen de défense fondé sur la réglementation de l'activité a été invoqué, les termes « l'intérêt public » et limiter « indûment » la concurrence étaient toujours présents. L'absence de ces termes à l'art. 347 du *Code criminel* empêche d'invoquer ce moyen de défense en l'espèce.

e) Le principe de la validité *de facto*

80 Consumers' Gas soutient que, puisqu'elle agissait en vertu de dispositions légales valides à l'époque, à savoir les ordonnances de la Commission, elle devrait être exonérée de toute responsabilité en application du principe de la validité *de facto*. Cet argument ne saurait être retenu. Consumers' Gas n'est pas un fonctionnaire qui agit avec une apparence d'autorité. Bien que l'intimée indique que les ordonnances de la Commission justifient ses actes, le principe de la validité *de facto* ne s'applique pas pour autant à elle étant donné que la jurisprudence ne favorise pas l'application du principe à d'autres actes que ceux des fonctionnaires. Le principe a pour objet fondamental d'assurer le respect de la loi et de l'ordre ainsi que de l'autorité du gouvernement, lesquels ne sont pas en cause dans la présente affaire. Par conséquent, Consumers' Gas ne peut invoquer le principe de la validité *de facto* pour s'opposer à l'action du demandeur.

81 En outre, le principe de la validité *de facto* s'applique au gouvernement et à ses fonctionnaires afin de protéger et de maintenir la primauté du droit et l'autorité du gouvernement. L'application du principe à une société privée simplement réglementée par un organisme gouvernemental n'est pas étayée par la jurisprudence et ne favorise pas, selon moi, la réalisation de son objet fondamental. Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, p. 756, notre Cour a statué :

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

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

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

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

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

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

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the

Il n'y a qu'une seule vraie condition préalable à l'application de ce principe : l'officier *de facto* doit occuper sa charge sous apparence d'autorité.

On ne saurait affirmer que Consumers' Gas était un officier *de facto* agissant avec une apparence d'autorité lorsqu'elle infligeait des PPR à ses clients. Consumers' Gas est une société privée agissant dans un cadre réglementaire, et non un fonctionnaire investi de quelque forme d'autorité. Lorsqu'elle inflige des PPR, Consumers' Gas effectue une opération commerciale et ne se trouve pas à délivrer un permis ou à adopter un règlement.

En refusant d'appliquer le principe de la validité *de facto* en l'espèce, je suis conscient du passage tiré de la p. 757 du *Renvoi relatif aux droits linguistiques au Manitoba*, que l'intervenante Toronto Hydro a cité et qui, à première vue, semble indiquer que le principe de la validité *de facto* pourrait s'appliquer aux sociétés privées :

> . . . le principe de la validité *de facto* permettra de sauver les droits, obligations et autres effets ayant découlé des actes accomplis, conformément à des lois invalides du Manitoba, par des corps publics ou privés, des tribunaux, des juges, des personnes exerçant des pouvoirs légaux et des officiers publics. [Je souligne.]

Bien qu'il paraisse indiquer que le principe protège les « corps privés », ce passage doit être interprété en fonction de l'ensemble du jugement. Plus tôt, à la p. 755, la Cour mentionne un passage tiré des p. 3-4 de l'ouvrage du juge A. Constantineau, intitulé *The De Facto Doctrine* (1910). L'extrait suivant de ce passage est pertinent :

> [TRADUCTION] Le principe de la validité *de facto* est une règle ou un principe de droit qui [. . .] reconnaît l'existence, les protégeant d'une contestation indirecte, des corps publics ou privés qui, bien qu'irrégulièrement ou illégalement constitués, sous apparence de légalité, exercent ouvertement les pouvoirs et fonctions des corps régulièrement constitués . . . [Je souligne.]

À mon avis, il est clair, dans ce passage, que la Cour ne mentionne les « corps privés » qu'en ce qui concerne les questions touchant à la constitution de la société, par exemple, lorsqu'une société a été constituée en vertu d'une loi invalide. Ce passage

acts of the corporation are shielded from liability by virtue of the *de facto* doctrine.

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

That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):

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

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

C. *Other Orders Requested*

(a) Preservation Order

The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future

n'indique pas que les actes d'une telle société n'engagent pas sa responsabilité en vertu du principe de la validité *de facto*.

84 Ce point de vue trouve également appui dans l'extrait suivant de l'arrêt (p. 755) :

Le juge Constantineau dit clairement que ce principe a pour fondement le principe supérieur de la primauté du droit (aux pp. 5 et 6) :

> [TRADUCTION] Ici encore, le principe est nécessaire au maintien de la primauté du droit et à la préservation de la paix et de l'ordre dans la société en général, car toute autre règle susciterait une incertitude et une confusion de nature à anéantir l'ordre et la tranquillité de toute administration civile. D'ailleurs, si un individu ou un groupe d'individus étaient autorisés, selon leur bon plaisir, à contester l'autorité de l'État et des divers fonctionnaires par lesquels il exerce ses nombreux pouvoirs, et à refuser de leur obéir, ou à refuser de reconnaître les corps municipaux et leurs officiers, en raison de leur existence irrégulière ou pour vice de titres, l'insubordination et le désordre les plus graves seraient encouragés, ce qui, à tout moment, pourrait conduire à l'anarchie.

Ce principe a pour objet fondamental d'assurer le respect de la loi et de l'ordre ainsi que de l'autorité du gouvernement, lesquels ne sont pas en cause dans la présente affaire. Somme toute, je considère non fondé l'argument de Consumers' Gas selon lequel le principe de la validité *de facto* l'exonère de toute responsabilité. Par conséquent, ce principe ne doit pas empêcher l'appelant de recouvrer les sommes en cause.

C. *Les autres ordonnances sollicitées*

a) Ordonnance de conservation

85 L'appelant Garland sollicite une ordonnance de conservation de « type *Amax* » pour le motif que les PPR à un taux criminel continuent d'être perçues pendant la présente instance et que, n'eût été les délais inhérents au litige, les sommes en question n'auraient jamais été payées (*Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576). J'estime toutefois qu'il ne convient pas de prononcer une ordonnance de conservation en l'espèce. Consumers' Gas ne perçoit plus des PPR à un taux criminel. Par conséquent, si une ordonnance de

LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

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

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

conservation était prononcée, elle ne pourrait s'appliquer à aucune autre PPR versée par la suite. Même en ce qui concerne les PPR versées depuis 1994, auxquelles elle pourrait s'appliquer, il n'y a pas lieu de prononcer une ordonnance de conservation pour trois autres raisons : (1) cette ordonnance ne serait d'aucune utilité, (2) l'appelant n'a pas satisfait aux critères énoncés dans les *Règles de procédure civile* de l'Ontario, R.R.O. 1990, règl. 194, et (3) l'affaire *Amax* peut être distinguée de celle dont nous sommes saisis en l'espèce.

Premièrement, l'appelant n'a pas allégué que Consumers' Gas est une défenderesse démunie ou qu'il existe une autre raison de croire qu'elle n'exécuterait pas un jugement rendu contre elle. Même s'il existait quelque raison de croire que Consumers' Gas n'exécuterait pas un tel jugement, une ordonnance de type *Amax* permet au défendeur de dépenser les sommes d'argent détenues dans le cours normal de ses affaires, de sorte qu'aucun véritable fonds ne serait créé. Une ordonnance de conservation aurait donc pour seul effet d'empêcher Consumers' Gas de dépenser les sommes tirées d'une manière anormale des PPR (en les transférant à l'étranger, par exemple); toutefois, l'appelant n'a pas allégué qu'une telle situation pourrait se présenter si l'ordonnance n'était pas rendue.

Deuxièmement, l'intimée fait valoir qu'en sollicitant une ordonnance de conservation, l'appelant tente de contourner la règle 45.02 des *Règles de procédure civile* de l'Ontario, qui est la seule disposition habilitante en matière d'ordonnance de conservation en Ontario. Les *Règles de procédure civile* s'appliquent aux recours collectifs et ne permettent pas de prononcer une telle ordonnance dans ces circonstances. La règle 45.02 prévoit que « [s]i le droit d'une partie à un fonds déterminé est mis en cause, le tribunal peut ordonner que ce fonds soit consigné au tribunal ou garanti d'une autre façon, à des conditions justes » (je souligne). L'intimée soutient qu'en fait l'appelant ne réclame pas un fonds déterminé en l'espèce. Comme l'appelant n'a avancé aucun argument à ce sujet, je suis d'avis qu'il n'a pas satisfait aux critères énoncés dans les *Règles de procédure civile* de l'Ontario et que notre Cour pouvait, de ce fait, refuser l'ordonnance sollicitée.

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

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

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

(b) Declaration That the LPPs Need Not Be Paid

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

(c) Costs

The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be

88 Enfin, le recours de l'appelant à l'arrêt *Amax*, précité, pour justifier le type d'ordonnance sollicité n'est pas fondé. L'appelant a cité cet arrêt de manière très sélective. Dans sa version intégrale, la partie de l'arrêt que l'appelant cite dans ses observations écrites est ainsi rédigée (p. 598) :

> Indépendamment de ces règles, cette Cour a le pouvoir discrétionnaire de prononcer une ordonnance, comme le demandent les appelantes, qui enjoindrait à la province de la Saskatchewan de détenir à titre de dépositaire, les sommes versées par les appelantes en conformité de la loi contestée, tout en ayant le droit de les utiliser à des fins provinciales, mais avec l'obligation de les rembourser avec intérêts au cas où la loi serait déclarée *ultra vires*. Toutefois, il s'agirait là d'une ordonnance inusitée en ce qu'elle autoriserait le dépositaire à dépenser les sommes d'argent en jeu; et je ne vois pas alors en quoi cette ordonnance pourrait être utile. [Je souligne.]

Dans l'arrêt *Amax*, la Cour a refusé de prononcer l'ordonnance sollicitée. Donc, bien que l'appelant ait raison d'affirmer que, dans cet arrêt, la Cour n'a pas écarté la possibilité de prononcer une telle ordonnance à l'avenir, il me semble qu'en l'espèce, comme dans l'affaire *Amax*, une telle ordonnance ne serait d'aucune utilité. Pour ces motifs, j'estime que rien ne justifie de prononcer une ordonnance de conservation en l'espèce.

b) Jugement déclarant qu'il n'est pas nécessaire de payer les PPR

89 L'appelant sollicite aussi un jugement déclarant qu'il n'est pas nécessaire de payer les PPR. Étant donné que l'intimée affirme qu'elle ne perçoit plus des PPR à un taux criminel, un tel jugement déclaratoire ne serait d'aucune utilité et, par conséquent, il n'y a pas lieu de le rendre.

c) Dépens

90 L'appelant a droit à ses dépens dans toutes les cours. Cela signifie qu'indépendamment de l'issue de tout litige ultérieur il a droit à ses dépens relatifs au pourvoi *Garland n^o^ 1* et au présent pourvoi, y compris ceux relatifs aux procédures qui ont abouti à ces deux pourvois. En outre, dans sa plaidoirie, l'avocat de la Fondation du droit de l'Ontario a fait valoir qu'afin de réduire les dépens relatifs aux futurs recours collectifs, les [TRADUCTION]

avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

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

VI. Disposition

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

Appeal allowed with costs.

Solicitors for the appellant: McGowan Elliott & Kim, Toronto.

Solicitors for the respondent: Aird & Berlis, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

« procès en plusieurs épisodes » comme celui qui s'est déroulé en l'espèce doivent être évités. Je suis d'accord. À ce propos, je fais miens les commentaires du juge en chef McMurtry, au par. 76 de ses motifs :

> [TRADUCTION] Dans ce contexte, je souligne que la longue durée de cette instance jette un certain doute sur la sagesse d'instruire une affaire par épisodes, comme cela a été fait en l'espèce. Avant d'adopter une méthode d'instruction par épisodes, il y a lieu de se demander si cette façon de procéder est susceptible de causer une multiplication de procédures devant différentes instances. Une telle situation doit être évitée autant que possible, car il n'est guère dans l'intérêt des parties ou de l'administration efficace de la justice qu'elle survienne.

VI. Dispositif

Pour les motifs susmentionnés, je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours, d'annuler l'arrêt de la Cour d'appel de l'Ontario et d'y substituer une ordonnance enjoignant à Consumers' Gas de rembourser à l'appelant, selon le montant fixé par le juge de première instance, les sommes qu'il a versées, après l'introduction de l'instance en 1994, pour acquitter les PPR qui représentaient un taux d'intérêt supérieur à la limite prescrite par l'art. 347.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant : McGowan Elliott & Kim, Toronto.

Procureurs de l'intimée : Aird & Berlis, Toronto.

Procureur de l'intervenant le procureur général du Canada : Sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de la Saskatchewan : Sous-procureur général de la Saskatchewan, Regina.

Procureurs de l'intervenante Toronto Hydro-Electric System Limited : Ogilvy Renault, Toronto.

Procureur de l'intervenante la Fondation du droit de l'Ontario : Mark M. Orkin, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

Margaret Patricia Kerr *Appellant*

v.

Nelson Dennis Baranow *Respondent*

- and -

Michele Vanasse *Appellant*

v.

David Seguin *Respondent*

INDEXED AS: KERR *v.* BARANOW

2011 SCC 10

File Nos.: 33157, 33358.

2010: April 21; 2011: February 18.

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

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

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

Family law — Common law spouses — Property — Resulting trust — Whether evidence of common intention should be considered in context of resulting trust — Whether resulting trust principles apply to property or monetary award in resolution of domestic cases.

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

In the *Kerr* appeal, K and B, a couple in their late 60s separated after a common law relationship of more

Margaret Patricia Kerr *Appelante*

c.

Nelson Dennis Baranow *Intimé*

- et -

Michele Vanasse *Appelante*

c.

David Seguin *Intimé*

RÉPERTORIÉ : KERR *c.* BARANOW

2011 CSC 10

N^os^ du greffe : 33157, 33358.

2010 : 21 avril; 2011 : 18 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Abella, Charron, Rothstein et Cromwell.

EN APPEL DES COURS D'APPEL DE LA COLOMBIE-BRITANNIQUE ET DE L'ONTARIO

Droit de la famille — Conjoints de fait — Biens — Enrichissement injustifié — Réparation pécuniaire — Une réparation pécuniaire est-elle restreinte au quantum meruit? — La preuve de coentreprise familiale doit-elle être prise en compte au moment d'accorder une réparation? — Les avantages réciproques et les attentes raisonnables des parties doivent-ils être pris en compte dans l'évaluation de la réparation?

Droit de la famille — Conjoints de fait — Biens — Fiducie résultoire — La preuve de l'intention commune doit-elle être prise en compte dans le contexte de la fiducie résultoire? — Les principes de la fiducie résultoire s'appliquent-ils aux réparations accordées en biens ou en argent dans le cadre de la résolution des litiges familiaux?

Droit de la famille — Conjoints de fait — Aliments — Séparation des conjoints après plus de 25 ans de vie commune — Action de la conjointe réclamant une pension alimentaire et une part des biens — La pension alimentaire est-elle rétroactive à la date du procès ou à la date d'introduction de l'instance?

Dans le pourvoi *Kerr*, K et B, tous deux dans la soixantaine avancée, se sont séparés après plus de 25

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

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

ans de vie commune. Ils avaient travaillé pendant presque toutes ces années et avaient chacun contribué de diverses façons à leur bien-être commun. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, K a réclamé une pension alimentaire et une part des biens détenus au nom de B. Par demande reconventionnelle, B a cherché à faire reconnaître que K s'était injustement enrichie grâce aux services d'entretien ménager qu'il lui avait rendus et à l'aide personnelle qu'il lui avait apportée après qu'elle eut été victime d'un grave accident vasculaire. Le juge de première instance a accordé à K 315 000 $ et un tiers de la valeur de la maison de B qu'ils avaient partagée, sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, car il avait conclu que K avait fourni des capitaux et des actifs d'une valeur de 60 000 $ au début de la relation. Il a également accordé à K une pension alimentaire mensuelle de 1 739 $, rétroactive à la date d'introduction de l'instance. La Cour d'appel a conclu que K n'a pas contribué financièrement à l'acquisition ou à l'amélioration de la maison de B, ce qui constituait le fondement de la réparation accordée à K en première instance, et elle a rejeté ses réclamations fondées sur un droit de propriété. La Cour d'appel a ordonné une nouvelle audition de la demande reconventionnelle de B. Elle a en outre statué que l'ordonnance alimentaire serait rétroactive à la date du début du procès.

Dans le pourvoi *Vanasse*, il a été admis que S s'est injustement enrichi grâce aux contributions de sa conjointe, V, au cours de leur union de fait qui a duré 12 ans. Pendant les quatre premières années de leur relation, les parties ont poursuivi leurs carrières respectives. En 1997, V a pris un congé et le couple a déménagé à Halifax afin que S puisse y développer son entreprise. Au cours des trois années et demie qui ont suivi, S et V ont eu des enfants et V est demeurée à la maison pour s'occuper d'eux et elle s'est occupée des tâches domestiques. S travaillait de longues heures et voyageait fréquemment pour ses affaires. En 1998, S a démissionné de son poste de PDG de l'entreprise et la famille est retournée à Ottawa où ils ont acheté une maison enregistrée en leurs deux noms. En 2000, S a reçu environ 11 millions de dollars en vendant ses actions dans l'entreprise et à compter de ce moment, jusqu'à la séparation en 2005, il s'est acquitté davantage des tâches domestiques. La juge de première instance a conclu qu'il n'y avait pas eu enrichissement injuste au cours des première et dernière périodes de cohabitation, mais a conclu que S s'était injustement enrichi aux dépens de V durant la période au cours de laquelle les enfants sont nés. V a eu droit à la moitié de la valeur de la richesse accumulée par S au cours de la période d'enrichissement injustifié, moins la valeur de sa part dans la résidence familiale et

party received from the other was assessed and set off.

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

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

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

For unmarried persons in domestic relationships in most common law provinces, judge-made law is the only option for addressing the property consequences of the breakdown of those relationships. The main legal mechanisms available have been the resulting trust and the action in unjust enrichment. Resulting trusts arise from gratuitous transfers in two types of situations: the transfer of property from one partner to the other without consideration, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. The underlying legal principle is that contributions to the acquisition of a property, which were not reflected in the legal title, might nonetheless give rise to a property interest. In Canada, added to this underlying notion was the idea that a resulting trust could arise based solely on the "common intention" of the parties that the non-owner partner was intended to have an interest. This theory is doctrinally unsound, however, and should

ses REER. La cour d'appel a annulé cette décision et a statué que la réparation devait être établie par un calcul fondé sur le *quantum meruit*, où la valeur que chacune des parties a reçue de l'autre est évaluée et défalquée.

Arrêt : Dans *Kerr*, le pourvoi sur la question de la pension alimentaire est accueilli et l'ordonnance du juge de première instance est rétablie. Le pourvoi en ce qui concerne la décision de la Cour d'appel de rejeter la demande de K fondée sur l'enrichissement injustifié est également accueilli et une nouvelle audition de cette demande est ordonnée. Le pourvoi formé contre la décision rejetant la demande de K relative à une fiducie résultoire est rejeté. L'ordonnance d'une nouvelle audition de la demande reconventionnelle de B est confirmée.

Arrêt : Dans *Vanasse*, le pourvoi est accueilli et l'ordonnance de la juge de première instance est rétablie.

Ces pourvois nous obligent à répondre à cinq questions principales. La première porte sur le rôle de la fiducie résultoire fondée sur « l'intention commune » dans les réclamations présentées par les conjoints de fait. La deuxième question consiste à savoir si l'indemnité pécuniaire pour enrichissement injustifié doit toujours être évaluée en fonction du *quantum meruit*. La troisième question a trait aux avantages réciproques dans le contexte d'une réclamation fondée sur l'enrichissement injuste et au moment auquel ceux-ci doivent être pris en compte. La quatrième question traite du rôle des attentes raisonnables des parties dans l'analyse de l'enrichissement injustifié. Enfin, dans le pourvoi *Kerr*, la Cour doit aussi déterminer la date de prise d'effet de l'ordonnance alimentaire.

En ce qui concerne les conjoints non mariés dans la plupart des provinces de common law, le recours au droit jurisprudentiel est la seule solution permettant de traiter des conséquences financières de la rupture des relations conjugales. La fiducie résultoire et l'action fondée sur l'enrichissement injustifié sont les principaux mécanismes juridiques qui s'offrent aux parties. Les fiducies résultoires découlent de transferts à titre gratuit dans deux types de situations : le transfert d'un bien d'un partenaire à l'autre sans aucune considération, et la contribution des deux partenaires à l'acquisition d'un bien, dont le titre est au nom d'un seul des partenaires. Selon le principe juridique sous-jacent, les contributions à l'acquisition de biens, qui n'étaient pas indiquées dans le titre de propriété, peuvent néanmoins créer un droit de propriété. À cette notion sous-jacente s'ajoutait l'idée, au Canada, qu'une fiducie résultoire pouvait découler de la seule « intention commune » des parties d'accorder un droit au partenaire

have no continuing role in the resolution of domestic property disputes. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, parties have increasingly turned to the law of unjust enrichment and the remedial constructive trust. Since the decision in *Pettkus v. Becker*, the law of unjust enrichment has provided a much less artificial, more comprehensive and more principled basis to address claims for the distribution of assets on the breakdown of domestic relationships. It permits recovery whenever the plaintiff can establish three elements: an enrichment of the defendant by the plaintiff, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. This Court has taken a straightforward economic approach to the elements of enrichment and corresponding deprivation. The plaintiff must show that he or she has given a tangible benefit to the defendant that the defendant received and retained. Further, the enrichment must correspond to a deprivation that the plaintiff has suffered. Importantly, provision of domestic services may support a claim for unjust enrichment. The absence of a juristic reason for the enrichment means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff. This third element also provides for due consideration of the autonomy of the parties, their legitimate expectations and the right to order their affairs by contract.

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

The object of the remedy for unjust enrichment is to require the defendant to reverse the unjustified enrichment and may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In most cases, a monetary award will be sufficient to remedy the unjust enrichment but two issues raise difficulties in determining appropriate compensation. Where there has been a mutual conferral of benefits, it is often difficult for the court to retroactively value every service rendered by each party to the other. While the value of domestic services is not questioned, it would be unjust to only consider the contributions of one party. A second

non propriétaire. Cette théorie est toutefois sans fondement sur le plan théorique et ne devrait plus avoir aucun rôle à jouer dans la résolution des litiges familiaux. Si les principes traditionnels de la fiducie résultoire peuvent jouer un rôle dans la résolution des litiges entre partenaires non mariés, les parties ont eu recours de plus en plus au droit de l'enrichissement injustifié et à la fiducie constructoire de nature réparatoire. Depuis l'arrêt *Pettkus c. Becker*, le droit de l'enrichissement injustifié offre un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter les demandes de partage des biens après la rupture des relations conjugales. Il permet le recouvrement dès lors que le demandeur peut prouver trois éléments : un enrichissement du défendeur par le demandeur, un appauvrissement correspondant du demandeur, et l'absence de tout motif juridique de l'enrichissement. Notre Cour a appliqué une analyse économique simple aux éléments d'enrichissement et d'appauvrissement correspondant. Le demandeur doit prouver qu'il a procuré un avantage tangible au défendeur qui a reçu et retenu cet avantage. De plus, l'enrichissement doit correspondre à un appauvrissement du demandeur. Fait important, la prestation de services domestiques peut appuyer une action pour enrichissement injustifié. L'absence d'un motif juridique pour l'enrichissement signifie que ni le droit ni les exigences de la justice ne permettent au défendeur de conserver l'avantage conféré par le demandeur. Ce troisième élément permet aussi de prendre dûment en considération l'autonomie des parties, leurs attentes légitimes et leur droit de régler contractuellement leurs affaires.

L'analyse du motif juridique comprend deux étapes. Premièrement, les catégories établies de motifs juridiques doivent être examinées, par exemple l'avantage conféré par don ou découlant d'une obligation légale. En l'absence de motifs juridiques d'une catégorie, la deuxième étape autorise la prise en considération des attentes légitimes des parties ainsi que des considérations d'intérêt public afin de déterminer si l'enrichissement est injustifié.

La réparation fondée sur l'enrichissement injustifié oblige le défendeur à rembourser ou à annuler l'enrichissement et peut donner lieu soit à une « indemnisation », soit à une « restitution du bien ». Dans la plupart des cas, une réparation pécuniaire suffira à corriger l'enrichissement injustifié, mais deux questions suscitent des difficultés dans la détermination de la réparation adéquate. Dans les cas où les conjoints ont mutuellement tiré des avantages, la cour a souvent de la difficulté à évaluer rétroactivement chaque service rendu par chacune des parties à l'autre partie. Bien que la valeur des services domestiques ne soit pas remise en question, il

difficulty is whether a monetary award must invariably be calculated on a *quantum meruit*, "value received" or "fee-for-services" basis or whether that monetary relief may be assessed more flexibly, on a "value survived basis" by reference to the overall increase in the couple's wealth during the relationship. In some cases, a proprietary remedy may be required. Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, and that a monetary award would be insufficient, a share of the property proportionate to the claimant's contribution can be impressed with a constructive trust in his or her favour.

Three areas in the law of unjust enrichment require clarification. Once the choice has been made to award a monetary remedy, the question is how to quantify it. If a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or to order a monetary remedy calculated on a *quantum meruit* basis. This dichotomy of remedial choice should be rejected, however, as the value survived measure is a perfectly plausible alternative to the constructive trust. Restricting the money remedy to a fee-for-service calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. The basis of all domestic unjust enrichment claims do not fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. Where the contributions of both parties over time have resulted in an accumulation of wealth, the unjust enrichment occurs when one party retains a disproportionate share of the assets that are the product of their joint efforts following the breakdown of their relationship. The required link between the contributions and a specific property may not exist but there may clearly be a link between the joint efforts of the parties and the accumulation of wealth. While the law of unjust enrichment does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one party to share in the other's property, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. Second, the remedial dichotomy is inconsistent with the inherent flexibility of unjust enrichment and with the Court's approach to equitable

serait injuste de tenir compte des contributions d'une seule partie. Une deuxième difficulté tient à la question de savoir si une réparation pécuniaire doit invariablement être calculée en fonction du *quantum meruit*, de la « valeur reçue » ou de la « rémunération des services », ou si la réparation pécuniaire peut être évaluée de manière plus souple, selon la méthode fondée sur la « valeur accumulée », soit l'augmentation globale de la richesse du couple pendant l'union. Dans certains cas, il peut être nécessaire d'accorder une réparation fondée sur le droit de propriété. Si le demandeur peut établir un lien ou un rapport de causalité entre ses contributions et l'acquisition, la conservation, l'entretien ou l'amélioration du bien en cause, et qu'une réparation pécuniaire serait insuffisante, une part du bien proportionnelle à la contribution du demandeur peut faire l'objet d'une fiducie constructoire en sa faveur.

Trois sujets dans les règles relatives à l'enrichissement injustifié nécessitent des précisions. Une fois que la décision est prise d'accorder une réparation pécuniaire, la question se pose de savoir comment quantifier cette réparation. Si la réparation pécuniaire doit invariablement être quantifiée en fonction du *quantum meruit*, il faut alors, dans les cas d'enrichissement injustifié, se demander s'il faut choisir d'imposer une fiducie constructoire ou d'ordonner une réparation pécuniaire calculée en fonction du *quantum meruit*. Cette dichotomie des mesures de réparation devrait toutefois être rejetée car la réparation fondée sur la valeur accumulée est une alternative tout à fait plausible à la fiducie constructoire. Il est inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflète pas la réalité de nombreux conjoints vivant en union libre. Les fondements de toutes les actions pour enrichissement injustifié intentées par des conjoints de fait n'entrent pas dans deux catégories seulement — celle où l'enrichissement découle de la prestation de services non rémunérés, et celle où il découle d'une contribution non reconnue à l'acquisition, à l'amélioration, à l'entretien ou à la conservation d'un bien en particulier. Lorsque les contributions des deux parties ont, au fil du temps, entraîné une accumulation de la richesse, il y a un enrichissement injustifié quand une partie conserve, après la rupture, une part disproportionnée des biens obtenus grâce à l'effort conjoint des deux parties. Le lien requis entre les contributions et un bien en particulier n'existe peut-être pas, mais il peut y avoir un lien incontestable entre les efforts conjoints des parties et l'accumulation de richesse. Bien que les règles relatives à l'enrichissement injustifié n'entraînent pas une présomption de partage égal et que la cohabitation, en soi, ne confère pas à

remedies. Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development requires recourse to a number of different sorts of remedies depending on the circumstances. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial strait-jacket. What is essential is that there must be a link between the contribution and the accumulation of wealth. Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation. Third, the remedial dichotomy ignores the historical basis of *quantum meruit* claims. Finally, a remedial dichotomy is not mandated, as has been suggested, by the Court's judgment in *Peter v. Beblow*.

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

To determine whether the parties have, in fact, been engaged in a joint family venture, the particular circumstances of each particular relationship must be taken into account. This is a question of fact and must

une personne le droit à une part des biens de l'autre personne, les conséquences juridiques de la rupture d'une relation conjugale devraient refléter la façon dont les gens vivent. Deuxièmement, la dichotomie des mesures de réparation est incompatible avec la souplesse inhérente à l'enrichissement injustifié et avec l'approche de la Cour à l'égard des réparations en equity. De plus, la Cour a reconnu que, compte tenu de la grande variété de situations relevant des catégories traditionnelles de l'enrichissement injustifié et de la souplesse de l'approche plus générale et raisonnée, le principe exige qu'on ait recours à différents types de réparation selon les circonstances. Rien ne justifie, en principe, qu'une des catégories traditionnelles d'enrichissement injustifié serve à imposer la réparation pécuniaire dans tous les cas d'enrichissement injustifié entre conjoints de fait. Il est essentiel qu'il y ait un lien entre la contribution et l'accumulation de la richesse. Lorsque ce lien est établi, et qu'une réparation fondée sur le droit de propriété est inappropriée ou inutile, la réparation pécuniaire devrait être adaptée pour refléter la nature véritable de l'enrichissement et de l'appauvrissement correspondant. Troisièmement, la dichotomie des mesures de réparation ne tient pas compte de l'historique des réclamations fondées sur le *quantum meruit*. Enfin, l'arrêt *Peter c. Beblow* n'impose pas, comme il a déjà été donné à penser, la dichotomie des mesures de réparation.

Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié est de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre d'une « coentreprise familiale » à laquelle les deux conjoints ont contribué, la réparation pécuniaire devrait être calculée en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Lorsque les conjoints sont des partenaires conjugaux et financiers, il n'est nul besoin d'un « duel de *quantum meruit* ». Les règles relatives à l'enrichissement injustifié, y compris la fiducie constructoire de nature réparatoire, constituent la meilleure façon de remédier aux iniquités susceptibles de survenir au moment de la rupture d'une union de fait puisque la réparation pour enrichissement injustifié « est adaptée à la situation et aux revendications particulières des parties ». Pour avoir droit à une réparation pécuniaire fondée sur la valeur accumulée, le demandeur doit prouver qu'une coentreprise familiale existait effectivement et qu'il existe un lien entre ses contributions à la coentreprise et l'accumulation de la richesse.

Pour déterminer si les parties ont, de fait, été engagées dans une coentreprise familiale, les circonstances particulières de chaque relation doivent être prises en compte. Il s'agit d'une question de fait que l'on peut

be assessed by having regard to all of the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family. The pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent to which the parties have formed a true partnership and jointly worked towards important mutual goals. The use of parties' funds entirely for family purposes or where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities and enabling him or her to pursue activities in the paid workforce, may also indicate a pooling of resources. The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they have engaged in a joint family venture. The actual intentions of the parties, either express or inferred from their conduct, must be given considerable weight. Their conduct may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture, but may also conversely negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Another consideration is whether and to what extent the parties have given priority to the family in their decision making, and whether there has been detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. This may occur where one party leaves the workforce for a period of time to raise children; relocates for the benefit of the other party's career; foregoes career or educational advancement for the benefit of the family or relationship; or accepts underemployment in order to balance the financial and domestic needs of the family unit.

apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs à l'effort commun, à l'intégration économique, à l'intention réelle et à la priorité accordée à la famille. Les efforts conjoints et le travail d'équipe, la décision d'avoir et d'éduquer des enfants ensemble, ainsi que la durée de la relation peuvent tous indiquer la mesure dans laquelle, le cas échéant, les parties constituaient véritablement une association et ont collaboré à la réalisation d'objectifs communs importants. Le fait que les fonds des parties soient entièrement consacrés à la famille ou le fait qu'un conjoint s'acquitte de la totalité, ou de la plus grande partie, des travaux domestiques, libérant l'autre de ces responsabilités et lui permettant de se consacrer à ses activités rémunérées à l'extérieur, peuvent également indiquer une mise en commun des ressources. Plus le niveau d'intégration des finances, des intérêts économiques et du bien-être économique des conjoints est élevé, plus il est probable que ceux-ci se seront engagés dans une coentreprise familiale. Il faut accorder une importance considérable aux intentions réelles des parties; ces intentions peuvent avoir été exprimées par les parties ou inférées de leur conduite. La conduite des parties peut démontrer qu'elles voulaient que leurs vies familiale et professionnelle fassent partie d'un tout, d'une entreprise commune, mais pourrait aussi permettre d'écarter l'existence d'une coentreprise familiale ou étayer la conclusion selon laquelle des biens déterminés devaient être détenus de façon indépendante. Un autre facteur à considérer consiste à savoir si, et dans quelle mesure, les conjoints avaient donné la priorité à la famille dans le processus décisionnel, et si, pour le bien-être de la famille, une des parties ou les deux se sont fiées à la relation à leur détriment. Cela peut survenir lorsqu'une partie quitte le marché du travail pendant un certain temps pour élever les enfants; lorsqu'elle déménage pour aider la carrière de l'autre partie; lorsqu'elle renonce à une carrière ou à une formation pour le bien de la famille ou de la relation; et lorsqu'elle accepte un sous-emploi dans le but d'équilibrer les besoins financiers et domestiques de l'unité familiale.

The unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits. When the appropriate remedy is a money award based on a fee-for-services provided approach, the fact that the defendant has also provided services to the claimant should mainly be considered at the defence and remedy stages of the analysis but may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of a juristic reason for the enrichment. However, given that the purpose of the juristic reason

L'analyse de l'enrichissement injustifié en matière familiale se complique souvent du fait qu'il y a eu des avantages réciproques. Lorsque la réparation appropriée consiste en une indemnité pécuniaire calculée en fonction de la valeur de la rémunération des services rendus, le fait que le défendeur ait aussi fourni des services au demandeur devrait être examiné principalement au stade de la défense ou à celui de la réparation, mais il est aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constitue une preuve pertinente de l'existence (ou de l'absence) d'un motif juridique de

step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose. Otherwise, the mutual exchange of benefits should be taken into account only after the three elements of an unjust enrichment claim have been established.

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

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

l'enrichissement. Cependant, comme l'analyse du motif juridique vise à déterminer si l'enrichissement était équitable et non à en mesurer l'ampleur, les avantages réciproques ne devraient être pris en considération à cette étape que pour cette fin précise. Autrement, il faut tenir compte des avantages réciproques seulement une fois remplies les trois conditions de l'action pour enrichissement injustifié.

Les demandeurs doivent démontrer qu'aucun motif juridique ne se retrouve dans l'une ou l'autre des catégories établies, par exemple si l'avantage était un don ou s'il découlait d'une obligation légale. Si cette preuve est faite, le défendeur peut alors démontrer qu'un motif juridique différent justifiant l'enrichissement devrait être reconnu, compte tenu des attentes raisonnables des parties et des considérations d'intérêt public. Les avantages réciproques et les attentes raisonnables des parties ont un rôle très limité à jouer dans la première étape de l'analyse du motif juridique. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties peut constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'applique. Les attentes raisonnables ou légitimes des parties jouent un rôle à la deuxième étape de l'analyse du motif juridique, où il incombe au défendeur d'établir qu'il existe un motif juridique de conserver l'avantage n'appartenant pas aux catégories établies. La question est de savoir si les attentes des parties prouvent qu'il est équitable de conserver les avantages.

Dans *Vanasse*, la juge de première instance a conclu qu'il y avait une coentreprise familiale, bien qu'elle ne l'ait pas qualifiée ainsi, et qu'il existait un lien entre la contribution de V à la coentreprise et l'accumulation importante de la richesse familiale. Elle a raisonnablement évalué l'indemnité pécuniaire appropriée pour permettre l'annulation de cet enrichissement injustifié, en tenant dûment compte des contributions importantes de S. Selon ses conclusions de fait et son analyse, l'enrichissement injustifié de S au détriment de V tient à la conservation, par S, d'une part disproportionnée de la richesse générée par une coentreprise familiale. Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Elles ont pris des décisions importantes en gardant le bien-être de la famille au premier plan. Les parties ont été en mesure d'élever une famille et d'acquérir une richesse grâce à leurs efforts communs. S n'aurait pas pu faire tous les efforts qu'il a faits pour développer l'entreprise si V n'avait pas assumé les responsabilités familiales. Il convient de souligner que la période d'enrichissement

that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. There was also evidence of economic integration as their house was registered jointly and they had a joint bank account. Their words and actions indicated that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children. There is a strong inference from the factual findings that, to S's knowledge, V relied on the relationship to her detriment. She left her career, gave up her own income, and moved away from her family and friends. V then stayed home and cared for their two small children. During the period of the unjust enrichment, V was responsible for a disproportionate share of the domestic labour. There was a clear link between V's contribution and the accumulation of wealth. The trial judge took a realistic and practical view of the evidence and took into account S's non-financial contributions and periods during which V's contributions were not disproportionate to S and her judgment should be restored.

The Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment in *Kerr* and in ordering a new hearing on B's counterclaim. On the basis of the unsatisfactory record at trial, which includes findings of fact tainted by clear error, K's unjust enrichment claim should not have been dismissed but a new trial ordered. The Court of Appeal erred in assessing B's contributions as part of the juristic reason analysis and prematurely truncated K's *prima facie* case of unjust enrichment. The family property approach is rejected, and for K to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that B has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. With regard to B's counterclaim, there was evidence that he made very significant contributions to K's welfare such that his counterclaim cannot simply be dismissed. The trial judge also referred to various other monetary and non-monetary contributions which K made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the

injustifié correspond à la période pendant laquelle les parties ont eu leurs deux enfants, un autre indice qu'elles travaillaient ensemble en vue de réaliser des objectifs communs. La durée de la relation est aussi pertinente, et 12 ans de cohabitation se veut une période assez longue. Certains éléments de preuve indiquaient également qu'il y avait intégration économique car la résidence familiale était enregistrée aux deux noms et les parties avaient un compte chèque conjoint. Leurs paroles et leurs actes indiquaient qu'il existait une coentreprise familiale à laquelle le couple a contribué conjointement pour leur bénéfice et le bénéfice de leurs enfants. Il y a de fortes raisons d'inférer des conclusions de fait que, à la connaissance de S, V s'est fiée sur la relation à son détriment. Elle a renoncé à sa carrière et à son salaire et déménagé loin de sa famille et de ses amis. V est donc restée à la maison et s'est occupée de leurs deux jeunes enfants. Pendant la période d'enrichissement injustifié, V assumait une part disproportionnée des travaux domestiques. Il y avait un lien clair entre la contribution de V et l'accumulation de la richesse. La juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve et elle a pris en considération les importantes contributions non financières de S et les périodes pendant lesquelles les contributions de V n'étaient pas disproportionnées par rapport à celles de S, et sa décision devrait être rétablie.

Dans *Kerr*, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concerne la fiducie résultoire et l'enrichissement injustifié et d'ordonner une nouvelle audition de la demande reconventionnelle de B. Compte tenu du dossier insatisfaisant en première instance, qui comprend des conclusions de fait clairement erronées, la demande de K fondée sur l'enrichissement injustifié n'aurait pas dû être rejetée mais la tenue d'un nouveau procès aurait dû être ordonnée. La Cour d'appel a commis une erreur en évaluant les contributions de B dans le cadre de l'analyse du motif juridique et a prématurément tronqué la preuve *prima facie* d'enrichissement injustifié de K. La méthode fondée sur l'avoir familial est rejetée, et pour démontrer qu'elle a droit à une part proportionnelle de la richesse accumulée pendant la relation, K doit établir que B s'est injustement enrichi à ses dépens, que leur relation constituait une coentreprise familiale et que ses contributions sont liées à l'accumulation de la richesse pendant la relation. Elle devrait ensuite démontrer quelle proportion de la richesse accumulée conjointement correspond à ses contributions. En ce qui concerne la demande reconventionnelle de B, certains éléments de preuve indiquaient que B a contribué de façon importante au bien-être de K de sorte que sa

contributions made by B. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Further, the Court of Appeal ought not to have set aside the trial judge's order for spousal support in favour of K effective on the date she had commenced proceedings. It is clear that K was in need of support from B at the date she started her proceedings and remained so at the time of trial. K should not have been faulted for not bringing an interim application in seeking support for the period in question. She suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with B. B had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

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demande reconventionnelle ne peut simplement pas être rejetée. Le juge de première instance a aussi mentionné diverses autres contributions financières et non financières apportées par K au bien-être et au confort du couple, mais il ne les a pas évaluées et les a encore moins comparées à celles de B. Peu de conclusions de fait sont pertinentes en ce qui concerne la question clé de savoir si la relation des parties constituait une coentreprise familiale. De plus, la Cour d'appel n'aurait pas dû annuler l'ordonnance du juge de première instance accordant à K une pension alimentaire rétroactive à la date d'introduction de l'action. Il est clair que K avait besoin que B lui verse une pension alimentaire à la date où elle a introduit les procédures et qu'elle en avait toujours besoin lors du procès. On a eu tort de reprocher à K de ne pas avoir présenté une demande provisoire dans sa demande de pension alimentaire pour la période en question. Elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait quand elle habitait avec B. B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge mettait B dans une situation financière difficile, de sorte que l'ordonnance était inappropriée.

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

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

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

John E. Johnson, for the appellant Michele Vanasse.

H. Hunter Phillips, for the respondent David Seguin.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Weiler, Juriansz et Epstein), 2009 ONCA 595, 252 O.A.C. 218, 96 O.R. (3d) 321, [2009] O.J. No. 3211 (QL), 2009 CarswellOnt 4407, qui a infirmé une décision de la juge Blishen, 2008 CanLII 35922, [2008] O.J. No. 2832 (QL), 2008 CarswellOnt 4265. Pourvoi accueilli.

Armand A. Petronio et *Geoffrey B. Gomery*, pour l'appelante Margaret Kerr.

Susan G. Label et *Marie-France Major*, pour l'intimé Nelson Baranow.

John E. Johnson, pour l'appelante Michele Vanasse.

H. Hunter Phillips, pour l'intimé David Seguin.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

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

[3] As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust. In order to successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Dans une série de décisions rendues dans les 30 dernières années, la Cour s'est heurtée aux questions de droits financiers et de droits des biens des parties à la rupture du mariage ou de la relation conjugale. Aujourd'hui, des lois exhaustives en matière de régimes matrimoniaux adoptées à la fin des années 1970 et dans les années 1980 prévoient le cadre juridique applicable aux époux. Cependant, en ce qui concerne les conjoints non mariés dans la plupart des provinces de common law, le recours au droit jurisprudentiel était et demeure la seule solution. Les principaux mécanismes juridiques auxquels les parties et les tribunaux peuvent avoir recours sont la fiducie résultoire et l'action en enrichissement injustifié.

[2] Dans les premières décisions rendues dans les années 1970, les parties et les tribunaux se sont tournés vers la fiducie résultoire. Selon le principe juridique sous-jacent, les contributions à l'acquisition de biens, qui n'étaient pas indiquées dans le titre de propriété, pouvaient néanmoins créer un droit de propriété. À ce principe s'ajoutait l'idée qu'une fiducie résultoire pouvait découler d'une « intention commune » des parties d'accorder un droit au partenaire non propriétaire. La fiducie résultoire s'est vite avérée une solution juridique insatisfaisante dans de nombreux litiges se rapportant aux biens conjugaux, mais des recours sont encore intentés et tranchés sur ce fondement.

[3] À mesure que les problèmes théoriques et les limitations pratiques de la fiducie résultoire se sont précisés, les parties et les tribunaux se sont de plus en plus tournés vers le droit naissant de l'enrichissement injustifié. Au fil de son évolution, l'enrichissement injustifié a conduit à la possibilité d'une fiducie constructoire de nature réparatoire. Pour réussir à établir le bien-fondé d'une action en enrichissement injustifié, le demandeur doit démontrer l'enrichissement du défendeur, son

This claim has become the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships. However, various issues continue to create controversy, and these two appeals, argued consecutively, provide the Court with the opportunity to address them.

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

propre appauvrissement correspondant et l'absence de « motif juridique » de l'enrichissement. Ce recours est devenu le moyen prééminent pour traiter des conséquences financières de la rupture des relations conjugales. Cependant, diverses questions continuent de susciter la controverse, et ces deux pourvois entendus consécutivement donnent à la Cour l'occasion d'y répondre.

[4] Dans le pourvoi *Kerr*, un couple dans la soixantaine avancée s'est séparé après plus de 25 ans de vie commune. Tous deux avaient travaillé pendant presque toutes ces années et avaient chacun contribué de diverses façons à leur bien-être commun. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, M^me^ Kerr a réclamé une pension alimentaire et une part des biens détenus au nom de son conjoint. Le juge de première instance lui a accordé un tiers de la valeur de la résidence du couple au titre de la fiducie résultoire et de l'enrichissement injustifié (2007 BCSC 1863, 47 R.F.L. (6th) 103). Il n'a pas traité, sauf dans une remarque incidente, de la demande reconventionnelle de M. Baranow suivant laquelle M^me^ Kerr se serait injustement enrichie à ses dépens. Le juge a aussi ordonné le paiement d'une pension alimentaire mensuelle élevée à M^me^ Kerr en vertu de la loi, et ce, à compter de la date à laquelle la demande de réparation a été présentée à la cour. Toutefois, la Cour d'appel de la Colombie-Britannique a écarté les conclusions du juge de première instance se rapportant à la fiducie résultoire et à l'enrichissement injustifié (2009 BCCA 111, 93 B.C.L.R. (4th) 201). Les deux tribunaux d'instance inférieure ont examiné le rôle que peuvent jouer l'intention commune et les attentes raisonnables des parties. Le présent pourvoi soulève des questions relatives au rôle du droit des fiducies résultoires dans les litiges de ce genre, ainsi que celle de la mesure dans laquelle l'analyse de l'enrichissement injustifié devrait prendre en compte les avantages réciproques et de l'importance à accorder aux intentions et attentes des parties dans cette analyse. Notre Cour est également appelée à décider si l'ordonnance alimentaire en faveur d'un conjoint devrait prendre effet à la date de la demande, comme l'a conclu le juge de première instance, à la date du procès, comme l'a ordonné la Cour d'appel, ou à une autre 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). 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,

[5] Dans le pourvoi *Vanasse*, le problème fondamental est de savoir comment déterminer l'indemnité à accorder pour enrichissement injustifié. Il est admis que M. Seguin s'est injustement enrichi grâce aux contributions de sa conjointe, M^me^ Vanasse; ils ont vécu en union de fait pendant environ 12 ans et ils ont eu deux enfants pendant cette période. La juge de première instance a établi la valeur de l'enrichissement en déterminant la proportion de l'avoir de M. Seguin qui était attribuable aux efforts de M^me^ Vanasse, qui avait contribué de manière aussi importante à l'entreprise familiale (2008 CanLII 35922). La Cour d'appel a écarté cette conclusion et, bien qu'elle ait ordonné la tenue d'un nouveau procès, elle a indiqué que la méthode appropriée pour déterminer la valeur de l'enrichissement injustifié consistait à attribuer une valeur pécuniaire aux services fournis à la famille par M^me^ Vanasse, en prenant en considération les contributions de M. Seguin en compensation (2009 ONCA 595, 252 O.A.C. 218). En résumé, la Cour d'appel a conclu que M^me^ Vanasse devait être considérée comme une employée non rémunérée, et non comme une co-entrepreneure. Dans le présent pourvoi, on conteste cette conclusion.

[6] Les présents pourvois nous obligent à répondre à cinq questions principales. La première porte sur le rôle de la fiducie résultoire fondée sur l'intention commune dans les réclamations présentées par les partenaires vivant en union libre. À mon avis, il est temps de reconnaître que, dans l'examen de la fiducie résultoire, il ne faut plus accorder un rôle à l'« intention commune » lorsqu'il s'agit de trancher les réclamations fondées sur un droit de propriété présentées par des partenaires vivant en union libre au moment de la rupture de leur relation.

[7] La deuxième question porte sur la nature de l'indemnité pécuniaire pour enrichissement injustifié. Selon certains tribunaux, s'il est impossible d'établir un lien entre la contribution d'un demandeur et un bien précis, une réparation pécuniaire doit toujours être évaluée en fonction de la valeur des services rendus. D'autres tribunaux ont adopté une approche plus souple. À mon avis, si les deux parties ont travaillé ensemble dans un intérêt commun et ont fait des contributions importantes,

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

mais différentes, au bien-être de l'autre et, de ce fait, elles ont accumulé des biens, la réparation pécuniaire pour enrichissement injustifié devrait refléter cette réalité. Dans ces circonstances, la réparation ne devrait pas être fondée sur un calcul détaillé des contributions et des concessions de la vie quotidienne; le demandeur devrait être traité comme un co-entrepreneur plutôt qu'un employé.

[8] La troisième question qui mérite clarification se rapporte aux avantages réciproques. Plusieurs relations conjugales supposent des avantages réciproques, dans le sens que chacune des parties contribue de diverses façons au bien-être de l'autre. La question est de savoir comment et à quel moment de l'analyse de l'enrichissement injustifié ces avantages réciproques devraient être pris en considération. Pour des raisons que je vais exposer plus loin, cette question devrait, à une exception près, être traitée à l'étape de la défense et de la réparation.

[9] La quatrième question concerne le rôle que jouent les attentes raisonnables ou légitimes des parties dans l'analyse de l'enrichissement injustifié. Je suis d'avis qu'elles ont un rôle limité et qu'elles doivent être examinées par rapport à la question de savoir s'il y a un motif juridique de l'enrichissement.

[10] Enfin, il reste la question de la date de prise d'effet de la pension alimentaire. À mon avis, dans l'affaire *Kerr*, la Cour d'appel a commis une erreur en annulant la décision du juge de première instance quant à la date de prise d'effet de la pension dans les circonstances.

[11] Je vais d'abord traiter du droit des fiducies résultoires tel qu'il s'applique à la rupture d'une relation de nature conjugale. Ensuite, j'examinerai le droit relatif à l'enrichissement injustifié dans ce contexte. Enfin, je vais aborder les questions particulières soulevées dans les deux pourvois.

II. Fiducies résultoires

[12] La fiducie résultoire a joué un rôle important dans les premières décisions de la Cour se rapportant aux droits de propriété à la suite de la rupture

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

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

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

d'une relation personnelle. Cela n'est guère surprenant; il est bien établi en droit, depuis au moins 1788 en Angleterre (et probablement bien avant), qu'une fiducie à l'égard d'un domaine légal au nom de l'acheteur ou d'une autre personne est créée au bénéfice de la personne qui fournit le prix d'achat : *Dyer c. Dyer* (1788), 2 Cox Eq. Cas. 92, 30 E.R. 42, p. 43. Par conséquent, la fiducie résultoire semblait être un moyen prometteur de traiter la prétention selon laquelle la contribution d'une partie à l'acquisition d'un bien ne se reflétait pas dans le titre de propriété.

[13] La jurisprudence portant sur la fiducie résultoire en matière de biens familiaux a donné lieu à ce qu'on a appelé [TRADUCTION] « une invention purement canadienne », la fiducie résultoire fondée sur « l'intention commune » : A. H. Oosterhoff, et autres, *Oosterhoff on Trusts : Text, Commentary and Materials* (7e éd. 2009), p. 642. Bien que ce recours ait été largement éclipsé par les règles de l'enrichissement injustifié depuis l'arrêt de notre Cour *Pettkus c. Becker*, [1980] 2 R.C.S. 834, des réclamations fondées sur l'« intention commune » de créer une fiducie résultoire continuent d'être présentées. Par exemple, dans l'affaire *Kerr*, le juge de première instance a justifié l'existence d'une fiducie résultoire, en partie, parce que les parties voulaient toutes les deux que M. Baranow détienne le titre de propriété au moyen d'une fiducie résultoire pour Mme Kerr. La Cour d'appel, tout en infirmant la conclusion de fait du juge de première instance sur ce point, a implicitement accepté la validité de la fiducie résultoire fondée sur l'intention commune.

[14] La fiducie résultoire fondée sur l'intention commune est apparue comme une méthode prometteuse au début, mais les problèmes théoriques et pratiques sont vite devenus évidents et ont suscité les commentaires de la Cour et des auteurs : voir, par exemple, *Pettkus*, p. 842-843; Oosterhoff, p. 641-647; D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005) (« *Waters* »), p. 430-435; J. Mee, *The Property Rights of Cohabitees : An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), p. 39-43; T. G. Youdan, « Resulting and Constructive Trusts », dans *Special*

Canada 1993 — *Family Law: Roles, Fairness and Equality* (1994), 169, at pp. 172-74.

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

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

[17] Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in

Lectures of the Law Society of Upper Canada 1993 — Family Law : Roles, Fairness and Equality (1994), 169, p. 172-174.

[15] Devant notre Cour, depuis l'arrêt *Pettkus*, la fiducie résultoire fondée sur l'intention commune demeure intacte mais inutilisée. Il se pourrait bien que les principes traditionnels de la fiducie résultoire aient un rôle à jouer dans le règlement des litiges concernant les biens entre des partenaires non mariés, mais le moment est venu de reconnaître que la fiducie résultoire fondée sur l'intention commune a perdu sa raison d'être. Pour expliquer cette conclusion, je dois d'abord situer la question dans le contexte de certains principes de base se rapportant aux fiducies résultoires.

[16] Cette tâche n'est pas aussi simple qu'elle devrait l'être; dès que l'on aborde le sujet des fiducies résultoires, on risque la contradiction. Un débat entoure le mode de constitution et de classification de ce type de fiducie, sans compter de nombreuses autres subtilités : voir, par exemple, *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, p. 449-450; *Waters'*, p. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11e éd. 2009), p. 67. Toutefois, il est largement reconnu que la notion sous-jacente de la fiducie résultoire est qu'elle est imposée afin que [TRADUCTION] « la personne qui détient le titre sur le bien le retourne à la personne qui lui a donné et qui détient le droit à titre de bénéficiaire. Ainsi, l'intérêt bénéficiaire "revient" (retourne) au véritable propriétaire » : Oosterhoff, p. 25. De plus, on s'entend de manière générale pour dire que, traditionnellement, les fiducies résultoires prenaient naissance dans les cas où il y avait eu un transfert à titre gratuit ou quand les fins énoncées par une fiducie explicite ou implicite n'avaient pas permis d'épuiser les biens en fiducie : *Waters'*, p. 21.

[17] Les fiducies résultoires découlant de transferts à titre gratuit sont celles qui sont pertinentes en matière familiale. Selon le point de vue traditionnel, elles découlaient de deux types de situations : le transfert à titre gratuit d'un bien d'un partenaire à l'autre, et la contribution des deux partenaires à l'acquisition d'un bien, dont le titre est au nom d'un seul des partenaires. Dans l'un ou l'autre

the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

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

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

[20] The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example, in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to

des cas, le transfert est à titre gratuit; dans le premier cas, parce que le transfert du bien s'effectue sans contrepartie, et dans le second cas, parce que la contribution à l'acquisition du bien est faite sans contrepartie.

[18] L'arrêt le plus récent de la Cour en matière de fiducies résultoires confirme l'approche selon laquelle, dans ces situations de transfert à titre gratuit, l'intention réelle du donateur est le facteur déterminant : *Pecore c. Pecore*, 2007 CSC 17, [2007] 1 R.C.S. 795, par. 43-44. Comme le juge Rothstein l'a indiqué au par. 44 de *Pecore*, lorsqu'un transfert à titre gratuit est contesté, « [l]e juge de première instance entamera son instruction en appliquant la présomption appropriée et il appréciera tous les éléments de preuve pour déterminer l'intention réelle de l'auteur du transfert, selon la prépondérance des probabilités » (je souligne).

[19] Comme le fait remarquer le juge Rothstein dans ce passage, les présomptions peuvent entrer en jeu lorsqu'il est question de transferts à titre gratuit. Le droit présume généralement que le donateur avait l'intention de créer une fiducie, au lieu de faire une donation, de sorte que la présomption de fiducie résultoire trouve souvent application. Comme l'a expliqué le juge Rothstein, une présomption de fiducie résultoire est la règle générale applicable aux transferts à titre gratuit. Dans le cas d'un tel transfert, la preuve de l'intention de faire un don incombe à son destinataire. Autrement, le destinataire détient le bien en fiducie au profit de l'auteur du transfert. Cette présomption repose sur le principe que l'equity présume l'existence d'une entente, et non d'une donation (*Pecore*, par. 24).

[20] Cependant, la présomption de fiducie résultoire n'est ni universelle ni irréfutable. Ainsi, par exemple, dans le cas de transferts entre des personnes ayant entre eux une certaine relation (comme celle d'un parent à un enfant mineur), une présomption d'avancement — c'est-à-dire une présomption selon laquelle l'auteur du transfert avait l'intention de faire une donation — au lieu d'une présomption de fiducie résultoire s'applique : voir *Pecore*, par. 27-41. Traditionnellement, la présomption d'avancement s'appliquait aux transferts à l'épouse alors

grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

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

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

que la présomption de fiducie résultoire s'appliquait aux transferts à l'époux. Il est fort possible que la question de savoir si la présomption d'avancement s'applique aux couples non mariés soit plus controversée : Oosterhoff, p. 681-682. Bien que, dans *Kerr*, le juge de première instance ait abordé cette question, ni l'une ni l'autre des parties n'invoque la présomption d'avancement et je ne dirai rien de plus sur cette question.

[21] Cela m'amène à la fiducie résultoire fondée sur l'« intention commune ». Elle a eu beaucoup d'importance dans les motifs de la majorité dans l'arrêt *Murdoch c. Murdoch*, [1975] 1 R.C.S. 423. Citant un extrait des motifs de lord Diplock dans *Gissing c. Gissing*, [1970] 2 All E.R. 780 (H.L.), p. 789 et 793, le juge Martland a conclu au nom de la majorité que, en l'absence d'une contribution financière à l'acquisition du bien contesté, une fiducie résultoire ne pouvait prendre naissance « que dans des cas où la cour est convaincue par les paroles ou la conduite des parties que leur intention commune était que la propriété véritable n'appartiendrait pas seulement au conjoint investi de la propriété légale mais serait partagée entre eux selon telle ou telle proportion » : *Murdoch*, p. 438.

[22] Trois ans plus tard, cette approche a été retenue et adoptée par une majorité de la Cour dans *Rathwell*, p. 451-453, bien que la Cour ait aussi conclu à l'unanimité qu'il y avait eu une contribution financière directe de la part de la demanderesse. Dans cet arrêt, les notions de contribution et d'intention commune sont aussi embrouillées; on y mentionne le fait qu'une présomption de fiducie résultoire s'explique parfois par le fait que la contribution prouve l'intention commune de partager le titre de propriété : voir p. 452, le juge Dickson (plus tard Juge en chef); p. 474, le juge Ritchie. Cette confusion ressort aussi des motifs de la Cour d'appel dans *Kerr*, où la cour a affirmé au par. 42 qu'[TRADUCTION] « [u]ne fiducie résultoire est une notion d'equity qui, par effet de la loi, impose une fiducie à une partie qui détient un titre légal afférent à un bien qui lui a été transféré à titre gratuit par une autre partie et dans les cas où des éléments de preuve indiquent l'intention commune qu'avaient les parties de partager le bien » (je souligne).

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

[23] La Cour a cessé d'acquiescer à la notion de fiducie résultoire fondée sur l'intention commune dans l'arrêt *Pettkus*, où le juge Dickson (plus tard Juge en chef) a souligné les « multiples difficultés, mentionnées dans la jurisprudence et les commentaires sur le sujet » ainsi que « le caractère artificiel de la recherche de l'intention commune » dans les fiducies résultoires : p. 842-843. Le juge Dickson a aussi clairement rejeté la notion selon laquelle l'intention commune requise pouvait être attribuée aux parties lorsqu'une telle intention était réfutée par la preuve : p. 847. Par suite de l'arrêt *Pettkus*, les règles de l'enrichissement injustifié, conjuguées aux règles de la fiducie constructoire de nature réparatoire, sont devenues le mécanisme le plus souple et le plus approprié pour résoudre les litiges en matière de biens et les différends financiers en matière familiale. Comme M^me^ Kerr l'affirme dans son mémoire, [TRADUCTION] « l'approche énoncée dans l'arrêt *Pettkus c. Becker* est devenue le paradigme juridique dominant pour la résolution de litiges en matière de biens entre conjoints de fait » (par. 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.

[24] Selon moi, il doit en être ainsi et le moment est venu de dire que la fiducie résultoire à base d'intention commune n'a plus aucun rôle à jouer dans la résolution des litiges familiaux, et ce, pour quatre raisons.

[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

[25] Premièrement, comme le démontrent les abondantes critiques, la fiducie résultoire basée sur l'intention commune est mal fondée sur le plan théorique. Elle est incompatible avec les principes sous-jacents du droit des fiducies résultoires. Dans les cas où la question de l'intention est pertinente pour conclure à l'existence d'une fiducie résultoire, seule l'intention du donateur ou du contributeur compte. Comme l'a dit le professeur Waters, [TRADUCTION] « [e]n imposant une fiducie résultoire au bénéficiaire, l'equity ne s'intéresse jamais à l'intention [commune] » (*Waters'*, p. 431). Les principes sous-jacents du droit des fiducies résultoires s'appliquent mal également aux situations où la contribution du demandeur ne s'est pas faite sous la forme d'un bien ni sous une forme étroitement liée à l'acquisition du bien. Le principe au cœur de la fiducie résultoire est que le demandeur réclame son propre

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.

bien, ou la reconnaissance de son intérêt proportionnel dans l'actif acquis par une autre personne grâce à ce bien. Ce raisonnement s'étend artificiellement aux réclamations fondées sur des contributions qui ne sont pas clairement liées à l'acquisition d'un droit de propriété; dans de tels cas, il n'y a pas à toutes fins utiles de [TRADUCTION] « retour » du bien transféré : *Waters'*, p. 432. Ainsi, une fiducie résultoire uniquement fondée sur l'intention, sans transfert de biens, est, comme l'indique Oosterhoff, une impossibilité théorique : [TRADUCTION] « . . . une fiducie résultoire ne peut prendre naissance que lorsqu'une personne a transféré des biens à une autre personne, ou acheté des biens pour elle, sans avoir eu l'intention de lui en faire don » : p. 642. Le dernier problème théorique est qu'il faut déterminer l'intention au moment de l'acquisition du bien. Par conséquent, il est difficile de concevoir comment une fiducie résultoire peut découler de contributions versées au fil du temps dans le but d'améliorer un bien existant, ou de contributions en nature pour son entretien. Comme Oosterhoff l'explique brièvement à la p. 652, une fiducie résultoire est inappropriée dans ces circonstances parce que, dans les faits, elle oblige une partie à renoncer au droit de propriété à titre de bénéficiaire dont elle jouissait avant l'amélioration ou l'entretien du bien.

[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.

[26] Ces problèmes théoriques ne sont pas les seuls. La fiducie résultoire fondée sur l'intention commune pose une deuxième difficulté parce que la notion d'intention commune peut être extrêmement artificielle, surtout en matière familiale. La recherche d'une intention commune peut facilement devenir « un simple moyen ou une formule » pour donner une part dans un actif, sans aucune évaluation réaliste de l'intention réelle des parties. Dans *Pettkus*, le juge Dickson a fait remarquer le caractère artificiel et la malléabilité indue de la recherche de l'intention commune : p. 843-844.

[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

[27] Troisièmement, la fiducie résultoire fondée sur « l'intention commune » au Canada tire son origine d'une interprétation erronée de quelques formulations imprécises dans l'ancienne jurisprudence de la Chambre des lords. Comme ce sujet a fait couler beaucoup d'encre, il suffit ici de noter, comme l'a fait le juge Dickson à la p. 842

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

de *Pettkus*, que les principes qui ont guidé l'évolution de la jurisprudence relative aux fiducies résultoires fondée sur l'intention commune se trouvent dans les arrêts *Pettitt c. Pettitt*, [1970] A.C. 777, et *Gissing* de la Chambre des lords. Cependant, aucune opinion majoritaire claire ne s'est dégagée dans ces arrêts et quatre des cinq lords juges dans *Gissing* ont parlé de [TRADUCTION] « fiducie résultoire, implicite, ou par interprétation » sans faire de distinction. Les passages ayant eu le plus de retentissement au Canada sur ce point, sous la plume de Lord Diplock, se rapportent en fait aux fiducies constructoires plutôt que résultoires : voir, par exemple, *Waters'*, p. 430-435; Oosterhoff, p. 642-643. J'estime convaincants les commentaires du professeur Waters, expressément acceptés par le juge Dickson dans *Pettkus*, selon lesquels lorsque la recherche de l'intention commune devient simplement un moyen pour atteindre ce que le tribunal considère comme étant un résultat équitable, [TRADUCTION] « [c]'est en fait la fiducie par interprétation qui se déguise en une fiducie par déduction » : D. Waters, Commentaire (1975), 53 *R. du B. can.* 366, 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.

[28] Enfin, comme le montre l'évolution du droit depuis l'arrêt *Pettkus*, les principes de l'enrichissement injustifié, conjugués au recours possible à la fiducie constructoire, fournissent un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter de la grande variété des circonstances donnant lieu à des réclamations découlant d'unions conjugales. Il n'est nul besoin de mener une enquête artificielle sur l'intention commune. Les demandes d'indemnisation et les revendications de droits de propriété peuvent être examinées. Les contributions de toute sorte, versées à tout moment, peuvent être équitablement prises en considération. Le tribunal peut analyser l'équilibre particulier de l'affaire dans la transparence et conformément aux principes applicables, au lieu de tenter souvent artificiellement de trouver une intention commune qui appuie ce qu'il considère, pour des raisons inexprimées, être un résultat équitable.

[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*,

[29] Je suis d'avis que la fiducie résultoire créée du seul fait de l'intention commune des parties, telle que décrite par la Cour dans *Murdoch* et *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, 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.

n'a plus de rôle utile à jouer dans la résolution des litiges relatifs aux droits de propriété et aux finances en matière familiale. Je tiens à préciser que je renvoie uniquement à la fiducie résultoire fondée sur l'intention commune. Je ne traite pas des autres aspects du droit applicable aux fiducies résultoires, et je ne suggère pas non plus qu'une fiducie résultoire par ailleurs validement créée est anéantie en raison de l'existence d'une intention commune.

III. Enrichissement injustifié

A. *Introduction*

[30] Les règles relatives à l'enrichissement injustifié ont été le principal moyen utilisé pour régler les réclamations pour partage inéquitable des biens après la rupture d'une relation conjugale. Dans une série de décisions, la Cour a élaboré un cadre solide pour traiter de ces réclamations. Cependant, un certain nombre de questions théoriques et pratiques demandent un examen plus approfondi. Je vais d'abord énoncer brièvement le cadre juridique existant, puis j'exposerai les questions qui, à mon avis, méritent d'être examinées plus attentivement, et, enfin, je proposerai des façons de les aborder.

B. *Le cadre juridique de l'action pour enrichissement injustifié*

[31] Au cœur de la doctrine de l'enrichissement injustifié se trouve la notion de la restitution d'un avantage que la justice ne permet pas à une personne de conserver : *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 788. Pour qu'il y ait recouvrement, il faut que le demandeur ait donné une chose et que la chose donnée ait été reçue et retenue par le défendeur sans motif juridique. Une série de catégories, où la conservation de l'avantage conféré a été jugée inéquitable, a été élaborée. Ces catégories incluaient notamment les avantages conférés par suite d'une erreur de fait ou de droit, sous la contrainte, par nécessité, par suite d'une opération non consommée ou à la demande du défendeur : voir *Peel*, p. 789; voir, en général, G. H. L. Fridman, *Restitution* (2e éd. 1992), ch. 3-5, 7, 8 et 10; et Lord Goff of Chieveley et G. Jones, *The Law of Restitution* (7e éd. 2007), ch. 4-11, 17 et 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, 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.

[32] Toutefois, en droit canadien, les demandes fondées sur l'enrichissement injustifié ne se limitent pas à ces catégories. Le recouvrement est permis quand le demandeur peut prouver trois éléments : un enrichissement ou un avantage pour le défendeur, l'appauvrissement correspondant du demandeur et l'absence de tout motif juridique à l'enrichissement : *Pettkus*; *Peel*, p. 784. En conservant les catégories existantes, tout en reconnaissant que les principes qui sous-tendent l'enrichissement injustifié s'appliquent à d'autres réclamations, le droit peut « évoluer avec la souplesse qui s'impose pour tenir compte des perceptions changeantes de la justice » : *Peel*, p. 788.

[33] L'application des principes de l'enrichissement injustifié aux réclamations présentées par des conjoints de fait s'est heurtée à une certaine résistance jusqu'à ce que la Cour rende sa décision dans *Pettkus* en 1980. En appliquant ces principes aux réclamations présentées par des conjoints de fait, la Cour a pris soin de préciser cependant qu'il n'y a pas et qu'il n'y avait pas lieu d'élaborer une jurisprudence distincte dans les affaires « familiales » dans le cadre des règles relatives à l'enrichissement injustifié. Au contraire, le souci de clarté et d'uniformité de la doctrine dans ce domaine veut que « les principes fondamentaux régissant les droits et les réparations demeurent les mêmes dans tous les cas » (*Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 997).

[34] Bien que les principes juridiques demeurent constants dans tous les domaines, il faut les appliquer en fonction du contexte factuel et social particulier dans lequel les réclamations sont présentées. Dans *Peter*, la Cour a conclu à l'unanimité que les tribunaux « doivent faire preuve de souplesse et de bon sens lorsqu'ils appliquent les principes d'equity à des questions relevant du droit de la famille, tout en tenant bien compte des circonstances particulières de chaque cas » (p. 997, la juge McLachlin (maintenant Juge en chef); voir aussi p. 1023, le juge Cory). Ainsi, bien que les principes juridiques qui sous-tendent les règles relatives à l'enrichissement injustifié soient les mêmes dans tous les cas, les tribunaux doivent appliquer ces principes communs en fonction du contexte particulier dans lequel ils doivent s'appliquer.

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

C. *The Elements of an Unjust Enrichment Claim*

(1) Enrichment and Corresponding Deprivation

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

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

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

[39] Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to

[35] Il est utile de rappeler, brièvement, l'état actuel du droit relativement à chacun des éléments d'une demande fondée sur l'enrichissement injustifié et de signaler les questions particulières que soulèvent les réclamations des conjoints de fait.

C. *Les éléments d'une demande fondée sur l'enrichissement injustifié*

(1) Enrichissement et appauvrissement correspondant

[36] Les première et deuxième étapes de l'analyse de l'enrichissement injustifié portent premièrement sur la question de savoir si le défendeur s'est enrichi grâce au demandeur et, deuxièmement, sur la question de savoir si le demandeur a subi un appauvrissement correspondant.

[37] La Cour a appliqué une analyse économique simple aux deux premiers éléments — enrichissement et appauvrissement correspondant. Par conséquent, d'autres considérations, comme les questions de morale et d'intérêt public, doivent plutôt être examinées à l'étape de l'analyse du motif juridique : voir *Peter*, p. 990, renvoyant à *Pettkus*; *Sorochan c. Sorochan*, [1986] 2 R.C.S. 38; et *Peel*, confirmé dans *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, par. 31.

[38] Pour ce qui est du premier élément — l'enrichissement —, le demandeur doit prouver qu'il a donné quelque chose au défendeur et que ce dernier a reçu et retenu la chose donnée. Il n'est pas nécessaire que l'avantage soit conservé de façon permanente, mais il doit y avoir un avantage qui a enrichi le défendeur et qui peut être restitué *en nature* ou en argent au demandeur. De plus, l'avantage doit être tangible. Il peut être positif ou négatif, « négatif » en ce sens qu'il épargne au défendeur une dépense à laquelle il aurait été tenu (*Peel*, p. 788 et 790; *Garland*, par. 31 et 37).

[39] Pour ce qui est du deuxième élément — l'appauvrissement *correspondant* —, la perte subie par le demandeur n'est pertinente que si le défendeur a reçu un avantage ou qu'il a été enrichi (*Peel*, p. 789-790). C'est la raison pour laquelle le deuxième

establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

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

[41] Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp. 990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract" (*Peel*, at p. 803).

[42] A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After

élément oblige le demandeur à prouver non seulement que le défendeur s'est enrichi, mais aussi qu'il a subi un appauvrissement qui correspond à cet enrichissement (*Pettkus*, p. 852; *Rathwell*, p. 455).

(2) Absence de motif juridique

[40] Le troisième élément d'une action pour enrichissement injustifié est qu'il doit y avoir eu un avantage et un appauvrissement correspondant sans motif juridique. En somme, ni le droit ni les exigences de la justice ne permettent au défendeur de conserver l'avantage conféré par le demandeur, rendant la conservation de l'avantage « injuste » dans les circonstances de l'affaire : voir *Pettkus*, p. 848; *Rathwell*, p. 456; *Sorochan*, p. 44; *Peter*, p. 987; *Peel*, p. 784 et 788; *Garland*, par. 30.

[41] L'intention de faire un don (appelée « intention libérale »), le contrat ou la disposition légale peuvent constituer des motifs juridiques de refuser le recouvrement (*Peter*, p. 990-991; *Garland*, par. 44; *Rathwell*, p. 455). Cette dernière catégorie comprend habituellement les cas où la loi prescrit l'enrichissement du défendeur au détriment du demandeur, comme lorsqu'une loi valide empêche le recouvrement (P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (1990), p. 46; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Mack c. Canada (Procureur géneral)* (2002), 60 O.R. (3d) 756 (C.A.)). Cependant, tout comme la Cour n'a pas retenu une approche purement fondée sur des catégories de réclamations pour enrichissement injustifié, elle a aussi refusé de limiter les motifs juridiques à une liste restrictive. Cette troisième étape de l'analyse de l'enrichissement injustifié permet de prendre dûment en considération l'autonomie des parties, y compris des facteurs comme « l'expectative légitime des parties, leur droit de régler contractuellement leurs affaires et le droit des législateurs [. . .] d'agir selon leur bon jugement, sans avoir à craindre de se voir imposer ultérieurement des obligations imprévues » (*Peel*, p. 803).

[42] Dans les réclamations contre le conjoint, une question cruciale consistait au début à savoir si la prestation de services domestiques pouvait appuyer

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

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

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory

une action pour enrichissement injustifié. Après certaines hésitations, ce point a été définitivement réglé dans l'arrêt *Peter*, où la Cour a conclu que cela était possible. Généralement, un conjoint de fait n'est pas tenu en common law, en equity ou par la loi de travailler pour son conjoint ou de lui fournir des services. Par conséquent, selon une analyse économique simple, il n'y a aucune raison de distinguer les services domestiques des autres contributions (*Peter*, p. 991 et 993; *Sorochan*, p. 46). Ils constituent un enrichissement parce que de tels services sont fort utiles pour la famille et pour l'autre conjoint; toute autre conclusion dévalue les contributions apportées, principalement par les femmes, aux finances de la famille (*Peter*, p. 993). La prestation non rémunérée de services (y compris de services domestiques) ou le travail non rémunéré peuvent aussi constituer un appauvrissement parce qu'il n'y a aucune difficulté à considérer comme un appauvrissement la contribution à plein temps et sans compensation de son travail et de ses revenus. La Cour a rejeté l'argument selon lequel ces services ne peuvent fonder une action pour enrichissement injustifié parce qu'ils sont offerts par « amour et affection naturels » : (*Peter*, p. 989-995, la juge McLachlin, et p. 1012-1016, le juge Cory).

[43] Dans *Garland*, la Cour a élaboré une analyse en deux étapes de l'absence du motif juridique. Il est important de se rappeler que cela visait à éviter que l'analyse du motif juridique soit « purement subjecti[ve] », ajoutant à l'analyse de l'enrichissement injustifié un « pouvoir discrétionnaire incommensurable » inacceptable qui allait permettre le « cas par cas » : *Garland*, par. 40. La première étape de l'analyse du motif juridique consiste à appliquer les catégories établies de motifs juridiques; en l'absence de motif juridique dans une catégorie, la deuxième étape permet de tenir compte des attentes raisonnables des parties et des considérations d'intérêt public afin de déterminer si le recouvrement devrait être refusé :

> Le demandeur doit d'abord démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie de refuser le recouvrement. [. . .] Parmi les catégories établies susceptibles de constituer un motif juridique, il y a le contrat (*Pettkus*, précité), la disposition légale (*Pettkus*, précité), l'intention libérale (*Peter*, précité) et

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

les autres obligations valides imposées par la common law, l'equity ou la loi (*Peter*, précité). S'il n'existe aucun motif juridique appartenant à une catégorie établie, le demandeur a alors établi une preuve *prima facie* en ce qui concerne le volet « motif juridique » de l'analyse.

La preuve *prima facie* est cependant réfutable si le défendeur parvient à démontrer qu'il existe un autre motif de refuser le recouvrement. En conséquence, le défendeur a l'obligation *de facto* de démontrer pourquoi il devrait conserver ce dont il s'est enrichi. À cette étape de l'analyse, le défendeur peut donc recourir à une catégorie de moyens de défense résiduels qui permettent aux tribunaux d'examiner toutes les circonstances de l'opération afin de déterminer s'il existe un autre motif de refuser le recouvrement.

Lorsque le défendeur tente de réfuter la preuve en question, les tribunaux doivent tenir compte de deux facteurs : les attentes raisonnables des parties et les considérations d'intérêt public. [par. 44-46]

[44] Ainsi, à l'étape de l'analyse qui porte sur le motif juridique, si aucune catégorie établie ne s'applique, la cour peut prendre en considération les attentes légitimes des parties (*Pettkus*, p. 849) ainsi que les arguments de morale et d'intérêt public sur la question de savoir si l'enrichissement est injustifié (*Peter*, p. 990). Par exemple, dans *Peter*, c'est à cette étape que la Cour a examiné et rejeté l'argument selon lequel la prestation de services domestiques et de soins des enfants ne devrait pas, dans une relation matrimoniale ou quasi matrimoniale, donner lieu à une réclamation en equity contre l'autre conjoint (p. 993-995). Dans l'ensemble, le critère du motif juridique est souple et les facteurs à considérer varieront en fonction de la situation dont la cour est saisie (*Peter*, p. 990).

[45] Les arguments d'intérêt public touchant l'autonomie personnelle peuvent être soulevés à la deuxième étape de l'analyse du motif juridique. Dans le contexte des actions pour enrichissement injustifié, cela a mené à rechercher comment (et quand) les facteurs relatifs à la façon dont les parties structurent leur union devraient être pris en considération. On a soutenu, par exemple, que la décision du législateur d'exclure les couples non mariés de la protection des lois relatives au partage des biens indique que la cour ne devrait pas appliquer la théorie de l'enrichissement injustifié

Peter rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 61.)

(3) Remedy

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

(a) *Monetary Award*

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

[48] First, the fact that many domestic claims of unjust enrichment arise out of relationships in which there has been a mutual conferral of benefits gives rise to difficulties in determining what will constitute adequate compensation. While the value of domestic services is not questioned (*Peter*; *Sorochan*), it is unjust to pay attention only to the contributions of one party in assessing an appropriate remedy. This is not only an important issue of principle; in practice, it is enormously difficult for the parties and the court to "create, retroactively, a notional ledger to record and value every service rendered by each party to the other" (R. E. Scane,

reconnue en equity pour régler les différends en matière de biens et d'actifs. Toutefois, dans *Peter*, la Cour a rejeté cet argument, soulignant qu'on se méprenait sur le rôle de l'equity. Comme l'a dit la juge McLachlin à la p. 994, « [c]'est précisément dans les cas où une injustice ne peut pas être réparée en vertu de la loi que l'equity joue un rôle. » (Voir également *Nouvelle-Écosse (Procureur général) c. Walsh*, 2002 CSC 83, [2002] 4 R.C.S. 325, par. 61.)

(3) Réparation

[46] Les moyens utilisés pour corriger l'enrichissement injustifié sont de nature réparatoire, en ce que la réparation oblige le défendeur à rembourser ou à annuler l'enrichissement injustifié. Lorsqu'une action pour enrichissement injustifié est accueillie, il y a soit « indemnisation », soit « restitution du bien ». En d'autres termes, le demandeur a droit à une réparation pécuniaire ou fondée sur le droit de propriété (*Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, p. 669, le juge La Forest).

a) *Une réparation pécuniaire*

[47] Il faut toujours considérer la réparation pécuniaire en premier (*Peter*, p. 987 et 999). Dans la plupart des cas, elle suffira à corriger l'enrichissement injustifié. Toutefois, le calcul d'une telle réparation est loin d'être simple. Deux questions ont suscité des désaccords et des difficultés dans le cas des conjoints de fait.

[48] D'abord, comme bon nombre d'actions pour enrichissement injustifié découlent de relations où les conjoints ont mutuellement tiré des avantages, il est difficile de déterminer ce qui constitue une réparation adéquate. Bien que la valeur des services domestiques ne soit pas remise en question (*Peter*; *Sorochan*), il est injuste de tenir compte des contributions d'une seule partie au moment de déterminer la réparation appropriée. Ce n'est pas seulement une importante question de principe; en pratique, il est extrêmement difficile pour les parties et le tribunal de [TRADUCTION] « créer, rétroactivement, un registre symbolique où inscrire chaque service

"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, at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108, at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also *Matrimonial Property Law in Canada* (loose-leaf), vol. 1, by J. G. McLeod and A. A. Mamo, eds., at pp. 40.78-40.79.

(b) *Proprietary Award*

[50] The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial

rendu par chacune des parties et en déterminer la valeur » (R. E. Scane, « Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts » (1991), 70 *R. du B. can.* 260, p. 281). Un auteur a judicieusement qualifié ce problème pratique de [TRADUCTION] « duel de *quantum meruit* » (J. D. McCamus, « Restitution on Dissolution of Marital and Other Intimate Relationships : Constructive Trust or Quantum Meruit? » dans J. W. Neyers, M. McInnes et S. G. A. Pitel, dir., *Understanding Unjust Enrichment* (2004), 359, p. 376). La juge McLachlin a également mentionné ce problème pratique dans *Peter*, p. 999.

[49] Une deuxième difficulté tient au fait que, selon certains tribunaux et certains auteurs, l'arrêt *Peter* pose qu'une réparation pécuniaire appropriée doit invariablement être calculée en fonction de la valeur monétaire des services non rémunérés. On parle souvent, dans ce cas, de *quantum meruit*, de « valeur reçue » ou de « rémunération des services ». Ce raisonnement a été suivi dans *Bell c. Bailey* (2001), 203 D.L.R. (4th) 589 (C.A. Ont.). D'autres cours d'appel ont conclu que la réparation pécuniaire pouvait être évaluée de manière plus souple — selon la méthode fondée sur la valeur accumulée — en fonction, par exemple, de l'augmentation globale de la richesse du couple pendant l'union : *Wilson c. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, par. 50; *Pickelein c. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison c. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane c. Smith*, 2003 NBCA 6, 256 R.N.-B. (2e) 108, par. 31-34 et 41-43; *Shannon c. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, par. 37. Quant aux incohérences relevées dans la façon de calculer une réparation personnelle pour enrichissement injustifié, voir aussi *Matrimonial Property Law in Canada* (feuilles mobiles), vol. 1, J. G. McLeod et A. A. Mamo, dir., p. 40.78-40.79.

b) *Réparation fondée sur le droit de propriété*

[50] La Cour a reconnu que, dans certains cas, si une réparation pécuniaire est inappropriée ou insuffisante, il peut être nécessaire d'accorder une réparation fondée sur le droit de propriété. C'est

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

dans l'arrêt *Pettkus* qu'on a d'abord reconnu un remède important en enrichissement injustifié au Canada : la fiducie constructoire de nature réparatoire. Imposée sans qu'il y ait une intention de créer une fiducie, la fiducie constructoire est un outil général, souple et juste qui permet de déterminer le droit de propriété véritable (*Pettkus*, p. 843-844 et 847-848). Si le demandeur peut établir un lien ou un rapport de causalité entre ses contributions et l'acquisition, la conservation, l'entretien ou l'amélioration du bien en cause, une part proportionnelle à l'enrichissement injustifié peut faire l'objet d'une fiducie constructoire en sa faveur (*Pettkus*, p. 852-853; *Sorochan*, p. 50). Il ressort clairement de l'arrêt *Pettkus* que ces principes s'appliquent également aux conjoints non mariés, puisque « [l]e principe d'*equity* sur lequel repose le recours à la fiducie par interprétation [ou fiducie constructoire] est large et général; son but est d'empêcher l'enrichissement sans cause dans toutes les circonstances où il se présente » (p. 850-851).

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

[51] Quant à la nature du lien exigé entre la contribution et le bien, la Cour a toujours jugé que le demandeur devait démontrer un lien « suffisamment important et direct », un « lien causal » ou un « lien » entre les contributions du demandeur et le bien visé par la fiducie (*Peter*, p. 988, 997 et 999; *Pettkus*, p. 852; *Sorochan*, p. 47-50; *Rathwell*, p. 454). Une contribution mineure ou indirecte ne suffit pas (*Peter*, p. 997). Comme l'a dit le juge en chef Dickson dans *Sorochan*, la question fondamentale est de savoir si les contributions « se rapportent clairement aux biens » (p. 50, citant les notes du professeur McLeod relatives à *Herman c. Smith* (1984), 42 R.F.L. (2d) 154, p. 156). La contribution indirecte d'argent et la contribution directe de labeur peuvent être suffisantes, pourvu qu'un lien soit établi entre l'appauvrissement du demandeur et l'acquisition, la conservation, l'entretien ou l'amélioration du bien (*Sorochan*, p. 50; *Pettkus*, 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

[52] Le demandeur doit aussi prouver qu'une réparation pécuniaire serait insuffisante dans les circonstances (*Peter*, p. 999). À cet égard, le tribunal peut tenir compte de la probabilité de recouvrement ainsi que de la question de savoir s'il existe

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

une raison d'accorder au demandeur des droits supplémentaires découlant de la reconnaissance d'un droit de propriété (*Lac Minerals*, p. 678, le juge La Forest).

[53] La part de propriété devrait être proportionnelle aux contributions du demandeur. Si les contributions sont inégales, les parts seront inégales (*Pettkus*, p. 852-853; *Rathwell*, p. 448; *Peter*, p. 998-999). Comme l'a expliqué le juge Dickson dans *Rathwell*, « [l]e tribunal évaluera les contributions de chaque conjoint et fera un partage juste et équitable selon leur contribution respective » (p. 454).

D. *Sujets nécessitant des précisions*

[54] Bien que les règles relatives à l'enrichissement injustifié constituent un cadre juridique solide pour régler les réclamations présentées par les conjoints vivant en union de fait, trois sujets continuent de susciter la controverse et nécessitent des précisions. Comme je l'ai déjà dit, ce sont le mode de calcul de la réparation pécuniaire lorsqu'une action pour enrichissement injustifié est accueillie, la façon d'examiner le problème des avantages réciproques et le moment pour le faire, ainsi que le rôle des attentes raisonnables ou légitimes des parties. Je vais aborder ces trois sujets à tour de rôle.

E. *Une réparation pécuniaire est-elle restreinte au quantum meruit?*

(1) Introduction

[55] Comme je l'ai fait remarquer précédemment, les réparations en cas d'enrichissement injustifié peuvent être soit fondées sur le droit de propriété (habituellement un recours à la fiducie constructoire), soit personnelles (habituellement une réparation pécuniaire). Une fois que la décision est prise d'accorder une réparation pécuniaire plutôt qu'une réparation fondée sur le droit de propriété, la question de savoir comment quantifier cette réparation pécuniaire se pose. Selon certains tribunaux, la réparation pécuniaire doit toujours être calculée en fonction de la valeur reçue ou du *quantum meruit* (*Bell*), et selon d'autres tribunaux, elle peut aussi

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

être fondée sur la valeur accumulée (c.-à-d. en fonction de la valeur du bien) (*Wilson*; *Pickelein*; *Harrison*; *MacFarlane*; *Shannon*). Si, comme l'ont conclu certains tribunaux, la réparation pécuniaire doit invariablement être quantifiée en fonction du *quantum meruit*, il faut alors, dans les cas d'enrichissement injustifié, se demander s'il faut choisir d'imposer une fiducie constructoire ou d'ordonner une réparation pécuniaire calculée en fonction du *quantum meruit*. Un auteur a qualifié cette approche de fausse dichotomie entre la fiducie constructoire et le *quantum meruit* (McCamus, p. 375-376). Certains auteurs ont aussi souligné cette incertitude qui règne dans la jurisprudence et ont affirmé qu'une réparation personnelle (*in personam*) fondée sur la valeur accumulée est une alternative plausible à la fiducie constructoire (McCamus, p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), p. 394-395). Comme je l'explique ci-après, on dit que c'est dans l'arrêt *Peter* que ce principe de dichotomie quant au choix de la réparation a été établi. Toutefois, à mon avis, l'arrêt *Peter* portait principalement sur la possibilité de recourir à la fiducie constructoire de nature réparatoire et cet arrêt ne devrait pas être interprété comme limitant le calcul de la réparation pécuniaire au *quantum meruit* dans les cas d'enrichissement injustifié. Lorsque les circonstances s'y prêtent, la réparation pécuniaire peut être fondée sur la valeur accumulée.

[56] Je vais d'abord exposer brièvement la genèse de la restriction à laquelle on voudrait soumettre la réparation pécuniaire. Ensuite, je vais expliquer pourquoi, à mon avis, elle devrait être rejetée. Enfin, je vais exposer mon opinion sur la façon dont il convient de traiter les réparations pécuniaires pour enrichissement injustifié en matière familiale.

(2) La dichotomie des mesures de réparation

[57] Comme je l'ai déjà dit, selon une opinion très répandue, mais non unanime, il y a seulement deux choix de réparation en cas d'enrichissement injustifié : une réparation pécuniaire, évaluée en fonction de la rémunération des services rendus; ou une réparation fondée sur le droit de

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.

propriété (généralement sous la forme d'une fiducie constructoire de nature réparatoire), si le demandeur peut prouver que l'avantage conféré a contribué à l'acquisition, la conservation, l'entretien ou l'amélioration d'un bien en particulier. Quelques brefs commentaires formulés dans *Peter* semblent être à l'origine de cette idée, laquelle est reflétée dans un certain nombre de décisions rendues par des cours d'appel. Par exemple, dans *Vanasse*, la Cour d'appel de l'Ontario a adopté le raisonnement suivant : puisque M^me^ Vanasse ne pouvait pas prouver que ses contributions étaient liées à un bien en particulier, sa réclamation devait être quantifiée en fonction de la rémunération des services rendus. En toute déférence, je ne souscris pas à l'opinion selon laquelle les réparations pécuniaires en cas d'enrichissement injustifié doivent toujours être calculées de cette façon.

(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.

(3) Pourquoi rejeter la dichotomie des mesures de réparation?

[58] À mon avis, il est inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflète pas la réalité de nombreux conjoints vivant en union libre. Deuxièmement, il est incompatible avec la souplesse inhérente à l'enrichissement injustifié. Troisièmement, il ne tient pas compte de l'historique des réclamations fondées sur le *quantum meruit*. Enfin, l'arrêt *Peter* ne l'impose pas. Pour ces raisons, la dichotomie des mesures de réparation devrait être rejetée. L'analyse qui suit concerne seulement la quantification d'une réparation pécuniaire en cas d'enrichissement injustifié; les règles servant à déterminer dans quels cas une réparation fondée sur le droit de propriété devrait être accordée sont bien établies et demeurent inchangées.

(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

a) *Expérience de vie*

[59] La dichotomie des mesures de réparation serait appropriée si, dans les faits, les fondements de toutes les actions pour enrichissement injustifié intentées par des conjoints de fait entraient dans deux catégories seulement — celle

of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. To be sure, those two bases for unjust enrichment claims exist. However, all unjust enrichment cases cannot be neatly divided into these two categories.

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

[61] There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in *Clarke v. Clarke*, [1990] 2 S.C.R. 795, at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), ". . . the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. . . . The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by

où l'enrichissement découle de la prestation de services non rémunérés, et celle où il découle d'une contribution non reconnue à l'acquisition, à l'amélioration, à l'entretien ou à la conservation d'un bien en particulier. Certes, ces deux fondements sur lesquels reposent les actions pour enrichissement injustifié existent. Cependant, tous les cas d'enrichissement injustifié ne se répartissent pas nettement entre ces deux catégories.

[60] Il est facile de dégager au moins une autre catégorie d'enrichissement injustifié, soit celle où les contributions des deux parties ont, au fil du temps, entraîné une accumulation de la richesse. Il y a un enrichissement injustifié quand une partie conserve, après la rupture, une part disproportionnée des biens obtenus grâce à l'effort conjoint des deux parties. Le lien requis entre les contributions et un bien en particulier n'existe peut-être pas, de sorte qu'il est inapproprié d'accorder une réparation fondée sur le droit de propriété. Or, il peut y avoir un lien incontestable entre les efforts conjoints des parties et l'accumulation de richesse; en d'autres termes, un lien entre la « valeur reçue » et la « valeur accumulée » comme la juge McLachlin l'a dit dans *Peter*, p. 1000-1001. Ainsi, si une relation peut être décrite comme étant une « coentreprise familiale » et les efforts conjoints des parties sont liés à l'accumulation de la richesse, on peut considérer qu'il y a enrichissement injustifié lorsqu'une partie quitte avec une part disproportionnée des avoirs acquis conjointement.

[61] Il n'y a rien de nouveau à propos de la notion d'entreprise familiale où les deux parties contribuent à leur enrichissement global. C'est la reconnaissance de cette réalité qui a donné lieu à la réforme législative globale des régimes matrimoniaux à la fin des années 1970 et au début des années 1980. Comme l'a expliqué la Cour dans *Clarke c. Clarke*, [1990] 2 R.C.S. 795, à la p. 807 (relativement à la *Matrimonial Property Act* de la Nouvelle-Écosse), « [l]a Loi appuie donc l'égalité des deux parties dans un mariage et reconnaît la contribution solidaire des conjoints, qu'elle soit financière ou autre, à cette entreprise. [. . .] En conséquence, la Loi est de nature réparatrice. Elle

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

a été rédigée pour pallier les inéquités du passé, quand la contribution faite par les femmes à la survie économique et à la croissance de la famille n'était pas reconnue » (je souligne).

[62] Les règles relatives à l'enrichissement injustifié n'entraînent pas une présomption de partage égal, comme c'est le cas de nombreux textes législatifs relatifs aux régimes matrimoniaux. Cependant, elles peuvent et devraient tenir compte de la réalité sociale cernée par le législateur selon laquelle beaucoup de relations conjugales sont, de manière plus réaliste, considérées comme des coentreprises auxquelles contribuent conjointement les deux parties.

[63] La Cour a reconnu cette réalité à maintes reprises et dans de nombreux contextes. Par exemple, dans *Murdoch*, le juge Laskin (plus tard Juge en chef), en dissidence, aurait imposé une fiducie constructoire, au motif que les faits étaient « compatibles avec une mise en commun, par les conjoints, d'efforts » destinés à réaliser leur établissement dans une exploitation d'élevage (p. 457), et que les conjoints avaient travaillé ensemble pendant quinze ans dans le but d'améliorer « leur sort en faisant des acquisitions toujours plus grandes de biens de ranch » (p. 446). De même, dans *Rathwell*, les juges majoritaires ont convenu que M. et M^{me} Rathwell avaient uni leurs efforts pour accumuler une richesse. Le juge Dickson a souligné que les parties avaient décidé ensemble « de faire de l'agriculture » (p. 444) et que seuls un « effort conjoint » et un « travail d'équipe » ont permis à M. Rathwell d'acquérir en son propre nom des propriétés (p. 461).

[64] C'est également ce qu'a reconnu la Cour dans *Pettkus* et dans *Peter.*

[65] Dans *Pettkus*, les parties avaient mis sur pied une exploitation apicole prospère, dont les profits avaient servi à acquérir des immeubles. Le juge Dickson, rédigeant pour la majorité, a souligné les faits qui indiquaient une relation conjugale et financière entre partenaires. Il a fait remarquer qu'« ils sont tous deux partis de rien; chacun a travaillé continuellement, assidûment et diligemment

to the "good fortune of the common enterprise" (p. 838); that Wilson J.A. (as she then was) at the Court of Appeal had found the wealth they accumulated was through "joint effort" and "teamwork" (p. 849); and finally, that "[t]heir lives and their economic well-being were fully integrated" (p. 850).

[66] I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

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

[68] The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that,

à l'entreprise conjointe » (p. 853); que chacun a contribué « à la réussite de l'entreprise commune » (p. 838); que la juge Wilson (plus tard juge de notre Cour) de la Cour d'appel avait conclu que leur richesse avait été accumulée grâce à un « effort conjoint » et à un « travail d'équipe » (p. 849); et enfin, que « [l]eur vie et leur bien-être économique étaient entièrement intégrés » (p. 850).

[66] Je suis d'accord avec le professeur McCamus pour dire que la Cour, dans *Pettkus*, était [TRADUCTION] « convaincue que les parties participaient à une entreprise commune et s'attendaient à partager les avantages découlant de la richesse qu'elles ont créée ensemble » (p. 367). Autrement dit, M. Pettkus ne s'est pas injustement enrichi parce que M^me^ Becker s'attendait précisément à obtenir un droit sur certains biens, mais plutôt parce qu'ils étaient en réalité partenaires d'une entreprise commune.

[67] Le fait que les biens aient été acquis grâce à un effort conjoint était encore une fois au premier plan de l'analyse dans *Peter*. Dans cette affaire, les parties ont vécu en union de fait pendant 12 ans. Bien que M. Beblow ait généré la majeure partie du revenu familial et ait aussi contribué à l'entretien de la propriété, M^me^ Peter s'est chargée des travaux domestiques (y compris l'éducation des six enfants des deux familles réunies), elle a aidé à l'entretien et elle s'est occupée de la propriété toute seule lorsque M. Beblow était absent. La juge McLachlin a reconnu la réalité de leur coentreprise lorsqu'elle a écrit : « En effet, cette coentreprise familiale n'est pas différente de la ferme qui a été grevée d'une fiducie dans l'arrêt *Pettkus c. Becker* » (p. 1001).

[68] La Cour a clairement reconnu la coentreprise familiale à trois autres reprises dans *Peter*. Premièrement, au sujet de la justesse de la méthode de calcul de l'indemnité fondée sur la « valeur accumulée », la juge McLachlin fait remarquer qu'« un couple s'attendra davantage à participer à la richesse générée par la relation qu'à être indemnisé des services rendus pendant la durée de la relation » (p. 999). Deuxièmement, et aussi en ce qui concerne l'indemnité à accorder

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.*,

pour enrichissement injustifié, la juge McLachlin a souligné que, lorsque les deux parties contribuent à la « coentreprise familiale », il faut examiner l'ensemble de l'avoir familial, et non un seul bien, pour déterminer la valeur approximative de la contribution du demandeur à l'avoir familial (p. 1001). Troisièmement, la justification de la Cour au sujet de la confirmation de la valeur des services domestiques reposait, en partie, sur le raisonnement voulant que ces services soient souvent rendus dans le contexte d'une entreprise commune (p. 993).

[69] Les relations de cette nature sont chose commune dans notre société. Dans de nombreux cas, la seule conclusion raisonnable est de considérer le couple comme une entreprise conjointe, de sorte qu'il est hautement artificiel en théorie et extrêmement difficile en pratique de faire un bilan détaillé des contributions apportées et des avantages reçus en fonction de la rémunération des services rendus. Bien entendu, chaque relation est particulière et on ne peut rien présumer dans un sens ou dans l'autre. Cependant, les conséquences juridiques de la rupture d'une relation conjugale devraient refléter la façon dont les gens vivent. Elles ne devraient pas les forcer à recourir à une approche comptable artificielle, qui ne reflète pas la véritable nature de leur relation.

b) *Souplesse*

[70] Maintenir une dichotomie stricte des mesures de réparation est incompatible avec l'approche de la Cour à l'égard des réparations en equity en général et à l'égard de l'élaboration de réparations en cas d'enrichissement injustifié en particulier.

[71] La Cour a souvent souligné la souplesse des réparations en equity et la nécessité d'établir des réparations raisonnées et réalistes, adaptées aux diverses situations. Par exemple, à propos de l'indemnité en equity en matière d'abus de confiance, le juge Binnie a affirmé que « la Cour a largement compétence pour établir la réparation appropriée à partir de la gamme complète des réparations disponibles, dont une indemnité pécuniaire adéquate » : *Cadbury Schweppes Inc. c. Aliments FBI Ltée*,

[1999] 1 S.C.R. 142, at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: ". . . the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *L.M.C.L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

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

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

[1999] 1 R.C.S. 142, par. 61. Au paragraphe 24, il a souligné l'approche libérale à l'égard des réparations en equity dans les cas d'abus de confiance adoptée par la Cour dans *Lac Minerals*. Ce faisant, il a cité et approuvé l'extrait suivant : « . . . la réparation à accorder [une fois qu'un motif de responsabilité est établi] devrait donc être celle qui est la plus appropriée compte tenu des faits de l'affaire plutôt qu'une réparation résultant du passé ou d'une multiplication des catégories » (tiré de J. D. Davies, « Duties of Confidence and Loyalty », [1990] *L.M.C.L.Q.* 4, p. 5). De même, dans le contexte d'une fiducie constructoire, la juge McLachlin (maintenant Juge en chef) a dit que « [l]es réparations reconnues en *equity* sont souples; elles sont accordées en fonction de ce qui est juste compte tenu de toutes les circonstances de l'espèce » : *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 34.

[72] Quant aux réparations pour enrichissement injustifié, je reprends les propos du juge Binnie dans *Pacific National Investments Ltd. c. Victoria (Ville)*, 2004 CSC 75, [2004] 3 R.C.S. 575, au par. 13. Il a fait remarquer que l'enrichissement injustifié, qui se fonde sur des principes clairement définis, « offre une grande souplesse dans les réparations susceptibles d'être accordées dans différentes circonstances selon des principes fondés sur l'équité et la bonne conscience ». De plus, la Cour a reconnu que, compte tenu de la grande variété de situations relevant des catégories traditionnelles de l'enrichissement injustifié et de la souplesse de l'approche plus générale et raisonnée, le principe suppose, et en fait exige, qu'on ait recours à différents types de réparation selon les circonstances : voir *Peter*, p. 987; *Sorochan*, p. 47.

[73] Ainsi, la réparation devrait refléter la souplesse inhérente au principe de l'enrichissement injustifié, de façon à permettre à la cour de trouver une réponse appropriée au problème dont elle est saisie. Cela signifie qu'une réparation pécuniaire doit correspondre, autant que possible, à la mesure de l'enrichissement injustifié du défendeur. Il n'y a aucune raison de penser que le vaste éventail des situations pouvant donner ouverture à l'action pour enrichissement injustifié tomberont nécessairement

remedial options into which some have tried to force them.

(c) *History*

[74] Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), vol. I, at §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.

dans l'une ou l'autre des deux catégories de réparations possibles, où d'aucuns ont voulu les faire entrer.

c) *Historique*

[74] Imposer une dichotomie stricte des mesures de réparation est aussi incompatible avec l'évolution historique du principe de l'enrichissement injustifié, lequel a été élaboré à partir de catégories particulières de cas, dont le *quantum meruit*, qui est à l'origine de la réparation fondée sur la rémunération des services rendus. Le *quantum meruit* tire son origine d'une demande d'indemnisation en common law pour les avantages conférés en vertu d'une entente qui, malgré qu'elle semblait lier les parties, est devenue inopérante pour une raison reconnue en common law. La portée du recours a été élargie au fil du temps, et l'appréciation du *quantum meruit* était souple. Il peut équivaloir, par exemple, à ce qu'il en coûte au demandeur pour fournir le service, à la valeur marchande de l'avantage ou encore à la valeur que le bénéficiaire accorde à l'avantage : P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (éd. feuilles mobiles), vol. I, §4:200.30. Cependant, il est important de souligner que le *quantum meruit* n'est qu'une des catégories établies d'action pour enrichissement injustifié. Rien ne justifie, en principe, qu'une catégorie traditionnelle d'enrichissement injustifié serve à imposer la réparation pécuniaire dans tous les cas d'enrichissement injustifié entre conjoints de fait.

d) *L'arrêt Peter c. Beblow*

[75] L'arrêt *Peter* ne commande pas une stricte adhésion à la méthode du *quantum meruit* pour le calcul de la réparation en matière d'enrichissement injustifié. Il faut se rappeler que cette affaire portait essentiellement sur la question de savoir si les contributions de la demanderesse lui donnaient droit à une fiducie constructoire à l'égard de l'ancienne demeure familiale. Bien que les juges McLachlin et Cory, auteurs des motifs concourants de l'arrêt, aient supposé qu'une réparation pécuniaire serait établie en fonction du *quantum meruit*, ce point n'était pas en litige et n'a pas davantage fait l'objet d'une conclusion.

[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

[76] En fait, seules deux phrases dans les jugements paraissent appuyer le point de vue selon lequel cette règle devrait toujours s'appliquer. À la page 995, la juge McLachlin a affirmé : « [i]l y a deux réparations possibles : une indemnité calculée en fonction de la valeur des services rendus, c'est-à-dire le *quantum meruit* et celle accordée par le juge de première instance, soit le titre de propriété sur la maison, fondée sur une fiducie par interprétation ». À la page 999, elle a écrit que « [d]ans le cas du versement d'une indemnité, il convient d'utiliser la méthode fondée sur la "valeur reçue" ». Comme l'arrêt portait sur la question de savoir si une réparation fondée sur le droit de propriété était appropriée, ces deux courts passages ne posent pas, à mon avis, comme règle absolue qu'une réparation pécuniaire doit toujours être calculée en fonction de la rémunération des services rendus.

[77] De plus, la juge McLachlin a souligné que le principe de l'enrichissement injustifié s'appliquait à diverses situations et que différentes réparations avaient été accordées, selon les circonstances. Seule l'une d'elles était le paiement pour services rendus sur la base du *quantum meruit* : p. 987. Rien dans ses propos n'indique que la Cour ait décidé d'opter pour une réparation pécuniaire universelle, surtout lorsqu'une telle approche serait contraire à la souplesse des règles de l'enrichissement injustifié et des réparations correspondantes, que la Cour a maintes fois reconnue.

[78] Cette interprétation restrictive de l'arrêt *Peter* n'est pas compatible avec la nature sous-jacente de l'action fondée sur les principes énoncés dans *Pettkus*. Comme l'a dit le professeur McCamus, les affaires de type *Pettkus* reposent sur le droit du demandeur de partager la richesse créée par un effort conjoint et un travail d'équipe. Ainsi, une réparation fondée sur des honoraires théoriques pour des services rendus n'est pas adaptée à la nature sous-jacente de la demande : McCamus, p. 376-377. À mon avis, ce raisonnement est convaincant, que l'effort conjoint ait donné lieu à l'accumulation de biens en particulier, auquel cas une fiducie constructoire de nature réparatoire peut être appropriée selon les principes bien établis dans

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

ce domaine du droit des fiducies, ou que l'effort conjoint ait donné lieu à l'accumulation de richesse en général. Dans le second cas, lorsque la situation s'y prête, il n'y a en principe aucune raison de refuser une réparation pécuniaire basée sur l'enrichissement et l'appauvrissement correspondant. À mon avis, il est essentiel, dans l'un et l'autre cas, qu'il y ait un lien entre la contribution et l'accumulation de la richesse ou, pour reprendre les propos de la juge McLachlin dans *Peter*, entre la « valeur reçue » et la « valeur accumulée ». Lorsque ce lien est établi, et qu'une réparation fondée sur le droit de propriété est inappropriée ou inutile, la réparation pécuniaire devrait être adaptée pour refléter la nature véritable de l'enrichissement et de l'appauvrissement correspondant.

[79] Le professeur McCamus a avancé que la réparation en equity que constitue la reddition de compte relative aux profits pourrait s'avérer un remède approprié : p. 377. Bien que je ne nie pas cette possibilité, je doute que la complexité et les subtilités procédurales de cette réparation soient adaptées aux situations familiales, lesquelles sont, la plupart du temps, assez simples. Le principe de l'enrichissement injustifié est fondamentalement souple et, à mon avis, le calcul d'une indemnité pécuniaire pour enrichissement injustifié devrait être tout aussi souple. Cela est nécessaire pour répondre à l'enrichissement en question, dans la mesure où une somme d'argent peut le faire. À mon sens, le professeur Fridman avait raison de dire que [TRADUCTION] « dans les cas où le demandeur a démontré l'enrichissement injustifié, la cour peut accorder la réparation la plus appropriée de manière à faire en sorte que le demandeur obtienne ce à quoi il a droit, indépendamment de la question de savoir si la situation aurait été du ressort de la common law ou de l'equity ou si elle aurait autrefois donné ouverture à une réparation personnelle ou fondée sur le droit de propriété » (p. 398).

(4) L'approche applicable en matière de réparation pécuniaire

[80] L'étape suivante de l'évolution jurisprudentielle devrait consister à s'éloigner de la fausse dichotomie entre le *quantum meruit* et la fiducie

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

constructoire, pour revenir aux principes qui sous-tendent les règles relatives à l'enrichissement injustifié. Ces principes portent principalement sur la qualification appropriée de la nature de l'enrichissement injustifié à l'origine de la réclamation. Comme je l'ai déjà dit, tous les enrichissements injustifiés entre conjoints non mariés ne se rangent pas aisément dans la catégorie de la « rémunération des services rendus » ou dans celle relative à « une partie d'un bien déterminé ». Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié est de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre de ce que la juge McLachlin a appelé, dans *Peter* (p. 1001), une « coentreprise familiale » à laquelle les deux conjoints ont contribué, la réparation pécuniaire devrait refléter ce fait.

[81] Dans de tels cas, le fondement de l'enrichissement injustifié est la rétention d'une part excessivement disproportionnée de la richesse par une partie quand les deux parties ont participé à une coentreprise familiale et qu'il existe un lien évident entre les contributions du demandeur et l'accumulation de la richesse. Indépendamment du titulaire du titre de propriété sur certains biens déterminés, on peut considérer que les parties, dans de telles circonstances, [TRADUCTION] « créent la richesse dans le cadre d'une entreprise commune qui les aidera à maintenir leur relation, leur bien-être et leur vie de famille » (McCamus, p. 366). La richesse créée durant la période de cohabitation sera considérée comme étant le fruit de leur relation conjugale et financière, sans nécessairement que les deux parties y aient contribué en parts égales. Comme les conjoints sont des partenaires conjugaux et financiers, il n'est nul besoin d'un « duel de *quantum meruit* ». Dans de tels cas, l'allégation d'enrichissement injustifié naît de ce que la partie qui quitte avec une part disproportionnée de la richesse prive le demandeur d'une part raisonnable de la richesse accumulée pendant la relation grâce à leurs efforts conjoints. Il faudrait évaluer la réparation pécuniaire en déterminant la contribution proportionnée du demandeur à l'accumulation de la richesse.

[82] Cette souplesse dans la détermination de la réparation pécuniaire dans les cas d'enrichissement

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

injustifié est tout à fait conforme à l'arrêt *Walsh*. Même si cette affaire soulevait des questions constitutionnelles dont nous ne sommes pas saisis en l'espèce, le jugement majoritaire ne cherchait manifestement pas à figer les règles relatives à l'enrichissement injustifié en matière familiale; l'arrêt indique que ces règles, y compris la fiducie constructoire de nature réparatoire, constituent la meilleure façon de remédier aux iniquités susceptibles de survenir au moment de la rupture d'une union de fait puisque la réparation pour enrichissement injustifié « est adaptée à la situation et aux revendications particulières des parties » (par. 61). En résumé, tout en soulignant l'importance du respect de l'autonomie, la Cour a reconnu que les règles relatives à l'enrichissement injustifié devaient toujours évoluer pour s'adapter à la myriade de formes et fonctions des unions de fait.

[83] Une approche semblable a été appliquée dans *Peter*. Monsieur Beblow soutenait que les conjoints non mariés ne devaient pas se voir attribuer une part des biens en vertu des règles de l'enrichissement injustifié parce que le législateur avait choisi de ne pas leur accorder les droits conférés aux conjoints mariés en vertu de la législation sur les biens matrimoniaux. La Cour a laconiquement — et catégoriquement — rejeté cet argument en affirmant que c'est « précisément dans les cas où une injustice ne peut pas être réparée en vertu de la loi que l'*equity* joue un rôle » : p. 994.

[84] Les règles relatives à l'enrichissement injustifié ne visent pas à reproduire, pour les conjoints non mariés, la présomption législative voulant que les conjoints mariés soient associés dans une coentreprise familiale. Cependant, rien ne s'oppose en principe à ce que les réparations applicables en cas d'enrichissement injustifié ne tiennent pas compte de cette réalité dans la vie et les relations des conjoints non mariés.

[85] Je conclus donc que les règles de la common law relatives à l'enrichissement injustifié devraient reconnaître et prendre en compte cette réalité, à savoir que certaines ententes conjugales conclues entre conjoints non mariés sont des partenariats; dans de tels cas, la réparation devrait remédier à la

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.

rétention disproportionnée des avoirs acquis avec une autre personne grâce aux efforts conjoints. Évidemment, ce genre de partage ne doit pas être présumé, non plus qu'il sera présumé que la richesse accumulée grâce à l'effort des deux conjoints sera partagée également. Suivant les règles de la common law relatives à l'enrichissement injustifié, la cohabitation, en soi, ne confère pas à une personne le droit à une part des biens de l'autre personne ou à toute autre forme de réparation. Toutefois, lorsqu'une certaine richesse a été accumulée grâce à un effort conjoint, comme en témoigne la nature de la relation des parties et leurs rapports réciproques, le droit de l'enrichissement injustifié devrait refléter cette réalité.

[86] Par conséquent, le rejet de la dichotomie des mesures de réparation nous amène à examiner les circonstances dans lesquelles un enrichissement injustifié peut être considéré comme le résultat d'un partage inéquitable des biens acquis grâce aux efforts conjoints des parties. Il faudra certes raffiner cette approche, mais voici un aperçu des cas où cette qualification sera appropriée.

(5) Enrichissement injustifié découlant d'une coentreprise familiale

[87] Selon moi, quand les parties ont été engagées dans une coentreprise familiale, et que les contributions du demandeur sont liées à l'accumulation de la richesse, il convient de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Pour appliquer cette approche, il faut d'abord déterminer si les parties ont, de fait, été engagées dans une coentreprise familiale. Dans la partie précédente, j'ai passé en revue les nombreuses occasions où l'existence d'une coentreprise familiale a été reconnue. De cet ensemble de faits bien étoffé, à quoi peut-on reconnaître les marques distinctives d'une telle relation?

[88] Il est essentiel de souligner que les couples qui cohabitent ne forment pas un groupe homogène. Par conséquent, l'analyse doit tenir compte des circonstances particulières de chaque relation.

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

De plus, comme je l'ai déjà dit, on ne peut pas présumer l'existence d'une coentreprise familiale. Il s'agit donc d'attacher des conséquences équitables à la façon dont les parties ont vécu, de ne pas les traiter comme si elles auraient dû vivre autrement ou établir leur relation sur une base différente. L'existence d'une coentreprise familiale ne peut être reconnue par la cour que lorsqu'elle est, en fait, bien appuyée par la preuve. L'accent devrait porter sur la façon dont les parties ont réellement vécu, et non sur leurs allégations *ex post facto* ou sur l'opinion de la cour quant à la façon dont elles auraient dû vivre.

[89] Pour procéder à cette analyse, il peut être utile d'examiner la preuve sous quatre rubriques principales : l'effort commun, l'intégration économique, l'intention réelle et la priorité accordée à la famille. De toute évidence, il y a un chevauchement des facteurs qui pourraient se révéler pertinents sous ces rubriques et la liste de ces facteurs n'est pas définitive. Ce qui suit n'est pas une liste des conditions requises pour pouvoir conclure (ou ne pas conclure) que les parties étaient engagées dans une coentreprise familiale. Ces rubriques, et les facteurs qui y sont regroupés, servent simplement à faciliter l'analyse globale de la preuve et à donner quelques exemples d'éléments à prendre en considération pour décider si les parties étaient engagées dans une coentreprise familiale. L'absence de ces facteurs, et plusieurs autres considérations pertinentes, pourrait fort bien écarter cette conclusion.

a) *Effort commun*

[90] Le premier ensemble de facteurs porte sur la question de savoir si les parties collaboraient en vue d'atteindre des buts communs. Les efforts conjoints et le travail d'équipe, la décision d'avoir et d'éduquer des enfants ensemble, ainsi que la durée de la relation peuvent tous indiquer la mesure dans laquelle, le cas échéant, les parties constituaient véritablement une association et ont collaboré à la réalisation d'objectifs communs importants.

[91] Les contributions conjointes, ou les contributions à un fonds commun, peuvent constituer la preuve d'un effort conjoint. Par exemple, dans

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

(b) *Economic Integration*

[92] Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson*; *Panara*).

[93] The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over

Murdoch, le fait que les parties avaient uni leurs efforts dans le but de réaliser leur établissement dans une exploitation d'élevage était au cœur de l'analyse du juge Laskin sur la fiducie constructoire. Les contributions conjointes sont aussi un aspect important des analyses de la Cour dans *Peter*, *Sorochan* et *Pettkus*. La mise en commun des efforts et des ressources, à titre de capital ou de revenu, a également été soulignée dans des affaires jugées en appel (voir, par exemple, *Birmingham c. Ferguson*, 2004 CanLII 4764 (C.A. Ont.); *McDougall c. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54, par. 14). Le fait que les fonds des parties soient entièrement consacrés à la famille peut indiquer une mise en commun des ressources : *McDougall*. On peut aussi affirmer que les parties mettent leurs ressources en commun quand un conjoint s'acquitte de la totalité, ou de la plus grande partie, des travaux domestiques, libérant l'autre de ces responsabilités et lui permettant de se consacrer à ses activités rémunérées à l'extérieur (voir *Nasser c. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (C.A. Ont.), et *Panara c. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382, par. 27).

b) *Intégration économique*

[92] Le deuxième ensemble de facteurs, liés à ceux du premier ensemble, a trait au degré d'interdépendance et d'intégration économiques caractérisant la relation des parties (*Birmingham*; *Pettkus*; *Nasser*). Plus le niveau d'intégration des finances, des intérêts économiques et du bien-être économique des conjoints est élevé, plus il est probable que ceux-ci soient considérés comme ayant été engagés dans une coentreprise familiale. Par exemple, l'existence d'un compte de banque conjoint utilisé comme une « bourse commune », ainsi que le fait que l'unité familiale exploitait la ferme, constituaient des facteurs clés dans l'analyse effectuée par le juge Dickson dans *Rathwell*. Le partage des dépenses et la mise en commun des économies peuvent aussi être des facteurs pertinents (voir *Wilson*; *Panara*).

[93] La conduite des parties peut aussi indiquer un sentiment d'appartenance, de réciprocité et de priorité du bien-être de l'unité familiale par rapport

the individual interests of the individual members (McCamus, at p. 366). These and other factors may indicate that the economic well-being and lives of the parties are largely integrated (see, e.g., *Pettkus*, at p. 850).

(c) *Actual Intent*

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

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

aux intérêts individuels de chacun des membres (McCamus, p. 366). Ces facteurs, parmi d'autres, peuvent indiquer que le bien-être économique et la vie des parties sont bien intégrés (voir, par exemple, *Pettkus*, p. 850).

c) *Intention réelle*

[94] Un souci du respect de l'autonomie des parties sous-tend les règles relatives à l'enrichissement injustifié, et il s'agit d'un élément particulièrement important dans les unions libres. Les conjoints de fait peuvent décider de ne pas se marier pour une foule de raisons, mais l'une d'elles peut être le choix délibéré de ne pas être financièrement liés. Par conséquent, pour savoir s'il existe une coentreprise familiale, il faut accorder une importance considérable aux intentions réelles des parties. Ces intentions peuvent avoir été exprimées par les parties ou inférées de leur conduite. Cependant, ce qui importe, c'est que l'on recherche leur intention réelle, expresse ou inférée, et non ce que, selon la cour, des parties « raisonnables » *auraient dû* vouloir dans les mêmes circonstances. Les tribunaux doivent, en invoquant l'intention inférée, veiller à ne pas imposer leurs points de vue dans le but d'arriver à un certain résultat.

[95] Les tribunaux peuvent déduire de la conduite des parties qu'elles avaient l'intention de partager la richesse qu'elles ont créée ensemble (P. Parkinson, « Beyond *Pettkus* v. *Becker* : Quantifying Relief for Unjust Enrichment » (1993), 43 *U.T.L.J.* 217, p. 245). La conduite des parties peut démontrer qu'elles voulaient que leurs vies familiale et professionnelle fassent partie d'un tout, d'une entreprise commune (*Pettkus*; *Peter*; *Sorochan*). Dans certains cas, les tribunaux ont expressément défini la relation comme étant une [TRADUCTION] « association » d'un point de vue social et économique (*Panara*, par. 71; *McDougall*, par. 14). De même, l'intention de s'engager dans une coentreprise familiale peut être déduite quand les parties ont reconnu que leur relation était [TRADUCTION] « équivalente au mariage » (*Birmingham*, par. 1), ou quand les parties se présentaient auprès d'autrui comme un couple marié (*Sorochan*). La stabilité de la relation peut constituer un facteur pertinent, tout comme

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

la durée de la cohabitation (*Nasser*; *Sorochan*; *Birmingham*). Si les parties ont vécu une relation stable pendant une longue période, il est presque impossible de soupeser précisément les avantages conférés dans le cadre de la relation (*McDougall*; *Nasser*).

[96] Le titre de propriété peut aussi refléter une intention de partager équitablement la richesse, ou une partie de celle-ci. Ce peut être le cas lorsque les parties possèdent des biens en commun. Même quand le titre est enregistré au nom d'une des parties, d'autres aspects de la conduite des parties peuvent indiquer que la richesse sera partagée. Par exemple, les parties peuvent être très peu intéressées par tout ce qui entoure le titre et l'état des sommes dépensées pour la résidence, les rénovations, les taxes, les assurances et tout le reste. Les plans de répartition des biens au décès, que ce soit dans un testament ou une déclaration verbale, peuvent aussi indiquer que les parties se considéraient comme des partenaires conjugaux et économiques.

[97] L'intention réelle des parties pourrait aussi permettre d'écarter l'existence d'une coentreprise familiale ou étayer la conclusion selon laquelle des biens déterminés devaient être détenus de façon indépendante. Encore une fois, c'est l'intention réelle des parties, expresse ou inférée de la preuve, qui est le facteur pertinent.

d) *Priorité accordée à la famille*

[98] Le dernier ensemble de facteurs à considérer pour déterminer si les parties participaient à une coentreprise familiale consiste à savoir si elles avaient donné la priorité à la famille dans le processus décisionnel, et ce, dans quelle mesure. Une question pertinente est de savoir si, dans une certaine mesure, une des parties ou les deux se sont fiés sur la relation à leur détriment, mais pour le bien-être de la famille. Comme l'indique le professeur McCamus, la question est de savoir si les parties ont [TRADUCTION] « [a]gi en sachant ou en supposant qu'elles mèneraient une vie commune, peu importe que cela ait été dit ou non » (p. 365). L'accent est mis sur les contributions au partenariat domestique et financier, et particulièrement sur les

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.

sacrifices financiers consentis par les parties pour le bien-être de l'unité collective ou familiale. Que les rôles des parties correspondent à la répartition traditionnelle des tâches entre le salarié et la femme au foyer, ou que les deux parties aient un emploi et partagent les responsabilités domestiques, il arrive souvent qu'une des parties se fie à la réussite et à la stabilité de la relation pour en assurer la sécurité économique, à son propre détriment économique (Parkinson, p. 243). Cela peut survenir de nombreuses façons, notamment lorsqu'une partie quitte le marché du travail pendant un certain temps pour élever les enfants; en déménageant pour aider la carrière de l'autre partie (et, par conséquent, en abandonnant son emploi et les réseaux liés à l'emploi); en renonçant à une carrière ou à une formation pour le bien de la famille ou de la relation; et en acceptant un sous-emploi dans le but d'équilibrer les besoins financiers et domestiques de l'unité familiale.

[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

[99] Selon moi, accorder la priorité à la famille n'est pas exclusivement le fait du conjoint le plus dépendant financièrement. Le conjoint ayant le revenu le plus élevé peut aussi faire des sacrifices financiers (par exemple, en renonçant à une promotion au profit de la vie familiale), ce qui peut indiquer que les parties considéraient la relation comme un partenariat domestique et financier. Comme l'indique le professeur Parkinson, il y a une coentreprise familiale quand

> [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]

> [TRADUCTION] [u]ne partie a encouragé l'autre à se fier à elle à son détriment en quittant le marché du travail ou en renonçant à d'autres possibilités d'avancement pour le bien de la relation, et la rupture la laisse dans une situation pire que si elle n'avait pas agi de cette façon à son détriment économique. [p. 256]

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

(6) *Quantum meruit* plutôt que fiducie constructoire : résumé

[100] I conclude:

[100] En conclusion :

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

1. La réparation pécuniaire pour enrichissement injustifié ne se limite pas à une indemnité calculée en fonction de la rémunération des services rendus.

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

2. Dans les cas où l'enrichissement injustifié est, de façon très réaliste, défini comme étant le fait pour une partie de conserver une part disproportionnée des biens provenant d'une coentreprise familiale, et qu'une réparation pécuniaire est appropriée, il faut calculer cette réparation en fonction de la part de ces biens qui est proportionnelle aux contributions du demandeur.

3. Pour avoir droit à une réparation pécuniaire de cette nature, le demandeur doit prouver : a) qu'une coentreprise familiale existait effectivement, et b) qu'il existe un lien entre ses contributions à la coentreprise et l'accumulation de l'avoir ou de la richesse.

4. La question de savoir s'il existait une coentreprise familiale est une question de fait et on peut l'apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs : a) à l'effort commun, b) à l'intégration économique, c) à l'intention réelle et d) à la priorité accordée à la famille.

F. *Avantages réciproques*

(1) Introduction

[101] Comme je l'ai déjà mentionné, l'analyse de l'enrichissement injustifié en matière familiale se complique souvent du fait qu'il y a eu des avantages réciproques; dans presque tous les cas, chaque partie confère des avantages à l'autre partie : Parkinson, p. 222. Bien entendu, le demandeur ne peut pas s'attendre tout à la fois à récupérer quelque chose qu'il a donné au défendeur et à conserver une chose que lui a donnée le défendeur : Birks, p. 415. L'analyse doit tenir compte de cette proposition sensée. Comment et à quel moment dans l'analyse faut-il prendre en compte les avantages réciproques?

[102] La réponse est assez simple si l'allégation d'enrichissement injustifié veut essentiellement qu'une partie ait quitté la relation avec une part disproportionnée des avoirs accumulés grâce aux efforts conjoints. C'est le cas des coentreprises familiales dans lesquelles les efforts communs des parties ont permis d'accumuler une richesse. La réparation consiste en une part de cette richesse

proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

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

[104] In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court,

proportionnée aux contributions du demandeur. Une fois que le demandeur a démontré sa contribution à la coentreprise familiale ainsi que le lien entre cette contribution et l'accumulation de la richesse, les contributions respectives des parties sont prises en considération pour déterminer la part proportionnelle du demandeur. Bien que le calcul des contributions proportionnelles des parties ne soit pas une science exacte, il n'est généralement pas nécessaire d'effectuer un examen détaillé des contributions et des concessions quotidiennes. Il faut plutôt porter un jugement raisonné à la lumière de l'ensemble de la preuve.

[103] Cependant, les avantages réciproques entraînent des problèmes pratiques particuliers lorsque la réparation appropriée consiste en une indemnité pécuniaire calculée en fonction de la valeur de la rémunération des services rendus. Le fait que le défendeur ait aussi fourni des services au demandeur peut être considéré comme un facteur pertinent à toutes les étapes de l'analyse de l'enrichissement injustifié. Certains tribunaux ont examiné les avantages reçus par le demandeur dans le cadre de l'analyse des avantages et des désavantages (par exemple, la Cour d'appel dans *Peter c. Beblow* (1990), 50 B.C.L.R. (2d) 266). D'autres ont considéré les avantages réciproques comme un aspect de l'analyse du motif juridique (par exemple, *Ford c. Werden* (1996), 27 B.C.L.R. (3d) 169 (C.A.), et le jugement de la Cour d'appel dans l'affaire *Kerr*). D'autres encore ont examiné les avantages réciproques tant à l'étape de l'analyse du motif juridique qu'à celle de la réparation (par exemple, tel que proposé dans *Wilson*). De toute évidence, une certaine clarté et une certaine cohérence s'imposent sur ce point.

[104] À mon avis, il y a beaucoup à dire sur la méthode d'analyse des avantages réciproques élaborée par la juge Huddart de la cour d'appel dans l'affaire *Wilson*. Plus particulièrement, je ferais miennes ses conclusions selon lesquelles les enrichissements mutuels devraient être examinés principalement au stade de la défense ou à celui de la réparation, mais qu'il est aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constitue une preuve pertinente de l'existence (ou de

and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

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

[106] In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid $350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required. The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: [1988] B.C.J. No. 887 (QL).

[107] The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266, set aside the judge's finding on the basis that Ms. Peter had failed to establish that she had suffered a deprivation corresponding to the benefits she had conferred on Mr. Beblow. The court reasoned that, although she had performed the services of a housekeeper and homemaker, she had

l'absence) d'un motif juridique justifiant l'enrichissement (par. 9). Cette approche est conforme à la jurisprudence de notre Cour, et elle offre un moyen simple et juste de faire en sorte que l'octroi d'avantages réciproques soit dûment pris en considération sans court-circuiter l'analyse de l'enrichissement injustifié. Je vais expliquer brièvement pourquoi, à mon avis, cette approche est bien fondée.

[105] D'entrée de jeu, toutefois, je souligne que l'arrêt *Peter* de notre Cour n'exige pas que l'on prenne en considération les avantages réciproques à l'étape de l'analyse du motif juridique : voir, par exemple, *Ford*, par. 14; *Thomas c. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376, par. 18. Au contraire, il ressort clairement de *Peter* qu'on ne devrait généralement pas tenir compte des avantages réciproques au stade de l'analyse avantages-désavantages; la Cour a aussi approuvé la décision du juge de première instance de prendre en considération les avantages réciproques au moment de déterminer la réparation à accorder au titre de l'enrichissement injustifié.

[106] Dans *Peter*, le juge de première instance a conclu que les trois éléments de l'enrichissement injustifié avaient été prouvés. Avant que M. Beblow n'habite avec M^me^ Peter, il avait une aide ménagère qu'il payait 350 $ par mois. Lorsque M^me^ Peter a emménagé chez lui avec ses enfants et qu'elle a assumé les tâches ménagères en plus de s'occuper des enfants, l'aide ménagère n'était plus nécessaire. Le juge de première instance a déterminé la valeur de la contribution de M^me^ Peter en partant du montant que M. Beblow donnait à l'aide ménagère, puis en en soustrayant la moitié pour refléter les avantages que M^me^ Peter a reçus en retour. Le juge de première instance a ensuite utilisé ce montant réduit pour déterminer la valeur des services rendus par M^me^ Peter pendant les 12 années qu'a duré la relation : [1988] B.C.J. No. 887 (QL).

[107] La Cour d'appel, dans (1990), 50 B.C.L.R. (2d) 266, a écarté cette conclusion au motif que M^me^ Peter n'avait pas réussi à prouver qu'elle avait subi un appauvrissement correspondant aux avantages qu'elle avait conférés à M. Beblow. La cour a conclu que, bien qu'elle ait rendu les services d'une aide ménagère et d'une personne au foyer, elle avait

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

reçu une compensation parce que ses enfants et elle vivaient chez M. Beblow sans avoir à payer de loyer et que celui-ci contribuait plus qu'elle à payer l'épicerie.

[108] Notre Cour a infirmé la décision de la Cour d'appel et a rétabli la décision du juge de première instance. La Cour a décidé à l'unanimité que M^me^ Peter avait prouvé tous les éléments de l'enrichissement injustifié, y compris l'appauvrissement. Le juge Cory (la juge McLachlin partageait son avis sur ce point) est passé rapidement sur la prétention de M. Beblow selon laquelle M^me^ Peter n'avait pas démontré l'appauvrissement. Il a fait remarquer que, « [e]n règle générale, si l'on constate que le défendeur s'est enrichi du fait des efforts de la demanderesse, cette dernière subira presque certainement un appauvrissement » : p. 1013. La Cour a aussi confirmé à l'unanimité l'approche du juge de première instance selon laquelle il faut tenir compte des avantages reçus par M^me^ Peter au moment de déterminer la réparation à accorder. Comme je l'ai déjà indiqué, le juge de première instance avait réduit de moitié le montant mensuel utilisé pour calculer la somme accordée à M^me^ Peter pour refléter les avantages que celle-ci avait reçus de M. Beblow. La juge McLachlin n'a pas rejeté cette approche, concluant à la p. 1003 que le montant auquel était arrivé le juge reflétait bien la valeur de la contribution de M^me^ Peter à l'avoir familial. À la page 1025, le juge Cory a qualifié l'approche du juge de première instance de « façon équitable de calculer le montant dû à l'appelante ». Ainsi, la Cour a souscrit à l'approche selon laquelle il faut, dans l'analyse, tenir compte de la question des avantages réciproques à l'étape de la réparation. L'arrêt *Peter* n'étaye donc pas le point de vue selon lequel il convient, dans l'analyse, d'examiner les avantages réciproques à l'étape de l'examen des avantages et des désavantages ou à celle du motif juridique.

(2) La bonne approche

[109] Comme je l'ai déjà dit, je suis d'avis que les avantages réciproques peuvent être pris en considération à l'étape de l'analyse du motif juridique, mais seulement dans la mesure où ils offrent une preuve pertinente de l'existence d'un tel motif. Autrement, il faut en tenir compte à l'étape de la défense ou de

be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

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

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

la réparation. Il est important de souligner que cela peut, et devrait, avoir lieu peu importe que le défendeur ait présenté une demande reconventionnelle formelle ou invoqué la compensation.

[110] Je vais d'abord expliquer pourquoi les avantages réciproques ne devraient pas être examinés, dans l'analyse, à l'étape de l'examen des avantages et des désavantages. À mon avis, refuser de traiter de la question des avantages réciproques à cette étape est conforme à la notion du *quantum meruit* dont l'approche fondée sur la rémunération des services rendus tire son origine et aussi à l'analyse économique simple des avantages et des désavantages, que notre Cour a toujours utilisée.

[111] L'action pour enrichissement injustifié fondée sur la rémunération des services rendus est analogue à la réclamation traditionnelle fondée sur le *quantum meruit*. Dans ces réclamations, le fait que le défendeur ait conféré un avantage au demandeur est pris en considération pour réduire le recouvrement du demandeur du montant de l'avantage ainsi reçu. Par exemple, s'agissant d'une réclamation fondée sur le *quantum meruit* où le demandeur cherche à recouvrer les sommes payées en vertu d'un contrat inexécutable alors qu'il a déjà reçu un avantage du défendeur, la réclamation sera accueillie, mais l'indemnité sera réduite du montant correspondant à la valeur de cet avantage : Maddaugh et McCamus (éd. feuilles mobiles), vol. II, §13:200. Les auteurs citent, à titre d'exemple, l'affaire *Giles c. McEwan* (1896), 11 Man. R. 150 (B.R. *in banco*). Dans cette affaire, deux employés avaient présenté une réclamation fondée sur le *quantum meruit* afin de recouvrer la valeur des services rendus au défendeur en vertu d'un contrat inexécutable, mais le montant de l'indemnité a été réduit pour refléter la valeur des avantages conférés par le défendeur. Ainsi, prendre en considération à l'étape de la réparation les avantages conférés par le défendeur est conforme aux principes généraux s'appliquant aux réclamations fondées sur le *quantum meruit*. Bien entendu, si le défendeur a déposé une demande reconventionnelle ou a invoqué la compensation, la question des avantages mutuels doit être tranchée au moment de considérer ce moyen de défense ou cette demande.

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

[112] Suivant l'analyse économique simple des avantages et des désavantages que la Cour a toujours utilisée, il faut refuser de prendre les avantages réciproques en considération à cette étape. L'arrêt *Garland* en offre un bon exemple. Dans un recours collectif, les demandeurs réclamaient la restitution, pour enrichissement injustifié, des pénalités pour paiement en retard imposées mais que notre Cour (dans une décision antérieure) avait déclaré constituer des intérêts à un taux criminel : voir *Garland c. Consumers' Gas Co.*, [1998] 3 R.C.S. 112. L'entreprise a soutenu qu'elle ne s'était pas enrichie parce que ses taux étaient fixés par un mécanisme de réglementation indépendant, et que les taux auraient été encore plus élevés si l'entreprise n'avait pas reçu les pénalités pour paiement en retard à titre de recettes. Cet argument a été accepté par la Cour d'appel, mais a été rejeté lors du pourvoi devant notre Cour. Le juge Iacobucci, rédigeant pour la Cour, a conclu que les paiements, dans le cadre de l'« analyse économique simple » adoptée dans *Peter*, constituaient un avantage : par. 32. Voici ce qu'il a affirmé au par. 36 : « Il n'y a simplement aucun doute que Consumers' Gas a reçu les sommes d'argent représentées par les [pénalités pour paiement en retard] et qu'elle pouvait utiliser cet argent pour exploiter son entreprise. [. . .] À ce stade, nous ne nous intéressons pas à la question de savoir où est passé cet avantage dans le cadre de l'application du régime de réglementation. » La Cour a conclu que l'entreprise invoquait en fait le moyen de défense fondé sur « le changement de situation » (c.-à-d., le moyen de défense que peut faire valoir « un défendeur innocent démontre qu'à la suite d'un enrichissement il a modifié sa situation à un point tel qu'il serait inéquitable de l'obliger à rendre l'avantage qu'il a reçu » : par. 63). Ce moyen de défense est pris en considération seulement une fois remplies les trois conditions de l'action pour enrichissement injustifié : par. 37. La Cour a donc refusé de procéder, à l'étape de l'examen des avantages et des désavantages, à un examen détaillé des prétentions du défendeur selon lesquelles il n'avait bénéficié d'aucun avantage à cause du régime de réglementation.

[113] While *Garland* dealt with the payment of money, my view is that the same approach should be applied where the alleged enrichment consists

[113] L'arrêt *Garland* portait sur le paiement d'une somme d'argent, mais j'estime qu'il faut appliquer la même méthode quand l'enrichissement

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

allégué consiste en des services. Dans la mesure où ils confèrent un avantage tangible au défendeur, les services constituent généralement un enrichissement et un appauvrissement correspondant. La question de savoir si l'appauvrissement était contrebalancé par des avantages conférés au demandeur par le défendeur ne devrait pas être traitée aux deux premières étapes de l'analyse. J'examinerai maintenant le rôle limité que peuvent jouer les avantages réciproques à l'étape de l'analyse du motif juridique.

[114] Comme je l'ai déjà dit, le motif juridique est la troisième des trois parties de l'analyse de l'enrichissement injustifié. Comme l'a dit la juge McLachlin à la p. 990 de l'arrêt *Peter*, « [c]'est à cette étape que le tribunal doit vérifier si l'enrichissement et le désavantage, moralement neutres en soi, sont "injustes" ». L'analyse du motif juridique vise à indiquer si le défendeur est justifié de conserver l'enrichissement, et non pas à en déterminer la valeur ou à déterminer s'il convient d'opérer compensation après examen des avantages réciproques : *Wilson*, par. 30. Selon *Garland*, les demandeurs doivent démontrer qu'aucun motif juridique ne se retrouve dans l'une ou l'autre des catégories établies, par exemple si l'avantage était un don ou s'il découlait d'une obligation légale. Si cette preuve est faite, le défendeur peut alors démontrer qu'un motif juridique différent justifiant l'enrichissement devrait être reconnu, compte tenu des attentes raisonnables des parties et des considérations d'intérêt public.

[115] Le fait que les parties se soient mutuellement conféré des avantages peut constituer une preuve pertinente de leurs attentes raisonnables, ce qui peut devenir pertinent au moment où le défendeur essaie de prouver que ces attentes appuient l'existence d'un motif juridique que l'on ne retrouve dans aucune des catégories établies. Cependant, comme l'analyse du motif juridique cherche à déterminer si l'enrichissement était équitable et non à en mesurer l'ampleur, les avantages réciproques ne devraient être pris en considération à cette étape que pour cette fin précise.

(3) Résumé

[116] Je conclus que les avantages réciproques peuvent être examinés à l'étape de l'analyse du motif

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

juridique, mais seulement dans la mesure où ils fournissent une preuve pertinente relativement aux attentes raisonnables des parties. Sinon, ils doivent être pris en considération au stade de la défense ou à celui de la réparation. J'en dirai davantage dans la prochaine partie sur la façon dont les avantages réciproques et les attentes raisonnables des parties peuvent entrer en jeu dans l'analyse du motif juridique.

G. *Attentes raisonnables ou légitimes*

[117] Le dernier point qui requiert quelques précisions concerne le rôle des attentes raisonnables des parties en matière familiale. Je conclus que, bien que les attentes raisonnables des parties aient joué un rôle important dans l'analyse du motif juridique dans les premières affaires familiales d'enrichissement injustifié, avec l'évolution du droit, et en particulier depuis l'arrêt *Garland* de notre Cour, l'importance que l'on accorde à ces attentes est plus limitée et clairement circonscrite.

[118] Dans les premières affaires où l'enrichissement injustifié était allégué en situation familiale, les attentes raisonnables du demandeur et le fait que le défendeur connaissait ces attentes étaient au cœur de l'analyse du motif juridique. Par exemple, dans *Pettkus*, quand le juge Dickson est arrivé dans son analyse à l'étape de l'examen du motif juridique, il a affirmé que « lorsqu'une personne, liée à une autre dans une relation qui équivaut à une union conjugale, se cause un préjudice dans l'expectative raisonnable de recevoir un droit de propriété et que l'autre personne accepte librement les avantages que lui procure la première, alors qu'elle connaît ou devrait connaître cette expectative, il serait injuste de permettre au bénéficiaire de conserver cet avantage » (p. 849). De même, dans *Sorochan*, à la p. 46, exactement le même raisonnement a été suivi pour montrer qu'il n'y avait aucun motif juridique justifiant l'enrichissement.

[119] Dans ces affaires, la question de savoir s'il était équitable d'obliger le défendeur à payer — en fait de céder un droit de propriété — pour des services qu'il n'avait pas expressément demandés constituait l'une des préoccupations majeures de la Cour. La Cour a répondu qu'il serait effectivement

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

injuste pour le défendeur de conserver les avantages, étant donné qu'il avait continué à accepter les services alors qu'il savait ou aurait dû savoir que le demandeur les rendait dans l'expectative raisonnable de recevoir une récompense.

[120] La prise en considération par la Cour des attentes raisonnables et de la connaissance qu'en avait, dans ces affaires, le défendeur rejoint le principe de l'« acceptation libre ». On a eu recours à la notion d'acceptation libre pour étendre la portée du recouvrement aux fins de restitution au-delà des catégories traditionnelles de demandes fondées sur le *quantum meruit* où l'on faisait valoir que des services avaient été demandés ou fournis en vertu d'une entente inexécutable. La réticence traditionnelle de la common law à accorder une réparation dans les cas où il n'y a eu aucune demande reposait sur le principe qu'une personne n'est généralement pas tenue de payer les services qu'elle n'a pas demandés, et ne voulait peut-être pas. Toutefois, cette préoccupation revêt une importance bien moindre quand la personne qui reçoit les services savait qu'ils étaient rendus, n'avait aucun motif raisonnable de penser qu'il s'agissait d'une donation et a tout de même continué à les accepter librement : voir P. Birks, *Unjust Enrichment* (2e éd. 2005), p. 56-57.

[121] La nécessité de procéder à cette analyse des attentes raisonnables du demandeur et de la connaissance qu'en avait le défendeur relativement aux services domestiques est à mon avis dépassée du fait de l'évolution du droit. L'arrêt *Garland*, comme je l'ai indiqué plus haut, a établi une méthode en deux étapes pour guider l'analyse du motif juridique. La première étape oblige le demandeur à prouver que l'avantage ne correspond pas à l'une des catégories établies de motifs juridiques. Il importe de souligner que le fait que le défendeur ait aussi rendu des services au demandeur n'entre dans aucune de ces catégories établies de motifs juridiques, pas plus que le fait que les services aient été fournis conformément aux attentes raisonnables des parties. Cependant, le fait que les parties s'attendaient raisonnablement à ce que les services soient fournis peut constituer une preuve pertinente relativement à la question de savoir si l'affaire entre dans une des catégories traditionnelles, par exemple, un contrat ou une donation.

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

Sinon, les avantages réciproques et les attentes raisonnables des parties ont un rôle très limité à jouer dans la première étape de l'analyse du motif juridique énoncée dans *Garland*.

[122] Cependant, des considérations différentes entrent en jeu à la deuxième étape. Suivant les arrêts *Peter* et *Garland*, les attentes raisonnables ou légitimes des parties jouent un rôle essentiel quand le défendeur cherche à établir un nouveau motif juridique, que ce soit au cas par cas ou à l'égard d'une catégorie. Comme le dit le juge Iacobucci dans *Garland*, cela introduit des situations résiduelles qui permettent « aux tribunaux d'examiner toutes les circonstances de l'opération afin de déterminer s'il existe un autre motif de refuser le recouvrement » (par. 45). Plus particulièrement, c'est à cette étape que le tribunal devrait tenir compte des attentes raisonnables des parties et des considérations d'intérêt public.

[123] Pour comprendre de quelle façon les arrêts *Peter* et *Garland* vont de pair, il sera utile d'appliquer la méthode énoncée dans *Garland* à une question abordée, mais non réglée, dans *Peter*. Dans *Peter*, on cherchait à savoir si une demande fondée sur la prestation de services domestiques pouvait être rejetée au motif que les services avaient été fournis dans le cadre d'une entente intervenue entre les parties lorsqu'elles ont décidé de vivre ensemble. Bien que la Cour ait conclu que la demande n'était pas fondée dans les faits, elle n'a pas statué qu'une telle demande était vouée à l'échec dans tous les cas : p. 991. Il me semble que, au vu de l'arrêt *Garland*, lorsque l'existence d'une « entente » qui ne constitue pas un contrat obligatoire est alléguée, la question sera examinée à l'étape à laquelle le défendeur tente de prouver qu'il existe un motif juridique justifiant l'enrichissement qui n'entre dans aucune des catégories existantes; il invoquera que l'« entente » représente les attentes raisonnables des parties, et une preuve relative à ces attentes sera une preuve pertinente de l'existence (ou de l'absence) d'une telle entente.

[124] En résumé :

1. Les attentes raisonnables ou légitimes des parties jouent un rôle négligeable au moment

the services were provided for a juristic reason within the existing categories.

2. In some cases, the fact that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.

3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

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

IV. The *Vanasse* Appeal

A. *Introduction*

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

de décider si les services ont été fournis pour un motif juridique appartenant à une catégorie établie.

2. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties peut constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'applique. On pourrait citer comme exemple l'existence d'un contrat stipulant la prestation des avantages. Cependant, en général, l'existence d'avantages conférés par le défendeur au demandeur ne sera pas prise en considération à l'étape de l'analyse qui porte sur l'examen du motif juridique.

3. Les attentes raisonnables ou légitimes des parties jouent un rôle à la deuxième étape de l'analyse du motif juridique, où il incombe au défendeur d'établir qu'il existe un motif juridique de conserver l'avantage n'appartenant pas aux catégories établies. Ce sont les attentes mutuelles ou légitimes des deux parties qui doivent être prises en considération, et non uniquement les attentes du demandeur ou celles du défendeur. La question est de savoir si les attentes des parties prouvent qu'il est équitable de conserver les avantages.

[125] Je vais maintenant examiner les deux présents pourvois.

IV. Le pourvoi *Vanasse*

A. *Introduction*

[126] Dans le pourvoi *Vanasse*, la principale question consiste à savoir comment établir la valeur d'une indemnité pécuniaire pour enrichissement injustifié. La juge de première instance a accordé une part de l'augmentation nette de la richesse familiale pendant la période de l'enrichissement injustifié. La Cour d'appel a conclu que ce n'était pas la bonne façon de procéder et que la juge de première instance aurait dû effectuer un calcul fondé sur le *quantum meruit* où la valeur que

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

chacune des parties a reçue de l'autre est évaluée et défalquée. Il fallait évaluer les contributions non financières du défendeur M. Seguin, ce qui, selon la Cour d'appel, n'a pas été fait par la juge de première instance. Comme le dossier ne permettait pas à la cour d'appliquer aux faits les principes juridiques appropriés, elle a ordonné la tenue d'une nouvelle audience relativement à la question de l'indemnité et de la modification corrélative de la pension alimentaire.

[127] Devant notre Cour, l'appelante M^me^ Vanasse soulève deux questions :

1. La Cour d'appel a-t-elle commis une erreur en imposant une approche stricte fondée sur le *quantum meruit* (c.-à-d. la « valeur reçue ») pour établir la valeur de l'indemnité pécuniaire pour enrichissement injustifié?

2. La Cour d'appel a-t-elle commis une erreur en concluant que la juge de première instance avait omis de tenir compte d'éléments de preuve pertinents aux contributions de M. Seguin?

[128] À mon avis, il convient d'accueillir le pourvoi et de rétablir la décision de la juge de première instance. Pour les motifs exposés ci-dessus, j'estime qu'il n'est pas toujours nécessaire, en principe, de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction du *quantum meruit*. En l'espèce, la juge de première instance a conclu qu'il y avait une coentreprise familiale, bien qu'elle ne l'ait pas qualifiée ainsi, et qu'il existait un lien entre la contribution de M^me^ Vanasse à la coentreprise et l'accumulation importante de la richesse familiale. À mon avis, la juge de première instance a raisonnablement évalué l'indemnité pécuniaire appropriée pour permettre l'annulation de cet enrichissement injustifié, en tenant dûment compte des contributions incontestées et importantes de M. Seguin.

B. *Bref aperçu des faits et des décisions des juridictions inférieures*

[129] Le contexte de l'espèce n'est essentiellement pas contesté. Les parties ont vécu en union de

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

fait pendant environ 12 ans, de 1993 à mars 2005. Ensemble, ils ont eu deux enfants qui étaient âgés de 8 et 10 ans au moment du procès.

[130] Pendant environ les quatre premières années de leur relation (de 1993 à 1997), les parties ont diligemment continué leur carrière respective, M^me^ Vanasse avec le Service canadien du renseignement de sécurité (« SCRS ») et M. Seguin avec Fastlane Technologies Inc., où il commercialisait un système d'exploitation de réseau qu'il avait mis sur pied.

[131] En mars 1997, M^me^ Vanasse a pris un congé pour pouvoir s'installer avec M. Seguin à Halifax, où Fastlane avait déménagé pour des raisons d'affaires importantes. Au cours des trois années et demie qui ont suivi, les parties ont eu deux enfants. Madame Vanasse s'occupait des travaux domestiques pendant que M. Seguin se consacrait à la croissance de Fastlane. La famille est revenue à Ottawa en 1998, où M. Seguin a acheté une maison qu'il a enregistrée au nom des deux parties en tant que copropriétaires. En septembre 2000, Fastlane a été vendue et M. Seguin a reçu environ 11 millions de dollars. Il a placé les fonds dans une société de portefeuille, grâce à laquelle il a continué de profiter d'occasions d'affaires et de placement.

[132] Après la vente de Fastlane, M^me^ Vanasse a continué de s'acquitter de la plupart des obligations familiales, bien que M. Seguin ait été davantage disponible pour l'aider. Il a continué de gérer les finances.

[133] Les parties se sont séparées le 27 mars 2005. À ce moment-là, leur situation financière était diamétralement opposée : l'avoir net de M^me^ Vanasse était passé d'environ 40 000 $ au début de leur vie commune à près de 332 000 $ au moment de la séparation; M. Seguin avait environ 94 000 $ au début de la relation et son avoir net s'élevait à environ 8 450 000 $ au moment de la séparation.

[134] Madame Vanasse a intenté une action devant la Cour supérieure de justice. En plus de demander une pension alimentaire et la garde des

custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr. Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

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

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

enfants, elle a invoqué l'enrichissement injustifié. Elle a soutenu que M. Seguin s'était injustement enrichi parce qu'il avait conservé la quasi-totalité de la somme provenant de la vente de Fastlane, bien qu'elle ait contribué à son acquisition grâce aux avantages qu'elle conférait sous forme de services domestiques et de soins des enfants. Elle a affirmé que ses contributions ont permis à M. Seguin de consacrer la majeure partie de son temps et de son énergie à l'entreprise. Elle a invoqué l'existence d'une fiducie constructoire sur la moitié de la résidence familiale revenant à M. Seguin et un intérêt bénéficiaire de moitié dans les placements de la société de portefeuille de M. Seguin.

[135] Monsieur Seguin a contesté la demande pour enrichissement injustifié. Il a admis s'être enrichi pendant la période d'environ trois ans où il travaillait à temps plein à l'extérieur de la maison et que M^{me} Vanasse restait à la maison à temps plein (de mai 1997 à septembre 2000), mais il a soutenu qu'il n'y avait pas eu un appauvrissement correspondant parce qu'il lui avait donné la moitié de la résidence familiale et environ 44 000 $ dans des régimes enregistrés d'épargne-retraite (« REER »). À titre subsidiaire, M. Seguin a fait valoir qu'une fiducie constructoire était inappropriée en raison de l'absence de lien entre les contributions de M^{me} Vanasse et la propriété de Fastlane.

[136] En première instance, la juge Blishen a conclu que la relation des parties pouvait se diviser en trois périodes distinctes : (1) du début de la cohabitation en 1993 jusqu'en mars 1997 quand M^{me} Vanasse a laissé son emploi au SCRS; (2) de mars 1997 à septembre 2000, période pendant laquelle les deux enfants sont nés et Fastlane a été vendue; et (3) de septembre 2000 à la séparation des parties en mars 2005. Elle a conclu que ni l'une ni l'autre des parties ne s'était injustement enrichie au cours de la première et de la troisième périodes; elle était d'avis que leurs contributions à la relation pendant ces périodes avaient été proportionnées. Durant la première période, les parties n'avaient pas d'enfant et elles se concentraient sur leur carrière; durant la troisième période, les deux parents étaient à la maison et leurs contributions étaient proportionnées.

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

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

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

Again at para. 137, the trial judge found that

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

[137] Cependant, durant la deuxième période, la juge de première instance a conclu que M. Seguin s'était injustement enrichi grâce à M^me^ Vanasse. Cette dernière s'occupait des travaux domestiques, ainsi que de leurs deux enfants. Elle n'était pas une [TRADUCTION] « gouvernante/femme de ménage » et, comme l'a dit la juge de première instance, elle a « contribué au moins autant à la coentreprise familiale » pendant la relation. La juge de première instance a conclu que les contributions de M^me^ Vanasse pendant la deuxième période « avaient grandement avantagé M. Seguin et n'étaient pas proportionnées » (par. 139).

[138] La juge de première instance a conclu que les efforts déployés par M^me^ Vanasse pendant cette deuxième période étaient directement liés au succès professionnel de M. Seguin. Elle a affirmé ce qui suit au par. 91 :

> [TRADUCTION] Monsieur Seguin s'était enrichi du fait que M^me^ Vanasse gérait la maisonnée, s'occupait de deux jeunes enfants et veillait à prendre tous les rendez-vous nécessaires pour ceux-ci et à répondre à tous leurs besoins. Monsieur Seguin n'aurait pas pu faire tous les efforts qu'il a faits pour créer l'entreprise si M^me^ Vanasse n'avait pas assumé ces responsabilités. Monsieur Seguin a tiré un avantage des efforts de M^me^ Vanasse, car il a été en mesure de concentrer son temps, son énergie et ses efforts sur Fastlane. [Je souligne.]

Encore au par. 137, la juge du procès a conclu comme suit :

> [TRADUCTION] Monsieur Seguin s'était injustement enrichi et M^me^ Vanasse s'est appauvrie pendant trois ans et demi de leur relation, période pendant laquelle M. Seguin travaillait souvent jour et nuit et voyageait fréquemment quand ils habitaient à Halifax. Monsieur Seguin n'aurait pas pu avoir le même succès et développer l'entreprise comme il l'a fait si M^me^ Vanasse n'avait pas assumé la majeure partie des responsabilités parentales et domestiques. Il n'aurait pas pu consacrer son temps à Fastlane si M^me^ Vanasse n'avait pas assumé ces responsabilités. [. . .] Monsieur Seguin a bénéficié des efforts déployés par M^me^ Vanasse puisqu'il était en mesure de concentrer toute son énergie et son talent sur la réussite de Fastlane. [Je souligne.]

[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.

[139] La juge du procès a conclu qu'une indemnité pécuniaire était appropriée, compte tenu de la capacité de payer de M. Seguin et de l'absence d'un lien suffisamment direct et important entre les contributions de M^me^ Vanasse et Fastlane ou la société de portefeuille de M. Seguin, comme cela est requis pour imposer une fiducie constructoire de nature réparatoire.

[140] Quant au montant de cette indemnité, la juge Blishen a fait remarquer que M^me^ Vanasse avait reçu une part de 50 pour cent dans la résidence familiale, mais a conclu que cela ne constituait pas une compensation adéquate pour ses contributions. Après avoir comparé les avoirs nets des parties, elle a décidé que M^me^ Vanasse avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de M. Seguin pendant la période de l'enrichissement injustifié. Selon elle, son avoir net avait augmenté d'environ 8,4 millions de dollars au cours des 12 années de la relation. Elle a certes souligné que l'augmentation la plus importante a eu lieu quand Fastlane a été vendue vers la fin de la période de l'enrichissement injustifié, mais elle a tout de même réparti l'augmentation sur les 12 années qu'a duré la relation, arrivant à un montant d'environ 700 000 $ par année. En commençant avec l'augmentation de 2,45 millions de dollars attribuable à la période de trois ans et demi d'enrichissement injustifié, la juge de première instance a accordé à M^me^ Vanasse la moitié de ce montant, moins la valeur de sa part dans la résidence familiale et ses REER. Le montant accordé était donc d'un peu moins de 1 million de dollars.

[141] En appel, M. Seguin n'a pas attaqué la conclusion de la juge Blishen relative à l'enrichissement injustifié et a admis cet enrichissement entre 1997 et 2000. Par conséquent, les conclusions de la juge de première instance, suivant lesquelles il y a eu enrichissement injustifié durant cette période et non durant les autres périodes, ne sont pas en cause. La seule question que notre Cour est appelée à trancher concerne la justesse de l'indemnité pécuniaire accordée pour l'enrichissement injustifié.

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

C. *Analyse*

(1) La juge du procès était-elle tenue d'appliquer une méthode fondée sur le *quantum meruit* pour calculer l'indemnité pécuniaire?

[142] Je suis d'accord avec l'appelante pour dire qu'il n'est pas nécessaire, en principe, de toujours calculer l'indemnité pécuniaire pour enrichissement injustifié en fonction de la valeur des services. Comme je l'ai déjà dit, la meilleure façon de définir l'enrichissement injustifié est de considérer ce qui se produit lorsqu'une partie quitte la relation avec une part disproportionnée de la richesse accumulée grâce aux efforts communs des parties. Il y a un enrichissement injustifié quand les parties étaient engagées dans une coentreprise familiale et qu'il existe un lien entre les contributions du demandeur et l'accumulation de la richesse. Quand c'est le cas, il convient d'évaluer la valeur de l'enrichissement en déterminant la contribution proportionnelle du demandeur à cette richesse. Selon la juge de première instance, telle était la situation de M^me^ Vanasse et de M. Seguin.

(2) Existence d'une coentreprise familiale

[143] Après un procès de six jours, la juge de première instance a conclu que [TRADUCTION] « M^me^ Vanasse n'était ni une gouvernante ni une femme de ménage ». La juge était d'avis que M^me^ Vanasse avait « contribué au moins autant à la coentreprise familiale » pendant la relation et que, pendant la période d'enrichissement injustifié, ses contributions « avaient grandement avantagé M. Seguin » (par. 139).

[144] Évidemment, la juge de première instance n'a pas examiné la preuve en fonction des rubriques qui, selon moi, permettront de reconnaître l'existence d'une coentreprise familiale, à savoir « l'effort commun », « l'intégration économique », « l'intention réelle » et « la priorité accordée à la famille ». Toutefois, selon ses conclusions de fait et son analyse, l'enrichissement injustifié de M. Seguin au détriment de M^me^ Vanasse tient à la conservation, par M. Seguin, d'une part disproportionnée de la

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

richesse générée par la coentreprise familiale. Les conclusions de la juge entrent parfaitement dans les rubriques que j'ai suggérées.

a) *Effort conjoint*

[145] En l'espèce, plusieurs facteurs donnent à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Premièrement, comme je l'ai déjà mentionné, la juge de première instance a conclu que M^me^ Vanasse n'avait pas un rôle de [TRADUCTION] « gouvernante ni de femme de ménage », mais qu'elle avait contribué au moins autant pendant la relation. Les parties ont pris des décisions importantes en gardant le bien-être de la famille au premier plan : la décision de déménager à Halifax, la décision de revenir s'établir à Ottawa et la décision selon laquelle M^me^ Vanasse ne retournerait pas travailler après la vente de Fastlane en sont des exemples clairs. Les parties ont uni leurs efforts pour le bien-être de l'unité familiale. Comme l'a conclu la juge de première instance, pendant la deuxième étape de leur relation de mars 1997 à septembre 2000, la répartition des tâches était telle que M^me^ Vanasse était presque entièrement responsable de la maison et des enfants, alors que M. Seguin travaillait de longues heures et gérait les finances familiales. La juge de première instance a conclu que les parties ont été en mesure d'élever une famille et d'acquérir une richesse grâce à leurs efforts communs. Pour reprendre ses propos, [TRADUCTION] « M. Seguin n'aurait pas pu faire tous les efforts qu'il a faits pour créer l'entreprise si M^me^ Vanasse n'avait pas assumé ces responsabilités » (par. 91). Bien que les longues heures de travail et les déplacements de M. Seguin aient quelque peu diminué en septembre 1998 quand les parties sont retournées à Ottawa, la répartition fondamentale des tâches est demeurée la même.

[146] Il convient de souligner que la période d'enrichissement injustifié correspond à la période pendant laquelle les parties ont eu leurs deux enfants (en 1997 et 1999), un autre indice qu'elles travaillaient ensemble dans le but de réaliser des objectifs communs. La durée de la relation est aussi pertinente, et 12 ans de cohabitation se veut

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

une période assez longue. Enfin, la juge de première instance a décrit l'entente entre les parties comme une [TRADUCTION] « entreprise familiale », à laquelle M^me^ Vanasse « contribuait au moins autant » (par. 138-139).

b) *Intégration économique*

[147] La juge du procès a conclu que [TRADUCTION] « [c]e n'était pas une situation d'interdépendance économique » (par. 105). Cela dit, il y avait une mise en commun des ressources. Madame Vanasse ne travaillait pas et ne contribuait pas financièrement à la famille après la naissance des enfants; elle était donc financièrement dépendante de M. Seguin. La résidence familiale était enregistrée aux deux noms et les parties avaient un compte chèque conjoint. Comme l'a dit la juge de première instance, [TRADUCTION] « [e]lle était "PDG des enfants" et il était "PDG des finances" » (par. 105).

c) *Intention réelle*

[148] Dans une relation conjugale, il faut accorder beaucoup d'importance à l'intention réelle des parties, exprimée par elles ou inférée de leur conduite, au moment de déterminer s'il existait une coentreprise familiale. Un certain nombre de conclusions de fait indiquent que ces parties considéraient leur relation comme une coentreprise familiale.

[149] Bien qu'une promesse de mariage ou un projet de mariage ne soit absolument pas une condition préalable pour conclure à l'existence d'une coentreprise familiale, en l'espèce, les intentions des parties à l'égard du mariage portent fortement à croire qu'elles se considéraient elles-mêmes comme un couple marié. Monsieur Seguin a demandé M^me^ Vanasse en mariage en juillet 1996 et ils ont échangé des anneaux. Bien qu'ils aient été [TRADUCTION] « très attachés l'un à l'autre et en amour », ils n'ont jamais fixé une date de mariage (par. 14). Monsieur Seguin a soulevé à nouveau le sujet du mariage quand M^me^ Vanasse a su qu'elle était enceinte de leur premier enfant. Ils ne se sont jamais mariés, mais la juge de première instance a conclu que les parties [TRADUCTION] « entendaient

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,

[se marier] pendant les premières années de leur relation de 12 ans » (par. 64). Monsieur Seguin a continué d'appeler M^me^ Vanasse [TRADUCTION] « ma future femme » et c'est ainsi que les autres la percevaient (par. 33).

[150] La juge de première instance a aussi fait référence à certaines déclarations de M. Seguin qui donnaient fortement à penser que lui-même estimait qu'il existait une coentreprise familiale. Comme l'a dit la juge de première instance au par. 28, après la vente de Fastlane,

> [TRADUCTION] M. Seguin est devenu riche. Il a affirmé à M^me^ Vanasse qu'ils n'auraient jamais à se préoccuper de leurs finances comme c'était le cas de leurs parents; leurs enfants pourraient fréquenter les meilleures écoles et ils pourraient mener une belle vie sans soucis financiers.

Et au par. 98 :

> [TRADUCTION] Après la vente de l'entreprise, M. Seguin a affirmé qu'ils pouvaient prendre leur retraite, que les enfants pourraient fréquenter les meilleures écoles et que la famille serait bien traitée. La famille a voyagé, roulé en voitures de luxe, acheté un grand bateau de croisière pour les vacances d'été ainsi que des condominiums à Mont-Tremblant.

[151] La juge de première instance était d'avis que, à cause des promesses et des paroles rassurantes de M. Seguin, M^me^ Vanasse s'attendait raisonnablement à profiter de l'augmentation de l'avoir net pendant la période d'enrichissement injustifié, mais à mon avis, ces remarques reflètent davantage le fait qu'il existait une coentreprise familiale à laquelle le couple a contribué conjointement pour leur bénéfice et le bénéfice de leurs enfants.

d) *Priorité accordée à la famille*

[152] Il y a de fortes raisons d'inférer des conclusions de fait que, à la connaissance de M. Seguin, M^me^ Vanasse s'est fiée sur la relation à son détriment. Comme l'a dit la juge de première instance, M^me^ Vanasse a renoncé, en 1997, à une carrière lucrative et excitante au SCRS, où elle était en formation pour devenir agente du renseignement, afin de suivre M. Seguin à Halifax. À bien des

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.

égards, elle a fait un sacrifice : elle a quitté sa carrière, renoncé à son salaire et déménagé loin de sa famille et de ses amis. Monsieur Seguin s'était installé à Halifax dans le but d'y relocaliser Fastlane pour des raisons d'affaires. Madame Vanasse est donc restée à la maison et s'est occupée de leurs deux jeunes enfants. Comme je l'ai déjà expliqué, pendant la période d'enrichissement injustifié, M^me^ Vanasse assumait une part disproportionnée des travaux domestiques. Ce sont ces contributions domestiques qui ont permis, en partie, à M. Seguin de se concentrer sur son travail avec Fastlane. Plus tard, en 2003, la [TRADUCTION] « famille a décidé » que M^me^ Vanasse allait rester à la maison après la fin de son congé du SCRS (par. 198). La situation financière de M^me^ Vanasse au moment de leur rupture indique qu'elle s'est fiée sur la relation à son détriment économique. Tous ces éléments de preuve étayent la conclusion que les parties formaient, dans les faits, une coentreprise familiale.

[153] Enfin, je renvoie aux arguments de M. Seguin, qui ont été acceptés par la Cour d'appel, selon lesquels la juge de première instance n'a pas accordé l'importance qui convenait aux sacrifices faits par M. Seguin au bénéfice de la relation. Plus loin dans mes motifs, je vais aborder la question de savoir si la juge de première instance a effectivement commis une erreur à cet égard. Cependant, les points soulevés par M. Seguin pour appuyer cet argument servent en fait à renforcer la conclusion selon laquelle il existait une coentreprise familiale. Monsieur Seguin mentionne expressément un certain nombre de facteurs, y compris : accepter de démissionner de son poste de PDG de Fastlane en septembre 1997 pour se rendre plus disponible pour M^me^ Vanasse, créant ainsi des frictions avec ses collègues et ses partenaires et réduisant sa rémunération; accepter de déménager à Ottawa en 1998 à la demande de M^me^ Vanasse; et redoubler d'efforts pour travailler plus souvent à la maison et voyager moins souvent après le déménagement à Ottawa. Ces faits révèlent un accord mutuel dans la relation sociale et financière des parties. En résumé, ils appuient l'existence d'une coentreprise familiale.

(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

e) *Conclusion sur l'existence de la coentreprise familiale*

[154] À mon avis, dans ses conclusions de fait, la juge de première instance montre clairement que M^me^ Vanasse et M. Seguin étaient engagés dans une coentreprise familiale. Il reste à savoir s'il y avait un lien entre les contributions de M^me^ Vanasse à la coentreprise et l'accumulation de la richesse.

(3) Lien avec l'accumulation de la richesse

[155] La juge de première instance a clairement conclu qu'il y avait un lien entre les contributions de M^me^ Vanasse et l'accumulation de la richesse familiale.

[156] J'ai déjà fait état, d'une manière assez détaillée, des conclusions de la juge de première instance à cet égard. Je reprends toutefois ses propos particulièrement clairs au par. 91 de ses motifs :

[TRADUCTION] Monsieur Seguin n'aurait pas pu faire tous les efforts qu'il a faits pour créer l'entreprise si M^me^ Vanasse n'avait pas assumé ces responsabilités [liées à l'entretien de la maison et à l'éducation des enfants]. Monsieur Seguin a tiré un avantage des efforts de M^me^ Vanasse, car il a été en mesure de concentrer son temps, son énergie et ses efforts sur Fastlane.

[157] Compte tenu de cette conclusion et d'autres semblables, je conclus que non seulement ces parties étaient engagées dans une coentreprise familiale, mais aussi qu'il y avait un lien clair entre la contribution de M^me^ Vanasse et l'accumulation de la richesse. Il convient donc de considérer qu'il y a enrichissement injustifié du fait que M. Seguin quitte la relation avec une part disproportionnée de la richesse accumulée grâce à leurs efforts conjoints.

(4) Calcul de l'indemnité

[158] Le pourvoi visait principalement à savoir s'il aurait fallu calculer l'indemnité en fonction du *quantum meruit*. Devant notre Cour, la façon dont la juge de première instance a déterminé la part proportionnelle de la richesse accumulée des parties a été très peu débattue. J'estime que l'approche

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

adoptée par la juge de première instance était raisonnable dans les circonstances, mais je souligne qu'il ne s'agit pas nécessairement d'un modèle à suivre. Selon les principes juridiques que j'ai exposés, il y a peut-être de nombreuses façons de quantifier raisonnablement une indemnité. Je préfère ne pas faire d'autres commentaires généraux sur le processus de quantification dans le contexte du présent pourvoi, sauf celui-ci. Dans la mesure où les bons principes juridiques sont appliqués, et que les conclusions de fait ne sont pas entachées d'une erreur manifeste et déterminante, la cour d'appel doit faire preuve d'une grande retenue envers l'appréciation des dommages-intérêts par un juge de première instance : voir, par exemple, *Nance c. British Columbia Electric Railway Co.*, [1951] A.C. 601 (C.P.). Il convient de faire preuve de la même retenue envers le jugement motivé et minutieux du juge de première instance quant à l'indemnité pécuniaire appropriée pour corriger un enrichissement injustifié. Il me faut aborder deux derniers points précis.

[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.

[159] Monsieur Seguin prétend, très brièvement, qu'une application juste de la méthode fondée sur la « valeur accumulée » commanderait que l'on fasse une analyse attentive afin de déterminer la valeur des contributions des tiers à la croissance de Fastlane pendant la période où il avait réduit ses propres contributions, à la suite de ce que l'avocat appelle les « exigences » de M^{me} Vanasse, qui voulait qu'il diminue ses heures de travail et qu'ils retournent à Ottawa. Cet argument postule qu'il n'avait pas à partager l'argent provenant de la vente avec M^{me} Vanasse. Je ne peux pas accepter ce postulat. La raison pour laquelle il a reçu plus que sa part à la vente de l'entreprise ou pour laquelle, ayant reçu plus qu'il ne le devait, M^{me} Vanasse n'a toujours pas droit à une part équitable de ce qu'il a reçu, demeure inexpliquée.

[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

[160] Aussi, il y a la conclusion de la Cour d'appel selon laquelle la juge de première instance n'a pas pris en considération la preuve des nombreuses et importantes contributions non financières de M. Seguin au bien-être de la famille. Avec égards, je ne peux pas souscrire à cette conclusion. La juge de première instance a expressément mentionné ces

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.

contributions dans ses motifs. En outre, en limitant la période d'enrichissement injustifié à une période de trois ans et demi, la juge de première instance a tenu compte des périodes pendant lesquelles les contributions de M^me^ Vanasse n'étaient pas disproportionnées par rapport à celles de M. Seguin. À mon avis, la juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve dont elle disposait et a suffisamment tenu compte des contributions de M. Seguin.

D. *Dispositif*

[161] Je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance de la Cour d'appel et de rétablir l'ordonnance de la juge de première instance. L'appelante a droit à ses dépens dans toutes les cours.

V. Le pourvoi *Kerr*

A. *Introduction*

[162] Quand leur union de fait a pris fin après plus de 25 ans, M^me^ Kerr a intenté une action contre son ancien conjoint, M. Baranow, concluant à l'enrichissement injustifié, à l'imposition d'une fiducie résultoire et à l'octroi d'une pension alimentaire. Par une demande reconventionnelle, M. Baranow a cherché à faire reconnaître que M^me^ Kerr s'était injustement enrichie grâce aux services d'entretien ménager qu'il lui avait rendus entre 1991 et 2006, grâce aussi à la retraite anticipée prise pour lui apporter une aide personnelle. Le juge de première instance a accordé 315 000 $ à M^me^ Kerr, estimant qu'elle avait droit à ce montant par application de la fiducie résultoire (pour refléter sa contribution à l'acquisition de biens) et par application de la fiducie constructoire de nature réparatoire (comme réparation pour enrichissement injustifié). Il a également accordé à M^me^ Kerr une pension alimentaire mensuelle de 1 739 $, rétroactive à la date d'introduction de l'instance. Bien que le juge de première instance ait rejeté l'affirmation de M. Baranow selon laquelle M^me^ Kerr s'était injustement enrichie à ses dépens, les motifs du jugement et l'ordonnance rendue n'abordent pas par ailleurs la question de la demande reconventionnelle de M. Baranow.

[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

[163] Monsieur Baranow a interjeté appel. La Cour d'appel a accueilli l'appel, concluant que les demandes de M^me^ Kerr relatives à une fiducie résultoire et un enrichissement injustifié devaient être rejetées, que la demande de M. Baranow fondée sur l'enrichissement injustifié devait être renvoyée au juge de première instance pour qu'il tranche à nouveau la question et que l'ordonnance de pension alimentaire devait rétroagir à la date du premier jour du procès, et non à la date d'introduction de l'instance.

[164] Madame Kerr fait appel de cette décision et plaide que la Cour d'appel a commis une erreur en écartant les conclusions du juge de première instance selon lesquelles :

(1) une fiducie résultoire a été créée en sa faveur;

(2) M. Baranow s'est injustement enrichi grâce à elle;

(3) la pension alimentaire devait être versée à compter de la date d'introduction de l'action.

[165] À mon avis, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concerne la fiducie résultoire et l'enrichissement injustifié. Elle n'a pas non plus commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de M. Baranow à la Cour suprême de la Colombie-Britannique. Cependant, j'estime qu'au lieu de rejeter la demande de M^me^ Kerr fondée sur l'enrichissement injustifié, la cour d'appel aurait dû ordonner la tenue d'un nouveau procès. Les erreurs du juge de première instance n'étaient certes pas inoffensives, mais il est impossible de dire au vu du dossier, qui comprend des conclusions de fait clairement erronées, que la demande fondée sur l'enrichissement injustifié était vouée à l'échec si elle avait été analysée à l'aide du cadre juridique précisé ci-dessus. En ce qui concerne la date d'exécution de l'ordonnance alimentaire, je suis d'avis d'annuler l'ordonnance de la Cour d'appel et de rétablir l'ordonnance de première instance.

B. *Aperçu des faits*

[166] La conclusion du juge de première instance en ce qui concerne les allégations de fiducie

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,

résultoire et d'enrichissement injustifié reposait sur le fait que M^me^ Kerr avait fourni des capitaux et des actifs d'une valeur de 60 000 $ au début de la relation. Ce fait, selon le juge de première instance, justifiait de lui accorder un tiers de la valeur de la maison qu'elle partageait avec M. Baranow au moment de la séparation. Selon le juge de première instance, ces capitaux et actifs de 60 000 $ englobaient trois éléments : 37 000 $ en valeur nette de la maison de la rue Coleman qu'elle a partagée avec son ex-époux; la valeur d'une automobile; et la valeur des meubles qu'elle possédait avant de rencontrer M. Baranow. Le juge de première instance n'a tiré aucune conclusion de fait précise à propos de la valeur des contributions non financières de M^me^ Kerr ou de M. Baranow. Comme je l'ai déjà dit, bien que le juge ait rejeté en une seule phrase la prétention de M. Baranow voulant que M^me^ Kerr se soit injustement enrichie à ses dépens, il n'a pas expliqué le fondement de cette conclusion. La demande reconventionnelle de M. Baranow n'a pas été considérée.

[167] Les conclusions de fait du juge de première instance doivent évidemment être acceptées à moins qu'elles ne soient entachées d'une erreur manifeste et déterminante. Cependant, en l'espèce, l'intervention de la Cour d'appel à l'égard de quelques-unes des principales conclusions du juge était justifiée parce que ces conclusions n'étaient pas étayées par le dossier. Je vais devoir étudier les faits, plus qu'il ne serait habituellement nécessaire, pour expliquer ma conclusion.

[168] Les parties ont commencé à habiter ensemble dans la maison de M. Baranow sur la rue Wall, à Vancouver, en mai 1981. Peu de temps après, ils ont déménagé dans l'ancien domicile conjugal de M^me^ Kerr sur la rue Coleman. Ils s'étaient rencontrés au port de Vancouver, leur lieu de travail, où elle occupait un poste de secrétaire et lui, un poste de débardeur. Madame Kerr était en instance de divorce. Aux termes de l'accord de séparation, elle a reçu l'intérêt de son mari dans leur ancienne résidence familiale de la rue Coleman, à North Vancouver, tous les meubles et une Cadillac

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

Eldorado 1979. Cependant, son ex-époux devait plus de 400 000 $ et M^me^ Kerr était garante d'une partie de cette dette.

[169] À l'été 1981, la maison de la rue Coleman faisait l'objet de procédures de forclusion et, selon la preuve, elle était sur le point d'être saisie le 29 juillet 1981. Madame Kerr a déclaré au procès que, à ce moment-là, elle avait deux adolescents, elle gagnait moins de 30 000 $ par année et elle n'avait pas d'argent pour conserver la maison.

[170] Madame Kerr a demandé à son avocat de céder la maison et la voiture à M. Baranow, lequel a payé 33 000 $ en argent pour protéger la maison contre les dettes impayées et a garanti un prêt hypothécaire de 100 000 $ à un taux de 22 pour cent. Il a ensuite commencé à faire les paiements hypothécaires, plus tard, il a refinancé l'hypothèque avec celle de sa maison de la rue Wall, et il a assumé lui-même cette nouvelle hypothèque.

[171] Le couple a vécu ensemble pendant les 25 années qui ont suivi, d'abord dans la maison de la rue Wall, puis dans celle de la rue Coleman, ensuite dans un appartement temporaire et enfin dans leur « maison de rêve » qu'ils ont fait construire sur le terrain de la rue Wall appartenant à M. Baranow.

[172] Quand les parties habitaient la maison de la rue Coleman (de septembre 1981 à décembre 1985), M. Baranow conservait le revenu de 450 $ par mois que lui procurait la location de sa maison de la rue Wall. Le juge de première instance a conclu que, bien que les parties aient toujours géré leurs finances personnelles séparément, il y avait une entente aux termes de laquelle M. Baranow payait les taxes foncières et les hypothèques des deux résidences, celle de la rue Coleman et celle de la rue Wall. Les hypothèques ont été entièrement remboursées avant juillet 1985. Cependant, M. Baranow a contracté un prêt hypothécaire de 32 000 $ pour la maison de la rue Wall en juillet 1985, qui a été remboursé avant août 1988.

[173] La maison de la rue Coleman a été vendue en août 1985 pour un montant de 138 000 $. Cette vente représentait une perte importante, compte

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

tenu de la commission de l'agent immobilier, du montant de 33 000 $ payé par M. Baranow au moment du transfert, et des paiements hypothécaires qu'il a faits entre le transfert à l'été 1981 et la vente à l'été 1985.

[174] Les parties ont emménagé dans un appartement (d'août 1985 à octobre 1986) pendant la construction de leur « maison de rêve » sur la rue Wall. L'habitation existante a été démolie et remplacée. Monsieur Baranow a dépensé entre 97 000 $ et 105 000 $ pour la construction, plus les matériaux, la main-d'œuvre et les permis. Selon le juge de première instance, M^me^ Kerr s'occupait de la planification, de la décoration intérieure et du nettoyage. Elle a aussi semé du gazon, entretenu le jardin de fleurs et payé du lambris pour la chambre du sous-sol. De plus, elle a contribué à l'achat des meubles, des électroménagers et d'autres effets pour la maison de la rue Wall. Son fils payait un loyer mensuel de 350 $, montant que M. Baranow conservait. Dans un passage de ses motifs, le juge de première instance a affirmé que M^me^ Kerr payait [TRADUCTION] « toutes les dépenses du ménage et les assurances de la nouvelle maison [. . .] même après que [M. Baranow] eût remboursé l'hypothèque de 32 000 $ en août 1988 » (par. 24). Toutefois, ailleurs dans ses motifs, il a souligné que M^me^ Kerr payait les services publics et l'assurance et elle faisait « parfois le marché » (par. 36). Selon lui, M. Baranow payait les dépenses liées à la propriété, soit les taxes foncières (moins la prestation d'invalidité de M^me^ Kerr) et les frais d'entretien (qui étaient minimes dans la nouvelle maison). Le juge de première instance a conclu que la maison de la rue Wall valait 942 500 $, comparativement à 205 000 $ en octobre 1986. Il a ensuite conclu que, comme il n'y avait plus de paiements hypothécaires à faire après 1988, la part des dépenses de M^me^ Kerr [TRADUCTION] « a été probablement plus élevée » que celle de M. Baranow pendant environ 18 ans, jusqu'à ce qu'ils n'habitent plus ensemble.

[175] En 1991, M^me^ Kerr a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque, qui l'ont laissée paralysée du côté gauche et l'ont rendue inapte au travail. Sa santé s'est progressivement détériorée et la relation du couple est devenue

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

de plus en plus tendue. Monsieur Baranow a pris une retraite anticipée en 2002. Le juge de première instance a reconnu que M. Baranow avait dit avoir pris sa retraite pour prendre soin de M^me^ Kerr, mais il a fait remarquer que cette retraite favorisait aussi M. Baranow. Selon le juge de première instance, M. Baranow a commencé à ressentir une certaine fatigue liée à son rôle d'aidant naturel et à chercher dès juin 2005 des solutions pour qu'elle reçoive des soins en établissement. L'été suivant, en août 2006, M^me^ Kerr a dû subir une chirurgie du genou. Après la chirurgie, M. Baranow a clairement indiqué au personnel hospitalier qu'il n'était pas prêt à la ramener à la maison. Madame Kerr a été transférée dans un établissement de soins prolongés où elle demeurait au moment du procès. Le juge de première instance a conclu que, dans les 18 derniers mois où M^me^ Kerr habitait la maison de la rue Wall, M. Baranow s'occupait de la majeure partie des tâches ménagères et lui prodiguait des soins personnels.

C. *Analyse*

(1) La question de la fiducie résultoire

[176] S'appuyant sur trois motifs, le juge de première instance est arrivé à la conclusion que M. Baranow détenait un tiers de la valeur de la maison de la rue Wall au titre d'une fiducie résultoire pour M^me^ Kerr. La Cour d'appel a conclu que chacun de ces motifs était erroné. Avec égards, je suis aussi de cet avis.

a) *Transfert à titre gratuit*

[177] Le juge de première instance a conclu que le transfert du titre de la maison de la rue Coleman à M. Baranow a été fait à titre gratuit, créant ainsi la présomption de fiducie résultoire en faveur de M^me^ Kerr. Au moment du transfert, il fallait environ 133 000 $ pour conserver la propriété (elle était grevée d'une première hypothèque d'un peu moins de 80 000 $ et d'une deuxième hypothèque d'un peu moins de 35 000 $, d'un jugement en faveur de la Banque de Montréal d'un peu moins de 12 000 $ et d'autres dettes et charges diverses, pour une dette totale d'environ 133 000 $). Il y avait aussi

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

un jugement de 26 500 $ en faveur de la CIBC, qui préoccupait M^me^ Kerr, bien qu'il ne figure pas dans la liste des paiements à faire pour conclure le transfert. Nous savons que M^me^ Kerr était garante d'une partie des dettes de son ex-époux et qu'elle a fait faillite en 1983 relativement à une dette de 15 000 $ dont elle était cosignataire avec son ex-époux.

[178] La Cour d'appel a infirmé la décision du juge de première instance à propos de la fiducie résultoire, concluant que le transfert n'a pas été fait à titre gratuit. Elle a signalé les contributions et les responsabilités assumées par M. Baranow pour rendre le transfert possible, et a statué que la conclusion du juge de première instance à cet égard constituait une erreur manifeste et dominante.

[179] À cet égard, je partage l'opinion de la Cour d'appel. Nul ne conteste que M. Baranow a investi environ 33 000 $ en argent et a garanti un prêt hypothécaire de 100 000 $ pour éviter la saisie de la propriété par la banque. Cela constituait une contrepartie, et le transfert ne peut donc pas être raisonnablement considéré comme étant à titre gratuit. Selon l'intimé, il faudrait conclure le contraire en se fondant sur des arguments techniques à propos de l'absence de coïncidence précise entre le moment du transfert et des paiements et le fait que ceux-ci n'ont pas été faits directement à M^me^ Kerr, M. Baranow les ayant versés à ses créanciers. Ces arguments sont dénués de fondement. Un élément important de la conclusion du juge de première instance en ce qui a trait à l'existence d'une fiducie résultoire était le fait qu'il n'existait [TRADUCTION] « aucune preuve » selon laquelle le paiement en argent de 33 000 $ effectué par M. Baranow et sa garantie de l'hypothèque de 100 000 $ « étaient liés au transfert ou faisaient partie d'une entente entre les parties de sorte qu'ils constituaient une contrepartie au transfert » (par. 76). Si l'on fait abstraction pour le moment de la question de savoir si cette conclusion reflète bien la notion de transfert à titre gratuit, cette affirmation du juge est clairement erronée; il existait en effet de nombreux éléments de preuve en ce sens. Monsieur Baranow a affirmé que M^me^ Kerr lui avait [TRADUCTION] « demandé

"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

en pleurant » de l'aider à protéger la propriété des créanciers. L'avocat de M^me^ Kerr a noté dans sa lettre-rapport qu'elle avait l'impression de n'avoir d'autre choix que de céder la maison à M. Baranow [TRADUCTION] « compte tenu des lourdes dettes de [son] mari qui inclu[aient] un jugement en faveur de la CIBC pour une dette de 26 500 $ ». Au procès, on a demandé à M^me^ Kerr si elle avait demandé à M. Baranow de sauver la maison et elle a répondu : [TRADUCTION] « Je suppose. » Ainsi, contrairement à la conclusion du juge, de nombreux éléments de preuve indiquaient que M. Baranow avait remboursé les dettes et garanti l'hypothèque parce que la maison lui avait été transférée. La preuve montre qu'il a accepté le transfert et assumé les obligations financières à la demande de M^me^ Kerr, et aussi dans le but d'éviter que les créanciers saisissent la propriété.

[180] La Cour d'appel a eu raison d'intervenir sur ce point et de conclure que le transfert n'avait pas été fait à titre gratuit. L'imposition, par le juge de première instance, d'une fiducie résultoire sur le tiers de la valeur de la maison de la rue Wall pour cette raison ne peut donc être maintenue.

b) *Les contributions de M^me^ Kerr*

[181] Le juge de première instance a aussi fondé sa conclusion relative à l'existence d'une fiducie résultoire sur les contributions financières et non financières de M^me^ Kerr à l'acquisition de la nouvelle maison sur la rue Wall. Selon lui, M^me^ Kerr avait versé un total de 60 000 $: 37 000 $ en valeur nette provenant du transfert de la résidence de la rue Coleman à M. Baranow; une Cadillac d'une valeur de 20 000 $ aussi transférée à M. Baranow; et des meubles de la maison de la rue Coleman d'une valeur de 3 000 $. De plus, le juge de première instance a fait remarquer que, en obtenant le titre légal de la maison de la rue Coleman, M. Baranow était en mesure de [TRADUCTION] « réhypothéquer les deux propriétés pour une valeur de 116 000 $ et d'utiliser 16 000 $ pour acquérir la maison de la rue Wall » (par. 82). En outre, M. Baranow n'aurait pas pu rembourser les prêts hypothécaires aussi diligemment sans les contributions de M^me^ Kerr

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.

aux dépenses du ménage. Cependant, le juge de première instance n'a attribué aucune valeur à ces deux derniers points dans sa décision quant à la portée de la fiducie résultoire qu'il a imposée relativement à la maison de la rue Wall.

[182] La Cour d'appel a écarté cette conclusion au motif qu'elle n'était pas étayée par le dossier. Elle a fait remarquer que M^me^ Kerr ne détenait pas 37 000 $ en valeur nette de la maison de la rue Coleman au moment où M. Baranow en a acquis le titre, que M. Baranow n'a reçu aucun intérêt bénéficiaire dans le véhicule et qu'il n'y avait aucune preuve de la valeur des meubles.

[183] Je souscris à la façon dont la Cour d'appel a tranché ce point. Comme elle l'a souligné, la preuve démontrait que, outre le fait que M. Baranow a payé en argent et garanti une hypothèque, il a versé les paiements hypothécaires mensuels, a payé les taxes et les frais d'entretien de la maison de la rue Coleman jusqu'à ce qu'elle soit vendue en 1985 pour un montant de 138 000 $ (moins la commission de l'agent immobilier). Monsieur Baranow n'a reçu aucun intérêt bénéficiaire dans le véhicule et le juge ne s'est pas prononcé sur la valeur des meubles. En réalité, M^me^ Kerr n'a retiré de la maison de la rue Coleman aucune valeur nette lui permettant de contribuer à l'acquisition ou à l'amélioration de la maison de la rue Wall. Je suis d'avis de confirmer la conclusion de la Cour d'appel sur ce point.

c) *Fiducie résultoire fondée sur l'intention commune*

[184] Le juge de première instance semble aussi avoir fondé ses conclusions relatives à la fiducie résultoire sur l'existence d'une intention commune, de la part de M^me^ Kerr et de M. Baranow, de partager la propriété de la rue Wall. Pour les motifs que j'ai déjà exposés, la fiducie résultoire fondée sur « l'intention commune » n'a plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci. J'estime qu'une fiducie résultoire n'aurait pas dû être imposée à l'égard de la propriété de la rue Wall sur la base de l'intention commune des 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;

d) *Conclusion relative à la fiducie résultoire*

[185] À mon avis, la Cour d'appel a eu raison d'écarter les conclusions du juge de première instance à l'égard des questions relatives à la fiducie résultoire.

(2) Enrichissement injustifié

[186] Le juge de première instance a aussi conclu que M. Baranow s'était injustement enrichi de 315 000 $ grâce à M^me^ Kerr, soit un tiers de la valeur de la maison de la rue Wall déterminée dans le cadre de l'analyse concernant la fiducie résultoire. Il était d'avis que M^me^ Kerr avait apporté les avantages suivants à M. Baranow :

a. une valeur nette de 37 000 $ dans la maison de la rue Coleman;

b. l'automobile;

c. les meubles;

d. 16 000 $ au titre du refinancement provenant du transfert de la maison de la rue Coleman et utilisés pour l'acquisition de la maison de la rue Wall;

e. 22 000 $ tirés de la revente de la maison de la rue Coleman;

f. les dépenses ménagères et les assurances liées aux deux résidences;

g. des services tels que les tâches ménagères, accueillir des invités et préparer les repas jusqu'à ce que l'invalidité de M^me^ Kerr l'empêche de continuer;

h. l'aide à la planification et à la décoration de la maison de la rue Wall;

i. les contributions financières à l'achat de biens pour la nouvelle maison;

j. une exemption d'impôt pour personnes handicapées;

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

k. l'équivalent du revenu de location du fils de M^me^ Kerr durant environ cinq ans.

[187] En ce qui concerne l'appauvrissement correspondant, le juge de première instance a souligné qu'il était [TRADUCTION] « peu probable » que M^me^ Kerr ait renoncé à une carrière ou à des possibilités de s'instruire pendant sa relation. De plus, son revenu est resté inchangé, même après son accident vasculaire cérébral, parce qu'elle touchait des prestations d'invalidité et d'autres avantages. Selon le juge, elle n'a pas eu à payer de loyer pendant toute la durée de la relation. Il est toutefois arrivé à la conclusion qu'elle avait subi un appauvrissement parce que, si elle n'avait pas investi la valeur nette de la maison de la rue Coleman, il était [TRADUCTION] « raisonnable d'inférer qu'elle l'aurait utilisée pour acheter un bien à son propre nom, investir pour elle-même, nourrir un intérêt personnel, ou autrement profiter d'une belle occasion d'affaires » : par. 92. Il a aussi conclu, sans plus d'explications, que les avantages qu'elle a tirés de la relation n'ont pas dépassé ses contributions.

[188] La Cour d'appel a écarté la conclusion du juge de première instance en ce qui concerne l'enrichissement injustifié. Elle a conclu que les contributions directes et indirectes de M. Baranow, grâce auxquelles M^me^ Kerr s'est enrichie et pour lesquelles il n'a pas été compensé, constituaient un motif juridique justifiant l'enrichissement, le cas échéant, de M. Baranow au détriment de M^me^ Kerr. Selon la Cour d'appel, pour les motifs exposés ci-dessus, M^me^ Kerr n'a pas versé une contribution de 60 000 $ et, par conséquent, sa demande reposait sur ses contributions indirectes. Toujours selon la Cour d'appel, le juge de première instance n'a pas évalué l'étendue des contributions directes et indirectes versées par M. Baranow à M^me^ Kerr, y compris : les frais d'hébergement qu'il a payés pendant toute la durée de la relation; sa contribution à l'acquisition de la fourgonnette que M^me^ Kerr possède toujours; le fait qu'elle a bénéficié de près de la moitié de son régime viager d'assurance-maladie des employés, pour payer ses soins de santé; le fait qu'il ait pris une retraite anticipée avec une prestation mensuelle réduite pour prendre soin de M^me^ Kerr; et le fait qu'il ait fourni d'importants services de soins personnels

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

et des services domestiques sans compensation. De plus, la Cour d'appel est d'avis que le juge de première instance n'a pas pris en considération que le fait que M. Baranow a payé les frais de subsistance de M^me^ Kerr a permis à cette dernière d'économiser environ 272 000 $ au cours de la relation.

[189] L'appelante conteste la décision de la Cour d'appel pour deux raisons. Premièrement, elle soutient que la Cour d'appel a eu tort de modifier la conclusion de fait du juge de première instance relativement à sa contribution de 60 000 $. Deuxièmement, elle prétend que la Cour d'appel a eu tort d'examiner la question des avantages réciproques en fonction du motif juridique, et qu'elle n'a donc pas cherché à savoir globalement qui s'est enrichi et qui s'est appauvri. Sur ce dernier point selon M^me^ Kerr, il faudrait procéder à l'examen des avantages réciproques aux deux premières étapes de l'analyse de la question de l'enrichissement injustifié : l'enrichissement et l'appauvrissement correspondant. Une fois cette preuve faite, elle prétend que les attentes légitimes des parties peuvent être prises en considération dans le cadre de l'analyse de la question de savoir s'il y avait un motif juridique de l'enrichissement. L'essentiel, selon l'argument de l'appelante, est que le juge de première instance pouvait donc conclure que les parties s'attendaient légitimement à accumuler une richesse proportionnelle à leur revenu respectif; sans une part de la valeur de l'immeuble acquis pendant la relation, cette attente raisonnable ne peut se réaliser.

[190] Plus fondamentalement, l'appelante exhorte la Cour à adopter ce qu'elle appelle la « méthode fondée sur l'avoir familial » en matière d'enrichissement injustifié. Essentiellement, elle prétend que ses contributions lui permettaient de s'attendre raisonnablement à recevoir une part équitable des biens acquis pendant la relation.

[191] Je vais examiner chacune de ces prétentions.

a) *Conclusions de fait quant à la contribution de 60 000 $*

[192] Comme je l'ai déjà mentionné, la Cour d'appel avait raison d'écarter la conclusion du

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.

juge de première instance selon laquelle l'appelante avait contribué à l'actif du couple pour une valeur de 60 000 $. De façon réaliste, il n'y avait aucune « valeur nette » provenant de la maison de la rue Coleman qui pouvait servir à l'acquisition de la nouvelle « maison de rêve » de la rue Wall. De plus, l'appelante a conservé l'usage bénéficiaire du véhicule et il n'y avait aucune preuve valable de la valeur des meubles. Les conclusions du juge sur ce point résultaient d'une erreur claire et déterminante.

b) *Analyse des enrichissements compensatoires*

[193] Sur ce point, je ne peux pas accepter les conclusions du juge de première instance ni celles de la Cour d'appel. Je le répète, dans sa décision au sujet de l'enrichissement injustifié de M^me^ Kerr, le juge de première instance n'a guère tenu compte des contributions de M. Baranow. Cependant, pour les raisons exposées précédemment, la Cour d'appel a commis une erreur en évaluant les contributions de M. Baranow dans le cadre de l'analyse du motif juridique; cette analyse a prématurément tronqué la preuve *prima facie* d'enrichissement injustifié de M^me^ Kerr. J'ai énoncé précédemment dans mes motifs la façon dont il convient d'aborder cette question. Comme j'estime qu'un nouveau procès doit être tenu relativement à l'allégation d'enrichissement injustifié de M^me^ Kerr et à la demande reconventionnelle de M. Baranow, il n'est pas nécessaire d'en dire plus. Les principes énoncés ci-dessus doivent donc s'appliquer lors du nouveau procès sur cette question.

c) *La « méthode fondée sur l'avoir familial »*

[194] J'aborde enfin l'argument de nature plus générale de M^me^ Kerr selon lequel il faudrait évaluer sa demande suivant une « méthode fondée sur l'avoir familial ». Comme je l'ai déjà dit, pour démontrer qu'elle a droit à une part proportionnelle de la richesse accumulée pendant la relation, M^me^ Kerr doit établir que M. Baranow s'est injustement enrichi à ses dépens, que leur relation constituait une coentreprise familiale et que ses contributions sont liées à l'accumulation de la richesse pendant

She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

(d) *Disposition of the Unjust Enrichment Appeal*

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

[196] The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separately from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

[197] More fundamentally, Ms. Kerr's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that I have set out. Even assuming that Ms. Kerr

la relation. Elle devrait ensuite démontrer quelle proportion de la richesse accumulée conjointement correspond à ses contributions. Bien sûr, le juge de première instance et la Cour d'appel n'avaient pas accès à ce modèle clarifié. Cependant, ces exigences sont bien différentes de celles avancées par l'appelante, de sorte que sa « méthode fondée sur l'avoir familial » doit être rejetée.

d) *Décision sur la question de l'enrichissement injustifié*

[195] Je conclus que les conclusions du juge de première instance en matière d'enrichissement injustifié ne peuvent être maintenues. La question suivante est de savoir si, comme l'a jugé la Cour d'appel, il convient de rejeter la demande de M^me^ Kerr fondée sur l'enrichissement injustifié ou de la renvoyer pour qu'elle fasse l'objet d'un nouveau procès. Bien qu'à contrecœur, j'estime que la dernière option est la plus équitable dans les circonstances.

[196] La première considération à l'appui d'un nouveau procès est que la Cour d'appel a ordonné l'audition de la demande reconventionnelle de M. Baranow. Comme le juge de première instance n'a malheureusement pas examiné cette demande de manière significative, l'ordonnance de la Cour d'appel sur ce point est inattaquable. Certains éléments de preuve indiquaient que M. Baranow a contribué de façon importante au bien-être de M^me^ Kerr de sorte que sa demande reconventionnelle ne peut simplement pas être rejetée. Comme je l'ai déjà dit, le juge de première instance a aussi mentionné diverses autres contributions financières et non financières apportées par M^me^ Kerr au bien-être et au confort du couple, mais il ne les a pas évaluées et les a encore moins comparées à celles de M. Baranow. Dans ces circonstances, il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle de M. Baranow séparément de celle de M^me^ Kerr.

[197] Fondamentalement, la demande de M^me^ Kerr n'a pas été présentée, défendue ni examinée par les tribunaux d'instance inférieure suivant la méthode d'analyse de la coentreprise familiale que

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.

j'ai exposée. Même si l'on suppose que M^me^ Kerr a établi le bien-fondé de sa demande relative à l'enrichissement injustifié, il est impossible en l'espèce d'appliquer équitablement cette méthode d'analyse sur la base du dossier soumis à notre Cour. Peu de conclusions de fait sont pertinentes en ce qui concerne la question clé de savoir si la relation des parties constituait une coentreprise familiale. De plus, même si l'on était convaincu que la preuve permettrait de trancher la question de la coentreprise familiale, le dossier ne permet pas de décider si les contributions de M^me^ Kerr à une coentreprise familiale étaient liées à l'accumulation de la richesse et, le cas échéant, dans quelle proportion. Le juge de première instance a estimé que le fait qu'elle ait payé les dépenses du ménage et les assurances, en plus du « produit » tiré de la maison de la rue Coleman, ont permis à M. Baranow de rembourser le prêt hypothécaire de 116 000 $ sur les deux maisons avant juillet 1985. On peut donc dire que ses contributions étaient liées à l'accumulation de la richesse étant donné que la maison de la rue Wall était évaluée à 942 500 $ au moment du procès. Cependant, comme les conclusions du juge relatives à la valeur nette que possédait M^me^ Kerr dans la maison de la rue Coleman ne peuvent être maintenues, cette conclusion est considérablement minée. Pour à peu près les mêmes raisons, il est impossible au vu du dossier d'évaluer les contributions proportionnelles apportées à la coentreprise familiale. Bref, tenter de trancher sur le fond la demande de M^me^ Kerr fondée sur l'enrichissement injustifié, sur la base du dossier soumis à la Cour, présente trop d'aléas et des risques d'injustice.

[198] À cet égard, le pourvoi *Kerr* diffère nettement du pourvoi *Vanasse*. Dans *Vanasse*, un enrichissement injustifié a été admis et les conclusions de fait de la juge de première instance correspondent étroitement à la méthode d'analyse que j'ai proposée. Dans *Kerr*, bien que les conclusions ne semblent pas établir l'existence d'une coentreprise familiale ou un lien concomitant avec la richesse accumulée, il serait injuste d'arriver à cette conclusion sans donner aux parties la possibilité de présenter leur preuve et leurs arguments selon la méthode énoncée dans les présents motifs.

[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.

[199] Ainsi, bien qu'à regret, je suis d'avis d'ordonner la tenue d'un nouveau procès relativement à la demande de M^me^ Kerr fondée sur l'enrichissement injustifié et de confirmer l'ordonnance de la Cour d'appel prescrivant une audition de la demande reconventionnelle de M. Baranow.

(3) Effective Date of Spousal Support

(3) Date de prise d'effet de l'ordonnance alimentaire pour époux

[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.

[200] La dernière question est celle de savoir, comme l'a conclu la Cour d'appel, si le juge de première instance a commis une erreur en rendant en faveur de M^me^ Kerr une ordonnance alimentaire rétroactive à la date d'introduction de l'action plutôt qu'à la date du début du procès. À mon humble avis, la Cour d'appel a commis une erreur dans l'application des facteurs pertinents et n'aurait pas dû annuler l'ordonnance du juge de première instance.

[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.

[201] Le juge de première instance a conclu qu'en 2006, le revenu de l'appelante était de 28 787 $ et que celui de l'intimé s'élevait à 70 520 $, sur le fondement de leur déclaration de revenus respective. Il a ensuite appliqué les Lignes directrices facultatives en matière de pensions alimentaires pour époux (« Lignes directrices ») pour arriver à une fourchette de 1 304 $ à 1 739 $ par mois. Il a accordé un montant se situant dans la partie supérieure de la fourchette pour que M^me^ Kerr soit en mesure de payer une chambre privée en attendant un lit subventionné dans un établissement approprié plus près de sa famille.

[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

[202] La Cour d'appel était d'accord avec le juge de première instance pour dire que M^me^ Kerr avait droit à une pension alimentaire compte tenu de la durée de la relation des parties, de son âge, de son revenu fixe et limité et de l'importance de son invalidité, qu'elle avait droit à une pension alimentaire qui lui permettrait d'avoir un mode de vie se rapprochant davantage de celui qu'avaient les parties quand elles vivaient ensemble. La Cour d'appel était aussi d'avis que le juge avait bien déterminé le montant de la pension alimentaire.

the date Ms. Kerr had commenced proceedings. It faulted the judge in several respects: for apparently making the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government-subsidized care facility and had not had to encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.

Elle a toutefois conclu que le juge de première instance avait commis une erreur en ordonnant que la pension alimentaire soit rétroactive à la date à laquelle M[me] Kerr avait intenté les procédures. Elle a adressé au juge de première instance les reproches suivants : il a rendu l'ordonnance de façon automatique plutôt qu'en appliquant les principes juridiques pertinents; il n'a pas pris en compte le fait que, pendant la période transitoire, M[me] Kerr n'avait aucun besoin financier au-delà de ses moyens car elle résidait dans un établissement de soins de santé subventionné par le gouvernement et elle n'avait pas eu à puiser dans son capital; il n'a pas pris en compte le fait qu'elle n'avait pas demandé à M. Baranow de lui verser une pension alimentaire provisoire et qu'elle n'avait pas expliqué pourquoi elle n'avait pas demandé une telle pension; il a ordonné la rétroactivité de la pension alors que, vu l'absence d'une demande provisoire, on n'avait rien à reprocher à M. Baranow.

[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.

[203] L'appelante soutient que la décision d'établir un parallèle entre les principes se rapportant à la pension alimentaire pour le conjoint avec effet rétroactif et ceux se rapportant à la pension alimentaire pour enfants avec effet rétroactif a été prise sans aucun examen ou analyse juridique. Elle soutient également que le raisonnement de la Cour d'appel impose un fardeau trop lourd et inapproprié aux demandeurs, les obligeant essentiellement à présenter une demande de pension alimentaire pour conjoint provisoire, sous peine de perdre leur droit aux aliments. Enfin, elle affirme que dans le cas de la pension alimentaire rétroactive, il faut en droit faire une distinction selon que la pension est rétroactive à une date antérieure ou postérieure au dépôt de la demande, et que dans ce dernier cas, il est moins nécessaire que le juge fasse preuve de retenue. Je suis d'accord avec l'appelante quant aux deuxième et troisième prétentions.

[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*

[204] Il ne fait aucun doute que le juge de première instance pouvait accorder une pension alimentaire devant prendre effet à la date d'institution des procédures. Cela ressort clairement de

Relations Act, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

93 . . .

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

. . .

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

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

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

[207] While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor,

l'al. 93(5)d) de la *Family Relations Act*, R.S.B.C. 1996, ch. 128, de la Colombie-Britannique (« *FRA* ») :

[TRADUCTION]

93 . . .

(5) Une ordonnance rendue aux termes du présent article peut aussi prévoir au moins un des éléments suivants :

. . .

d) le paiement d'une pension alimentaire pour toute période antérieure à l'ordonnance;

[205] L'appelante a demandé une pension alimentaire à compter de la date à laquelle son bref d'assignation et sa déclaration ont été délivrés et signifiés. Elle n'a pas demandé, et ne demande toujours pas, de pension alimentaire pour la période antérieure au début des procédures, ou pour une période pendant laquelle une autre ordonnance alimentaire était en vigueur. Je remarque qu'elle était légalement tenue de présenter une demande de pension alimentaire dans l'année suivant la fin de la cohabitation : définition d'[TRADUCTION] « époux », al. 1(1)b) de la *FRA*. Madame Kerr a présenté sa demande à peine plus d'un mois après la fin de la cohabitation des parties.

[206] Je ne me risquerai pas dans les débats sémantiques sur la définition du mot « rétroacti[f] » : voir *D.B.S. c. S.R.G.*, 2006 CSC 37, [2006] 2 R.C.S. 231, par. 2, 69-70; *S. (L.) c. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (C.A.), par. 55-57. Je préfère plutôt suivre l'exemple du juge Bastarache dans *D.B.S.* et examiner les facteurs pertinents qui entrent en jeu lorsqu'une demande de pension alimentaire est présentée relativement à une période antérieure à l'ordonnance.

[207] Bien que l'arrêt *D.B.S.* porte sur la pension alimentaire pour enfants plutôt que pour le conjoint, je souscris à l'opinion de la Cour d'appel selon laquelle des considérations semblables à celles exposées dans le contexte de la pension alimentaire pour enfants sont également pertinentes pour décider de l'opportunité d'une pension

the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

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

alimentaire « rétroactive ». Plus précisément, ces facteurs incluent les besoins du bénéficiaire, le comportement du débiteur, la raison du retard dans la présentation de la demande de pension alimentaire et tout préjudice que peut causer une pension rétroactive au conjoint débiteur. Cependant, dans les cas de pension alimentaire pour conjoint, ces facteurs doivent être examinés et soupesés à la lumière de principes et objectifs juridiques qui diffèrent de ceux de la pension pour enfants. J'aborde brièvement certaines de ces différences, mais sans les approfondir.

[208] La pension alimentaire pour le conjoint n'a pas le même fondement juridique que la pension pour enfants. La relation parent-enfant est une relation fiduciale de dépendance présumée et l'obligation du père et de la mère de subvenir aux besoins de leur enfant s'applique dès la naissance. En ce sens, l'enfant acquiert le droit aux aliments « automatiquement » et le père et la mère doivent privilégier les intérêts de leur enfant plutôt que les leurs au moment de négocier la pension et de la débattre en justice. Le droit aux aliments appartient à l'enfant, et non au parent qui demande la pension au nom de l'enfant, et le montant de base de la pension pour enfants en vertu de la *Loi sur le divorce*, L.R.C. 1985, ch. 3 (2^{e} suppl.), (ainsi que plusieurs lois provinciales en matière de pension alimentaire pour enfants) dépend maintenant du revenu du débiteur, et non d'une pondération hautement discrétionnaire des ressources et des besoins. Ces aspects de la pension alimentaire pour enfants apaisent quelque peu les préoccupations relatives à l'absence d'avis et au manque de diligence dans les demandes de pension alimentaire pour enfants. En ce qui concerne l'avis, le parent débiteur sait, ou devrait savoir, qu'il est tenu de payer des aliments proportionnellement à son revenu. En ce qui concerne le retard à agir, le droit aux aliments appartient à l'enfant et, par conséquent, c'est l'enfant, et non l'autre parent, qui subit un préjudice en raison du manque de diligence du parent demandant la pension : voir *D.B.S.*, par. 36-39, 47-48, 59, 80, 100-104. Par contre, le conjoint n'a aucun droit présomptif à la pension et, contrairement à la pension pour enfants, le conjoint n'est généralement pas tenu de protéger les intérêts

(2004-2005), 23 *C.F.L.Q.* 243, at pp. 281 and 291-92.

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

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

[211] In *D.B.S.*, Bastarache J. referred to the date of effective notice as the "general rule" and "default option" for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support has been described by the Ontario Court of Appeal as the "usual commencement date", absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175, at para. 24. While in my view, the decision

juridiques du conjoint séparé. Par conséquent, les préoccupations au sujet de l'avis, du retard et de la conduite répréhensible ont généralement plus de poids en ce qui concerne les demandes d'aliments pour conjoint : voir, par exemple, M. L. Gordon, « Blame Over : Retroactive Child and Spousal Support in the Post-Guideline Era » (2004-2005), 23 *C.F.L.Q.* 243, p. 281 et 291-292.

[209] Lorsque, comme en l'espèce, le débiteur se plaint de ce que la pension aurait pu être demandée plus tôt, mais ne l'a pas été, deux intérêts sous-jacents entrent en jeu. Le premier concerne la certitude des obligations juridiques du débiteur; la possibilité qu'une ordonnance s'applique rétroactivement complique la planification des finances personnelles et une forte ordonnance alimentaire « rétroactive » non prévue par le débiteur peut lui causer des difficultés financières. Le deuxième vise à inciter le demandeur à présenter sa demande promptement (voir *D.B.S.*, par. 100-103).

[210] Ni l'une ni l'autre de ces préoccupations n'a beaucoup d'importance en l'espèce. L'ordonnance était rétroactive à la date où les procédures visant à obtenir un redressement ont été intentées, et il n'y a eu aucune ordonnance provisoire pour un montant différent. L'introduction des procédures a clairement avisé le débiteur qu'une pension alimentaire était demandée et lui a permis de se préparer à l'éventualité qu'elle soit ordonnée. Il n'y a donc pas vraiment lieu de s'interroger sur la certitude des obligations du débiteur. Madame Kerr a poursuivi l'affaire avec diligence et, cela étant, il n'est pas vraiment nécessaire de mettre en place d'autres mesures propres à l'inciter, elle ou d'autres personnes dans sa situation, à procéder de façon plus diligente.

[211] Dans l'arrêt *D.B.S.*, le juge Bastarache a dit que la date de l'information réelle du parent débiteur devrait « généralement être retenue » comme étant, « de prime abord », la date d'application de l'ordonnance (par. 118, 121; voir également le par. 125). La Cour d'appel de l'Ontario a retenu la date de l'introduction de la demande de pension alimentaire pour conjoint comme étant la [TRADUCTION] « date de prise d'effet habituelle », en l'absence de toute raison de ne pas faire entrer l'ordonnance en

to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *D.B.S.*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

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

vigueur à cette date : *MacKinnon c. MacKinnon* (2005), 75 O.R. (3d) 175, par. 24. Bien que, à mon avis, la décision de faire rétroagir le versement des aliments doive résulter du pouvoir discrétionnaire exercé à la lumière des circonstances particulières, le fait que l'ordonnance soit demandée à compter de l'introduction de la demande sera souvent un facteur important à considérer pour savoir quelle importance accorder aux considérations pertinentes. Il importe de souligner que, dans *D.B.S.*, les quatre parties demandaient que les paiements de pension alimentaire pour enfants remontent à une période antérieure au dépôt de leurs demandes respectives; ce n'est pas le cas en l'espèce.

[212] Parmi les autres facteurs pertinents signalés dans *D.B.S.*, mentionnons le comportement du débiteur, la situation de l'enfant (ou, dans le cas d'une pension alimentaire pour conjoint, la situation du conjoint qui réclame une pension), et toute difficulté occasionnée par l'ordonnance. Le comportement en question doit avoir un lien quelconque avec l'obligation alimentaire, par exemple, dissimuler certains biens ou ne pas communiquer l'information de manière appropriée : *D.B.S.*, par. 106. L'examen de la situation du conjoint qui demande la pension, par analogie avec l'analyse exposée dans *D.B.S.*, se rattachera aux besoins du conjoint au moment où la pension aurait dû être versée et au moment présent. Les commentaires formulés par le juge Bastarache au par. 113 de *D.B.S.* s'adaptent facilement à la situation du conjoint qui demande une pension alimentaire : « [le conjoint] qui a connu des difficultés dans le passé peut obtenir réparation grâce à une ordonnance rétroactive. Par contre, une telle ordonnance est plus difficile à justifier dans le cas où [le conjoint] a bénéficié de tous les avantages qu'il aurait obtenus [de cette pension] ». En ce qui concerne les difficultés, il y a le risque qu'une ordonnance rétroactive ne tienne pas compte de ce que le débiteur peut se permettre et que cela nuise à la capacité du débiteur de gérer ses finances. Cependant, il est aussi essentiel de souligner que, dans *D.B.S.*, notre Cour a mis l'accent sur le besoin de souplesse et a considéré l'affaire dans sa globalité en fonction des faits de l'espèce; la même souplesse est appropriée dans le cas des pensions alimentaires pour conjoint « rétroactives ».

[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.

[213] À la lumière de ces principes, j'estime que la Cour d'appel a commis deux erreurs principales.

[214] Premièrement, elle a commis une erreur en concluant que la situation de l'appelante était telle qu'elle n'avait pas besoin de soutien avant le procès. Le juge de première instance a conclu, et la Cour d'appel n'a pas contesté cette conclusion, que l'appelante avait droit à une pension alimentaire non compensatoire pour conjoint, dans la partie supérieure de la fourchette proposée dans les Lignes directrices, pour une période indéfinie. Le droit à la pension, le montant de celle-ci et la période indéfinie de l'ordonnance ne font pas l'objet du présent pourvoi. Il est clair que M^{me} Kerr avait besoin que l'intimé lui verse une pension alimentaire à la date où elle a introduit les procédures et qu'elle en avait toujours besoin lors du procès. La Cour d'appel a signalé à juste titre les facteurs pertinents, tels que son âge, son invalidité et son revenu fixe. Cependant, la Cour d'appel n'a pas expliqué de quelle façon la situation de M^{me} Kerr avait changé entre le début de l'instance et la date du procès et le changement ne ressort pas non plus clairement des conclusions de fait du juge de première instance. Si je comprends bien le dossier, un des objectifs de l'ordonnance alimentaire était de permettre à M^{me} Kerr d'avoir accès à une chambre privée pendant qu'elle attendait un lit subventionné dans un établissement convenable près de chez son fils. À compter de la date d'introduction des procédures jusqu'à la date du procès, elle habitait dans le pavillon Brock Fahrni qui se trouve dans un établissement de soins prolongés subventionné par le gouvernement et elle occupait une chambre avec trois autres personnes. À mon humble avis, elle avait besoin de soutien pendant toute cette période. Si, selon le raisonnement de la Cour d'appel, le besoin de M^{me} Kerr ne se ferait sentir qu'une fois qu'elle aurait sa chambre privée, sa décision de faire rétroagir l'ordonnance au premier jour du procès semble incompatible avec ce point de vue. La Cour d'appel n'a pas laissé entendre qu'il y avait une différence sur le plan des besoins qu'elle avait cette journée-là et ceux qu'elle avait au moment où elle a introduit les procédures. Elle n'a pas non plus indiqué que l'ordonnance alimentaire du juge de première instance causerait des difficultés financières à M. 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.

[215] Avec égards, la Cour d'appel a commis une erreur de principe en annulant l'ordonnance du juge qui prenait effet à la date d'introduction de la demande au motif que M^me^ Kerr n'avait aucun besoin pendant cette période, tout en confirmant les conclusions du juge se rapportant aux besoins de M^me^ Kerr dans une situation identique à celle qui existait au moment où la demande a été introduite.

[216] Deuxièmement, à mon avis, la Cour d'appel a eu tort de reprocher à M^me^ Kerr de ne pas avoir présenté une demande provisoire, lui attribuant de ce fait un retard déraisonnable dans le dépôt de la demande de pension alimentaire pour la période en question. Madame Kerr a introduit sa demande peu de temps après la séparation et, compte tenu du fait que le procès n'a débuté que treize mois plus tard, elle semble avoir poursuivi les procédures avec diligence. Monsieur Baranow avait donc reçu un avis clair de la pension alimentaire demandée et il aurait facilement pu demander conseil concernant l'étendue possible de sa responsabilité. Compte tenu des coûts financiers, matériels et affectifs élevés des requêtes interlocutoires, surtout pour une personne dont les moyens sont limités et qui souffre d'une invalidité importante comme M^me^ Kerr, j'estime qu'il était déraisonnable pour la Cour d'appel d'attacher des conséquences aussi graves au fait qu'une demande provisoire n'ait pas été présentée. À mon avis, la position adoptée par la Cour d'appel n'incite pas les parties à rechercher la communication de renseignements financiers, à poursuivre leurs réclamations avec diligence raisonnable et à restreindre au minimum les procédures interlocutoires. Le fait d'exiger des demandes provisoires risque de prolonger les procédures au lieu de les accélérer. L'argument de l'intimé fondé sur le fait qu'un critère juridique différent se serait appliqué à l'étape de la pension alimentaire provisoire est peu convaincant. Après un procès complet sur le fond, le juge de première instance est arrivé à des conclusions claires et maintenant incontestées quant au besoin de soutien en se fondant sur des circonstances qui n'avaient pas changé entre l'introduction de la demande et le procès.

[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

[217] En résumé, M^me^ Kerr n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début du procès. Madame Kerr avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec l'intimé. Monsieur Baranow avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge mettait M. Baranow dans une situation financière difficile, de sorte que l'ordonnance était inappropriée.

[218] Bien qu'il soit regrettable que le juge n'ait pas expliqué pourquoi il faisait rétroagir l'ordonnance à la date d'introduction des procédures, les principes juridiques pertinents qui ont été appliqués aux faits qu'il avait constatés appuient le prononcé de cette ordonnance et la Cour d'appel a commis une erreur en décidant autrement.

[219] En somme, je conclus que la Cour d'appel a commis une erreur en annulant la partie de l'ordonnance alimentaire du juge qui couvrait la période écoulée entre l'introduction des procédures et le début du procès. Je suis d'avis de rétablir l'ordonnance du juge de première instance en donnant effet à la pension alimentaire pour conjoint au 14 septembre 2006.

D. *Dispositif*

[220] Je suis d'avis d'accueillir le pourvoi en partie. Plus précisément, je suis d'avis :

a. d'accueillir le pourvoi sur la question de la pension alimentaire et de rétablir l'ordonnance alimentaire du juge de première instance;

b. d'accueillir le pourvoi en ce qui concerne la décision de la Cour d'appel de rejeter la demande de M^me^ Kerr fondée sur l'enrichissement injustifié et d'ordonner une nouvelle audition de cette demande;

c. de rejeter le pourvoi en ce qui concerne la demande de M^me^ Kerr relative à la fiducie

new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

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

Appeal 33157 allowed in part with costs.

Appeal 33358 allowed with costs.

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

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

Solicitors for the appellant Michele Vanasse: Nelligan O'Brien Payne, Ottawa.

Solicitors for the respondent David Seguin: MacKinnon & Phillips, Ottawa.

résultoire et l'ordonnance de nouvelle audition de la demande reconventionnelle de M. Baranow et de confirmer l'ordonnance de la Cour d'appel quant à ces questions.

[221] Comme M^me^ Kerr a eu gain de cause en bonne partie, je suis d'avis de lui accorder les dépens dans toutes les cours.

Pourvoi 33157 accueilli en partie avec dépens.

Pourvoi 33358 accueilli avec dépens.

Procureurs de l'appelante Margaret Kerr : Hawthorne, Piggott & Company, Burnaby.

Procureur de l'intimé Nelson Baranow : Susan G. Label, Vancouver.

Procureurs de l'appelante Michele Vanasse : Nelligan O'Brien Payne, Ottawa.

Procureurs de l'intimé David Seguin : MacKinnon & Phillips, Ottawa.

TAB J

24529

Supreme Court of Canada | Cour supême du Canada

96 327 131

BOMA MANUFACTURING LTD. AND PANABO SALES LTD.

v.

CANADIAN IMPERIAL BANK OF COMMERCE

CORAM:
The Right Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Appeal heard:
March 26, 1996

Judgment rendered:
November 21, 1996

Reasons for judgment by:
The Hon. Mr. Justice Iacobucci

Concurred in by:

The Right Hon. Antonio Lamer, P.C.
The Hon. Madame Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Mr. Justice Major

Dissenting reasons by:
The Hon. Mr. Justice La Forest

Concurred in by:
The Hon. Madam Justice McLachlin

BOMA MANUFACTURING LTD. ET PANABO SALES LTD.

c.

BANQUE CANADIENNE IMPÉRIALE DU CANADA

CORAM:
Le très honorable Antonio Lamer, c.p.
L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Appel entendu:
le 26 mars 1996

Jugement rendu:
le 21 novembre 1996

Motifs de jugement par:
L'honorable juge Iacobucci

Souscrivent à l'avis de l'honorable juge Iacobucci:
Le très honorable Antonio Lamer, c.p.
L'honorable juge L'Heureux-Dubé
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge Major

Motifs de dissidence par:
L'honorable juge La Forest

Souscrit à l'avis de l'honorable juge La Forest:
L'honorable juge McLachlin

Counsel at hearing:

For the appellants:
Bruce B. Clark

For the respondent:
Keith E.W. Mitchell
H. Rhys Davies

Avocats à l'audience:

Pour les appelantes:
Bruce B. Clark

Pour l'intimé:
Keith E.W. Mitchell
H. Rhys Davies

Citations	Références
B.C.S.C.: (1993), 81 B.C.L.R. (2d) 197, [1993] 7 W.W.R. 368.	C.S.C.-B.: (1993), 81 B.C.L.R. (2d) 197, [1993] 7 W.W.R. 368.
B.C.C.A.: (1994), 99 B.C.L.R. (2d) 201, 120 D.L.R. (4th) 250, [1995] 2 W.W.R. 435, 52 B.C.A.C. 161, 86 W.A.C. 161, 19 B.L.R. (2d) 166.	C.A.C.-B.: (1994), 99 B.C.L.R. (2d) 201, 120 D.L.R. (4th) 250, [1995] 2 W.W.R. 435, 52 B.C.A.C. 161, 86 W.A.C. 161, 19 B.L.R. (2d) 166.

PARAGRAPH NUMBERING

The paragraph numbering will now appear in the SCR.

NUMÉROTATION DES PARAGRAPHES

La numérotation des paragraphes figurera désormais dans le RCS.

boma manufacturing *v.* cibc

Boma Manufacturing Ltd. and Panabo Sales Ltd. *Appellants*

v

Canadian Imperial Bank of Commerce *Respondent*

Indexed as: Boma Manufacturing Ltd. *v.* Canadian Imperial Bank of Commerce

File No.: 24520.

1996: March 26; 1996: November 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Bills of exchange -- Cheques -- Conversion -- Defences -- Companies' bookkeeper issuing series of fraudulent cheques payable to third parties and depositing them to her bank accounts -- Bookkeeper forging payees' signature on certain cheques -- Other cheques accepted by collecting bank without endorsement -- Whether collecting bank liable to companies for conversion -- Whether cheques payable to fictitious or non-existing person -- Whether collecting bank holder in due course -- Bills of Exchange Act, R.S.C., 1985, c. B-4, ss 20(5), 165(3).

The appellants, two small, family-owned companies whose only shareholders and officers are M and his wife, were defrauded by their bookkeeper A through a series of fraudulent cheques issued over a five-year period. A, along with the two principals, was a duly authorized signing officer on the bank accounts maintained by the companies. Cheques drawn on these accounts required only one authorized signature. A used the appellants' pre-printed cheque forms to create some 155 cheques totalling $91,289.54, payable to a number of persons connected with the appellants, including the principals, several employees, and one of the subcontractors, Van Sang Lam (all but one of the cheques payable to Lam were made to "J. Lam" or "J.R. Lam", the initials and the last name mimicking the name of A's first husband). A signed 146 of the cheques on behalf of the appellants, and fraudulently obtained M's signature on the other nine. She deposited all the cheques into one of her accounts at the respondent bank. The respondent bank's policy with respect to a customer wishing to deposit a third party cheque to her account was to require that the cheque be endorsed by the payee. However, the bank accepted 107 of the cheques payable to "J. Lam" or "J.R. Lam" for deposit without endorsement. The tellers apparently assumed that the payee was A's first husband. A forged endorsements on some of the Lam cheques, and on all of the cheques payable to other third parties. The appellants brought an action in negligence, and in the alternative, conversion, against their own bank and against the respondent. They were successful at trial, and the respondent was ordered to pay $91,289.54. A majority of the Court of Appeal allowed the respondent's appeal, reducing the judgment so as to reflect only the amount of the nine cheques bearing M's signature.

Held (La Forest and McLachlin JJ. dissenting on the appeal): The appeal should be allowed and the cross-appeal dismissed.

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory, **Iacobucci** and Major JJ.: A bill of exchange is a chattel that can be negotiated from party to party. Title to a bill, such as a cheque, is obtained through negotiation. Once an individual has obtained title, that individual has the right to present the bill to the drawee for payment, as well as a right of recovery against the drawer if the bill is dishonoured by the drawee. If a bank pays to its customer the amount of a cheque to which that customer is not entitled, the bank will be strictly liable to the owner of the cheque for conversion. As a matter of principle contributory negligence is not available in the context of a strict liability tort. If the contributory negligence approach is to be introduced into this area of the law, it must be at the instance of the legislative branch.

The respondent is *prima facie* liable to the drawer for conversion in this case. The general rule is that a forged or unauthorized endorsement is wholly inoperative, and no right to retain the bill or to enforce payment thereof can be acquired through or under such a signature. An exception to this rule appears in s. 20(5) of the *Bills of Exchange Act*, which provides that a bill payable to a fictitious or non-existing person may be treated as payable to bearer. A cheque payable to bearer can be negotiated by simple "delivery" to the bank; endorsement is not required. If the cheques in question were payable to fictitious persons, and could accordingly be treated as bearer cheques, the bank would become a "holder in due course" pursuant to s. 73 of the Act despite the forged and missing endorsements and would consequently have a defence against liability for conversion. The policy underlying the fictitious person rule seems to be that a drawer who has drawn a cheque payable to order, not intending that the payee receive payment, loses, by his or her conduct, the right to the protections afforded to a bill payable to order.

Many of the cheques in question were payable to "real" persons, albeit persons to whom no money was owed by the companies. Because A, the writer of the cheques, did not intend these payees to receive the proceeds of the cheques, the Court of Appeal concluded that the drawer of the cheques intended them to be payable to bearer. The Court of Appeal erred in focussing on A's intention. It is the intention of the drawer that is significant for the purpose of s. 20(5), not the intention of the signatory of the cheque. A is not the drawer because she cannot be said to be the guiding mind of the corporate appellants; she simply had signing authority within limited circumstances. The relevant intention in this case is that of the appellant companies, as expressed by their guiding mind.

Where a drawer is fraudulently induced by another person into issuing a cheque for the benefit of a real person to whom no obligation is owed, the cheque is to be considered payable to the payee and not to a fictitious person. Here the cheques payable to actual persons associated with the appellants were not payable to fictitious persons, and could not be treated by the respondent bank as payable to bearer. While many of the cheques were made payable not to actual persons associated with the companies, but to "J. Lam" and "J.R. Lam", M was reasonably mistaken in thinking that the payee was an individual associated with his companies. These cheques thus could not be treated by the respondent bank as payable to bearer. While the cheques certainly were "delivered" by A to the respondent bank within the meaning of s. 2 of the Act, for negotiation to be effected endorsement by the payee was required.

Under s. 165(3) of the Act, a bank that collects a cheque for deposit to the credit of a person and that credits that person with the amount of the cheque acquires all the rights and powers of a holder in due course of the cheque. The "person" in this section means a person who is entitled to the cheque. Consequently, s. 165(3) does not

apply to the facts of this case. A was not the payee or a legitimate endorsee of the cheques in question, and accordingly she was not a "person" within the meaning of s. 165(3). Absent valid endorsements, the cheques were not validly negotiated to the bank. As a result, the respondent bank took the cheques subject to the equities of the situation. A was not entitled to the cheques, but the respondent bank credited her with the amount of those cheques. This constitutes conversion, for which the bank is strictly liable.

Per **La Forest** and McLachlin JJ. (dissenting on the appeal): The underlying conflict that arises when trying to decide the scope and application of s. 20(5) of the *Bills of Exchange Act* is that of the allocation of loss as between the accepting bank and the drawer of a fraudulent cheque. This conflict becomes ripe when it is an employee of the drawer, or a third person, who perpetrates the fraud and the loss must be borne by one of two innocent parties. As between the employer/drawer and the accepting bank, the employer/drawer should bear the risk of any loss and is in the best position to minimize that risk. As demonstrated by the facts of this case, it is easy enough for the perpetrator to forge the endorsement of the named payee and there is no way for the bank to verify the authenticity of the signature. On the other hand, the drawer/employer is in a much better position to put a stop to fraud of this type and is at least in an equal position to bear any loss. As a matter of course, any risk of loss on the part of a large corporation is generally covered by fidelity insurance. It is also possible for large-scale fraud to be discovered through audits or other protective measures. Allocating the loss to the accepting bank removes all incentive from a corporation to pursue business practices that will minimize such losses. Furthermore, such an allocation does not fit in well with the general scheme of bills of exchange, since the essence of a bill of exchange is its negotiability and the finality of payment inherent to such a negotiation.

Of the 155 fraudulent cheques, 41 were made out to existing employees of the appellants. With respect to the three cheques out of the 41 which A fraudulently produced and then induced M to sign, the respondent bank's defence under s. 20(5) must fail in light of this Court's decision in *Concrete Column Clamps*. However, the remaining 38 cheques prepared and signed by A, and payable by way of pretence to employees of the appellants, are payable to fictitious persons within the meaning of s. 20(5) of the Act and consequently must be treated as payable to bearer. The respondent bank is a holder in due course of these cheques and cannot be liable to the appellants for conversion. The application of the law of agency leads to the inevitable conclusion that where the fraudulent employee is a signing officer of the drawer, then his or her intent must be taken as being the intent of the drawer. While A clearly acted beyond the ambit of what the appellants had in mind when she prepared and signed cheques made out to payees who were not their creditors, it is equally clear that to the eyes of a third party she would have had the apparent authority to sign the cheques as she was an acknowledged signing officer of both companies. The intent of A is thus also the intent of the appellants, the drawer of the cheques. Assuming it is possible to do so, this is not an appropriate case for apportionment.

The test for a non-existent person under s. 20(5) is an objective one and involves a determination of whether the payee is a matter of invention and not a real person. The 114 cheques payable to D. Lam, J. Lam or J.R. Lam were payable to non-existent persons within the meaning of s. 20(5) and are therefore to be treated as payable to bearer. The respondent bank is accordingly a holder in due course of these cheques and has a complete defence against the action of the appellants. Section 165(3) should be given the interpretation adopted by Iacobucci J. both to avoid disharmony with the general scheme for cheques set out in the Act and to prevent injustice, and is thus not available as a defence to the respondent bank on the facts of this case. Since the

respondent did not cross-appeal with respect to the application of s. 20(5), the judgment of the Court of Appeal should stand as is.

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By Iacobucci J.

Distinguished: *Fok Cheong Shing Investments Co. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488; **disapproved:** *Toronto-Dominion Bank v Dauphin Plains Credit Union Ltd.* (1993), 98 D.L.R. (4th) 736; **referred to:** *Number 10 Management Ltd v. Royal Bank* (1976), 69 D.L.R. (3d) 99; *Marfani & Co. v. Midland Bank Ltd.*, [1968] 2 All E.R. 573; *Jervis B. Webb Co. v. Bank of Nova Scotia* (1965), 49 D.L.R. (2d) 692; *Ontario Woodsworth Memorial Foundation v Grozbord*, [1969] S.C.R. 622; *Norwich Union Fire Insurance Society Ltd v. Banque Canadienne Nationale*, [1934] S.C.R. 596; *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd*, [1977] 2 S.C.R. 456; *Bank of England v. Vagliano Brothers*, [1891] A.C. 107; *Gough Electric Ltd v Canadian Imperial Bank of Commerce* (1986), 34 B.L.R. 17; *Royal Bank of Canada v Wild* (1974), 51 D.L.R. (3d) 188.

By La Forest J. (dissenting on the appeal)

Bank of England v. Vagliano Brothers, [1891] A.C. 107; *Royal Bank of Canada v Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456; *Fok Cheong Shing Investments Co. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488; *Vinden v. Hughes*, [1905] 1 K.B. 795; *Harley v. Bank of Toronto*, [1938] 2 D.L.R. 135; *London Life Insurance Co v. Molsons Bank* (1904), 8 O.L.R. 238; *Metropolitan Life Insurance Co v Quebec Bank* (1916), 50 C.S. 214; *Canadian Laboratory Supplies Ltd. v. Engelhard*

Industries of Canada Ltd., [1979] 2 S.C.R. 787; *Clutton v. George Attenborough & Son*, [1897] A.C. 90; *Grey v. Pearson* (1857), 6 H.L.C. 60; *Caladonian Railway Co. v. North British Railway Co.* (1881), 6 App. Cas. 114.

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APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1994), 99 B.C.L.R. (2d) 201, 120 D.L.R. (4th) 250, [1995] 2 W.W.R. 435, 52 B.C.A.C. 161, 86 W.A.C. 161, 19 B.L.R. (2d) 166, varying a judgment of the Brtish Columbia Supreme Court (1993), 81 B.C.L.R. (2d) 197, [1993] 7 W.W.R. 368, allowing the appellants' action in damages. Appeal allowed, La Forest and McLachlin JJ. dissenting, and cross-appeal dismissed.

Bruce B Clark, for the appellants.

Keith E W. Mitchell and *H. Rhys Davies*, for the respondent.

Solicitors for the appellants. Baumgartel Gould, New Westminster, B.C

Solicitors for the respondent: Davis & Company, Vancouver.

SUPREME COURT OF CANADA

BOMA MANUFACTURING LTD. and PANABO SALES LTD.

v.

CANADIAN IMPERIAL BANK OF COMMERCE

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

IACOBUCCI J.:

1 In the main, this appeal raises issues concerning the tort of conversion with respect to cheques, the meaning of fictitious or non-existing persons in s. 20(5) of the *Bills of Exchange Act*, R.S.C., 1985, c. B-4 ("the Act"), and the defence of a holder in due course under s. 165(3) of the Act.

I. Background

2 The appellants Boma Manufacturing Ltd. and Panabo Sales Ltd. are associated companies in the business of manufacturing and marketing small souvenir items. The only shareholders and officers of the companies are Boris Mange and Ursula Mange.

3 The appellants' bookkeeper Donna Alm committed fraud against the companies by way of issuing a long series of fraudulent cheques. These cheques were honoured by her bank, the respondent Canadian Imperial Bank of Commerce

("CIBC") over the course of five years. The appellants brought an action in negligence, and in the alternative, conversion, against their bank, the Royal Bank of Canada, and against the respondent.

4 Donna Alm had been working for the appellants since 1967. Her responsibilities included preparing the payroll, handling accounts receivable and payable, preparing cheques and reconciling bank statements. She was never an officer, director or shareholder of the companies. She was, however, a duly authorized signing officer on the bank accounts maintained by the companies, along with Boris and Ursula Mange. Cheques drawn on these accounts required only one authorized signature. It was understood that Alm was to sign cheques only when the others were unavailable to do so, and only with respect to legitimate obligations of the companies.

5 Donna Alm's sole supervisor was Boris Mange. He would occasionally look at the cheque register and monthly bank statements. However, no routine, internal or independent audits were ever undertaken prior to discovery of the fraud.

6 Between 1982 and 1987, Donna Alm operated three bank accounts at a CIBC branch in North Vancouver, as follows:

(a) a chequing account in the name of Donna Alm's first husband, John R. Alm;

(b) a joint chequing account in the name of Donna and John R. Alm; after February 10, 1987, this account became a joint account for Donna Alm and her second husband Lou Hilford;

(c) a chequing account in the name of Donna Alm; this account also became joint with Lou Hilford after February 10, 1987.

7 Between December 8, 1982 and May 6, 1987, Alm used the appellants' pre-printed cheque forms to create some 155 cheques totalling $91,289.54, payable to a number of persons connected with the appellants, including Boris Mange, Ursula Mange, several employees, and one of the subcontractors, Van Sang Lam. The cheques payable to Lam were, with one exception, made to "J. Lam" or "J.R. Lam", the initials and the last name mimicking the name of Donna Alm's first husband. Alm signed 146 of the cheques on behalf of the appellants, and fraudulently obtained Mange's signature on the other nine. Alm deposited all the cheques into one of her accounts at the CIBC.

8 The appellants had entered into a verification agreement with the Royal Bank in connection with their accounts, which excepted "any payments made on forged or unauthorized endorsements". The fraudulently negotiated cancelled cheques were sent to the appellants, and most of them were removed and destroyed by Alm. Her conduct was not discovered until May 11, 1987, through a new assistant bookkeeper. Alm was immediately dismissed.

9 In April 1988, written notice with respect to some $74,000 worth of cheques was given to the Royal Bank and to the CIBC. A complete listing of the fraudulent cheques was provided to the Royal Bank and the CIBC in May of 1989, following a police investigation.

10 The CIBC's policy with respect to a customer wishing to deposit a third party cheque to her account was to require that the cheque be endorsed by the payee. If there was no endorsement by the payee, the teller was to return the cheque to the

customer. However, 107 of the cheques payable to "J. Lam" or "J.R. Lam" were accepted by the CIBC for deposit in one or the other of the three accounts without endorsement. The tellers apparently assumed that the payee was "J. Alm" or "J.R. Alm", Donna Alm's first husband, and so accepted the cheques without endorsement, contrary to policy. Donna Alm was a longstanding customer of the CIBC branch in question, and was considered to be reliable. The tellers also assumed, given the large number of transactions involving the appellants' cheques signed by Donna Alm, that Donna Alm owned the appellant companies. Some of the Lam cheques, and all of the cheques payable to other third parties, bore the forged endorsement of the payee, the forgeries having been perpetrated by Donna Alm.

11 The appellants were successful at trial, and the Royal Bank was ordered to pay $5,390.12, and the CIBC was ordered to pay $91,289.54: (1993), 81 B.C.L.R. (2d) 197, [1993] 7 W.W.R. 368. CIBC appealed the decision before a five-member panel. A majority of the Court of Appeal allowed the appeal, reducing the judgment so as to reflect only the amount of the nine cheques bearing Boris Mange's signature: (1994), 99 B.C.L.R. (2d) 201, 120 D.L.R. (4th) 250, [1995] 2 W.W.R. 435, 52 B.C.A.C. 161, 86 W.A.C. 161, 19 B.L.R. (2d) 166. A minority of two would have also held the CIBC liable for the amount of the 103 cheques signed by Donna Alm that were not endorsed.

II. Relevant Statutory Provisions

12 Bills of Exchange Act, R.S.C., 1985, c. B-4

2. In this Act,

. . .

"bearer" means the person in possession of a bill or note that is payable to bearer;

. . .

"delivery" means transfer of possession, actual or constructive, from one person to another;

"endorsement" means an endorsement completed by delivery;

"holder" means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof;

20.

(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer that is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank.

(4) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(5) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

39.(1) As between immediate parties and as regards a remote party, other than a holder in due course, the delivery of a bill

(*a*) in order to be effectual must be made either by or under the authority of the party drawing, accepting or endorsing, as the case may be...

(2) Where the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed.

48.(1) Subject to this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

49.(1) Where a bill bearing a forged or an unauthorized endorsement is paid in good faith and in the ordinary course of business by or on behalf of the drawee or acceptor, the person by whom or on whose behalf the payment is made has the right to recover the amount paid from the person to whom it was paid or from any endorser who has endorsed the bill subsequent to the forged or unauthorized endorsement if notice of the endorsement being a forged or an unauthorized endorsement is given to each such subsequent endorser within the time and in the manner mentioned in this section.

55.(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,

(*a*) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and

(*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

59.(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the endorsement of the holder.

73. The rights and powers of the holder of a bill are as follows:

(*a*) he may sue on the bill in his own name;

(*b*) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere

> personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;
>
> (*c*) where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and
>
> (*d*) where his title is defective, if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.
>
> **165.**...
>
> (3) Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

III. Judgments Appealed From

A. *British Columbia Supreme Court* (1993), 81 B.C.L.R. (2d) 197

13 Macdonald J. first examined ss. 48(1), 48(3) and 49 of the *Bills of Exchange Act*. He noted that all the cheques involved in this case had been properly issued, as they had all been signed either by Alm or by Mange, both of whom were authorized signing officers.

14 After considering the claim against the Royal Bank (not in issue in the instant appeal), Macdonald J. turned to the claims against the CIBC. The appellants claimed in negligence, conversion, and under the provisions of the Act itself. The negligence claim was dismissed, Macdonald J. finding that the CIBC owed no duty of care to the appellants. He also stated that the negligent failure of the appellants to detect Alm's fraudulent conduct far outweighed any negligent conduct on the respondent's part.

15 Macdonald J. found the respondent to be *prima facie* liable for conversion. Accordingly, he considered whether any of the following defences raised by the respondent could defeat the conversion claim: (a) the "worthless paper" defence; (b) the s. 165(3) defence; (c) the "fictitious payee" defence; and (d) the "inadequate notice" defence.

16 With respect to the worthless paper defence, the trial judge noted that where the signature of the maker of the cheque is forged, the cheques are "worthless", and incapable of conversion. However, in this case, Donna Alm and Boris Mange were authorized signing officers. Accordingly, the cheques in question were not worthless paper.

17 With respect to the second defence, s. 165(3), Macdonald J. concluded as follows (at p. 207):

> Where the endorsement is forged, or where the collecting bank neglects to require an endorsement by the payee and its own customer, that result would completely negative the effect of s. 48 of the *Act*. I accept the response of the [appellants] that "delivery" in s. 165(3) in these circumstances requires the authority of the drawer under s. 39(1)(*a*) of the Act, and that Donna Alm had no such authority. I reject the submission of C.I.B.C. that her authority to sign cheques on behalf of the [appellants] carried with it the authority to deliver the same. In my view, any such authority to deliver is limited to cheques properly drawn payable to creditors of the [appellants].
>
> With regard to those cheques with forged endorsements, there can be no argument that Donna Alm had any authority from the named payees.
>
> I reject the defence to conversion based on s. 165(3).

18 As a third defence, the CIBC submitted that the cheques in question had been made out to "fictitious payees", within the meaning of s. 20(5) of the Act.

Accordingly, the respondent would be able to treat the cheques as payable to bearer, rather than payable to order, and negotiation of the cheques would not require endorsement, but only delivery. Macdonald J. found a complete answer to this issue in *Number 10 Management Ltd. v. Royal Bank* (1976), 69 D.L.R. (3d) 99, at p. 102, wherein the Manitoba Court of Appeal found that a collecting bank guarantees the endorsement of all properly issued bills of exchange, and that where the bank pays out money on a forged endorsement, the bank will be liable. Macdonald J. found this approach to be consistent with the scheme of the Act. He stated that as the drawer of a cheque owes no duty to its own bank to verify monthly statements, in the absence of a verification agreement, then it certainly cannot owe any such duty to a collecting bank. He also noted that under s. 48(1) of the Act, a forged endorsement is wholly inoperative and gives no right either to retain the bill or enforce payment thereof. Macdonald J. agreed with the appellants that the fictitious payee defence is largely irrelevant to an action against a collecting bank for conversion, because in his view (at p. 208):

> ...a bearer cheque can be converted by a person not authorized to deliver it. Where the C.I.B.C. can be regarded as an agent for its dishonest customer to collect, as would appear to be the case under its practice set out in the Agreed Statement of Facts, it is responsible to the drawer for her conversion.

He concluded that, even if the cheques in question were payable to "fictitious persons" within the meaning of s. 20(5), and the CIBC was entitled to treat them as bearer cheques, the cheques were not "delivered" or "negotiated" and the CIBC did not acquire title to them. Accordingly, the CIBC had no right to obtain payment for the cheques from the appellants' bank accounts.

19 With respect to the last defence raised, Macdonald J. was of the view that notice had been provided within a reasonable time in this case.

20 The trial judge ultimately concluded that it was on the third ground advanced by the appellants that the claim should succeed, that is, under s. 49(1) of the Act. Under this section, where a cheque bearing a forged endorsement is paid, there is a right of recovery against any subsequent endorser. In his view, this section makes the CIBC "the guarantor of the validity of the payee's endorsement on the cheques in issue here" (p. 208), as stated in *Number 10 Management*. As for the cheques that were not endorsed, the trial judge stated that they had not been delivered within the meaning of s. 59(2). He also noted that the situation between the plaintiff and a collecting bank should be different from the situation between the plaintiff and its own bank (at pp. 208-9):

> The drawee bank is entitled to rely upon a person whom the drawer has authorized to conduct banking business on its behalf. There is no such connection between the drawer and the collecting bank, which is dependent upon its own customer for protection.
>
> The system requires the collecting bank to verify the endorsement ahead of its own, and it must rely on its own customer in that regard by ensuring that sufficient funds remain in the customer's account until the cheque has cleared or count on that customer to cover any cheque not honoured by the drawee bank.

For these reasons, the CIBC's negligence in failing to obtain an endorsement on the "Lam" cheques was a bar to the CIBC's reliance upon any estoppel arising from the negligence of the appellants.

21 The trial judge ordered judgment against the Royal Bank for $5,390.12, and judgment against the CIBC for the whole of the $91,289.54 claimed.

B. *British Columbia Court of Appeal* (1994), 99 B.C.L.R. (2d) 201

1. Southin J.A. (for the majority)

22 Southin J.A. emphasized the following four facts, which in her view were critical to the resolution of the appeal: (1) the cheques involved were the drawers' cheques, rather than forgeries thereof; (2) Alm, the signatory of the 146 cheques, intended both to validate the cheques for the bank upon which they were drawn and to receive the proceeds; (3) Mange, the signatory of the nine cheques, intended to validate them for the Royal Bank, but did not intend that anyone other than the named payee should receive the proceeds; and (4), of the 155 cheques, 107 were collected by the CIBC, although they were payable to a third party and had not been endorsed.

23 Southin J.A. concluded that the crux of the action in conversion was that the recipient of the proceeds, Donna Alm, was not the person intended to receive the funds. In this regard, it was important to determine whether it was the company's or the signatory's intention that was of relevance. Southin J.A. concluded that Alm, an authorized signing agent, had the power to bind her principal, and accordingly, it was Alm's intention that should prevail. Consequently, Southin J.A. was of the view that the action in relation to the 146 cheques that Alm had signed could not succeed, as there had been no misdirection of these cheques; Alm intended all along that they be directed to herself. The action in conversion could only succeed with respect to the nine cheques that Mange had signed, as they had truly been diverted from their intended recipient.

24 With respect to the application of s. 20(5) to the nine cheques signed by Mange, Southin J.A. noted that whether someone is "fictitious or non-existing" within the meaning of s. 20(5) of the Act must "depend on the intention of the drawer of the cheque, not the intention of the person who fills in the cheque" (p. 217). The intention of the drawer in this case, that is, the appellants, was that the payees receive payment. Accordingly, the payees were not fictitious persons, and the cheques could not be treated as payable to bearer.

25 Southin J.A. rejected the s. 165(3) defence raised by the CIBC. She stated that she was not "persuaded that Parliament intended, by s. 165(3), to give a bank an independent title to a cheque payable to A and intended by the drawer to be paid to A which was deposited to the account of B without any endorsement by A or with an endorsement by A which is forged" (p. 218). Accordingly, Southin J.A. held that the appellants were entitled to recover from the CIBC on the nine cheques signed by Mange. The award given at trial was reduced to the amount of the nine cheques.

2. Hutcheon J.A. (dissenting in part)

26 Hutcheon J.A. agreed with Southin J.A.'s disposition, "save as to 103 of the 107 cheques on which there was no signature purporting to be an endorsement of the payee". In his view, the cheques accepted by the CIBC without any endorsement were patently irregular on their face. He stated that in order for the provisions of s. 20(5) to be of application, the person claiming to enforce payment of the cheque must be its lawful holder. A holder, pursuant to s. 2 of the Act, is "the payee or endorsee of a bill or note ... or the bearer thereof", and a bearer is "a

person in possession of a bill or note that is payable to bearer". He concluded as follows (at p. 222):

> The Bank was neither the payee nor the endorsee of the cheques in question. Nor was it the person in possession of a cheque that was payable to bearer. All that s. 20(5) provides is that the cheque "may be treated as payable to bearer". On a strict construction of s. 20(5) that is different from a provision that the cheque is payable to bearer. No policy reason exists for extending s. 20(5) beyond its express letter to protect a collecting bank that received and paid the unendorsed cheques contrary to its own internal rules.
>
> For these reasons, s. 20(5) cannot be invoked by the Bank to set up the defence to the claim of conversion that the Bank was justified in ignoring the existence of a named payee on the face of the cheques. With respect, I do not think that it is any answer to say that if the Bank had not been internally careless Alm would simply have endorsed the cheques. I do not know what she would have done if she had been challenged.
>
> I would therefore allow the appeal by varying the amount of the judgment to the amount of the nine cheques dealt with by Madam Justice Southin and of the 103 cheques dealt with in these reasons.

IV. Issues

A. *On Appeal*

27

1. Were the cheques in question made payable to fictitious or non-existing persons?

2. Were the cheques in question "delivered" to the CIBC?

3. Was the CIBC, as a "collecting" bank, *prima facie* liable to the appellants in conversion so that the cheques in question had to be properly negotiated to the CIBC in order for the CIBC to obtain title to those cheques and thereby escape liability?

4. Is the defence of contributory negligence available to the respondent?

B. *On Cross-Appeal*

28 1. What is the proper interpretation of s. 165(3), and in particular:

(a) Must the cheque be deposited to the credit of its payee for the subsection to apply?

(b) Must the cheque be endorsed before the bank can credit the person with the amount of the cheque?

(c) Must the cheque be delivered with the authority of the drawer or endorser, or does simply handing it to the bank teller for deposit suffice?

V. Analysis

29 I have found it helpful to consider this appeal in terms of three broad issues, as follows: the doctrine of conversion with respect to cheques; s. 20(5) as a defence to an action in conversion; and s. 165(3) as a defence to an action in conversion.

A. *Conversion in relation to cheques*

30 It is a commonly accepted proposition that a bill of exchange is a chattel that can be negotiated from party to party. An individual obtains title to a bill through negotiation. Once an individual has obtained title, that individual has the right to present the bill to the drawee for payment, as well as a right of recovery against the drawer if the bill is dishonoured by the drawee.

31 The tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability, and accordingly, it is no defence that the wrongful act was committed in all innocence. Diplock L.J. asserted this principle in *Marfani & Co.* v. *Midland Bank Ltd.*, [1968] 2 All E.R. 573, at pp. 577-78:

> …the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part.
>
> …
>
> If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on assumpsit, for money had and received.

32 The fact that liability for the tort of conversion is strict suggests that the respondent's submission that the appellants were contributorily negligent must fail. The matter was raised before the Court of Appeal, and was dismissed without reasons. While this argument would be available in an action for negligence, the notion of strict liability involved in an action for conversion is *prima facie* antithetical to the concept of contributory negligence.

33 It is true that the comments of Professor Ogilvie in *Canadian Banking Law* (1991), at pp. 593-94, provide some support for the respondent's position:

> Contributory negligence would require courts to apportion liability in accordance with negligence as between the true owner and the bank in cases of conversion. The availability of contributory negligence as a

defence in an action for conversion was originally doubtful because the defence was at first only thought to be available in actions for negligence. But in a 1959 decision from New Zealand, the defence was permitted where conversion was found [*Helson v. McKensies (Cuba Street) Ltd.*, [1950] N.Z.L.R. 878 (C.A.)], and this approach was adopted in *Lumsden & Co. v. London Trustee Savings Bank* [[1971] 1 Lloyd's Rep. 114 (Ch. D.). See also: *Southrada v. Bank of New South Wales*, [1976] 2 Lloyd's Rep. 444 (P.C.)] by Donaldson J. who held that damages may be received where the plaintiff was also negligent.

...This decision has been doubted in Australia on the ground that the defence of contributory negligence is only available under the Act in situations where it could have been pleaded as a defence at common law, or in negligence cases only. In England, any doubts about the availability of contributory negligence as a defence were removed by section 47 of the Banking Act, 1979, which is one of the few sections of that Act still in force. In Canada, however, the situation is unknown. Most provinces have similar contributory negligence legislation to that in England and Australia, but there would appear to be no case law to date considering such a defence in an action against a collecting bank in conversion.

It is arguable that the defence of contributory negligence should be available. In most situations in which conversion occurs in relation to cheques, there are varying degrees of innocence and carelessness on both sides. It is more equitable to apportion liability in accordance with the actual facts as found by a court, than to expect banks to be the insurers of the "true owner" of a cheque whose carelessness has contributed to the conversion. As total insurers, banks would simply pass the costs on to all its customers, who played no role in the conversion whatsoever.

See also Professor Ogilvie's case comment, "Should the Collecting Banker Be the Drawer's Insurer?: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*" (1994), 9 *B.F.L.R.* 227, in which she expresses her view that this case should not be decided in reference to the Act, but rather on the common law tort of negligence, and that the courts should impose a duty of account verification on bank customers.

34 The respondent argues that it would have been easier for the appellants to detect the fraud than for the respondent: even if the unendorsed third party

cheques had been questioned by the respondent, it is submitted that Alm would have forged the endorsements and continued with her scheme. In the respondent's view, the appellants should have at least adopted the "elementary precaution" of having someone else check the bank statements, or requiring a second signature on cheques, or having the books audited.

35 As I stated above, however, it seems as a matter of principle that contributory negligence would not be available in the context of a strict liability tort. If the contributory negligence approach is to be introduced into this area of the law, I would leave that innovation to Parliament because such a change would be more appropriate for the legislative branch to make. As I see it, the strict liability feature of conversion is well engrained in the jurisprudence concerning bills of exchange.

36 The seminal discussion of conversion of cheques is found in Crawford and Falconbridge, *Banking and Bills of Exchange* (8th ed. 1986), vol. 2, at p. 1386:

> Conversion is the remedy of the lawful possessor of chattels to have their value paid to him by a wrongful dispossessor. It is normally applied to goods and there might appear to be some difficulty in holding that a bank that had paid part of what it owes to a customer to some other person not entitled to receive it is guilty of a conversion of the customer's chattel. But any such apparent difficulty has been surmounted by treating the conversion as being of the instrument itself, that is, of the piece of paper in respect of which the payment is made. Similarly, a bank that collects a sum of money under an instrument for a person not entitled to it is treated as having converted the instrument. It has been repeatedly held that a bank converts an instrument by dealing with it under the direction of one not authorized, either by collecting it or, *semble* (although this has not yet actually been decided) by paying it and in either case, making the proceeds available to someone other than the person rightfully entitled to possession.

37 The drawer, the payee or the endorsee can bring an action for conversion of a cheque. To make the claim for damages for conversion, the plaintiff must prove that he or she was either in actual possession or entitled to immediate possession of the chattel. As Rafferty states in "Forged Cheques: A Consideration of the Rights and Obligations of Banks and Their Customers" (1979-1980), 4 *C.B.L.J.* 208, at p. 228, "[t]he conversion action, however, will lie only if the drawer is still the true owner of the cheque. It must not have been issued to the payee" (*Jervis B. Webb Co. v. Bank of Nova Scotia* (1965), 49 D.L.R. (2d) 692 (Ont. H.C.), and see for example *Ontario Woodsworth Memorial Foundation v. Grozbord*, [1969] S.C.R. 622). The defendant's liability extends to the face value of the converted instrument, and is not limited to the value of the instrument as paper and ink (*Norwich Union Fire Insurance Society Ltd. v. Banque Canadienne Nationale*, [1934] S.C.R. 596).

38 In this case, it is common ground that the payees of the cheques in question had no right of possession to the cheques, as they were not created in respect of legitimate debts owed to them by the appellants. It is also agreed that Alm had no right to immediate possession of the cheques. However, it remains to be determined whether the respondent may have had a right of possession over and against the appellants; this issue will be canvassed below, in the context of fictitious or non-existing persons under s. 20(5) of the Act.

39 The respondent agrees that in this case, it is *prima facie* liable to the drawer for conversion. The trial judge, in finding the respondent liable for conversion, correctly affirmed, in my view, that where a collecting bank pays out on a forged endorsement, the collecting bank will be liable for conversion. The

Court of Appeal, by contrast, found that the action in conversion must fail with respect to the 146 cheques signed by Alm, for the reason that Alm had authority to sign the cheques as well as to deliver them. Further, the Court of Appeal found significance in the fact that Alm fully intended to receive the proceeds herself. Accordingly, in the majority's view, the payment was not diverted from its intended recipient.

40 In my view, the Court of Appeal's approach, with respect, misses the point. It is the intention of the drawer, not the signatory of the cheque, that is relevant, as will be discussed in greater detail below. Alm is not the drawer because she cannot be said to be the directing mind of the corporate appellants; she simply had signing authority within limited circumstances. The relevant intention in this case is that of the drawer, the appellant companies. In the absence of Alm's fraud, they would have been liable, not Alm, if the cheques had been validly issued and were subsequently dishonoured by the drawee.

41 The money on deposit in the appellants' Royal Bank accounts was owed to the lawful holder of those accounts, the appellants. Through the CIBC's actions, money owed to the appellants was paid to Alm, who was not entitled to the money. She was not a payee, and none of the cheques was endorsed by any of the named payees. The forged endorsements were "wholly inoperative" pursuant to s. 48 of the Act. The CIBC presented fraudulent cheques for payment to the Royal Bank, and collected the proceeds therefrom. The CIBC then accounted for the proceeds to Ms. Alm, one not "rightfully entitled" to the funds. Thus, the CIBC is *prima facie* liable in conversion to the appellants. However, it remains to be seen whether the CIBC can avail itself of a defence.

B. *Unauthorized signatures and the fictitious payee defence*

42 As noted above, Alm created some 155 cheques payable to a number of persons connected with the appellants. 107 of the cheques were payable to "J. Lam" or "J.R. Lam", and were accepted for deposit without endorsement. The remaining Lam cheques, and all of the cheques payable to other third parties, bore the forged endorsement of the payee, the forgeries having been perpetrated by Donna Alm.

43 I note in passing that in this case, we are not within the realm of *Number 10 Management, supra*, where the Manitoba Court of Appeal held that a cheque with a forged signature is not a bill of exchange. In this case, the cheques were signed by authorized signatories, albeit for non-existent obligations, and were bills of exchange.

44 As Professor Benjamin Geva notes in his commentary, "The Fictitious Payee and Payroll Padding: Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd."(1977-78), 2 *C.B.L.J.* 418, the general rule with respect to a forged or an unauthorized signature on a bill is contained in s. 48(1) (formerly s. 49(1)) of the Act. Such a signature is "wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature". As Geva states at pp. 418-19, "the effect of this section is to force a bank that has paid a cheque and debited the account of the drawee, based on a forged or unauthorized endorsement, to re-credit the account and to bear the loss".

45 An exception to this rule is set out in s. 20(5) of the Act, the fictitious payee provision. The section provides that, where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer. The significance of a cheque that is payable to bearer, rather than to order, is that it can be negotiated by simple "delivery" to the bank; endorsement is not required. The presence or absence of a legitimate or forged endorsement is irrelevant to a bearer cheque. A bank becomes the lawful holder of a bearer cheque simply through delivery. By contrast, in order for a bank to become the lawful holder of a cheque that is payable to order, not only must the cheque be delivered to effect negotiation, but the cheque must also be endorsed. If the cheques in question were payable to fictitious persons, and could accordingly be treated as bearer cheques, the bank would become a "holder in due course" pursuant to s. 73 of the Act despite the forged endorsements and the missing endorsements; to repeat, negotiation of a bearer cheque is achieved simply by delivery. In this way, an exception to the usual rule of *nemo dat quod non habet* is created. Through the fictitious payee defence, the loss, as Geva states at p. 419, "is thrown upon the drawer". (See also Rafferty, *supra*, at pp. 210-11.)

46 Falconbridge, in *Banking and Bills of Exchange* (6th ed. 1956), put forward the following four propositions with respect to fictitious payees (at pp. 468-69):

> Whether a named payee is non-existing is a simple question of fact, not depending on anyone's intention. The question whether the payee is fictitious depends upon the intention of the creator of the instrument, that is, the drawer of a bill or cheque or the maker of a note.
>
> In the case of a bill drawn by Adam Bede upon John Alden payable to Martin Chuzzlewit, the payee may or may not be fictitious or non-existent according to the circumstances:

> (1) If Martin Chuzzlewit is not the name of any real person known to Bede, but is merely that of a creature of the imagination, the payee is non-existing and is probably also fictitious.
>
> (2) If Bede for some purpose of his own inserts as payee the name of Martin Chuzzlewit, a real person who was known to him but whom he knows to be dead, the payee is non-existing, but is not fictitious.
>
> (3) If Martin Chuzzlewit is the name of a real person known to Bede, but Bede names him as payee by way of pretence, not intending that he should receive payment, the payee is fictitious, but is not non-existing.
>
> (4) If Martin Chuzzlewit is the name of a real person-intended by Bede to receive payment, the payee is neither fictitious nor non-existing, notwithstanding that Bede has been induced to draw the bill by the fraud of some other person who has falsely represented to Bede that there is a transaction in respect of which Chuzzlewit is entitled to the sum mentioned in the bill.

The policy underlying the fictitious person rule seems to be that if a drawer has drawn a cheque payable to order, not intending that the payee receive payment, the drawer loses, by his or her conduct, the right to the protections afforded to a bill payable to order.

47 The fictitious payee rule was considered by this Court in *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456, and in *Fok Cheong Shing Investments Co. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488. In *Concrete Column Clamps*, a payroll clerk perpetrated a fraud by including among the cheques presented to the authorized signing officer of the company a number of cheques payable to persons who were not owed any wages, some being former employees and the others having names which may or may not have been those of existing persons. The fraudulent employee took the cheques and received the amounts on forged endorsements. With regard to the named payees who were not former employees, it was held both by the trial judge and the Court of Appeal that

they were "non-existing", and so fell within the s. 21(5) (now s. 20(5)). No issue in this respect was raised on appeal to the Supreme Court. With respect to the cheques made payable to former employees, both the trial judge and the Court of Appeal applied the fourth proposition put forward by Falconbridge, namely, that:

> If Martin Chuzzlewit is the name of a real person, intended by Bede to receive payment, the payee is neither fictitious nor non-existing, notwithstanding that Bede has been induced to draw the bill by the fraud of some other person who has falsely represented to Bede that there is a transaction in respect of which Chuzzlewit is entitled to the sum mentioned in the bill.

48 The majority of the Court in *Concrete Column Clamps*, *supra*, agreed that the fourth proposition was of application, and noted that a considerable line of Canadian and English authority had adopted the same approach in similar circumstances. The appellant in that case had suggested that where the person authorized to sign the cheques did so mechanically, without knowing any of the payees personally, it was not possible to apply the same rule as when a cheque is signed relying on an explicit false declaration. However, Pigeon J. for the majority commented as follows (at p. 484):

> On the contrary, in an age when cheques are processed by computer, it is even more necessary to avoid facilitating fraudulent operations.
>
> By making banks responsible for cheques cashed on a false endorsement, our *Bills of Exchange Act* certainly has the effect of making it more difficult to cash a cheque fraudulently. It is common knowledge that as a result, public agencies and private enterprises rely heavily on the responsibility of those who pay the cheques they issue, to counteract all kinds of fraud and at the same time to protect those for whom the payments are intended. The argument of counsel for the appellant, based on references to legislation in other countries relieving banks of this responsibility, is unconvincing. It is not for this Court to judge the results of such legislation, no attempt was even made to show that they were favourable. If appellant believes they were, it is to Parliament that it should apply to have the *Bills of Exchange Act*

> amended. I can see no justification for changing the interpretation of this Act, because a different rule has been established elsewhere.

It is to be noted that in the United Kingdom the drawee bank which pays cheques in good faith but on forged endorsements is protected by s. 60 of its *Bills of Exchange Act*, which has no parallel in Canada.

49 Laskin C.J. took a view different from that of the majority. In his opinion, the intention of the dishonest clerk should be attributed to the drawer-employer. In this way, he concluded that the named former employees were fictitious persons. The Chief Justice considered principles of agency law and vicarious liability (at pp. 480-81):

> There is a fine line, too fine in my opinion, between the case where the authorized signer of a cheque perpetrates a payroll fraud and the case where the fraud is perpetrated by a payroll clerk upon whose integrity the authorized signer generally must rely in making out the payroll cheques. The *Restatement of Agency Second* (1958) accepts this distinction, holding that a drawee bank which acts in good faith is protected in the first situation and liable to suffer the loss in the second situation: see s. 173, *Comment b*; s. 280, *Comment b*. The Reporter's notes to s. 280 point out, *inter alia*, that "imputing knowledge to the principal is a fictitious way of stating that the principal is liable for the conduct of the agent, and the fiction should be used only where it would be equitable to do so" (at p. 482 of *Restatement of Agency Second*, Appendix).
>
> The distinction taken in the *Restatement of Agency Second* appears to be based on a line of cases different from the line that led to the development of the present law on vicarious liability in tort. That line is concerned with the question of how far notice to or knowledge of an agent of facts relating to a transaction which he is carrying out for the principal will be imputed to the latter. The general rule of imputation on such a case (and I state the matter broadly without the distinctions thrown up by the cases: see Powell, *Agency* (2nd ed. 1961) at pp. 236 ff.) has been held to be subject to an exception where the agent for his own purposes engages in a fraud against the principal: see for example, Bowstead, *Agency* (13th ed. 1968), at pp. 356-57; *Corporation Agencies Ltd. v. Home Bank of Canada* [[1925] S.C.R. 706], at p. 718. I do not

> think that this line of cases, concerned as they are with what a third party communicates to an agent and *vice versa*, or with what an agent knows or should know when acting for a principal, are applicable here. It seems to me that the tort cases offer a better analogy by posing the question as to when an employee's or an agent's interest adverse to the employer or principal takes him outside of the scope of his employment.

Laskin C.J. concluded that it would be more equitable for the drawer-employer to bear the loss, given that the drawee bank had not been negligent in any way. In his view, there was no basis for a distinction between cheques payable to imaginary persons or persons who were not former employees and those who were formerly employees. For a view in support of this position, see Geva's commentary, *supra*.

50 In *Fok Cheong*, *supra*, the president of the appellant company drew a cheque upon the company's account payable to one Looing Weir, one of the company's creditors. The president fraudulently endorsed Weir's name, and received the proceeds. It was found that the cheque was never intended by the drawer to be paid to the payee. The appellant contended that as the payee was a real person to whom the appellant company was indeed indebted, the payee could not be characterized as a fictitious or non-existing person. However, Ritchie J., writing for the Court, concluded as follows (at p. 490):

> It is obvious that the question of whether or not the payee is to be treated as a fictitious person lies at the very heart of this appeal and in my opinion this is to be determined in accordance with the reasoning expressed by Lord Herschell in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107 at p. 153 where he said:
>
> > For the reasons with which I have troubled your Lordships at some length, I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing

> person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.
>
> In my opinion this passage accurately expresses the effect of the accepted authorities and I agree with the Court of Appeal that the finding of fraudulent intent on the part of Chan in drawing the instrument in question makes the payee of this cheque a fictitious person within the meaning of the authorities, (see also the third illustration cited in *Falconbridge on Banking and Bills of Exchange*, 7th ed., 1969, at p. 486), and the bank was accordingly entitled to treat the cheque as payable to bearer and therefore to treat it as chargeable against the account of the appellant.

51 The appellants in the instant appeal submitted at the outset that the fictitious payee defence should not be available to collecting banks. The appellants argued that unlike a drawee bank, a collecting bank places no reliance on and has no knowledge of the drawer. The collecting bank relies solely upon the creditworthiness of its own customer. The respondent, however, points out that there is no support for this proposition in the Act, in the case law, or in the academic texts. The respondent notes that when the intention of the Act is that it should apply only to a particular class, this intention is made express, citing for example s. 39 of the Act, dealing with delivery of a bill.

52 I agree with the respondent that there is no precedent for holding that s. 20(5) is not available to a collecting bank. In any event, the appellants agreed in reply that rather than taking the position that the fictitious person defence does not apply to collecting banks, the better argument was that there is a distinction between cases where the cheque is slipped in front of a signing officer, and a situation where the dishonest person is the signing officer.

53 In the instant appeal, the appellants submit that the facts fall within the fourth proposition set forth by Falconbridge, *supra*, as adopted by this Court in

Concrete Column Clamps, *supra*. By contrast, the respondent submits that the circumstances of this case fall within the third proposition. The key issue is whether the drawer intended the payees to receive payment, which itself raises the question of who the drawer is. Can Donna Alm's intention be imputed to the appellants?

54 Many of the cheques in question were payable to "real" persons, albeit persons to whom no money was owed by the companies. Donna Alm, the writer of the cheques, did not intend for these payees to receive the proceeds of the cheques. This led the Court of Appeal to conclude that the drawer of the cheques intended them to be payable to bearer, based on the third proposition set out above, which was first stated in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107, at p. 153, as follows, and adopted by this Court in *Fok Cheong*, *supra*, at p. 490:

> For the reasons with which I have troubled your Lordships at some length, I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.

55 With respect, it seems to me that the Court of Appeal erred in focusing on Alm's intention. It is the intention of the drawer that is significant for the purpose of s. 20(5), not the intention of the signatory of the cheque. While a "drawer" is often defined to mean "[t]he person who signs or makes a bill of exchange" (cf. *The Dictionary of Canadian Law* (2nd ed. 1995), in my view, it is important in the circumstances of this case to distinguish between the signatory and the drawer. The drawer, in this case, is the entity out of whose bank account the cheques were drawn, that is, the appellant companies. Alm was not the drawer, but

was simply the signatory. Thus, it is the intention of the appellant companies, as the drawer, that must be determined. In my view, it is wrong to conclude that Alm, as an authorized signing officer of the appellants, could somehow be taken as expressing the intention of the appellant drawer.

56 Accordingly, the instant appeal is to be distinguished from the situation in *Fok Cheong*, *supra*. In that case, the drawer of the cheques was a company, and the signatory of the cheques was the president of that company. The actions of the signatory, who was the president and the guiding mind of the company, could be taken to express the intention of the drawer company itself. This is not the case before us now. There is no basis for holding that the intentions of the signatory Donna Alm could be imputed to the appellant companies. The only directors, officers and shareholders of the appellants were Boris Mange and Ursula Mange. Alm was authorized to sign cheques for the appellants only for the purpose of discharging lawful obligations of the appellants, and only when the Manges were not available.

57 The validity of the cheques is not challenged; therefore, it must be presumed that the drawer intended the payees to receive the proceeds of the cheques. Clearly, the appellants had no intention of transferring over $90,000 to Alm, rather than the payees, for no reason and via the circuitous route of third party cheques.

58 The respondent submits that the decision of this Court in *Concrete Column Clamps*, *supra*, should be overruled, and the approach taken by Laskin C.J. in dissent adopted. As I noted above, Laskin C.J. would have imputed the fraudulent intention of the employee to the employer-drawer. However, in my view,

it is neither necessary nor desirable to import notions of agency and vicarious liability into the analysis. As I understand the applicable provisions of the Act, they do not invite the courts to consider whether the drawer, as principal, is vicariously liable for the acts of the agent. To my mind, it is quite evident that it is the intention of the drawer, in the sense of the entity from whose account the cheques will be drawn, that is of relevance. In some cases, it may be that the signatory is effectively also the drawer. But in this case, however, this is not so.

59 Pursuant to *Concrete Column Clamps*, *supra*, and the fourth proposition put forward by Falconbridge, *supra*, where a drawer is fraudulently induced by another person into issuing a cheque for the benefit of a real person to whom no obligation is owed, the cheque is to be considered payable to the payee, and not to a fictitious person. Such cheques will, accordingly, still be considered payable to order rather than to bearer. In this case, as in *Concrete Column Clamps*, *supra*, the drawer was fraudulently induced by an employee into issuing cheques for the benefit of real persons to whom no obligation was owed. In this case, then, the cheques payable to actual persons associated with the appellants were not payable to fictitious persons, and could not be treated by the CIBC as payable to bearer.

60 Many of the cheques, however, were made payable not to actual persons associated with the companies, but to "J. Lam" and "J.R. Lam". The appellants had no dealings with any persons of such names. According to the criteria set out in Falconbridge, *supra*, such a person would be categorized as "non-existing", and hence, fictitious. But in my view, it seems that Boris Mange was reasonably mistaken in thinking that "J. Lam" or "J.R. Lam" was an individual associated with his companies. Mange knew that one of the subcontractors retained by the

companies was a "Mr. Lam". He did not specifically recall Lam's first name, which, incidentally, was Van Sang. However, when Mange approved the cheques to "J. Lam" and "J.R. Lam", he honestly believed that the cheques were being made out for an existing obligation to a real person known to the companies. The trial judge's comments in this regard were tantamount to a finding of fact, and were not disturbed on appeal; as these are concurrent findings of fact, this Court should not intervene.

61 Accordingly, the cheques made out to "J. Lam" and "J.R. Lam" also fall within the fourth category, and could not be treated by the CIBC as payable to bearer. Rather, the cheques were payable to order, and in order to be negotiable to the bank, delivery alone was not sufficient. Valid, non-forged endorsements were required.

62 The appellants also submitted that, even if the cheques in question could be considered to be payable to bearer (which, as I have stated, they cannot be), the cheques should not be considered to have been "delivered" within the meaning of the Act. Accordingly, they could not have been negotiated. Upon closer scrutiny, this submission relied upon a rather tortured reading of the Act, which I should like to address.

63 Section 2 of the Act states that "delivery" means transfer of possession, actual or constructive, from one person to another. Delivery, within the meaning of this section, was certainly effected in this case with respect to all the cheques in question, as Donna Alm transferred possession of them to the CIBC.

64 The appellants, however, submit that a cheque is not delivered by the mere handing of the cheque to a bank teller, but that the transfer of possession is merely part of a legal process, relying on *Gough Electric Ltd. v. Canadian Imperial Bank of Commerce* (1986), 34 B.L.R. 17 (B.C.C.A.). According to the court in *Gough*, the delivery must be made by the authority of the drawer or the acceptor or the endorsee, as the case may be, referring to the language set out in s. 39 of the Act.

65 I agree with the respondent's submission that it is incorrect to read s. 39 as if it defined "delivery" for all sections of the Act. The language of s. 39 necessarily refers back to the provisions of s. 38. Parliament has defined the term "delivery" in the interpretation section of the statute, a definition that is presumably to apply throughout the statute. In defining the term "delivery" differently in the later section, the clear inference is that this special definition is not intended to apply throughout the statute, but only in the circumstances contemplated by s. 38 because s. 39 cannot be read in isolation from s. 38. Where the delivery is taking place for the purposes of s. 38, there must be more than the transfer of possession, actual or constructive, from one person to another; it must also be made either by or under the authority of the party drawing, accepting or endorsing, as the case may be. Section 39 deals with the completion of a contract on a bill, not the delivery of every bill of exchange for simple deposit or negotiation. As further support for this interpretation, I note that the first incarnation of the Act incorporated the present ss. 38 and 39 in one section (see S.C. 1890, c. 33, s. 21).

66 If s. 39 applied beyond the situations encompassed in s. 38, s. 2 would be rendered meaningless, as delivery would never mean the simple transfer of

possession. Such a result would be an absurdity. It is true that the Manitoba Court of Appeal has held that "delivery" must always be more than mere transfer of possession, in *Toronto-Dominion Bank v. Dauphin Plains Credit Union Ltd.* (1993), 98 D.L.R. (4th) 736. I expressly disagree with this approach, however, as it renders s. 2 meaningless, and also essentially renders s. 20(5) nugatory. It must be remembered that a cheque payable to bearer, including a cheque payable to a fictitious person, is negotiated by simple delivery (s. 59(2)). To adopt the s. 39 definition of delivery for all purposes would mean that something more than simple delivery would be required, contrary to the very intent of s. 20(5) and s. 59(2). This result defies the maxim *ut res magis valeat quam pereat*, "it is better for a thing to go well than to come to nothing", that is, legislation should be interpreted to give it effect, rather than to render it a nullity.

67 For these reasons, it is my conclusion that the cheques in question certainly were "delivered" by Alm to the CIBC within the meaning of s. 2 of the Act. However, the cheques were not bearer cheques, but were payable to order. Accordingly, for negotiation to be effected, endorsement by the payee was required in order for the CIBC to acquire valid title to the cheques.

68 It remains to be seen, however, whether s. 165(3) of the Act is of application in this situation so as to give the CIBC the rights of a holder in due course, including immunity against a claim in conversion.

C. *Section 165(3)*

69 It should be noted at the outset that the CIBC in this case cannot be an actual holder in due course under the Act, because it is not a valid "holder" of the cheques in question. A bill must be negotiated to an individual in order for him or her to be a holder. As set out above, the cheques in this case were not validly negotiated, since they were payable to order, and bore no endorsement, or bore forged endorsements which amounted to a nullity under s. 48 of the Act.

70 However, it is argued that the CIBC acquired the rights of a holder in due course pursuant to s. 165(3), which provides that:

> Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

71 At this point, it should be noted that this section has attracted considerable commentary; see, for example, Professor Sheilah Martin's article "Section 165(3) of the Bills of Exchange Act" (1985), 11 *C.B.L.J.* 23, and Professor Stephen A. Scott's article "The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and its Curious Parliamentary History" (1973), 19 *McGill L. J.* 78.

72 Section 165(3) was introduced in 1966; Professor Martin summarizes the subsequent reaction to the new provision as highly critical by giving too wide protection to banks (at p. 23). She describes the significant advantage that the section affords to a depositing bank as follows, at p. 47:

> While some innovations have been made, in the case of a good faith requirement and the deposit proviso, most cases have technically applied s. 165(3) to give the bank the wide protection it promotes. When one realizes that s. 165(3) is now being used as a defence to common law actions and that the bank remains free to pursue the drawer or endorsers at its option and regardless of its relationship with the endorser, it is easy to understand the fear that the section has done much to strengthen the legal position of a depositing bank.

Professor Martin explores in her article whether the breadth of s. 165(3) can be narrowed by strictly construing its threshold requirements but concludes that it would be difficult to narrow the scope of the subsection.

73 Professor Scott goes so far as to state that s. 165(3) "must be summarily repealed", as "[i]ts continued presence on the Canadian statute book is completely unjustified" (p. 97). In his view, it would not be necessary to replace the section with a new provision, but he suggests specific changes (at p. 97).

74 The respondent submits that, within the plain meaning of s. 165(3), it has acquired the rights of a holder in due course, since the cheques in question were indeed "delivered to a bank for deposit to the credit of a person", and since the CIBC credited the person "with the amount of the cheque". At first blush, this interpretation seems to be attractive. However, the consequence of this approach would be far-reaching and overly broad.

75 If the respondent's interpretation were adopted, a bank would never need to require an endorsement, and the distinction between cheques payable to order and payable to bearer would be insignificant. A bank would always be immune from the consequences of having accepted unendorsed cheques into third party accounts. This result cannot be supported.

76 In my view, the "person" in s. 165(3) must mean a person who is entitled to the cheque. This means that only the payee or the legitimate endorsee of the payee would qualify as a "person" for the purposes of s. 165(3). The purpose of s. 165(3), in my view, is to deal with, among others, situations like the one that arose in *Royal Bank of Canada v. Wild* (1974), 51 D.L.R. (3d) 188 (Ont. C.A.), that is, where a payee deposits a cheque to his or her own account without endorsement, and to deal with restrictive endorsements. In that case, a cheque drawn by Wild and payable to Interlocking Building Systems Limited was delivered to the bank by the payee, to be deposited to the credit of his account. The words "for deposit only to the credit of Interlocking Building Systems Limited, dealer's account" were typed on the back of the cheque. There was no actual signature by way of endorsement on the cheque. The cheque was credited to the payee's account. When the cheque was presented by the collecting bank to the drawee, it was dishonoured, and charged back to the account of the payee. However, the funds in the payee's account were insufficient, there being an overdraft of $1,550. Several months later, the collecting bank demanded payment from the drawer of the cheque, Wild. The defendant conceded that the collecting bank had acquired the rights of a holder in due course by virtue of s. 165(3) of the Act.

77 In *Wild*, the bank, but for s. 165(3), could not have taken title to the cheque, since a cheque that is payable to order must be endorsed to be negotiated (s. 59(3)). The bank could not then be a holder in due course, and would be exposed to any equities between the payee and the drawer of the cheque. Section 165(3) remedies this situation. As long as a payee or endorsee is entitled to the proceeds of the cheque, the cheque can be deposited without endorsement without harming the position of the bank.

78 Section 165(3) represents a policy decision with respect to the allocation of risk. When a collecting bank is presented with a cheque for deposit to the credit of the payee, the bank is entitled, essentially, to assume that it was truly the intention of the drawer that the payee receive the proceeds of the cheque. It is more difficult for a fraudulent employee to manage to have cheques wrongfully made out in their own name; the likelihood with respect to cheques presented by the payee is that they are genuine. Accordingly, a policy decision has been made to overlook the lack of endorsement with respect to these cheques, to prevent the bank from being exposed to personal defences and defects in title should the cheque be dishonoured. The collecting bank is permitted to overlook endorsement with respect to these cheques, because it is very likely that they are indeed genuine.

79 However, the likelihood of fraud is dramatically higher when a person presents a third party cheque, particularly when it bears no endorsement. A collecting bank is not permitted to assume that the transaction is genuine in the face of circumstances that are so clearly prone to fraud. This is why the collecting bank is required, in the case of third party cheques, to ensure that they have been endorsed. It should be remembered that it was the respondent's own internal policy that third party cheques were not to be accepted without endorsement.

80 To some, the allocation of risk in the bills of exchange system may seem arbitrary, but in my view a necessary and coherent rationale sustains this allocation. With respect to forged endorsements, for example, no party in particular is in any better position to detect the fraud than any other. It is a risk that all parties must bear, including collecting banks. It is a price that must be paid if one wishes to enjoy the significant benefits of the bills of exchange scheme, not the least of which

is, from the bank's perspective, the facilitation of huge numbers of financial dealings conducted rapidly, and without overwhelming transaction costs. While the banks are accorded the important advantage of holder in due course status in many situations, it would not be appropriate, as the respondent would have it, to exempt any party, including collecting banks, from all exposure to the risk and consequence of fraud.

81 In my view, s. 165(3) does not apply to the facts of this case. Alm was not the payee or a legitimate endorsee of the cheques in question. Accordingly, she was not a "person" within the meaning of s. 165(3). Absent valid endorsements, the cheques were not validly negotiated to the bank. As a result, CIBC took the cheques subject to the equities of the situation. Alm was not entitled to the cheques, but CIBC credited her with the amount of those cheques. This constitutes conversion, for which CIBC is strictly liable.

VI. Conclusions and Disposition

82 A bill of exchange is a chattel that can be negotiated from party to party. Title to a bill, such as a cheque, is obtained through negotiation. Once an individual has obtained title, that individual has the right to present the bill to the drawee for payment, as well as a right of recovery against the drawer if the bill is dishonoured by the drawee.

83 A bank converts an instrument, including a cheque, by dealing with it under the direction of one not authorized, by collecting it and making the proceeds

available to someone other than the person rightfully entitled to possession. It should be noted that the tort of conversion is one of strict liability.

84 The respondent has agreed that it is *prima facie* liable to the drawer for conversion, and focuses instead on possible defences. I have concluded that the Court of Appeal was in error in holding that the action for conversion must fail with respect to the 146 cheques signed by Alm, having focused incorrectly on the intention of Alm, rather than the intention of the drawer. The respondent is indeed *prima facie* liable for conversion with respect to all of the cheques in question.

85 It is my further conclusion that s. 20(5) offers no defence to the respondent in the circumstances of this case. None of the cheques in question was payable to a fictitious person, in my view. Again, it is the intention of the drawer, in the sense of the one from whose account the cheques are drawn, that is of relevance, rather than the intention of the signatory. The drawer and the signatory may be one and the same in some instances, but this is not the situation in the instant appeal. As none of the cheques was payable to a fictitious person, the cheques could not be treated as payable to bearer by the CIBC. Accordingly, in order to be negotiated, the cheques had to be validly endorsed as well as delivered.

86 I have also concluded that the CIBC did not acquire the rights of a holder in due course pursuant to s. 165(3), for the reason that the person to whose account the cheques were deposited was not a legitimate payee or endorsee, but a third party. Absent valid endorsements, Alm could not validly negotiate the cheques to the bank. As a result, the CIBC took the cheques subject to the equities of the situation, and is liable for conversion with respect to those cheques.

87 Accordingly, I would allow the appeal with costs throughout, dismiss the cross-appeal with costs, set aside the judgment of the Court of Appeal, and restore the trial judgment against the CIBC for the full amount of the cheques in question, that is $91,289.54 plus interest.

SUPREME COURT OF CANADA

BOMA MANUFACTURING LTD. and PANABO SALES LTD.

v.

CANADIAN IMPERIAL BANK OF COMMERCE

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

LA FOREST J.

88 I have had the advantage of reading the reasons of my colleague, Justice Iacobucci, but, with respect, I am unable to agree with the result he has arrived at and with much of his reasoning. While we are at one in concluding that, absent any applicable defences, the respondent bank is liable to the appellants for conversion, our paths diverge as regards the application of one of those defences. As I see it, s. 20(5) of the *Bills of Exchange Act*, R.S.C., 1985, c. B-4 (the "Act") provides a defence to the respondent for all but $1,655.17 of the total amount claimed by the appellants. However, for somewhat different reasons, I agree with the interpretation of s. 165(3) arrived at by my colleague and that it is not available to the respondent on the facts of this case.

89 My colleague has summarized the facts and the judicial history of the case. I find it unnecessary to repeat the latter, but I do feel it is necessary to briefly

review the facts. The appellants, Boma Manufacturing Ltd. and Panabo Sales Ltd., are two small, family-owned, manufacturing companies whose only shareholders and officers are Boris Mange and his wife Ursula Mange. From 1967 to 1987 the appellants employed a bookkeeper, Donna Alm, who, along with Boris and Ursula Mange, was an authorized signing officer for both companies with respect to the appellants' accounts at the Royal Bank of Canada. Cheques drawn on these accounts required the signature of only one authorized signing officer. Over a five-year period, from 1982 to 1987, Ms. Alm defrauded the appellants of $91,289.54 by issuing and depositing to her own accounts with the respondent a total of 155 cheques drawn on the account of the appellants and fraudulently made out to third parties. Of the 155 cheques, 146 were signed personally by Ms. Alm in her capacity as signing officer; the remaining nine were prepared by Ms. Alm but signed by the president of the appellants, Boris Mange. The cheques were presented for deposit by Ms. Alm at her regular branch of the respondent CIBC. Ms. Alm had forged endorsements on some of the cheques but not on others. In any event, all of the cheques were accepted by the bank and Ms. Alm was credited with the face amount in each case.

90 In addition to grouping the 155 cheques depending on who signed them, it is also possible to group the cheques depending on the nature of the payee. Forty-one of the cheques were made out to existing employees of the appellants, including 34 which were variously made out to Boris Mange, Ursula Mange, and their son Michael Mange. Of the 41 cheques made out to existing employees of the appellants, 38 were signed by Ms. Alm herself and three by Boris Mange. The remaining 114 cheques were variously made out to "J. Lam", "J.R. Lam", or "D.

Lam". The appellants had previously engaged a subcontractor by the name of Van Sang Lam but had never employed or had dealings with anyone by the name of J. Lam, J.R. Lam, or D. Lam. Of these 114 cheques, six were signed by Boris Mange and the remaining 108 by Ms. Alm.

Fictitious and Non-Existing Payees

91 As noted by my colleague, s. 20(5) of the Act provides a defence to the respondent bank against an action for conversion in that a bill that is payable to a fictitious or non-existing person may be treated as payable to bearer. In so far as this section applies to any of the cheques which are the subject of the present appeal, the respondent stands in the position of a holder in due course of such cheques and cannot be sued for conversion by the drawer. On the facts of this case two different issues must be addressed under this section. First, are the 41 cheques which Ms. Alm made out to existing employees payable to fictitious persons? Second, are the 114 cheques with "J. Lam", "J.R. Lam", or "D. Lam" as the payee cheques made out to non-existent payees within the meaning of s. 20(5)? In addressing these questions it is necessary to remember that the cheque system is but one part of the bills of exchange system and that the underlying principles of the Act, including those of negotiability, certainty, and finality respecting commercial paper and commercial paper transactions, must be respected.

92 In addressing the first of these questions my colleague relies on the rules enunciated by Dean Falconbridge in the sixth edition of his textbook, *Banking and Bills of Exchange* (1956), at pp. 468-69, which read:

Whether a named payee is non-existing is a simple question of fact, not depending on anyone's intention. The question whether the payee is fictitious depends upon the intention of the creator of the instrument, that is, the drawer of a bill or cheque or the maker of a note.

In the case of a bill drawn by Adam Bede upon John Alden payable to Martin Chuzzlewit, the payee may or may not be fictitious or non-existing according to the circumstances:

(1) If Martin Chuzzlewit is not the name of any real person known to Bede, but is merely that of a creature of the imagination, the payee is non-existing and is probably also fictitious.

(2) If Bede for some purpose of his own inserts as payee the name of Martin Chuzzlewit, a real person who was known to him but whom he knows to be dead, the payee is non-existing, but is not fictitious.

(3) If Martin Chuzzlewit is the name of a real person known to Bede, but Bede names him as payee by way of pretence, not intending that he should receive payment, the payee is fictitious, but is not non-existing.

(4) If Martin Chuzzlewit is the name of a real person, intended by Bede to receive payment, the payee is neither fictitious nor non-existing, notwithstanding that Bede has been induced to draw the bill by the fraud of some other person who has falsely represented to Bede that there is a transaction in respect of which Chuzzlewit is entitled to the sum mentioned in the bill.

In his reasons, my colleague accepts these rules and interprets them as standing for the proposition that where a drawer does not intend a named payee to receive payment, the payee is fictitious and the bill must be read as payable to bearer. Applying this proposition to the facts of the case he states that the intention of the signor, Ms. Alm, cannot be equated to that of the drawer, the appellant companies, as Ms. Alm is not a guiding mind of the corporations. In consequence, the fourth rule applies and the payees are not fictitious within the meaning of s. 20(5).

93 The proposition embodied by s. 20(5) as it relates to the actions of fraudulent employees has been the subject of considerable judicial attention, starting with the House of Lords' decision in *Bank of England v. Vagliano Brothers*, [1891] A.C. 107, and continuing up until this Court's decisions in *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1977] 2 S.C.R. 456, and *Fok Cheong Shing Investments Co. Ltd. v. Bank of Nova Scotia*, [1982] 2 S.C.R. 488. It is fair to say that Dean Falconbridge's fourth rule, which encompasses the situation of the fraudulent employee, merely reflects one line of reasoning within the jurisprudence (see *Vinden v. Hughes*, [1905] 1 K.B. 795, and *Harley v. Bank of Toronto*, [1938] 2 D.L.R. 135 (Ont. C.A.)), and does not take into account various decisions that have gone the other way (see *London Life Insurance Co. v. Molsons Bank* (1904), 8 O.L.R. 238 (C.A.), and *Metropolitan Life Insurance Co. v. Quebec Bank* (1916), 50 C.S. 214). This fact has been acknowledged in the latest edition of the textbook (Crawford and Falconbridge, *Banking and Bills of Exchange* (8th ed. 1986)), where the editor, Bradley Crawford, is critical both of the fourth rule and the cases that have produced it (at pp. 1259 and 1261):

> The Canadian courts have been led into error by Warrington J. in *Vinden v. Hughes* and Dean Falconbridge's endorsement of that judgment in early editions of this treatise.
>
> ...
>
> It is probably of no use to point out that Falconbridge's proposition never was in accord with the actual result in *Vagliano's* case, where, it may be recalled, the acceptor was deceived by his clerk into signing bills he thought represented real transactions with real persons.

94 The problem with any black letter rule of law is that it offers no insight into the competing interests that underlie the conflict it allegedly resolves. Unfortunately, the cases that led to the formulation of Falconbridge's fourth rule, and those that have applied it, have by and large also failed to consider these competing interests as well as the policy considerations inherent in the conflict. In the case of s. 20(5), the underlying conflict that arises when trying to decide its scope and application is that of the allocation of loss as between the accepting bank and the drawer of a fraudulent cheque. This conflict becomes ripe when it is an employee of the drawer, or a third person, that perpetrates the fraud and the loss must be borne by one of two innocent parties: the employer/drawer or the accepting bank.

95 As between the employer/drawer and the accepting bank, the questions are who should bear the risk of any loss and who is in the best position to minimize that risk. The answer to both these questions must, I suggest, be the employer/drawer. In cases such as the one at bar the accepting bank usually receives the fraudulent cheques from the hands of one of its customers who passes himself or herself off as the endorsee or holder of the cheque. Since the named payee is generally a stranger to the bank, the requirement of an endorsement on the cheque will more often than not be ineffective in protecting against fraud. As demonstrated by the facts of this case, it is easy enough for the perpetrator to forge the endorsement of the named payee and there is no way for the bank to verify the authenticity of the signature. On the other hand, the drawer/employer is in a much better position to put a stop to fraud of this type and is at least in an equal position to bear any loss. As a matter of course, any risk of loss on the part of a large

corporation is generally covered by fidelity insurance. It is also possible for large scale fraud to be discovered through audits or other protective measures. If the drawer is a small company, as in the case at bar, then it is in an excellent position to detect the fraud at an early stage and in that way minimize the loss. From the facts of the present case it is clear that the only reason Ms. Alm was able to continue her illegal activities for such a long time was because no internal or independent audit was ever conducted by the appellants; nor was there a routine inspection of the cheque register or monthly bank statements. In short, the party in the best position to stop the fraudulent activity was, and generally is, the drawer/employer. In such a situation it makes sense to allocate the risk of loss to the drawer so that the proper steps can be taken to minimize such losses.

96 The problem with allocating the loss to the accepting bank is that it removes all incentive from a corporation to pursue business practices that will minimize such losses. Furthermore it has the effect of putting the accepting bank in the position of fidelity insurer for the appellants. I can see no justification for such a step. There is no doubt that the chartered banks, and trust companies for that matter, benefit from the existence of the chequing system. However it is also true that the business community in general also depends on the same chequing system to facilitate the function of commerce.

97 A second problem with allocating the loss to the accepting bank is that it does not fit in well with the general scheme of bills of exchange. The essence of a bill of exchange is its negotiability and the finality of payment inherent to such a negotiation. Imposing liability on the accepting bank rather than upon the party in

the position to stop the fraud is inconsistent with these policies. Whether one is talking about the situation where a signing officer has acted fraudulently, or the situation where a payroll clerk induces an innocent signing officer to sign a fraudulent cheque, allocating the loss to the accepting bank would create a situation where the bank would be required to verify the validity of every single cheque it receives involving a corporate drawer. Applying such a scheme to the facts of the present case would have demanded that every time the respondent received a cheque drawn by the appellants it should have called the president of the appellants, Boris Mange, and verified with him that the appellants had truly intended to issue the cheque to the payee. Besides being impractical, such a procedure is simply not in keeping with the purpose or the scheme of the Act.

98 Notwithstanding what I see as the convincing policy arguments in favour of imposing the loss on the drawer/employer, I remain bound by this Court's decision in *Concrete Column, supra*. In that case a majority of the Court held that where a payroll clerk had fraudulently filled out company cheques, and then fraudulently induced a signing officer to sign those cheques, they did not fall within the scope of s. 20(5). The intent of the payroll clerk was not the intent of the drawer; when he signed the cheques the latter had actually intended the named payees to receive payment. On its face the majority judgment endorses the fourth of Falconbridge's rules, but as Laskin C.J. noted in dissent, this rule encompasses at least three different fact scenarios. At pages 477-78, he stated:

> In approaching this issue, I would distinguish three situations which have been treated in the case law and in the leading textbook in this country, Falconbridge, *Banking and Bills of Exchange, supra*, as not

> warranting differentiation. Thus, in the fourth proposition quoted above from that textbook, the author speaks of the fraud of "some other person", that is, other than the drawer, which induced the drawing of the bill in the illustration there given. That person may, however, be a third person, as he was in the *Agricultural Savings and Loan Association* case, as he was in the *Macbeth* case, as he was in *Bank of Toronto v. Smith* and as he was in the *Barbeau* case; or he may be an employee who has been authorized to issue negotiable instruments, as in the *Bromont* case; or he may be an employee who has no authority to issue negotiable instruments but, on the other hand, is charged with the duty of making up the payroll for presentation to those authorized to issue cheques in the name of the drawer.

99 I agree with this distinction, though again for policy reasons I do not believe that the second and third scenarios should lead to different conclusions. However the fact situation in *Concrete Column* fell squarely within the third scenario. Similarly, the three cheques out of the 41 which Ms. Alm fraudulently produced and then induced Boris Mange to sign are also examples of the third scenario. Therefore, with respect to these three cheques only, having a combined face value of $1,655.17, the respondent's defence under this section must fail in light of the majority's decision in *Concrete Column*. However the remaining 38 cheques which Ms. Alm made out to existing employees, and which she herself signed in her capacity as a signing officer, are examples of the second scenario set out by Laskin C.J. in *Concrete Column* and do not fall within the scope of the majority's decision in that case.

100 With respect I must disagree with my colleague's conclusion that Ms. Alm's fraudulent intent as the signing officer cannot be equated to the intent of the drawer, the appellant companies. As I understand it, the application of the law of agency leads to the inevitable conclusion that where the fraudulent employee is a

signing officer of the drawer, then his or her intent must be taken as being the intent of the drawer. This issue was canvassed by Laskin C.J. in *Concrete Column*, where he reviewed the law of agency and of vicarious liability in tort. In particular, he thus addressed those situations where in the course of employment an employee defrauds a third party, at pp. 478-79:

> Agency law, especially as it relates to vicarious liability in tort, has long ago departed from strict conceptions of authority (see, for example, *Limpus v. London General Omnibus Co.* [(1862), 1 H. and C. 526, aff'd 9 Jur. N.S. 333]) and has, similarly, departed from notions of benefit or detriment so that an employer may be held vicariously liable to a person injured by his employee's negligence, even though the employee has, while acting within the scope of his employment, carried out his duties in a way expressly prohibited by the employer: see, for example, *Lockhart v. Stinson and C.P.R.* [[1941] S.C.R. 278, aff'd [1942] A.C. 591]; and *cf Rose v. Plenty* [[1976] 1 All E.R. 97].
>
> Again, even where the employee defrauds a third person, his employer may have to answer for the fraud, as was the case in *Lloyd v. Grace, Smith & Co.* [[1912] A.C. 716], where a solicitor's clerk, acting in the course of his employment, and held out as authorized to deal with clients of the solicitor, defrauded a client of her property. The principle underlying this and other cases is an old one, based on a broad rule of policy, stated for England nearly three hundred years ago in *Hern v. Nichols* [(1708), 1 Salk. 289, 91 E.R. 256] and restated in fuller terms by the House of Lords in *Lloyd v. Grace, Smith & Co.*, *supra*. There, Lord Shaw of Dunfermline put it as follows (at pp. 739-40):
>
> > The case is in one respect the not infrequent one of a situation in which each of two parties has been betrayed or injured by the fraudulent conduct of a third. I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud....
>
> This Court too has recognized the principle, as witness *The Queen v. Levy Bros. Ltd.* [[1961] S.C.R. 189], at p. 192, where Ritchie J. quoted with approval the following passage from *Story on Agency* (7th ed.) para. 452:

> ... he (the principal) is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

101 In the present case there is no question that Ms. Alm acted beyond the ambit of what the appellants had in mind when she prepared and signed cheques made out to payees who were not their creditors. However it is equally clear that to the eyes of a third party she would have had the apparent authority to sign the cheques as she was an acknowledged signing officer of both Boma Manufacturing Ltd. and Panabo Sales Ltd. The general rule of agency is that a principal is bound by the acts of an agent when that agent is acting within the scope of his or her ordinary or apparent authority. The agent does not cease to bind the principal when he or she acts fraudulently in furtherance of his or her own purposes. That this is the law in Canada was acknowledged in *Canadian Laboratory Supplies Ltd. v. Engelhard Industries of Canada Ltd.*, [1979] 2 S.C.R. 787, where Laskin C.J., speaking for the Court on this point, stated at p. 797:

> There is, of course, no doubt in my mind that if an agent, in the exercise of an admitted authority in him in respect of his ordinary duties acts for his own benefit, his principal cannot deny liability for contracts he purports to make on behalf of the principal. It is only in such circumstances or where there is a representation from the principal that puts the agent in a position to act beyond the authority reposed in him that the principal can be bound.

102 In light of this principle, I am unable to see how the intent of Ms. Alm is not also the intent of the appellants, the drawer of the cheques. Ms. Alm was

held out by the appellants as a signing officer and the very essence of this representation of agency was that to the outside world the intent of Ms. Alm was the intent of the appellants when it came to the issuing of cheques. Interestingly enough, this position is implicit in the majority's decision in *Concrete Column* where it was the intent of a signing officer that was held to be the intent of the respondent corporation/drawer, even though there was no indication that the signing officer in that case was a guiding mind of the corporation. There is simply no authority for the position adopted by my colleague on this point. Nor should there be, given the principles of the law of agency stated above. As a result, I find that the 38 cheques prepared and signed by Ms. Alm, and payable by way of pretence to employees of the appellants, are payable to fictitious persons within the meaning of s. 20(5) of the Act and in consequence must be treated as payable to bearer. As such the respondent is a holder in due course of these cheques and cannot be liable to the appellants for conversion.

103 The above discussion is based on the premise that the loss must be borne in its entirety by one party or the other. However, I am not yet prepared to discount the possibility that in a proper case the loss should be apportioned between the employer/drawer and the accepting bank. There is much to be said for the view that this would be the fairer course. One, but possibly not the only, vehicle that would allow this to occur would be a suit in negligence. In a suit in negligence apportionment is specifically provided for through the mechanism of contributory negligence. The principal difficulty with such an approach is that the courts in both England and Canada have traditionally been unwilling to find that a duty of care exists between the rightful owner of a cheque and an accepting bank (see Crawford

and Falconbridge, *supra*, at p. 1040). However, that type of reasoning is reminiscent of the time before the law could take contributory negligence into account by virtue of either legislation or judicial development.

104 Though the appellants in the present case originally alleged both conversion and negligence, and contributory negligence was pleaded by the respondent in turn, I need not enter further into the issue. The negligence action was dismissed by the trial judge and not pursued on appeal. Even if the negligence action were before us, or contributory negligence could otherwise be raised, the worst that can be said about the respondent is that it failed to follow its internal policy in accepting cheques for deposit that had not been endorsed. However the evidence is clear that the requirement for an endorsement was no obstacle to Ms. Alm's activities and thus any negligence on the part of the respondent was not causally linked to the appellants' loss. In short, assuming it is possible to do so, this is not an appropriate case for apportionment.

Non-Existent Persons

105 The majority of the cheques in this case, 114 in total, are not cheques to an existing person at all but rather to an imaginary person created by Ms. Alm for her own purposes. Unlike the debate surrounding the interpretation of a fictitious person, the concept of a non-existent person within the meaning of s. 20(5) is well settled: if the payee on a cheque is a matter of pure invention and not a real person then the payee is non-existent. There is no support for the position that this is a subjective test based on what the signor of a cheque believes is true; rather it

is an objective question of fact -- is the payee an invention of the employee? (see Crawford and Falconbridge, *supra*, at p. 1264, and *Clutton v. George Attenborough & Son*, [1897] A.C. 90 (H.L.)). This question was never addressed by either the trial judge or the Court of Appeal. In the reasons of both these courts there is no more than the recitation from paragraph 45 of the Agreed Statement of Facts that Boris Mange knew that the appellants engaged a subcontractor named Lam, "but had either forgotten, or never knew, his first name or initials". In this light I cannot agree that the trial judge's comments on this point were tantamount to a finding of fact.

106 On the basis of the Agreed Statement of Facts, there is no doubt that Boris Mange did not know a D. Lam, J. Lam, or J.R. Lam. It may well be that he thought they were the same person as his contractor Van Sang Lam, but that is not the question that needs to be asked. What is determinative is that on an objective standard the payees were non-existent to the knowledge of the signor, whether that be Ms. Alm or Boris Mange. I note that paragraph 43 of the Agreed Statement of Facts states that no person with the name D. Lam, J. Lam or J.R. Lam was known to the appellants, while paragraph 46 of the Agreed Statement of Facts says that Boris Mange simply assumed that the cheques payable to J. Lam and J.R. Lam were payable to the appellants' subcontractor with the last name of Lam. As a result, the remaining 114 cheques clearly fall within the scope of s. 20(5) of the Act and are to be treated as payable to bearer. Therefore the respondent is a holder in due course of these cheques and has a complete defence against the action of the appellants.

Section 165(3) -- The Bank as a Holder in Due Course

107 The second ground of defence raised by the respondent bank is that it has the rights of a holder in due course of the subject cheques via the operation of s. 165(3) of the Act, which reads as follows:

> **165.** . . .
>
> (3) Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

At first sight, this provision appears to remove from an accepting bank the obligation of satisfying the general requirements for becoming a holder in due course set out in s. 55 of the Act: namely that the cheque must be taken by negotiation, for value, and in good faith. In the case of a cheque payable to order, negotiation would require the valid endorsement of the payee or endorsee. By removing the need for these requirements, it may be said that s. 165(3) effectively removes any difference between a cheque payable to order and one payable to bearer; as long as the cheque is delivered to the accepting bank, and the depositor's account is credited with the amount of the cheque, the bank has the rights of a holder in due course of the cheque and takes the cheque free of any defect of title.

108 So interpreted, s. 165(3) would amount to a sweeping grant of powers to the banks, a possibility that has received almost unanimous condemnation and persistent calls for reform since its introduction into the Act in 1966 (see S. Scott,

"The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and its Curious Parliamentary History" (1973), 19 *McGill L.J.* 78; S. Martin, "Section 165(3) of the Bills of Exchange Act" (1985), 11 *C.B.L.J.* 23; Law Reform Commission of Canada, *The Cheque: Some Modernization* (1979)).

109 My colleague has attempted to restrict the scope of the section by interpreting the word "person" as being limited to the payee or the legitimate endorsee of the payee of the cheque only, with the result that the provision would be of no help to the respondent in the present case. The word "person" is clearly capable of diverse meanings depending on the circumstance in which it is used. Where a court is faced with the situation where there is more than one possible construction of the statutory provision before it, and the result of one construction would lead to manifest absurdity or injustice (see E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 47, and *Grey v. Pearson* (1857), 6 H.L.C. 60), it is well established that a court will adopt the construction that does not lead to that result, even though the words used would strongly favour the alternative construction; see, for example, *Caladonian Railway Co. v. North British Railway Co.* (1881), 6 A.C. 114 (H.L.). The situation here militates in favour of this approach. There is no question that if s. 165(3) is given the scope advanced by the respondent it will both be in disharmony with the general scheme for cheques set out in the Act, and has the potential for inflicting considerable injustice on the drawers of cheques. On the other hand, the interpretation adopted by my colleague avoids these results and is in keeping with the apparent intent of Parliament in introducing the section: the desire to protect banks in those situations where a cheque is restrictively endorsed or where the payee fails to endorse a cheque upon presenting

it to an accepting bank for deposit. Neither of these situations is present in the case at bar.

110 Accordingly I would dismiss the appeal and the cross-appeal, both with costs. Based on my findings with respect to the application of s. 20(5) I would have reduced the judgment of the Court of Appeal in favour of the appellants from $5,390.12 to $1,655.17, this amount being the face value of the three cheques fraudulently prepared by Ms. Alm but signed by Boris Mange in favour of existing employees. However the respondent did not cross-appeal on this issue and the judgment of the Court of Appeal shall stand as is.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McKnight v. Hutchison,*
2019 BCSC 944

Date: 20190612
Docket: S063172
Registry: Victoria

Between:

Donald Dale McKnight

Plaintiff

And

John Michael Hutchison and 574316 B.C. Ltd.

Defendants

Before: The Honourable Chief Justice Hinkson

Supplementary Reasons for Judgment

The Plaintiff, appearing in person:	D.D. McKnight
Counsel for the Defendants:	J.M. Hutchison, Q.C.
Place and Date of Trial:	Victoria, B.C. May 25-29, June 1-4, 8-11, 15-16, 2015 January 28-31, February 1 and February 26, 2019
Place and Date of Judgment:	Victoria, B.C. June 12, 2019

I. Introduction

[1] The plaintiff, Donald Dale McKnight, is a lawyer licensed to practise in the province of British Columbia. The personal defendant, John Michael Hutchison, is similarly licensed. The plaintiff and the personal defendant were partners in a law firm in the 1990s (the "partnership"). The corporate defendant is a company created and controlled by the personal defendant.

[2] On November 8, 1999, when Mr. McKnight discerned that Mr. Hutchison had withheld firm income from their partnership, he left the office space that the parties had shared and created his own firm, while Mr. Hutchison continued to practice in his new firm at the same premises.

[3] Litigation between the parties ensued and has dragged on to the present. At this stage of the litigation, the plaintiff seeks equitable compensation for the defendant's alleged breach of fiduciary duties, damages for alleged conversion, as well as punitive damages. He also seeks an order that any awards made be reduced by any amounts that he is found to owe the partnership, after taking into account advances made by the plaintiff for the benefit of the partnership, including payments of interest on the U.S. dollar ("USD") loan and income tax paid on monies held in trust for the partnership. In addition, Mr. McKnight seeks an order that the defendants may set off certain expenses, specified in paragraph 12 of my order entered on September 12, 2016.

[4] Given the protracted nature of this litigation, I will now summarize some salient aspects of the decisions in the litigation between the parties.

II. The Litigation Background

1. Mr. Justice Grist's 2002 decision

[5] In 2002 BCSC 1373 ("2002 Reasons"), Justice Grist summarized the factual background between the parties as follows:

> [1] The parties were partners in a law firm for a period of nine years. Their partnership ended when the plaintiff, Mr. McKnight, learned of the defendant, Mr. Hutchison's, receipt of earnings resulting from part ownership

> in a private company. The company and the individuals that operated it were clients of the firm. While acting for them Mr. Hutchison agreed to become director of the company and accepted company shares that subsequently returned substantial dividends. Mr. McKnight contends that Mr. Hutchison breached a fiduciary duty to disclose the activities giving rise to these and other subsequently revealed privately retained earnings. An order is sought requiring that the undisclosed profits be accounted for as accruing to the partnership.

[6] Grist J. summarized the obligation of disclosure between partners at paras. 63–67 as follows:

> [63] The obligation of full disclosure is common to relationships characterized by a duty of utmost fairness and good faith. *Aero Services Ltd. v. O'Mally et al.* (1973), 4 D.L.R. (2d) 371; *McMillan Bloedel Ltd. v. Binstead* [1983] B.C.J. No. 802. The authorities emphasize that the purpose served by the requirement of disclosure is to allow the informed party to exercise an independent will and take any position that party might adopt as appropriate. *Morrison v. Coast Finance Ltd.* (1965), 54 W.W.R. 257. And to be aware of any risk that the other might be tempted to fall short of their requisite duty. *Hitchcock v. Sykes*, [1914] S.C.R. 403.
>
> [64] In the case of partnerships, the institution requires there be trust. In the usual case the firm enterprise requires contribution from each partner and proportionate division is made of the profits or losses. There is no limitation from firm liability and each partner potentially has the power to expose the full worth of every other partner.
>
> [65] Where relationships are marked by the obligation of utmost fairness and good faith, the remedy for breach extends beyond damages. *McMillan Bloedel Ltd. v. Binstead*, *supra*, was a case of an employee profiting privately from sales arranged through his position with his employer. In the circumstances of the case the employer itself would not have been able to realise on the profits. In commenting on the consequences flowing from the employee's actions Dohm, J. said at para. 60:
>
> > Where there has been a breach of a fiduciary duty…the law calls on the defendants to account to the plaintiff for any profit made or benefit received as a result of the breach of duty. This is not the same as damages, which are compensatory in nature. The purpose of damages is to put the plaintiff in the same position it would have been if not for the wrongdoing. Here the plaintiff suffered little damage and will be in a better position than it would have been if not for the wrongful act of the defendants.
>
> [66] If there is any doubt that this principle applies to non-disclosure of matters affecting a professional partnership, it is settled in *Rochwerg v. Truster*, *supra*. That was a case where an accountant did not inform of benefits by way of share options associated with his position as a director of a company that was also a client of his accounting firm. In this case, Cronk, J.A. said at para. 115:

> The remedy for breach of a fiduciary duty by the realization of secret profits or benefits requires that the fiduciary be prevented from retaining any gain from the activity which arose from the breach of duty. The assessment for such a breach focuses on the wrongdoer's gain and not the beneficiary's loss.
>
> [67] The remedy here is of the same nature. The earnings from the sources indicated shall be accounted for as partnership income and dealt with in accordance with the terms of the partnership agreement applicable at the times the payments were received. In the case of trustee fees that were received after dissolution, that portion attributable to services performed during the partnership shall also be taken into account. Any further payments attributable to the shares held in the company controlled by the T. Family trust shall be treated as partnership revenue.

[7] Ultimately, Grist J. ordered that Mr. Hutchison account to the partnership for the "secret profits". He concluded, at paras. 4 and 70, that:

> [4] My conclusion is that Mr. Hutchison did not satisfy his obligation to make full disclosure to his partner of matters affecting the partnership. In six of the seven cases complained of the non-disclosed earnings came as fees from positions held in corporations or trusts created for firm clients, or from share holdings in the companies themselves. In the other matter, his partners knew that he had taken a position with a government board and that an honorarium was likely being paid, but he did not reveal he was retaining the honorarium privately. The remedy for these breaches of partnership obligation is to require the earnings to be accounted for as partnership income.
>
> …
>
> [70] A determination of what might follow from any imbalance in the capital accounts likely requires completion of the accounting indicated in respect of the funds retained by Mr. Hutchison personally and which will now be accounted for as firm revenues.

2. Mr. Justice Grist's 2004 decision

[8] In 2004 BCSC 1184 ("2004 Reasons"), Grist J. reviewed the Registrar's report on an accounting of Mr. Hutchison's profits, which concluded that the funds retained by the defendant amounted to $777,803.42 prior to the dissolution of the partnership, with a further $85,580.68 received after dissolution, together totalling $863,384.10.

[9] Grist J. concluded that Mr. Hutchison had received total income of $863,384.10 which should have been (but was not) reported as partnership income.

Of this total amount, the sum of $773,303.42 was received before November 8, 1999, and income of $72,291.66 plus interest of $8,039.02 were received after November 8, 1999.

[10] Grist J. then appointed Mr. Jackson, of the firm of Trenholme Jackson and Eade, chartered accountants, as a special referee to calculate the parties' respective capital accounts leading to their capital accounts at dissolution, after taking into account the monies which should have been received by the partnership, treating the defendant's receipt of these funds as drawings taken from the partnership's assets.

[11] The special referee found a disparity of some $523,000 in the parties' capital accounts. He found that Mr. McKnight had $473,252 in his capital account, whereas Mr. Hutchinson had a deficit of $50,615. His report was certified by Grist J. in February 2006, but there remained further adjustments to be made before the partnership could be wound up.

[12] In May 2011, Grist J. declared that this "first action" had come to an end and ordered Mr. Hutchison to pay costs in accordance with the order, dated April 14, 2003, and to pay special costs of the accounting before Registrar Bouck (as she then was): [2003] B.C.J. No. 848 (S.C.).

3. Mr. Justice Halfyard’s 2011 decision

[13] The trial and post-trial judgments of Grist J. did not result in a resolution of the issues remaining between the parties. Mr. McKnight had commenced a second action on July 14, 2006, against Mr. Hutchison and the company owned and controlled by him. In this action, Mr. McKnight claimed a further accounting by the defendant for unbilled work in progress (“WIP”), dissolution and winding up of the partnership, and personal judgment against the defendant for the amount required to pay any deficiency remaining in the plaintiff's capital account in full, with interest, after dissolution and winding up.

[14] The plaintiff claimed that, as of November 8, 1999, the value of accounts receivable from the defendant's clients was about $184,000, and the value of the unbilled WIP for the defendant's clients was about $410,000. He continued to allege, among other things, that the defendant had failed to make reasonable efforts to recover accounts receivable or to render accounts for WIP; and that the defendant obstructed the plaintiff's efforts to collect accounts receivable, to sell a condominium in Winnipeg, and sell the "FS shares" held by the defendant company.

[15] In 2011 BCSC 36 (“2011 Reasons”), Mr. Justice Halfyard dismissed the counterclaim that had been brought by Mr. Hutchison in the plaintiff’s second action. Halfyard J. found that the plaintiff established that the defendant had failed to bill his clients for a substantial part of his WIP as it existed at the time the parties ended their partnership. However, he was unable to determine the value of the defendant’s unbilled work on the evidence before him.

[16] At para. 62, Halfyard J. found that Mr. Hutchison had failed to make reasonable efforts to collect the accounts receivable relating to work that he performed for clients of the former partnership before November 8, 1999, relating to unpaid bills that the defendant rendered both before and after November 8, 1999. After the dissolution of their partnership, Halfyard J. further found at para. 72 that Mr. Hutchison received money from clients of the former partnership on at least three occasions, in payment for work he performed before November 8, 1999, but failed to credit these payments to the former partnership: at para. 72.

[17] At para. 86, Halfyard J. also concluded that Mr. Hutchison had unreasonably failed to comply with Mr. McKnight’s requests for disclosure, and production of documents and information. At para. 104, Halfyard J. found that:

> The evidence establishes that the defendant repeatedly promised to do specific things, and then failed to keep his promises. I have discussed the absence of satisfactory explanations for these failures and, in one instance, the assertion of an explanation that was false. I am left wondering why he would keep on making these promises over the years. It was not until November 30, 2009, (in his Outline) that Mr. Hutchison first suggested that it was too late to send out any more bills for the work in progress. The defendant's conduct seems to invite the inference that, until that point in time,

> he believed that it would be worthwhile to render accounts for his unbilled work in progress. His conduct also creates suspicion about the honesty of his several statements that he intended to do what he had accepted responsibility to do.

[18] Halfyard J. concluded at para. 121 that the false statements made by Mr. Hutchison, and his failure to disclose material facts relating to the commencement of an action on one file, demonstrated a high degree of carelessness on his part, and called into question the reliability of some of his statements made in letters to the plaintiff and on his examination for discovery. In particular, Halfyard J. found that the evidence indicated that his statements of intention and his statements as to the conditions of his accounts could not safely be relied upon.

4. The appeal of the first action

[19] In 2013, Mr. Hutchison appealed Grist J.'s 2002 decision. Mr. McKnight's second action was held in abeyance pending the disposition of the appeal.

[20] In her reasons for judgment on the appeal, indexed at 2013 BCCA 340 (the "Appeal"), at para. 1, Madam Justice Newbury described Mr. Hutchison's appeal as "the latest chapter in a protracted and unseemly dispute between two lawyers who practised law in partnership between 1990 and 1999".

[21] The court of appeal unanimously dismissed Mr. Hutchison's appeal.

5. My 2015 decision and 2016 supplementary reasons

[22] In May and June 2015, Mr. McKnight's second action came on for hearing before me. In reasons indexed at 2015 BCSC 1886 ("2015 Reasons"), I dismissed the plaintiff's claim against the corporate defendant. I will refer to Mr. Hutchison hereafter as either the defendant or by his name.

[23] As of October 31, 1999, approximately a week before the parties agreed to dissolve the partnership, the accumulated WIP for clients for whom the personal defendant was solely or primarily responsible was recorded as $367,000.42 for unbilled fees and $43,248.93 for unbilled disbursements (2011 Reasons at

para. 39). As of the same date, the outstanding accounts receivable for accounts that had been rendered to clients for whom the personal defendant was solely or primarily responsible was recorded as $155,972.16 for fees and $28,025.67 for disbursements, and those rendered by the plaintiff were $3,049.16 (2011 Reasons at para. 50).

[24] Although I found that the partnership terminated on November 8, 1999, I accepted that there should be an order winding up the affairs of the partnership following the settlement of its accounts and affairs. At the time the partnership dissolved, the partnership owed its bank roughly $280,000.

[25] I found that:

a) the partnership between the personal parties terminated on November 8, 1999 (at para. 34);

b) the personal parties each bear 50% responsibility for the partnership's financial obligations and are equally entitled to the partnership earnings (at para. 38);

c) the plaintiff's claim for payment by the defendants, with interest of his capital account was dismissed (at para. 44);

d) the payment priorities for the windup of the partnership were:

    i. outstanding obligations of the partnership to third parties;

    ii. repayment for advances made by the parties for partnership obligations;

    iii. repayment of the plaintiff's capital account; and

    iv. the balance, if any, to the personal parties, based on their partnership interests;

    (at para. 47)

e) the personal defendant was to pay any funds in his possession into the trust account maintained by the plaintiff and he was to be personally responsible for all fees associated with the creation and maintenance of the corporate defendant (at para. 49);

f) the personal defendant was held to have received $10,000 from an accounting firm client on behalf of the partnership, with credit for the expenses of attempting to realize on the account, and the personal defendant was not responsible for the balance of balance of the bills to the accounting firm client (at para. 74);

g) the personal defendant was responsible to the partnership for the account to a medical doctor client for $15,699.60 (at para. 79);

h) once the obligations of the partnership to third parties are met, the personal defendant is entitled to set off against the legitimate expenses of the partnership the advances by him for partnership obligations (at para. 89); and

i) the personal defendant owed nothing to the plaintiff for work on the estate files after dissolution (at para. 93).

[26] I also ordered the defendant to pay his capital account deficit as determined by Grist J. to the partnership, together with interest thereon, from February 28, 2006 (at para. 40).

[27] I declined to order that, if there were insufficient monies remaining upon the winding up of the partnership to pay the capital account of the plaintiff, the defendants should pay the balance owing with interest (at paras. 42–43).

[28] I enjoined the parties from using or disposing of any remaining assets of the original partnership or the continuing partnership without further order, and confirmed the priority for payments from the partnership assets: at paras. 45, 47.

[29] I also ordered that Mr. Hutchison pay any funds in the possession of the corporate defendant into the trust account of the plaintiff, as well as $15,699.60 to the firm for fees that he had failed to bill to a client identified as “Dr. R.”

[30] I also dismissed the plaintiff’s claim for damages for the loss of the firm’s goodwill.

[31] In my reasons for judgment, I referred to the figure of $773,187, net of reimbursements from recovered partnership funds claimed by the personal defendant for advances made to the firm. In supplemental reasons for judgment indexed at 2016 BCSC 137, I corrected that figure to take into account the recovery of GST, which reduced the figure, net of reimbursements from recovered partnership funds, to $742,437.72. Of that figure, I dismissed $365,062.21 of the claim of set off by Mr. Hutchison leaving a net owing to the partnership by Mr. Hutchison of $377,375.51, pending the reference to the Registrar of the accounting charges of Trenholme Jackson Eade.

[32] At para. 81 of my initial reasons for judgment, I found:

> 81 In some cases, the personal defendant sent bills to clients for work performed after the dissolution of the partnership, without billing or collecting for work performed during the life of the partnership. The personal defendant gave evidence that pursuant to the order of Halfyard J., of the files he billed following the dissolution, he recovered $102,608.54 which he paid to the plaintiff, together with some $64,000 attributable to proceeds from a shareholding that Grist J. found to be a partnership asset. I am satisfied that at least some portion of the work billed by the personal defendant following the dissolution was not credited as it should have been, to the partnership, but I am unable to determine the extent of this failure. This account now holds approximately $171,000, the breakdown of which is unclear.

[33] Insofar as the WIP of the partnership at the time of the termination of the partnership, I directed a further reference to the Registrar, at para. 9:

> 9. The Registrar is directed to determine the following:
>
> (a) To determine the amounts that the personal defendant should have billed for work performed prior to the dissolution of the partnership, but did not.
>
> (b) To determine the amounts that the personal defendant did bill for work performed prior to the dissolution of the partnership,

including, but not limited to, client file nos. 12407, 12294, 12358, 12296, 12431, and 12314.

(c) If the personal defendant is unable or unwilling to tender evidence as to his recovery of any amount billed for work performed prior to the dissolution of the partnership, the Registrar shall find that the recovery occurred. If the personal defendant is unable or unwilling to tender evidence as to his use of the funds recovered for partnership expenses, the Registrar shall find that such expenditures did not occur.

(d) To determine the value of the partnership assets taken by both the plaintiff and the personal defendant, as of the date of dissolution of the partnership.

(e) To determine the calculation of the plaintiff's recovery of any amount billed for work performed prior to the dissolution of the partnership, other than those already determined by Grist J. and the plaintiff's use of those assets.

(f) To determine what amounts, if any were paid by the plaintiff for partnership obligations following the dissolution of the partnership.

(g) If the plaintiff is unable or unwilling to tender evidence as to his recovery of any amount billed for work performed prior to the dissolution of the partnership, the Registrar shall find that the recovery occurred. If the plaintiff is unable or unwilling to tender evidence as to his use of the funds recovered for partnership expenses, the Registrar shall find that such expenditures did not occur.

[34] I adjourned the question of damages payable to the plaintiff by the personal defendant for breach of fiduciary duty and for punitive damages and costs until the Registrar's report was available to me.

III. Discussion

1. Unbilled work in progress and disbursements

A. The Registrar's determination of work in progress and disbursements

[35] A reference report was authored by a master of the Court, sitting as Registrar, and was dated May 30, 2018 (the "Report"). The parties agreed before the Master that the defendant only needed to account for the unbilled WIP and unbilled disbursements that cumulatively exceeded $100.00.

[36] The reference report came before me pursuant to Rule 18-1(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[37] In her Report, the Master observed that, "In many instances, it appeared that the parties were attempting to re-try their respective cases". Unenlightened by that comment, the parties, and in particular the plaintiff, continue to attempt to reargue issues and findings that have already been made by me and by other judges. The most egregious example is the plaintiff's assertion that:

> … unfortunately, inasmuch as Your Lordship adopted those false statements almost verbatim in paragraph 146 of the Reasons, it appears that, at least for now, the Personal Defendant has succeeded in his deception, to the considerable determent of the Plaintiff's professional and personal reputation.

[38] The defendant supplied the Master with a document prepared by his wife and bookkeeper, Mrs. Hutchison, which she referred to as "Spreadsheet 5", as will I. The Master described the contents of the spreadsheet as follows:

> [18] Columns C and D on the Spreadsheet show the WIP fees and disbursements as at the date of dissolution. Columns E and F show the account receivables on the bills issued prior to the dates of dissolution.
>
> [19] Columns G and H in Spreadsheet 5 reflect bills issued on behalf of the partnership on Mr. Hutchison's files under the direction of Mr. McKnight's new firm. Columns I and J reflect entries from the trust ledger for file 13060, being billings and issued by the New Firm on partnership files for which Mr. Hutchison was the responsible lawyer, and receipts on those billings.
>
> [20] Columns K through R reflect information on the New Firm's client summary report as at September 18, 2017 for post-dissolution WIP, billings and account receivable balances.
>
> [21] The figures in Spreadsheet 5 shown as a debit or "negative" reflect anticipated disbursement(s).
>
> [22] Spreadsheet 5 also delineates between three categories of files: the first group (up to page 8) represent files carried over to the New Firm; the second group represent files or matters not carried over to the New Firm; and the third group represent files that were opened in the partnership in the name of Gilbert J. Smith.
>
> [23] Finally, all of the figures found in Spreadsheet 5 are taken from accounting documents reviewed by Mrs. Hutchison, with the exception of line 122. That entry relates to a bill issued by Mr. McKnight on behalf of the partnership to Mrs. Hutchison personally. Mrs. Hutchison's payment on that account was applied

> partnership debts. Mrs. Hutchison testified that while the file associated with the legal work and bill appears on the client summary sheet provided by Mr. McKnight, she has no independent accounting record supporting the bill or the payment she made on that account. It appears that the monies came to Mr. McKnight directly from another solicitor's trust account.
>
> [24] Mrs. Hutchison noted the following corrections to be made to Spreadsheet 5:
>
> - The amount shown as received with respect to file 12468 (line 177 under Column J) is misstated. The amount received is $1,347.75. The balance of $1,190.45 should show as a receipt to the New Firm on behalf of the partnership in line 33. In other words, the client on file 12468 fully paid the account billed post-dissolution. The error appears to be an innocent juxtaposition of the final two numbers in the respective files, with all monies coming from the same trust account (13060);
> - Line 215 is a duplication of the information found at line 49 (this WIP was not billed);
> - The amount billed in line 65 (file 12181) should be attributed to file 11720 at line 64. As can be seen from exhibit 64, both files involve the same client;
> - On line 52, the amount received (Column H) should be stated as $2,500;
> - Line 80 should not be included in the Spreadsheet (solely a Gilbert Smith file before and after dissolution);
> - Lines 45 and 140 were Gilbert Smith files in the partnership but carried over to the New Firm by Mr. Hutchison.

[39] Unfortunately, the Master did not determine the amounts that the personal defendant should have billed for work performed prior to the dissolution of the partnership, as set out in direction 9(a). On this aspect of the reference, she reported only that:

> [63] Accordingly, subject to the trial judge's findings with respect to the personal defendant's obligations as a fiduciary in his billing practices, I recommend to the court that the amount the personal defendant should have billed in fees is at minimum $10,829.39 and at maximum $112,093.50.
>
> [64] In addition, the court might include the anticipated billing of file 6393 ($7,181.25 in fees and $1,078.36 in disbursements) in this aspect of the parties' final accounting.

[40] In the result, it is necessary for me to determine what should have been billed by the personal defendant. Before doing so, I will discuss the directions in 9(b) to (g).

[41] With respect to direction 9(b), I now have the benefit of the detailed accounting of the composition of the funds held in trust from billings rendered on behalf of the parties' partnership. It is in the form of a document entitled "Donald D. McKnight – Royal Bank Account in trust for Smith Hutchison" and discloses that funds in the amount of $12,522.29 were deposited in that account on February 10, 2011, attributed to J. Michael Hutchison as "Funds held on behalf of partnership". A second entry for the same date records the sum of $27,284.32 attributed to J. Michael Hutchison as "Funds held on behalf of 574316 B.C. Ltd." The third entry on the document records the sum of $12,500 attributed to Tees Kiddle Spencer for the settlement of a case on May 24, 2011. The fourth entry records the sum or $46,750 attributed to Marwest Management for the "Ashbury Place distributions" on October 4, 2011, and the fifth and final entry records the sum or $65,000 attributed to Maryland Enterprises for the "Sale of Ashbury Pl." on November 2, 2011.

[42] It is clear from this document and Mr. McKnight's evidence that the $171,000 referred to in para. 81 of my initial reasons (the amount the partnership account held at the time of those reasons) was from the sources described in that document.

[43] This conclusion is reinforced by the personal defendant's concession in para. 59 of his respondent's factum, filed on the appeal of my decision, wherein he stated, in part, "The evidence was that the Personal Respondent had recovered the sum of $201,608.54 of partnership monies and accounted to the Appellant for its application, entirely on behalf of the Partnership. However, this finding on the part of the Chief Justice cannot be shown to be material as it would not have affected the outcome in any way…"

[44] In answer to direction 9(b), the determination of the amount the personal defendant did bill for work performed prior to the dissolution of the firm, the Master reported:

> [65] Spreadsheet 5 addresses this term of the Order. The total amount billed as of the date of the reference is $238,629.32 (Columns G + I).

[45] I am prepared to accept that figure for the defendant's billings as accurate with the exception of six files. While the Master found that the personal defendant conceded that he did not bill files 12407, 12294, 12358, 12296, 12431, and 12314 at the trial before me, I accept the defendant's submission that he made no such concession and that he did bill these files. Therefore, he billed an additional $10,667.11, although, as discussed at paras. 152 and 153 below, files 12296 and 12407 were not billed for all of the WIP and disbursements recorded and the shortfall must be taken into account in direction 9(a).

[46] In answer to direction 9(c), the Master reported that:

> [66] The personal defendant has tendered evidence as to his recovery on partnership files, as set out in Spreadsheet 5 and further described in paragraphs 35 to 38 of his Affidavit #7. The amount recovered on these billings is $223,163.95 (Columns H + J with corrections noted above).

[47] I accept the Master's conclusion on direction 9(c), and do not find it necessary to comment on it, as the Master found that the defendant accounted for all but billings on files taken over by the defendant from a former partner, and I find that the fees on files taken over from the former partner need not be accounted for to the partnership by the defendant, as discussed at para. 93 of my initial reasons for judgment.

[48] In her Report, the Master advised that the parties reached a settlement with respect to direction 9(d), the value of the partnership assets taken by both the plaintiff and the defendant, as of the date of dissolution of the partnership, and so refrained from doing her own assessment of the value of such assets. The Master did not mention the value attributed to these assets by the parties.

[49] Mr. McKnight addressed the information required in answer to direction 9(e) in his affidavit sworn September 26, 2017, which he relied upon before the Master.

[50] The defendant disagreed with the conclusions of the Master with respect to direction 9(e). He contended that she noted that I found, in para. 85 of my reasons, that the evidence supplied by the plaintiff at trial did not permit a determination of

exactly what the plaintiff had done with monies, or, for that matter, exactly what monies he had received, on behalf of the partnership.

[51] While this is indeed what I found, it was without the benefit of the plaintiff's affidavit sworn September 26, 2017, which was before the Master and subsequently before me. I am satisfied that it provides the detail to the Master that was lacking before me in 2015.

[52] The Master quantified the amount to be determined pursuant to direction 9(e) at $123,436.40, as at July 15, 2005. The defendant contends that the Master "simply got it wrong when she stated in para. 46 that he did not dispute the plaintiff's evidence with respect to the direction 9(e)."

[53] What the Master determined with respect to the plaintiff's wife, Mrs. McKnight's evidence regarding directions 9(e) and (f) was:

> To reiterate, the evidence with respect to these two issues is contained in the affidavits of the plaintiff and Stacey McKnight. As such, there is not need to report on item 9(g) of the Order. In my view, Mrs. McKnight's evidence was not seriously challenged on cross-examination and ought to be accepted. However because the plaintiff's evidence requires the registrar to revisit or reconsider both the evidence presented at trial as well as findings made by the trial judge on that evidence, I am unable to make any conclusive recommendations with respect to these terms of the Order.

[54] The defendant contended that by commenting that Mrs. McKnight's evidence was not seriously challenged in cross-examination, she failed to appreciate how that cross-examination established the substantial limits in Mrs. McKnight's evidence and what it can be relied on for.

[55] I disagree. While I might not have chosen the adjective "seriously" to describe the challenge to Mrs. McKnight's evidence, I find that in the context that it was used by the Master, it was intended to convey that the cross-examination of Mrs. McKnight did not establish any compelling reason to reject her evidence. Having reviewed that cross-examination, I agree.

[56] The Master's findings with respect to direction 9(f) was, as noted above, that she accepted the figures from Mrs. McKnight's affidavit. I accept this finding. As a result, the total amount paid by the plaintiff for partnership obligations following the dissolution of the partnership is $108,404.82.

[57] While the parties have minor complaints with the figure arrived at by the Master, and having rejected the contention that Mrs. McKnight was not effectively challenged in cross-examination, I accept the Master's findings on directions 9(e) and (f), and therefore do not find it necessary to comment on direction 9(g), as I accept that the plaintiff accounted to the Master for his billings.

[58] As I have accepted the Master's findings with respect to directions 9(b), (c), (e), and (f), and directions 9(d) and (g) do not require further comment, the only accounting left to be done is that under direction 9(a).

[59] I turn now to consider the appropriate amount that the defendant must reimburse the partnership for unbilled WIP and disbursements.

B. How much must Mr. Hutchison reimburse the partnership for unbilled work and disbursements?

i. Work in progress

[60] The determination of the appropriate account to be rendered by a lawyer to a client is more a matter of discretion than an accounting exercise. Determining the appropriate fees charged by lawyers is done with reference to s. 71(4) of the *Legal Profession Act*, S.B.C. 1998, c. 9, and the principles laid down in *Yule v. Saskatoon (City) [No. 4]* (1995), 17 W.W.R. 305 at paras. 19–20 (Sask. Ct. Q.B.). Section 71(4) provides:

> 71(4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including:
>
> (a) the complexity, difficulty or novelty of the issues involved,
>
> (b) the skill, specialized knowledge and responsibility required of the lawyer,
>
> (c) the lawyer's character and standing in the profession,

> (d) the amount involved,
>
> (e) the time reasonably spent,
>
> (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
>
> (g) the importance of the matter to the client whose bill is being reviewed, and
>
> (h) the result obtained.

[61] Similarly, Mr. Justice Thomson commented in *Yule* that:

> 21 In fixing the remuneration of the plaintiff in this case all factors essential to justice and fair play must be taken into account: *Re Solicitor* (1920) 47 O.L.R. 522, affirmed on appeal, 48 O.L.R. 363. The circumstances to be considered in arriving at the proper amount are the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation in which the services were rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in his profession of the counsel; the results secured, and to some extent at least the ability of the client to pay: *Murphy v. Corry* (1906) 7 O.W.R. 363.

[62] More recently, for other than contingency fee retainers, lawyers have evolved to a more slavish reliance on timesheet recordings of the time that they devote to a particular client file as the principle basis for their accounts. In my view, timesheet entries alone cannot overshadow the other factors identified in *Yule* that must be considered in the determination of an appropriate account.

[63] The realities of modern practice can and often do oblige lawyers to consider reducing their accounts despite recorded time for such things as client development, goodwill, and the recognition that, for some clients who have recurring needs for legal assistance, some matters simply should not result in an account based on the time spent, or perhaps no account should be rendered at all.

[64] When lawyers practice on their own, they are free to discount their accounts for whatever reasons they deem appropriate. By contrast, when a lawyer is responsible to partners or employers for his or her billings there may be less discretion to be exercised.

[65] In this case, two lawyers practised together and, for some time, with other lawyers. Their differences have resulted in the need to determine what recorded time for WIP ought to have been billed by the defendant. The plaintiff's work was largely based upon contingency fee arrangements which rendered his time recording to be of limited importance. The defendant's work was largely more traditional corporate work at fixed rates for certain activities, or other types of work that was billed more or less on the basis of his recorded time on those client files.

[66] The defendant gave evidence that it was his invariable practice to write off some or all of his recorded time for some matters and some clients. To the extent that this practice was agreed to or acquiesced in by the plaintiff, it could excuse the fact that significant amounts of the personal defendant's WIP were never billed.

[67] However, the defendant also gave evidence that it was only billable work that went to the firm's billing department, and that the firm's practice throughout the years of the partnership was to review the partnership's WIP each summer and to assign some work-in-progress and accounts receivable to the "doubtful" file list. The defendant said that the capital account of the parties did not contain receivables that were deemed to be uncollectible.

[68] But to what extent was this practice agreed to or acquiesced in by the plaintiff, and to what extent should it apply to the recorded WIP?

[69] The defendant noted that the plaintiff identified some 36 files for which he was responsible, where the plaintiff exercised his discretion to reduce or refrain from billing with respect to his files for the partnership. The defendant does not suggest that the plaintiff was wrong to have exercised that discretion, but states that it is corroborative evidence of the existence of the discretion which became part of the terms and conditions of the partnership agreement, and there is no reason nor any legal basis, therefore, to now impose a different standard.

[70] I find that not all of the recorded time and disbursements recorded in the partnership's accounting records was expected to be billed to the clients, and that

each of the personal parties could exercise some discretion as to when and how much the partnership's clients would be billed.

[71] I do note, however, that there was a factor that would benefit the defendant if his WIP was significantly greater than that of the other lawyers with whom he practiced in partnership, and that related to the capital accounts of the partners. The capital accounts were determined in part by the WIP that remained after write-offs.

[72] Mr. Jackson is a chartered accountant with the firm of Trenholme Jackson Eade. That firm were the accountants for the partnership. He was asked and explained that:

> Q: … what was the process that you followed for the purposes of preparing financial statements for the firm?
>
> A: Well, we would receive the accounting records from the bookkeeper after the year-end date had passed. We would take those records and we would look at them and obtain supporting documentation to support the amounts reflected in the records and then we would put together the financial statements and we would review them with the partners and ask for their comments of any further details that we required to finalize them.
>
> Q: And for matters including figures related to work in progress and accounts receivable did you follow any practice in that regard?
>
> A: We would obtain a listing of accounts receivable for the firm by partner and that would be considered accounts receivable, and also for work from progress, I believe, and we would then review it and ask for the partners of the firm to identify any accounts that were doubtful of collection or any work in progress that was doubtful of being fully billed.
>
> …
>
> Q: Did you see any consistent pattern about who might have significant write-offs on a regular annual basis?
>
> A: There was a consistent pattern that went on for a period of time, and that was - - Mr. Hutchison's write-offs were significantly higher than the other partners on a consistent basis.

[73] The net WIP figures were one asset of the partnership, and each partner would receive interest on his share of the net WIP. If the WIP for a partner was exaggerated, it would result in greater interest than warranted.

[74] What amounts should Mr. Hutchison have billed for work performed prior to the dissolution of the partnership that he did not bill?

[75] The Master explained in her Report that columns H and J from Spreadsheet 5 showed the amounts received on bills issued by the defendant totalling $223,163.95, and reported that:

> [40] Although possibly beyond the scope of this report, Mr. Hutchison testified to having sent out the 20 bills on or about June 1, 2005 for work performed prior to the dissolution of the partnership. The amount billed and the recovery on those bills was as follows:
>
> - #12539 (line 264) - $417.17 billed and no recovery. The file was not carried over to the New Firm;
> - #12626 (line 27) - $481 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full;
> - #12515 (line 31) - $596.20 billed and no recovery. The file was carried over the New Firm but no WIP has accumulated nor disbursements incurred;
> - #12402 (line 108) - $767.75 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full;
> - #12361 (line 8) - $54.26 billed and recovered;
> - #12538 (line 99) - $4,691.65 billed with no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full;
> - #12356 (line 71) - $666.90 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full;
> - #12322 (line 67) - $508.23 billed and no recovery. The file was carried over the New Firm but no WIP has accumulated nor disbursements incurred;
> - #12296 - (line 89) - $798.00 billed (discounted) and no recovery to date. However, the client has been in contact with Mr. Hutchison and has apparently promised to pay the account upon the completion of a particular real estate transaction. Mr. Hutchison is confident that the bill will be paid;
> - #12265 (line 23) - $314.87 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full;

- #12254 (line 66) - $544.20 billed and no recovery. The file was carried over the New Firm but no WIP has accumulated nor disbursements incurred;
- #12181 (line 65) - two bills were issued on the same day under the same file number but referenced two separate matters: $30,436.61 billed and no recovery, and $328.84 was billed with no recovery. The file was carried over to the New Firm but no WIP has accumulated nor disbursements incurred;
- #12403 (line 22) - $82.32 billed and no recovery. The file was carried over to the New Firm but no WIP has accumulated nor disbursements incurred;
- #12000 (line 107) - $369.07 billed and no recovery to date. Mr. Hutchison is confident that this bill will be paid as it is the same client who has promised to pay the bill on #12296 above. The file was carried over to the New Firm but no WIP has accumulated nor disbursements incurred;
- #11999 (line 227) - $216.60 billed and no recovery. The file was not carried over to the New Firm;
- #11744 (line 70) - $29.44 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full;
- #12361 (line 8) - $474.10 billed and no recovery;
- #11108 (line 113) - $5,297.51 billed and no recovery;
- #10665 (line 183) - $3,734.77 billed and no recovery.

[Footnotes omitted.]

[76] Although these bills were sent out by Mr. Hutchison, he advised the Master that he made little or no effort to collect the accounts. I must therefore determine what amount should have been recovered from the bills that were rendered by the personal defendant.

[77] In para. 23 of her Report, the Master stated that the file recorded at line 122 of Spreadsheet 5, and the bill that was on the client summary sheet provided by the plaintiff, involved Mrs. Hutchison (this being her file with the firm), who had no independent accounting record supporting the bill or the payment she made.

[78] In fact, Mrs. Hutchison testified that she had received a bill and that she had paid it, but there was no record of that in the client ledger or the client listing that was produced after those payments had been made.

[79] At para. 23 of the Master's Report, she noted that the funds for the full amount of the account had been applied directly in payment of partnership expenses, as the plaintiff had been informed, rather than in payment to him from her solicitors.

[80] At para. 26, the Master found, and I accept, that Mr. Hutchison conceded in his oral evidence before her that certain matters should have been billed, albeit in some cases with reductions. She listed those as follows:

- line 48, #12512 - $180.39 in fees and $25.00 in disbursements;
- line 257, #11551 - $503.75 in fees, no disbursements recorded;
- line 110, #11190 - $1,525.25 in fees and $62.80 in disbursements;
- line 151, #12022 - $926.25 in fees and $366.30 in disbursements;
- line 153, #12505 - $1,276.25 in fees and $33.50 in disbursements;
- line 157, #12503 - $300 in fees and $26.80 in disbursements;
- line 306, #12511 - $500 in fees and $48.50 in disbursements;
- line 163, #12156 - $900 in fees and $128.56 in disbursements;
- line 165, #12177 - $500 in fees and $53.50 in disbursements;
- line 172, #11998 - $750 in fees and $17.50 in disbursements;
- line 182, #12103 - $600 in fees and $36.10 in disbursements;
- line 190, #10683 - no fees but disbursements of $101.93;
- line 198, #12529 - $200 in fees and $25.60 in disbursements;
- line 104, #12514 - $130 in fees and $328.90 in disbursements;
- line 207, #12531 - $502.50 in fees and $31.00 in disbursements
- line 206, #12528 - $800 in fees and $40.00 in disbursements;
- line 348, #12418 - $308.75 in fees and $34.53 in disbursements;
- line 208, #11691 - no fees but disbursements of $519.96;
- line 210, #12443 - $926.25 in fees plus $366.30 in disbursements.

TOTAL FEES:	$10,829.39
TOTAL DISBURSEMENTS:	$2,246.78
COMBINED FEES AND DISBURSEMENTS:	$13,076.17

[Footnotes omitted.]

[81] In addition to the files listed in para. 80 above, Mr. Hutchison also acknowledged to the Master that he is likely to issue a bill sometime in the future on partnership file 6393 with WIP of $7,181.25 and disbursements of $1,078.36. Mr. Hutchison said that the subject matter on this file was not yet complete but the matter was not carried over into his new firm. I agree with the Master, and I see no reason why the file could not and should not have been billed when the partnership dissolved, and find that the unbilled fees and disbursements of $8,259.61 should have been billed by the personal defendant.

[82] Likewise, I reject Mr. Hutchison's contention that these accounts should be reduced in some fashion, as it is too convenient for him to now shave off parts of this WIP and incurred disbursements. I disallow his proposed reductions in these accounts, with the exception of files 12418 and 11691, discussed at para. 84–85 below.

[83] I accept the Master's findings with respect to these bills with the following exceptions.

[84] First, while the Master found that some reductions were warranted, I disagree with respect to the following files:

a) Mr. Hutchison characterized file 12512 as one for a prospective client, and did not bill the fees and disbursements of $268.75 recorded on the file. He later sent a substantial bill to this client from his new firm, and in my view, ought to have billed for his time at his old firm at that time, or credited the old firm with the recovery of the unbilled fees and disbursements. He did neither, and I find that he must account to the partnership for the entire bill instead of, as the Master found, $180.39 in fees and $25.00 in disbursements.

b) Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of $731.00 on file 12511 and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.

c) Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of $1,493.56 on file 12156. I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.

d) Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of $1,203.75 on file 11998. Mr. Hutchison did bill the client once he established his new firm, and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.

e) Mr. Hutchison said that he did not bill the fees and disbursements of $681.93 on file 10683 because it was a diary file for a family trust. The Master would have only found that he should have billed the disbursements of $101.93. I find Mr. Hutchison's explanation inconsistent with the fact that he previously billed that family, and I reject his explanation for not billing this time and these disbursements and find that he should have done so.

f) File 12529, and closely related file 12527, are files that Mr. Hutchison said he would not bill because of his close relationship with the clients and the minor nature of the work done. I am skeptical of this explanation, as Mr. Hutchison continued to record time for these clients at his new firm. In any event do not regard it as a suitable excuse for his failure to bill the combined $548.35 in fees and disbursements recorded on these files. Although the Master found that Mr. Hutchison should have billed $200 in fees and $25.60 in disbursements for file 12529, I find that he should have billed the total amount for these two files.

g) Mr. Hutchison took file 12514 to his new firm and, once there, billed only one sixth of his fees and disbursements. He did not bill for any of the recorded fees or disbursements of $1,368.90 for the partnership. Fairness, in my view, warrants that he is responsible for one sixth of those fees and disbursements to the partnership, or the sum of $228.15.

h) With respect to file 12528, the Master reduced the fees to $800 and disbursements to $40. I disagree. Mr. Hutchison says that he should have only billed a portion of the total fees and disbursements of $1,063.75 on that file 12528. I do not agree, and find that he should have billed the entire amount.

[85] By contrast, while the Master found that bill 12418 should have been billed at $308.75 in fees and $34.53 in disbursements, Mr. Hutchison conceded that file 12418 should have been billed, but discounted from $308.75 to $300, which the plaintiff did not dispute. I therefore find that the file should have been billed at $300.

[86] Finally, with respect to file 11691, which the Master found that Mr. Hutchison should have only billed for disbursements of $519.96, Mr. Hutchison explained that he had agreed with the client on file 11691 not to send her an account due to the client's abandonment of her claim due to concerns about the risks she faced going ahead. Mr. McKnight conceded that he was not pressing the billing of this file and in the circumstances, I agree that it ought not to have been billed.

[87] This brings the total for fees and disbursements for the files identified by the Master (in para. 80 of these reasons) to a total of $14,692.25. Of this figure, only $6,976.43 was collected.

[88] Mr. Hutchison listed 102 other files in Spreadsheet 5 as files that were not billed even though the recorded WIP and disbursements were in excess of $100. Given Mr. Hutchison's concessions in front of the Master, and the findings of the Master and myself in respect of those files, the number of files that were in dispute before me was further winnowed to 64.

[89] For his part, Mr. McKnight submits that the files and amounts that should have been billed by Mr. Hutchison, but were not, amounted to $112,093.50 in fees, and $13,751.82 in disbursements, for a total of $125,845.32.

[90] The files and the unbilled fees (and the disbursements related to them) not otherwise dealt with above were identified as follows:

Tab	File No.	Client Initials	WIP	Disbursements
10	12423	JW	549.25	28.00
12	12384	JW	404.50	31.60
23	10665	DAR	3,591.25	753.65
24	10785	DAR	835.75	49.32
26	12406	ANR	308.75	26.20
29	11634	AAL	422.50	34.93
30	11793	AAL	292.50	12
31	12470	BCE	130.00	25.00
32	12435	BEL	438.75	33.75
43	7594	MB	2,616.00	273.88
71	11443	BHL	499.00	61.74
75	11917	PB	1,868.50	207.46
76	11478	PB	406.25	82.03
77	11275	TB	682.50	39.00
80	11983	CTEW	81.25	71.93
86	11556	MC	500.00	82.80
87	12501	SC	211.25	25.00
89	11767	DC	250.00	28.00
93	6047	CBA	3,680.75	0
102	12508	CSC	113.75	25.00
108	12251	LC	17,299.75	1,938.65
116	12490	BD	585.00	25.90
127	10567	EPS	195.00	9.50
128	11087	EPS	304.00	176.30
129	12411	ET	568.75	39.80
130	11957	EE	260.00	0
162	11204	HGT	276.25	25.00
163	7270	HGT	487.50	0
164	10496	HGT	1,990.25	593.20
165	12209	HGT	178.75	46.36
167	11937	JH	253.50	153.28
171	11757	RH	390.00	40.06
177	12482	ICL	682.50	32.80

178	12055	ICL	1,170.00	28.16
179	12262	ICL	995.00	79.40
180	12246	ICT	130.00	6.13
183	11157	IPBC	910.00	47.65
186	11025	ISHS	97.50	46.00
200	12318	L	682.50	33.45
205	12313	LTL	260.00	32.73
211	8357	AMM	25,484.75	3,637.70
214	11974	GM	243.75	25.00
220	12488	MM	715.00	26.80
234	12532	DM	292.50	25.00
237	12398	AM	500.00	53.30
266	10301	RPO	471.25	23.29
267	12370	GR	243.75	22.00
271	12113	TEE	1,166.75	45.40
275	11815	ELR	455.00	21.09
278	12363	RJHL	97.50	16.86
291	11358	MS	211.25	11.43
292	12020	MS	633.75	56.50
294	11266	HS	567.25	27.30
299	12275	GCT	390.00	25.00
309	8905	UoV	2,331.75	755.90
311	12487	UoV	162.50	28.00
319	7640	UAE	4,587.00	433.70
320	10545	VIBC	292.50	0
326	8881	WSC	1,045.50	61.09
332	12519	WSI	487.50	32.73
335	12394	JW	1,235.00	170.46
338	12524	WLHL	487.50	51.30
340	9450	YAWA	357.50	0
		TOTAL:	**$88,058.00**	**10,795.51**
	GRAND TOTAL:		**$98,853.51**	

[91] With respect to files 12423, 12384, 12411, and 12394, Mr. Hutchison gave evidence that he could not bill these files, as the principal of the client had left the

jurisdiction. I find that had Mr. Hutchison billed the file in November of 1999, as he said he would, these bills could have been pursued for the entire amount of the fees and disbursements of respectively $577.25, $436.10, $608.55, and $1,405.46.

[92] Mr. Hutchison asserts that file 10785 was billed. I do not accept his submission in that regard. The recorded fees and disbursements on that file amount to a total of $885.07, and I find that they should have been billed.

[93] Mr. Hutchison contends that the recorded time and disbursements of $334.95 for file 12406 represented time that would only be billed in the event that future corporate drafting services were provided. I find that this is inconsistent with other evidence given by Mr. Hutchison, and reject his explanation for the time and disbursements on this file, and find that they ought to have been billed.

[94] Files 11634 and 11793 appear to relate to the same client. Mr. Hutchison offered no reason why the recorded time and disbursements on these files in the amount of $761.93 could not have been billed, and indeed an account was sent to this client for work done by Mr. Hutchison at his new firm. I find that these amounts ought to have been billed by Mr. Hutchison.

[95] Files 12470 and 12435 relate to the same clients, who were the clients for whom Mr. Hutchison took $50,000 from his trust account. He contended that they were incapable of paying any account. Given that the personal defendant ended up covering the $50,000 he took from his trust account, without recovering any funds from these clients, I accept that it would have been pointless to submit these accounts.

[96] File 7594 had work recorded prior to 1992. While it should have been written off, as part of the annual write-offs, I am prepared to accept that by 1999, it was too late to bill this file.

[97] Mr. Hutchison gave evidence that file 11443 had been billed twice in 1997, and the only unbilled time recorded was for “follow-up” work. I do not accept his

explanation for his failure to bill this time, and find that the unbilled recorded time and disbursements of $560.74 should have been billed.

[98] Files 11917 and 11478 relate to the same client. I do not accept Mr. Hutchison's convoluted explanation for his failure to bill these two files, and find that he ought to have billed this client the recorded time and disbursements of $2,564.24.

[99] Although the client on file 11275 was billed by Mr. Hutchison, the file recorded $721.50 in unbilled fees and disbursements. I find that this client should have been billed for this amount.

[100] File 11983 had recorded fees and disbursements of $153.18. The client was billed by Mr. Hutchison at his new firm. As with file 12512, in my view, Mr. Hutchison ought to have billed for his time at his old firm, or credited the old firm with the recovery of the unbilled fees and disbursements. He did neither, and I find that he must account to the partnership for these fees and disbursements.

[101] Mr. Hutchison described the work he had done on file 11556 as work for a close friend of a minimal nature. Of the recorded fees and disbursements on this file of $1,086.05, the plaintiff seeks only $500, and I am satisfied that that amount would have been reasonable to bill the client and hold that a bill in that amount should have been rendered.

[102] Mr. Hutchison gave evidence that the time recorded on file 12501 was treated as non-billable because the file did not go anywhere. I accept his explanation and find that this file should not have been billed.

[103] Mr. Hutchison described the work he had done on file 11767 as work of a minimal nature for a close friend. Of the recorded fees and disbursements on this file of $503.75, the plaintiff seeks only $250, and I am satisfied that that amount would have been reasonable to bill the client and hold that a bill in that amount should have been rendered.

[104] Mr. Hutchison described the work he had done on file 6047 as work done as a courtesy donation because of his connections with his rugby club. Although he did bill this client for a small amount when at his new firm, I accept that the work done could properly be viewed as a donation, but find that what was billed at Mr. Hutchison's new firm should have been credited to the partnership and find that the sum of $326.70 should be taken as what should have been billed for the partnership.

[105] Mr. Hutchison excused his failure to bill file 12508 on the basis that the client had "gone under". While this may be so, it was not the case when the partnership dissolved, and I find that the client should have been billed for the fees and disbursements recorded on the file of $138.75.

[106] File 12251 relates to the same clients as files 12470 and 12435 and I reach the same conclusion with respect to this file as I did with those files: that they were incapable of paying any account and it would have been pointless to submit these accounts.

[107] File 12490 relates to a woman who had worked for the parties as a student. Although Mr. Hutchison continued to record time on the file at his new firm, the matter was not pursued, and I accept Mr. Hutchison's explanation that the file could not be billed.

[108] Files 10567 and 11087 both relate to the same client who Mr. Hutchison described as a close friend. He said that for that reason, and because the file was a general file for a corporate client, he did not bill the recorded time and disbursements of $685.30. I reject this excuse, as Mr. Hutchison did bill the client for a modest amount for work done at his new firm. I find that the client should have been billed for the recorded time and disbursements on these two files.

[109] As with some of the other files discussed above, Mr. Hutchison gave evidence that file 11957 had been billed, and the only unbilled time recorded was for

"follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of $260 should have been billed.

[110] Mr. Hutchison offered no satisfactory explanation for his failure to bill the unbilled fees and disbursements of $301.25 on file 11204, and I find that he should have done so.

[111] There were unbilled fees and disbursements of $487.50 on file 7270, and the file was billed by Mr. Hutchison, albeit for a lesser amount from his subsequent firm. I see no reason why the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.

[112] Files 10496 and 12209 were files for a client from whom Mr. Hutchison took some of the secret profits identified by Grist J. Mr. Hutchison described the first file as a "diary file", but did not provide a satisfactory explanation for his failure to bill the unbilled fees and disbursements of $2,808.56 on these files. I find that he should have done so.

[113] File 11937 related to a criminal matter that was billed when the matter concluded. I accept that in such a case, the likelihood of subsequent billings being recoverable is remote, and accept that it was appropriate not to bill the unbilled fees and disbursements on this file.

[114] File 11757 was a file for the possible sale of an interest that Mr. Hutchison's brother had in a company. Mr. Hutchison said that he would not send a bill to his brother, but in fact that is untrue. He previously billed his brother for attending a meeting in London, England, including the time to fly back and forth from the meeting. It would appear that he also charged his brother's associate for the same flying time. Therefore, I reject as false Mr. Hutchison's evidence that he would not bill his brother for legal work done for him, but on this file, I am prepared to accept that it was appropriate to refrain from billing for the limited work done and disbursements incurred.

[115] Mr. Hutchison provided no acceptable excuse for his failure to bill file 12482, and I find that he should have billed the fees and disbursements of $715.30 on this file.

[116] Mr. Hutchison conceded in his evidence before the Master that he should have billed some amount on file 12055, but not the entire amount of recorded fees and disbursements of $1,198.16. I reject his contention that the entire amount of the unbilled fees and disbursements should not have been billed.

[117] As with file 12055, Mr. Hutchison conceded that he could have billed file 12262, but not the entire amount of the unbilled fees and disbursements of $1,034.40 recorded for the file. Mr. Hutchison did bill the client for another matter once he established his new firm, and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.

[118] Mr. Hutchison said that, because file 12246 was a general file for a corporate client, he did not bill the recorded time and disbursements of $136.13. I reject this excuse, and find that the client should have been billed for the recorded time and disbursements on this file.

[119] Mr. Hutchison said that file 11157 was a corporate miscellaneous file or diary record, and that only a portion of the accumulated unbilled fees and disbursements of $957.65 should have been billed. I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.

[120] Mr. Hutchison said that file 11025 recorded time and disbursements for diary purpose, but had earlier said that the recorded and unbilled fees and disbursements of $143.50 would have routinely been written off. Mr. Hutchison did bill the client for another matter once he established his new firm, and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.

[121] Despite the contrary submission of the plaintiff, it would appear that Mr. Hutchison billed more than the recorded fees and disbursements on file 11368 once he was at his new firm, and I do not think it fair to expect his file to be included under direction 9(a), and I will not do so.

[122] Files 12318 and 12313 relate to the same client. Mr. Hutchison was unable to give a satisfactory answer as to the unbilled fees and disbursements of $715.95 on file 12318, and $292.73 on file 12313, and I find that these fees and disbursements should have been billed by him.

[123] File 8357 is one of a number of files that Mr. Hutchison had for what he described as a professional association that he billed both on behalf of the partnership, and on behalf of his new firm. He was questioned extensively about these files by the plaintiff, and gave what I conclude were obfuscating, evasive, and unconvincing explanations for his failure to render an account for the unbilled fees and disbursements on this file in the amount of $29,122.45.

[124] Mr. Hutchison did bill this client some $89,000 from his new firm. I am unable to discern from his evidence if some of the unbilled time and disbursements in the partnership records were captured in bills rendered by Mr. Hutchison from his new firm, but I find that he has failed to adduce satisfactory evidence why he did not bill for these fees and disbursements and find that he even if he did bill for them from his new firm, he must account to the partnership for not billing them on the partnership's behalf.

[125] File 11974 was a file opened for a woman whose claim, according to Mr. Hutchison, "never went anywhere". Given that the client was an individual, and the fact that the amount was small, I accept that this was a file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements was properly unbilled.

[126] Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of $741.80 on file 12488. I see no reason why all of the

unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.

[127] The unbilled fees and disbursements for file 12532 were not billed, and the personal defendant elected to write off time recorded for this client at his new firm. Given that the client was an individual, and the fact that the amount was small, I accept that this was another file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements was properly unbilled.

[128] The plaintiff conceded that the personal defendant need not have billed all of the recorded time and disbursements on file 12398. He accepted that only $500.00 needed to be billed by the personal defendant on this file, and I find that that amount is what should have been billed by the personal defendant.

[129] As with some of the other files discussed above, Mr. Hutchison gave evidence that file 10301 had been billed, and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of $494.54 should have been billed.

[130] File 12370 was a file with respect to a potential real estate transaction that did not proceed. Given that the client was an individual, and the fact that the amount was small, I accept that this was a file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements were properly unbilled.

[131] Mr. Hutchison explained his failure to bill the fees and disbursements of $1,212.15 on file 12113 on the basis that he did not render bills for his services as the trustee, and did not ever consider that it was appropriate to do so, but that is clearly incorrect. In *Hutchison v. Ridyard*, 2013 BCSC 671, based upon Mr. Hutchison's evidence, Madam Justice MacNaughton found at para. 31 that:

> 31 Mr. Hutchison testified that he told Dr. Ridyard that he would not bill him for the cleanup work until Dr. Ridyard had been discharged from

> bankruptcy and the issues with respect to liability for property transfer tax on the family home repurchase were resolved. In describing their agreement, Mr. Hutchison testified that "at a minimum they had an understanding" but he felt that he and Dr. Ridyard had an agreement that he would not bill until Dr. Ridyard paid off the mortgage he obtained to repurchase his interest in the family home. That did not occur until October 2007, when the property was sold. Mr. Hutchison testified that, pursuant to his agreement with Dr. Ridyard, it was then open to him to render the Accounts. He prepared the accounts in April 2008 but did not send them to Dr. Ridyard until on or about May 24, 2011.

[132] I find that Mr. Hutchison was deliberately dishonest in his effort to avoid the consequences of his failure to bill this file, and find that he should have billed the file.

[133] Mr. Hutchison gave evidence that file 11815 had been billed, and the only unbilled time recorded was for “follow-up” work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of $476.09 should have been billed.

[134] Mr. Hutchison said that he did not bill fees and disbursements of $114.36 on file 12363 because the client went to Mexico, and nothing further proceeded on the file. I am not satisfied that the file could not have been billed and find that it should have been billed.

[135] As with some of the other files discussed above, Mr. Hutchison gave evidence that file 11358 had been billed, and the only unbilled time recorded was for “follow-up” work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of $222.68 should have been billed.

[136] File 12020 involved the same client as file 11358. Mr. Hutchison explained his failure to bill this file on the basis that the file did not proceed, and said that if he had rendered any account, it would not have been for all of the recorded fees and disbursements of $690.25. I do not accept his explanation for his failure to bill this time, and find that the recorded fees and disbursements should have been billed.

[137] Mr. Hutchison gave evidence that file 11266 had been billed, and the only unbilled time recorded was for “follow-up” work. I do not accept his explanation for

his failure to bill this time, and find that the unbilled recorded time of $594.55 should have been billed.

[138] File 12275 was a file with respect to a potential real estate transaction that did not proceed. Given that the client was an individual, and the fact that the amount was small, I accept that this was a file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements were properly unbilled.

[139] Mr. Hutchison sent a number of bills to the longstanding client on files 8905, and conceded that he could offer no clear explanation for his failure to bill the accumulated fees and disbursements of $3,087.65 on the file. I find that he should have billed this amount.

[140] Mr. Hutchison had no reasonable explanation for his failure to bill the same client for the outstanding fees and disbursements of $190.50 on file 12487, and I find that he should have done so.

[141] Mr. Hutchison explained his failure to bill file 7640 on the basis that it had been billed a number of times, and no recent work had been done on the file by November of 1999. He then changed tack and blamed his failure to bill, after the client instructed him to close the file on a lack of diligence. I do not accept that this excuses his failure to bill the fees and disbursements of $5,020.70 on this file, and find that he should have done so.

[142] Mr. Hutchison claimed that he did not bill the outstanding fees and disbursements of $292.50 on file 10545 because it had been billed previously and the only unbilled time recorded was for “follow-up” work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time and disbursements should have been billed.

[143] Mr. Hutchison’s failure to bill file 8881 was first explained on the basis that it was going nowhere and was just recordings of clean up work. However, because he did pursue the client on behalf of his new firm for other work, I see not reason why

he could not have included the recorded time and disbursements in that bill, and find that the unbilled fees and disbursements of $1,106.59 should have been billed by Mr. Hutchison.

[144] File 12519 was a file for a group of clients who owned certain enterprises that Mr. Hutchison assisted with managing, amongst other things. Mr. Hutchison purported to justify his failure to bill the outstanding fees and disbursements of $520.23 on the basis that the file did not develop into the proceedings that had been contemplated. I reject this as a valid excuse for his failure to bill this file, and find that the client should have been billed on this file for $520.23.

[145] Mr. Hutchison described the client on file 12524 as a close friend. He said that for that reason, and because the file was opened on a preliminary basis. He did not bill the recorded time and disbursements of $538.80. I reject this excuse, and find that the client should have been billed for the recorded time and disbursements.

[146] Mr. Hutchison offered the explanation that the time and disbursements of $357.50 recorded on file 9450 must have been “mis-entered”. I do not accept that that was the case, and find that the amount should have been billed by Mr. Hutchison.

[147] In addition to the files listed at para. 90 above, the plaintiff argues that files 12526, 12525, and 12356 should also have been billed.

[148] File 12526 was billed, but only in the amount of $481.00, rather then the total fees and disbursements recorded of $626.25. The client has been subsequently billed by Mr. Hutchison at his new firm, and I see no reason why the entire amount recorded for this client for the former firm should not have been billed. I find that a further $145.25 should have been billed to this client.

[149] File 12525 was billed, but only in the amount of $596.20, rather then the total fees and disbursements recorded of $784.95. The client has been subsequently billed by Mr. Hutchison at his new firm, and I see no reason why the entire amount

recorded for this client should not have been billed. I find that a further $188.75 should have been billed to this client.

[150] The recorded unbilled time and disbursements for file 12356 is $569.10. Mr. Hutchison billed this client from his new firm for work done there, and ought to have billed for his time at his old firm, or credited the old firm with the recovery of the unbilled fees and disbursements. He did neither, and I find that he must account to the partnership for these fees and disbursements.

[151] Finally, with respect to files 12296, 12431, 12407, 12358, 12314, and 12294, the plaintiff contends, and I agree that:

a) while file number 12296 listed on line 89 of the spreadsheet was billed at $798.00 it should have been billed out at $946.05;

b) while file number 12431 listed on line 90 of the spreadsheet was billed at $2,038.90 it should have been billed out at $1,415.94;

c) while file number 12407 listed on line 91 of the spreadsheet was billed at $2,378.43 it should have been billed out at $2,401.09; and

d) while file number 12358 listed on line 99 of the spreadsheet was billed at $4,691.65 it should have been billed out at $4,129.42.

[152] In para. 12 of her Report, the Master stated that the defendant admitted the six files identified in direction 9(b) should have been billed. The personal defendant argued that the evidence before the Master was not to that effect. He contended that the files numbered 12358, 12296, 12431, 12314 and 12407 were in fact already billed. I accept that the defendant is correct that these files were in fact billed, although file 12296 was not billed for all of the WIP and disbursements recorded, as noted at para. 75 above. There was a shortfall in the billing of this file of $148.05, which I find should have been billed. Likewise, there was a shortfall of $22.66 on file 12407. The other files were billed in excess of the recorded WIP and disbursements.

[153] Therefore, Mr. Hutchison should have billed an additional $170.71 on these files.

[154] I am satisfied that file number 12294 was not billed but there was no record of WIP identified to be billed, and only $.30 in disbursements, so I will ignore this file.

[155] The total amount of fees and disbursements that should have been billed by Mr. Hutchison under direction 9(a) is therefore the sum of $88,472.05. That number is based on:

a) The total number of files that Mr. Hutchison conceded should have been billed, taking into account reductions accepted by myself and the Master, of $14,692.25.

b) The amount Mr. Hutchison should have billed for fees and disbursements on the remaining disputed files at paras. 91–146 of these reasons, being $64,591.63.

c) The amount Mr. Hutchison should have billed for file 6393, at para. 81 of these reasons, being $8,259.61.

d) What should have been billed for the three additional files discussed at paras. 147–150 of these reasons, and the shortfall from the files discussed at paras. 151–152 of these reasons, being $928.56.

[156] The defendant did collect the sum of $6,976.43 on the accounts that he did render. This reduces the figure for direction 9(a) to $81,495.62.

[157] Of the files that I have found Mr. Hutchison should have billed, I am satisfied that not all of them could have realistically been recovered upon. Some discount should be applied to those amounts that should have been billed. I have concluded that the discount should be 20%. This leaves the sum for which the defendant must reimburse the partnership for unbilled WIP and disbursements at $65,196.50.

[158] Therefore, in summary:

a) The amount that Mr. Hutchison should have billed for work performed prior to the dissolution of the firm is $88,472.05 (direction 9(a)).

b) The amount that Mr. Hutchison did bill for work performed prior to the dissolution of the partnership is $238,629.32 (direction 9(b)).

c) Direction 9(c) is satisfied.

d) Direction 9(d) is also satisfied, as the parties reached a settlement during the Registrar's hearing with respect to the value of the partnership assets taken by each of them at the date of the dissolution of the partnership.

e) The amount that Mr. McKnight recovered from work completed before dissolution is $123,436.40 (direction 9(e)).

f) The amount that Mr. McKnight paid for partnership obligations following the dissolution of the partnership is $108,404.82

g) Direction 9(g) is satisfied.

C. Breach of fiduciary duty

[159] Mr. McKnight seeks equitable compensation for Mr. Hutchison's breaches of fiduciary duty. Specifically, for neglecting, failing, or delaying billing his WIP, which caused losses to the partnership, and for failing to pay the plaintiff the "secret profits".

[160] Throughout the litigation, Mr. Hutchison has already been found to have breached his fiduciary duties. In his 2002 Reasons, Grist J. ordered the defendant to account for his "secret profits", finding Mr. Hutchison's duties to Mr. McKnight fiduciary in nature: at paras. 64–66.

[161] In his 2011 Reasons, Halfyard J. considered the plaintiff's claim that Mr. Hutchison had committed acts, and failed to do acts, which were "inconsistent with the duties owed by one partner to another". At para. 49 he concluded that the defendant failed to bill his clients for a "substantial part of his work in progress as it

existed at the time the parties ended their partnership practice together", but was unable to determine, on the evidence before him, the amount that Mr. Hutchison had to account to the partnership.

[162] In addition to these breaches, the plaintiff claims damages for various breaches by the defendant of his fiduciary duties to the partnership. Specifically, for the losses occasioned to the partnership as a result of the personal defendant's neglect, failure, or delay in billing his work-in-progress and the amount that the personal defendant ought to have paid to the plaintiff from the secret profits determined by Grist J. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 73, Mr. Justice La Forest wrote:

> It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the appellant is entitled to be restored to the position he was in before the transaction. The trial judge adopted this restitutionary approach and fixed damages at an amount equal to the return of capital, as well as all consequential losses, minus the amount the appellant saved on income tax due to the investments.

[163] The plaintiff contends that the partnership should be granted equitable compensation for the personal defendant's breach of fiduciary duty, and I agree.

[164] I assess that compensation as follows:

a) $476,258.59 share of secret profits; and

b) $88,472.05 in damages for the total amount that the personal defendant should have billed in fees and disbursements but did not.

[165] As the accounts of the partnership have now been settled, the partnership should be wound up pursuant to the *Partnership Act*, R.S.B.C. 1996, c. 348.

2. Tort of conversion

[166] The tort of conversion involves the wrongful interference with the goods of another: *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51 at para. 3. In *Ask v.*

Mikolas, 2010 BCSC 127, Mr. Justice Cullen (as he then was), described the tort of conversion as follows, at paras. 125–126:

> [125] The tort of conversion involves the wrongful interference with another person's chattels such as taking, using or destroying the goods in a way that is inconsistent with the owner's ownership of or title to the goods. See: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31.
>
> [126] The elements that must be proven to establish the tort of conversion are:
>
> (a) a wrongful act by the defendant involving the goods of the plaintiff;
>
> (b) the act must consist of handling, disposing, or destroying the goods; and
>
> (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

[167] The defendant's wrongful act must be a deliberate act of interference or dealing with the property that is inconsistent with, or repudiates, the plaintiff's right to it: *Insurance Corp. of British Columbia v. Suska*, 2011 BCCA 51. The defendant's conduct must be intentional. Negligent dealing with goods does not constitute conversion: Lewis N. Klar, *Remedies in Tort* (Toronto: Thomson Reuters, 2019).

[168] Funds and money can be the subject of a conversion claim: *Columbere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248; *Reliable Mortgages Investment Corp. v. Chan*, 2016 BCSC 405

[169] The plaintiff seeks the following amounts for conversion:

a) $8,426.10 for seven interest payments on the loan to address the trust fund deficiency;

b) $9,000.00 paid for the personal defendant's legal fees;

c) $3,557.08 paid for legal fees for the corporate defendant;

d) $7,363.66 for personal accounting fees; and

e) $6,304.88 for other unidentified payments made by the personal defendant from partnership funds.

[170] In his 2011 Reasons, Halfyard J. dealt with one aspect of this claim. At para. 128, he found that Mr. Hutchison misused partnership money on one occasion, when he rendered a bill for $2,397.06 for legal fees for the corporate defendant. Therefore, that amount must be deducted from (c) above, as it has already been determined.

[171] In addition to his findings, I find that these various payments totalling $32,255.66 were wrongly made by the personal defendant from partnership funds, and I find that conversion has been established.

[172] The remedy for conversion is that the defendant pay the value of the property at the time that it was wrongfully taken, together with the consequential loss: *Kostiuk, Re*, 2002 BCCA 410 at paras. 34, 66. Therefore, I find that Mr. Hutchison must pay $32,255.66 plus the consequential loss of these funds to the partnership.

3. Punitive damages

[173] In *Whiten v. Pilot Insurance Co*., 2002 SCC 18, Mr. Justice Binnie discussed the purpose of punitive damages at para. 36:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[174] The objectives of such damages were described by Binnie J. as retribution, deterrence, and denunciation.

[175] As Mr. Justice Goepel observed at para. 79 in *Marchen v. Dams Ford Lincoln Sales Ltd.,* 2009 BCSC 400:

> The award for punitive damages must be proportionate to blameworthiness of the defendant's conduct, the degree of vulnerability of the plaintiff, the potential harm directed specifically at the plaintiff and the need for deterrence.

[176] In *Huff v. Price*, 25 B.C.L.R. (2d) 364 (S.C.), aff'd 76 D.L.R. (4th) 138 (B.C.C.A.), Mr. Justice Taylor gave a punitive damage award in addition to the award for losses experienced by investors due to the breach of his fiduciary duty by a chartered accountant engaged in stock promotion. At page 367–69 Taylor J. wrote:

> I find that the defendant Leslie Price was in breach of his fiduciary duty to each plaintiff from the time he first invested her funds in Cumo stock. I find that each is entitled to receive as damages the full value of her account at that date increased at 20 per-cent per annum compounded annually for four years, in the case of Mrs. Huff from June 15, 1979, and in the case of Mrs. Donnelly from November 16, 1979, as a reasonable increase in value of a properly-managed portfolio up to the date when they could reasonably have been expected to re-assert control over their investments. They are entitled also to simple interest on the whole sum thereafter to this date at the pre-judgment interest rates allowed from time to time during that period by the district registrar on default judgments.
>
> Because Mr. Price committed gross breaches of trust in his frauds against the plaintiffs, and encouraged them to make expenditures they would not otherwise have made, and because no other penalty appears to have resulted from his conduct, nor has he sought to explain, apologize or make amends for it, the case is one in which substantial punitive damages are warranted. I assess punitive damages in favour of Mrs. Huff at $150,000 and in favour of Mrs. Donnelly at $100,000.

[177] The conduct of the personal defendant before and after the dissolution of the partnership has been reprehensible. It is hard to envisage how one partner could take such advantage of another, and the scope of the secret profits withheld by the personal defendant cannot be overstated. Caught out in this nefarious conduct, the personal defendant failed to do what he said he would, and what he was obliged to do: submit accounts for work done for the partnership. Since then he has been at considerable pains to delay his judgment day, withholding information from the plaintiff and dragging the litigation out to lengths that cannot be condoned.

[178] I have previously criticized the plaintiff who has failed to approach the litigation in a manner that might have ended it much sooner, but the sad fact is that

the plaintiff was greatly wronged by the personal defendant, and is entitled to damages for the wrongs done to him.

[179] Despite the passage of time since it was decided, I find that the upper end of the range of punitive damages awarded in *Huff* is a suitable award for the conduct that the personal defendant engaged in, and I award to the plaintiff in this case the sum of $150,000 for punitive damages.

4. Interest claims

[180] I will address court order interest below, but in addition thereto, the plaintiff seeks interest for monies borrowed to meet his business expenses that he would not have had to borrow if Mr. Hutchison had accounted for his secret profits when he was ordered to do so. I find that the delays in the resolution of the plaintiff's claims are more the fault of the defendant than the plaintiff, but do not find that the plaintiff is blameless in the delays. While he incurred interest charges, so too did the defendant, and I have refused to take these into account in determining damages. For this reason I have concluded that I must treat the plaintiff's claim for interest costs in the same manner, and therefore decline to award him compensation for the interest charges he has incurred. The plaintiff is entitled to court order interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[181] For the amount withheld from the partnership, net of the set off that I determined, the interest will run from the date of the termination of the partnership that I have determined: November 8, 1999.

[182] On the fees and disbursements that I have determined should have been billed and collected, but were not, the interest will run from May 8, 2000, which is six months following the termination of the partnership.

[183] The plaintiff's claim for conversion was not pleaded until December 11, 2018. In the result, interest will not run on this head of damages until the date that the claim was made.

[184] These awards are awards that must be paid by the defendant to the credit of the partnership. From these funds, together with the monies held in trust by the plaintiff discussed at para. 42 above, the obligations of the partnership must be addressed in the order of priority set out at para. 25(d) above.

[185] My award for punitive damages is an award that is personal to the plaintiff and is to be paid to him by the defendant and will not form a part of the funds that are available for payment of the partnership's obligations. This award is to address the conduct of the defendant during and following the termination of the partnership. Interest will run on this award from November 8, 2009, which is roughly halfway through the period of conduct it is intended to address because the basis for the award is Mr. Hutchison's ongoing conduct, after the law suit was initiated.

IV. Conclusion

[186] In summary:

a) Pursuant to Grist J.'s finding that Mr. Hutchison must account for his secret profits, the amount Mr. Hutchison owes the partnership is $476,258.59.

b) Mr. Hutchison should have billed $88,472.05 for work performed prior to the dissolution of the firm. By failing to bill this work, and delaying in collecting the accounts he did bill, he breached his fiduciary duties to the partnership.

c) Mr. Hutchison is liable under the tort of conversion for the wrongful interference of Mr. McKnight's funds. Mr. Hutchison must pay $32,255.66 plus the consequential loss of these funds to the partnership.

d) I award to the plaintiff in this case the sum of $150,000 for punitive damages.

e) With respect to interest:

i. For the amount withheld from the partnership, net of the set off that I determined, the interest will run from the date of the termination of the partnership that I have determined; November 8, 1999;

ii. On the fees and disbursements that I have determined should have been billed and collected, but were not, the interest will run from May 8, 2000, which is six months following the termination of the partnership;

iii. The plaintiff's claim for conversion was not pleaded until December 11, 2018. In the result, interest will not run on this head of damages until the date that the claim was made; and

iv. On the punitive damages award, interest will run on this award from November 8, 2009.

f) With respect to costs, the plaintiff proposed, and I agree that the entitlement of the parties to costs should await these reasons for judgment. Now that they are available, I will permit the plaintiff two weeks to file written submissions, not to exceed 15 pages in length, with respect to costs, and the defendants will have two weeks thereafter to file their submissions with the same 15 page limit. The plaintiff will have one week thereafter to file any written reply, not to exceed five pages in length. The parties need not file briefs of authorities, but must include full citations and paragraph references for any authorities that they rely upon.

The Honourable Chief Justice Hinkson

COURT OF APPEAL FOR ONTARIO

CITATION: Tar Heel Investments Inc. v. H.L. Staebler Company Limited, 2022 ONCA 842
DATE: 20221205
DOCKET: C69771

Huscroft, Nordheimer and Copeland JJ.A.

BETWEEN

Tar Heel Investments Inc.

Plaintiff
(Respondent/Appellant by way of cross-appeal)

and

H.L. Staebler Company Limited, Lisa Arseneau and Debbie Sutton

Defendants
(Appellants/Respondents by way of cross-appeal)

P. A. Neena Gupta and Jeramie Gallichan, for the appellants/respondents by way of cross-appeal

Stephen Gleave and Breanna Needham, for the respondent/appellant by way of cross-appeal

Heard: June 20, 2022

On appeal from the order of Justice Dale Parayeski of the Superior Court of Justice, dated July 19, 2021.

Huscroft J.A.:

[1] The appellants[1] appeal from an order awarding the respondent damages for conversion arising out of the sale of a book of business by Lisa Arseneau to H.L. Staebler Company Limited ("Staebler"). The respondent cross appeals, arguing that damages should also be awarded for the sale of a second book of business by Ms. Arseneau to Staebler.

[2] For the reasons that follow, I would allow the appeal and cross appeal, set aside the decision below, and order a new trial.

BACKGROUND

[3] The appellant Lisa Arseneau works in the transportation insurance industry. She developed a book of business while working at the Kimberly & Associates brokerage. When she joined PDI (the corporate predecessor of the respondent Tar Heel Investments Inc. ("Tar Heel")) in 2009, she brought a number of transportation clients with her (the "Kimberly book"). The basis of her entitlement to take the book of business from the Kimberly & Associates brokerage is not discussed in the trial judge's decision. No findings were made in this regard.

[4] During her tenure at PDI, which lasted several years, Ms. Arseneau developed a book of business as part of PDI's transportation division (the "TRIP book"). The principal of PDI augmented the TRIP book by transferring

[1] The trial judge found that a third defendant, Debbie Sutton, was not liable for anything arising out of her role in providing administrative assistance to Ms. Arseneau and she took no part in this appeal.

transportation clients and their corresponding premiums into it to help sustain the TRIP book in its initial years. In 2015, PDI was purchased by another firm, Jones Brown. Ms. Arseneau was not happy with the sale to Jones Brown and its ramifications. She sold a combined book of business that included the Kimberly book as well as the TRIP book to the appellant Staebler and, concurrently, commenced employment with it.

[5] PDI brought a claim against Ms. Arseneau and Staebler seeking, amongst other relief, damages for conversion, breach of and inducing breach of contract, breach of confidence, and breach of, inducing breach of, and knowingly assisting in breach of fiduciary duty.

The trial judge's decision

[6] The trial judge began by considering the nature of Ms. Arseneau's relationship with PDI. The trial judge found that Ms. Arseneau never paid expenses at PDI for items such as staff salaries, travel, occupancy, entertainment, licenses, Errors and Omissions insurance, charge backs, and bad debts. He found that these arrangments were inconsistent with operating under a broker support network ("BSN") model, as Ms. Arseneau argued. Ms. Arseneau was paid a guaranteed salary, benefits, and expenses, an arrangement that the trial judge described as speaking more to routine employment than some kind of independent or semi-independent status. The trial judge noted, however, the

evidence of the principal of PDI that even those working under a BSN were required to be employees of PDI due to regulatory requirements.

[7] The trial judge found that an agreement that may have existed between PDI and Ms. Arseneau regarding the Kimberly book was never committed to writing. Although Ms. Arseneau and PDI negotiated over the sale of the Kimberly book prior to her commencing employment with the respondent, they never agreed on a price for the book and no sale of it was completed. PDI believed there was an agreement that it would provide pension rights to Ms. Arseneau on retirement, but when PDI was purchased by Jones Brown, Ms. Arseneau declined PDI's offer to transfer $150,000 worth of shares in that company to her in exchange for pension rights. Instead of accepting the offer from PDI, she sold the entire book of business she had worked on at PDI – the Kimberly book as well as the TRIP book – to the appellant Staebler and commenced working for Staebler.

[8] The trial judge found that Ms. Arseneau was entitled to sell the Kimberly book to Staebler because she had never sold it to PDI, so "[b]y default" she continued to own it, "to the extent that it can be properly identified".[2] He found, however, that she never owned the TRIP book and by selling it she committed the tort of conversion. The trial judge did not address the other causes of action

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[2] The legal basis for Ms. Arseneau's right to sell the Kimberly book is unexplained.

asserted by the respondent, stating that the other claims “come around full circle to the act or omissions making up the conversion”. He did say, however, that he was not satisfied that Ms. Arseneau owed the respondent a fiduciary duty, as it was inconsistent with the respondent’s position that she was an employee at all times and she was not sufficiently senior in management to have fiduciary duties.

[9] The trial judge stated that 90 percent of the clients listed in the books of business followed Ms. Arseneau to Staebler within two years of her joining that firm, but he also said that it was not clear how much of this movement was attributable to the sale of the books as opposed to client loyalty to Ms. Arseneau. No findings were made in this regard. The trial judge acknowledged that the books, which he treated separately for the purpose of the conversion analysis, were comingled at the respondent’s firm and it was not easy to separate them for the purpose of calculating damages. He calculated damages based on the value of the TRIP book at the time of the conversion. Ms. Arseneau and Staebler were held jointly and severally liable for those damages.

DISCUSSION

The parties’ positions

[10] The appellants argue that Ms. Arseneau was entitled to sell the TRIP book and that the trial judge erred in finding that the sale constituted the tort of conversion. The trial judge wrongly imposed an agreement on the parties and

ignored evidence that Ms. Arseneau owned her book of business – the TRIP book as well as the Kimberly book. Ms. Arseneau renews her argument that she joined the respondent under the BSN model, but says that an employment structure did not support the assumption that the book of business belonged to PDI and there was never any agreement to amend the agreement with respect to the book of business. Ms. Arseneau argues that she had the right to solicit clients on her departure, as there was no restrictive covenant, and the law of conversion did not apply.

[11] The respondent argues that the trial judge properly concluded that Ms. Arseneau committed the tort of conversion by selling the TRIP book and in its cross appeal argues that Ms. Arseneau converted the Kimberly book as well. The respondent argues that an employer presumptively owns the book of business in the absence of an agreement to the contrary. The respondent argues that it paid for the Kimberly book in the context of a retirement plan, the value of which was to be determined objectively based on the value of the clients. The respondent argues that Ms. Arseneau had a fiduciary duty, but even if she did not, she owed a duty of loyalty and good faith to the respondent and breached that duty when she sold the entire book of business. Her ability to compete with the respondent, as a former employer, did not extend to using confidential information acquired while employed with the respondent. Ms. Arseneau's actions in selling the book and using it in her subsequent employment with

Staebler also constituted a breach of confidence and the tort of unlawful means conspiracy.

The focus on ownership

[12] The trial judge's conclusion that the Kimberly book belonged to Ms. Arseneau – "[b]y default" – led him to conclude that she was entitled to sell the Kimberly book to Staebler. There are several difficulties with this conclusion.

[13] The basis of Ms. Arseneau's ownership of the book in the first place is not addressed. It appears to have been assumed that she owned the book when she joined PDI.

[14] Nor does the trial judge make any findings concerning the nature of the book – what it included when Ms. Arseneau commenced working for PDI and what it included several years later when she sold it to Staebler. The trial judge discusses the concept of a book of business in general terms as "an organic thing", with some clients dropping off while others are gained, and some clients who leave may return. Moreover, clients' needs may change, resulting in increased or decreased premiums and commissions paid to the broker. At the same time, the trial judge suggested that the Kimberly book had become comingled with the TRIP book and had to separate the books for the purpose of assessing damages for conversion of the TRIP book.

[15] The finding that Ms. Arseneau owned the Kimberly book is problematic in the absence of findings as to the former Kimberly clients' relationship with PDI. The finding that Ms. Arseneau did not work under the BSN model suggests that the former Kimberly clients had a client relationship with PDI rather than Ms. Arseneau, but there are no specific findings in this regard. This case is unlike *King v. Merrill Lynch Canada Inc.*, 2005 CanLII 43679 (Ont. S.C.), which the respondent proffers as authority for its position that it owned the clients in the Kimberly book in the absence of an agreement to the contrary. In that case, R. Smith J. found, at para. 67, that the clients were clients of the employer and not the employees for many reasons, including evidence as to the nature of the clients' relationship with the broker as opposed to the employees who serviced the accounts. No similar findings were made in this case.

[16] There is also the problem of the evolving nature of the Kimberly book: additions and changes were made to the book over the years once Ms. Arseneau joined PDI. The trial judge states that Ms. Arseneau "owned" the Kimberly book at the time of the sale to Staebler, but qualifies this by saying "to the extent that it can be properly identified". By the time of the sale, the information in the Kimberly book appears to have been comingled with the information in the TRIP book.

Conversion not established

[17] The trial judge's focus on ownership of the book of business caused him to view the case through the lens of the tort of conversion, despite the nature of the property in question.

[18] The tort of conversion "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession": *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at p. 746. It is a tort of strict liability and it is no defence that the wrongdoer did not intend to convert the goods: *Boma*, at p. 746.

[19] It is not settled whether intangible property such as the information in a book of business can be the subject of a conversion claim. Some trial courts have held that the tort does not apply to intangible property: see e.g., *Del Giudice v. Thompson*, 2021 ONSC 5379, at para. 172; appeal transferred to Ont. C.A., C70175; *Mann Engineering Ltd. v. Desai*, 2021 ONSC 7580, 22 B.L.R. (6th) 165, at para. 126; *Utilebill Credit Corporation v. Exit It Contract Consulting Inc.*, 2022 ONSC 2307, at paras. 22-24. Other trial courts have held that it can apply: see e.g., *Brant Avenue Manor Ltd. Partnership v. Transamerica Life Insurance Co. of Canada* (2000), 48 O.R. (3d) 363 (S.C.), at para. 13; *Canivate Growing Systems*

Ltd. v. Brazier, 2020 BCSC 232, at para. 71. There is no authoritative guidance from this court on the issue.

[20] The trial judge does not address the matter and this court cannot do so given the state of the record. Even assuming that the tort of conversion could apply to intangible things, such as a book of business, the trial judge did not make the findings necessary to support the application of the tort in this case: see *Boma*, at p. 746. He stated simply that "[s]elling that which one does not own constitutes the tort of conversion." The difficulty is that information is unlike chattel property. In the normal sort of case involving conversion, an owner is deprived of the use of a chattel because it is taken by another. In this case, the information found to have been converted remained in the respondent's possession; it was copied and provided to Staebler. Use of the information by Staebler may well have had the effect of harming the respondent's business, but the information remained with the respondent while Staebler used it. In short, the trial judge's findings are not adequate to support the conclusion that conversion of the TRIP book had occurred.

The fiduciary claim

[21] The trial judge gave relatively few reasons for finding that Ms. Arseneau did not owe a fiduciary duty to the respondent. He stated that the respondent's claim that she was a fiduciary was inconsistent with its position that she was a

mere employee, and that neither managerial responsibilities nor titles were sufficient to establish a fiduciary duty. He also noted that Ms. Arseneau was not so senior in management as to have been consulted during PDI's negotiations with Jones Brown.

[22] The respondent contests this finding. In my view, there are difficulties with the trial judge's analysis that led to this finding. As I propose to send this matter back for a new trial, I would leave it up to the judge at that trial to determine whether a fiduciary duty was owed by Ms. Arseneau or not.

The other causes of action

[23] The trial judge stated that the other causes of action "[u]ltimately … come around full circle to the act or omissions making up the conversion", and so declined to address the other causes of action advanced by the respondent – breach of contract, breach of loyalty and good faith, breach of confidence, and conspiracy.

[24] This conclusion was in error. The other causes of action did not depend on the conversion claim. They required separate findings in accordance with the law that governed each of them.

[25] In essence, the respondent's claim is that the appellants stole its clients and destroyed its transportation insurance business. The trial judge's finding that 90 percent of PDI's clients listed in the books of business followed Ms. Arseneau

to the appellant Staebler appears to support this claim, but the trial judge makes no findings as to whether or to what extent the loss was attributable to any of the other causes of action.

[26] The components of the other causes of action demonstrate the need for findings unique to them. For example, in *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 635-636, La Forest J. set out the three elements of a breach of confidence as follows: 1) that the information conveyed was confidential; 2) that it was communicated in confidence; and 3) that it was misused by the party to whom it was communicated. No findings were made in regard to these elements, and it is possible that different findings may be made in respect of the Kimberly and TRIP books. This is complicated both by the extent to which the information in the Kimberly book evolved and the extent to which the information in both books was comingled.

CONCLUSION

[27] The trial judge observed that "[t]his case is an object lesson in the perils of parties working together without quite getting around to finalizing the actual terms of their business agreement." He noted the difficulties presented by the evidentiary record and noted that the parties' submissions had been less than helpful.

[28] Unfortunately, the trial judge's decision not to make findings on the various causes of action leaves this court in a difficult position on appeal. It is not possible to make the findings required on the state of the record in this case. In these circumstances, there is no alternative but to order a new trial.

[29] Accordingly, both the appeal and the cross-appeal must be allowed and the judgment below set aside.

[30] I would order a new trial on all of the causes of action.

[31] I would reserve the costs of the first trial to the judge hearing the second trial. The parties shall bear their own costs on the appeal.

Released: December 5, 2022 "G.H."

"Grant Huscroft J.A."
"I agree. I.V.B. Nordheimer J.A."
"I agree. Copeland J.A."

Most Negative Treatment: Distinguished
Most Recent Distinguished: Portage Credit Union Ltd. v. D.E.R. Auctions Ltd. | 1994 CarswellAlta 8, [1994] A.W.L.D. 167, 45 A.C.W.S. (3d) 176, 145 A.R. 395, 55 W.A.C. 395, 15 Alta. L.R. (3d) 418, [1994] 4 W.W.R. 59 | (Alta. C.A., Jan 10, 1994)

1985 CarswellAlta 323
Alberta Court of Queen's Bench

Canadian Imperial Bank of Commerce v. Federal Business Development Bank

1985 CarswellAlta 323, [1985] 3 W.W.R. 318, [1985] A.W.L.D. 236, [1985] A.W.L.D. 237, [1985] A.W.L.D. 256, [1985] A.W.L.D. 257, 30 A.C.W.S. (2d) 376, 36 Alta. L.R. (2d) 186, 57 C.B.R. (N.S.) 13, 60 A.R. 249

CANADIAN IMPERIAL BANK OF COMMERCE v. FEDERAL BUSINESS DEVELOPMENT BANK

Bowen J.

Judgment: January 31, 1985
Docket: Edmonton No. 8203 06931

Counsel: *N.J. Pollock*, for plaintiff.
M.J. McCabe, for defendants Federal Business Development Bank and Coopers & Lybrand Ltd.
D.R. Stewart, in person.

Subject: Corporate and Commercial; Torts; Insolvency

Related Abridgment Classifications

Personal property
III Choses in action
III.9 Priorities
III.9.c Between assignee and holder of statutory lien
III.9.c.ii Miscellaneous

Torts
IV Conversion
IV.1 Availability
IV.1.a Against particular party
IV.1.a.vii Miscellaneous

Headnote

Choses in Action --- Priorities

Torts --- Conversion — Availability — Against particular party — Receiver or trustee in bankruptcy

Secured creditors — Assignment of book debts — Debentures — Priorities — Company granting debenture to defendant which specifically allowed company to assign receivables — Company subsequently granting assignment of book debts to plaintiff bank with defendant's knowledge — Assignment having priority over receivables with respect to book debts existing before debenture enforced.

1985 CarswellAlta 323, [1985] 3 W.W.R. 318, [1985] A.W.L.D. 236, [1985] A.W.L.D. 237...

Receivers — Liability — Conversion — Receiver appointed under debenture — Receiver collecting company's receivables under debenture although valid assignment of book debts giving assignee priority to receivables — Receiver spending receivables in operation of business — Receiver guilty of conversion and liable for damages.

The corporate defendant granted a debenture with fixed and floating charges to the defendant bank. The charges in the debenture covered all the assets of the debtor including its accounts receivable. Subsequently, the debtor granted an assignment of book debts to the plaintiff bank. The debenture permitted the debtor to borrow from banks on the security of its accounts receivable until the security under the debenture became enforceable. Each party was aware of the existence of the other party's security agreement. After default, the defendant bank appointed a receiver, who collected the accounts receivable and expended some of the funds so collected in operating the business. The plaintiff bank brought an action for conversion against the defendant bank, the receiver and the guarantors. The issue was which bank had a prior claim to the accounts receivable of the debtor.

Held:

Judgment for plaintiff.

Since the assignment of book debts was specifically allowed by the debenture, the assignment had priority up to the date the debenture was enforced. The rights of the parties were determined by the wording of the security agreements. The prior crystallization of the floating charge contained in the debenture did not deprive the holder of the assignment of book debts of its rights.

Table of Authorities

Cases considered:

Can. Permanent Trust Co. v. King Art Dev. Ltd., [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, 12 D.L.R. (4th) 161, 54 A.R. 172 (C.A.) — *considered*

Harris v. Bank of Montreal (1984), 51 C.B.R. (N.S.) 228, 31 Alta. L.R. (2d) 24, 53 A.R. 92 (Q.B.) — *applied*

Royal Bank of Can. v. A.G. Can., 25 C.B.R. (N.S.) 233, [1977] 6 W.W.R. 170, 3 B.L.R. 52, 8 A.R. 225, affirmed 29 C.B.R. (N.S.) 227, [1979] 1 W.W.R. 479, 13 A.R. 318 (C.A.) — *applied*

Statutes considered:

Assignment of Book Debts Act, R.S.A. 1980, c. A-47, s. 3(1).

Interest Act, R.S.C. 1970, c. 1-18, s. 13.

Judgment Interest Act, 1984 (Alta.), c. J-0.5, s. 6 (not yet proclaimed).

Authorities considered:

Ashburner, Principles of Equity, 2nd ed. (1933), p. 239.

Bowstead on Agency, 14th ed. (1976), p. 414.

Salmond on Torts, 5th ed. (1920), p. 125.

Action to determine priorities and for damages for conversion of accounts receivable.

***Bowen J.*:**

1 The plaintiff is the holder of an assignment of book debts from the corporate defendant. The defendant bank holds a debenture on the assets of the corporate defendant. The individual defendants are guarantors of moneys advanced by the plaintiff and the defendant bank to the corporate defendant. Coopers & Lybrand were appointed by the defendant bank as receiver under the debenture held by the defendant bank.

2 On 23rd September 1980 the defendant bank authorized a loan of $250,000 to the corporate defendant, such loan to be secured by a debenture constituting a floating charge on the defendant company's assets. This debenture was executed on 20th March 1981 and registered at the companies branch and the central registry on 4th May 1981.

3 The defendant bank advanced $100,000 to the defendant company on 12th December 1980, a further sum of $50,000 on 23rd February 1981 and the balance of $100,000 on 3rd May 1981.

4 Because of the default in payments, the defendant bank appointed Coopers & Lybrand as receiver on 15th January 1982.

5 During negotiations for obtaining the loan from the defendant bank, it was always contemplated that such loan was to obtain capital assets and that the corporate defendant would obtain its operating capital by way of a further loan from some other financial institution, in this case, the plaintiff. On 18th November 1980 the plaintiff approved such operating loan, subject to certain conditions, in the sum of $125,000. Later, this amount was changed to a $75,000 operating credit and in September 1981 the plaintiff started to advance moneys under this credit to the corporate defendant. The balance outstanding as at 10th December 1984, including accrued interest, is $105,411.73.

6 As security, the plaintiff took, amongst other things, a general assignment of book debts on 2nd September 1981 and registered it at central registry.

7 The amount of receivables owing as of 15th January 1981 was found by the receiver to be in the sum of $47,888.26 of which $39,931.41 was collected and expended by the receiver in operating the business.

8 The debenture gave to the defendant bank a fixed and floating charge on all the assets of the defendant company. Section 4(b) allows the defendant company to borrow from bankers on the security of the defendant company's accounts receivable until the security under the debenture becomes enforceable. Section 4(b) reads as follows:

> ... provided that the floating charge hereby created shall not in any way hinder or prevent the Company (*until the security hereby constituted shall have become enforceable and the Bank* shall have determined (by notice in writing to the Company) to enforce the same) from leasing, mortgaging, pledging, selling, alienating, assigning, *giving security to the Bankers under the Bank Act* or otherwise charging, disposing of or dealing with the subject matter of such floating charge in the ordinary course of its business and for the purpose of carrying on the same. And without limiting the generality of the foregoing provision it shall in no way hinder the Company from *borrowing from Bankers or others upon the security of the Company's accounts or bills receivable or mercantile documents or any other property not specifically charged to the Bank by mortgage or otherwise*, such sums of money as the Company may from time to time deem necessary in the ordinary course of the Company's business and for the purpose of carrying on the same. [The italics are mine.]

9 The evidence of the plaintiff's loans officer, one Arsenault, dwelt to some extent on discussions occurring between him and the defendant bank's loans officer as to the defendant bank postponing their security under the debenture to the plaintiff's security on the accounts receivable. The plaintiff wished to have a written postponement to the plaintiff's security on the receivables. His evidence was that the defendant bank said such a postponement was not necessary as it was already built into the debenture. No written postponement was given.

10 At a later date, before the plaintiff approved an operating credit of $75,000, further discussions were held between the two banks, which, according to Arsenault, set up an agreement that the defendant bank had no objections to the assignment of receivables to the plaintiff and that it was satisfied with the reduced operating credit of $75,000. The debenture was in place at this time but the plaintiff did not receive a copy of it, although it was told that the matter of the plaintiff taking priority on

their assignment was provided for in the debenture.

11 The evidence of the defendant bank's loans officer, one Reid, was that, although he had talked to the plaintiff's loans officer at various times, he could not remember discussing priorities and the supplying of a postponement. Under these circumstances, great weight has to be given to the plaintiff's version of these conversations. In the plaintiff's version, however, it is obvious that according to its evidence, the plaintiffs were told that the postponement was encompassed in the debenture. In fact, the debenture gives the defendant company the right to borrow from a bank and to give an assignment of receivables. This was part of the debenture and was available to the plaintiff if they had searched the registered debenture.

12 It was argued that the undertaking of the defendant bank to postpone constituted an equitable estoppel barring the defendant bank from any right to the receivables. I cannot accept it as such. In fact, the security of the debenture specifically allows the defendant company to assign the receivables and this therefore must be determined by an appreciation of what this does as to the security held by the defendant bank and the plaintiff.

13 The issue is as to who has priority for the receivables up to the date of 15th January 1982, being the date of enforcement of the debenture. Each party was aware of the presence of the debenture and the assignment and their rights and priorities must be found within these two documents.

14 The defendant bank allowed the defendant company under the debenture to assign its receivables. These receivables were assigned to the plaintiff. The question is what does such an assignment give to the plaintiff by way of priority over the defendant bank? This problem was considered by Dixon J. in *Harris v. Bank of Montreal* (1984), 51 C.B.R. (N.S.) 228, 31 Alta. L.R. (2d) 24, 53 A.R. 92 (Q.B.). The facts were very similar to those in this case. The provisions of a debenture allowed the assignment of book debts until the debenture became enforceable. An assignment was taken but was not registered. Dixon J. held that the debenture holder had priority because the unregistered assignment was void as against creditors under s. 3(1) of the Assignment of Book Debts Act.

15 At p. 96, the learned justice states as follows:

> It is my view that the crystallization of the Harris Collision debenture triggered new rights in favor of Harris Storage whereby the accounts receivable of Harris Collision became subject to the specific charge of the subject debenture and at a time when by subs. 3(1) of the Act the Royal Bank assignment of book debts must be characterized as being void as against this creditor. It is my view that the crystallation of the debenture is the critical factor in this dispute as between creditors and had nothing occurred so as to create no new rights in the lender up to and including the date of registration of the assignment of book debts *then due and full recognition of the provisions of subparagraph 5(c) of the debenture would have to be given in favor of the Royal Bank of Canada*. [The italics are mine.]

I am sure that it should read "Bank of Montreal" rather than Royal Bank of Canada [see 51 C.B.R. (N.S.) 228 at 234].

16 It is obvious that but for the non-registration of the assignment, the judgment would have been in the assignee Bank of Montreal's favour on the assignment of book debts up to the time that the debenture was enforced. I agree with this finding.

17 In *Royal Bank of Can. v. A.G. Can.*, 25 C.B.R. (N.S.) 233, [1977] 6 W.W.R. 170, 3 B.L.R. 52, 8 A.R. 225 (T.D.), H.J. MacDonald J. quoted with approval Ashburner in Principles of Equity [2nd ed. (1933)], p. 239 [at p. 231]:

> *An assignment of a debt is complete as between assignor and assignee, although no notice is given to the debtor*.
>
> Where an *equitable assignment* has taken place the property assigned, so far as is necessary to satisfy the assignee, *ceases to be the property of the assignor, and therefore cannot be claimed by his trustee in bankruptcy, except where the trustee is enabled by statute to assert a title paramount to the bankrupt*. [The italics are mine.]

18 The learned justice went on to say [p. 231]:

> *It seems to me that when Vegas gave the plaintiff the assignment of its book debts, it transferred its interest in the book debts to the plaintiff, and that as between the assignor, Vegas, and the assignee, the plaintiff, the book debts became the*

property of the plaintiff. [The italics are mine.]

19 This judgment was affirmed by the Court of Appeal [29 C.B.R. (N.S.) 227, [1979] 1 W.W.R. 479, 13 A.R. 318].

20 In the present case, the defendant bank specifically allowed the giving and taking of an assignment knowing that the plaintiff was advancing moneys on the strength of such assignment and that such right was given up to the point in time that the debenture holder enforced its security. In other words, it relinquished its priority and allowed priority to the plaintiff for this period of time. The assignment was given and was registered. At that point, the property in the receivables passed to the plaintiff and for those receivables that were in existence up to 15th January 1982 the plaintiff became the owner in accord not only with the assignment but in priority to the defendant bank by virtue of the exception to the registered floating charge as contained in section 4(b) of the debenture.

21 The defendant company has been noted in default. The evidence of the plaintiff of the sum of $105,411.73 is undisputed and accepted by this court. The guarantees of the individual defendants have been satisfactorily proven.

22 The plaintiff shall have judgment against the defendant company for $105,411.73, being the amount owing with interest to 10th December 1984 and further interest at 5 per cent after judgment until paid.

23 The plaintiff shall have judgment against the individual defendants for the amounts noted above together with further interest as indicated.

24 The interest award after judgment follows s. 13 of the Interest Act, R.S.C. 1970, c. I-18, which reads:

13. Every judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied.

25 Section 6 of the Judgment Interest Act of Alberta affects post-judgment interest but is not in effect at the present time.

26 See also *Can. Permanent Trust Co. v. King Art Dev. Ltd.*, [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, 12 D.L.R. (4th) 161, 54 A.R. 172 (C.A.).

27 The judgments against the defendant company and the individuals shall be a joint and several judgment.

28 The statement of claim alleges that the defendant Coopers & Lybrand converted the accounts receivable and seeks damages for conversion.

29 Having found that the plaintiff is entitled to these receivables, it is apparent that, although innocently, the defendant receiver did convert them by taking and using them in a manner inconsistent with the owner's right of possession. The defendant receiver stated in para. 12 of the statement of defence:

These Defendants admit giving notice to the debtors of Don Reid and payments of accounts receivables owing to Don Reid were to be made to Coopers.

30 With regard to the conversion, Salmond on Torts, 5th ed. (1920), at p. 125 states:

For conversion may consist of an act deliberately done unconsistent with another's rights though the doer may not know of or intend to challenge the property or possession of that other.

Clause 13(g) of the debenture reads:

Every such receiver shall so far as concerns responsibility for his acts be deemed the agent of the Company.

Bowstead on Agency, 14th ed. (1976), p. 414, states:

> Conversion ... is a tort of strict liability, and, as stated in Article 130, the authority of the principle cannot provide immunity from liability for a tort committed by an agent against a third party.

31 The facts, in my view, make it clear that the defendant receiver and the defendant bank were principal and agent and that the receiver converted the accounts receivable so as to deprive the plaintiff of the moneys represented by the accounts receivable.

32 The plaintiff will therefore have judgment jointly and severally against the receiver and the defendant bank for $39,931.41 with interest at 11 per cent per annum from 15th January 1981 to 10th December 1984 and further interest at 5 per cent per annum until paid.

33 Costs may be spoken to.

Judgment for plaintiff.

Date: 20090619
Docket: CI 08-01-56696
(Winnipeg Centre)
Indexed as: Winnipeg Motor Express Inc. et al.
Cited as: 2009 MBQB 204

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the applicants")

Counsel:

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JENNIFER J. BURNELL
for Winnipeg Motor Express ("WME")

HARVEY G. CHAITON
for Heller Financial Canada Holding Company ("Heller") and GE Canada Leasing Services Company ("GE")

DONALD G. DOUGLAS
for Paccar Financial Services Ltd. ("Paccar")

DOUGLAS G. WARD, Q.C.
for Alterinvest Fund L.P. (BDC)

ROBERT A. DEWAR, Q.C.
for Ramwinn Diesel, Inc. ("Ramwinn")

WILLIAM G. HAIGHT
for Key Equipment Finance Canada Ltd.

) E. PETER AUVINEN
) for CIT Financial Ltd., Wells
) Fargo Equipment Finance
) Company, Capital Underwriters
) Inc. and Stoughton Trailers
) Canada Corp. ("Stoughton")
)
) DONALD R. KNIGHT, Q.C.
) for Maxim Transportation
) Services Inc. ("Maxim")
)
) Oral Reasons for Judgment
) Delivered: June 19, 2009

SUCHE J.

[1] The issue before me today is the appropriate distribution of the DIP loan and administrative charges (collectively referred to as the "Court Ordered Charges") incurred since May 15, 2008, when I granted a stay of proceedings pursuant to s. 11 of the ***CCAA***. The DIP loan represents working capital advanced to WME by Heller during the restructuring period; the administrative charges consist of the monitor's fees, its legal fees, WME's legal fees, and director's charges. The amount of these fees is not in issue and both have been paid by Heller out of receivables collected from WME's operations and sale of assets. Thus, the effect of this order will be to require other parties to reimburse Heller for some portion of the $1.8525 million in issue.

[2] The monitor, in its twelfth report dated February 12, 2009, recommends that the Court Ordered Charges be allocated among the secured creditors based on pro rata recovery, using actual or estimated recovery. Total recovery for any creditor includes its direct recovery plus allocated sale proceeds, plus any lease

payments recovered, less direct costs, which includes expenditures for such things as repairs or reconditioning.

[3] In the result, certain secured creditors will be excluded, namely:

(i) Daimler Chrysler Financial Services, as I ruled its equipment was not subject to the stay, or the Court Ordered Charges;

(ii) three secured creditors, Richard Sobey, Frontier Capital Partners, and Shaw Satellite Services, whose security is subordinate to BDC, which itself only recovered a minimal amount of WME's outstanding indebtedness.

[4] In addition, several office or non-fleet equipment lessors have been excluded on the basis of administrative efficiency because of the very small amount of their respective recoveries.

[5] In making its recommendations, the monitor indicates it relied on the following principles:

(i) all secured creditors should contribute to the cost of restructuring;

(ii) a strict accounting on a cost benefit basis is impractical and not necessary or desirable for allocation purposes;

(iii) security arrangements and priorities should not be readjusted as part of this process;

(iv) the proportion each creditor should be allocated need not be equal; and

(v) the allocation should be equitable, rather than equal.

[6] The monitor also recommends that no DIP charge should be allocated to any equipment parked and available for pickup at the date of filing, or for units that have not yet been returned to a lessor/lender.

THE PARTIES AND THEIR POSITIONS

Heller

[7] Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at $5,643,297, which was secured by accounts receivable of $5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately $8,750,000 (Cdn.) and $2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately $55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately $394,000 to financing lessors.

[8] Heller supports the monitor's recommendation.

GE

[9] GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately,

GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately $250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

[10] In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

[11] GE supports the monitor's proposed allocation.

Paccar

[12] as at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received $279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

[13] Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors,

particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

[14] Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately $2.7 million, compared to Heller's loss of $55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

[15] It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

[16] These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

[17] Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

[18] These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

[19] When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

[20] Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered $4,738.12 out of the proceeds of sale of WME's redundant assets.

[21] Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all

other creditors. Thus, to include its recovery in the allocation, effectively amounts to altering the security arrangements between WME and its creditors, which is something that should not be done.

[22] Finally, Ramwinn has a claim against WME in the amount of $18,679 for an account incurred subsequent to the stay. The monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

[23] Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease. It was paid its lease payments of $5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

[24] BDC was owed approximately $2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered $78,998.79 plus interest from the redundant asset

sale and will recover $260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. Since the date of the hearing, I have made an order of bankruptcy against WME.

[25] I turn, then, to the legal issues raised on this motion.

TRUE VERSUS FINANCING LEASES

[26] Both Stoughton and Maxim claim to be "true" lessors. The significance of this issue is twofold; s. 11.3(a) of the ***CCAA*** provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

[27] Section 11.3(a) was added to the ***CCAA*** in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in ***Quintette Coal Ltd. v. Nippon Steel Corp.*** (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2497 (QL), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good sense and also brings the ***CCAA*** into line with the ***Bankruptcy and Insolvency Act***, R.S.C.

1985, c. B-3, as amended (the "***BIA***"), which has a similar provision concerning proposals.

[28] The leading authority on the proper interpretation of s. 11.3(a) is ***Smith Brothers Contracting Ltd., Re*** (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (QL) (B.C.S.C.). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). The distinction between a true lease – that is, a contract of bailment also known as an operating lease – and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost.

[29] It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects.

[30] At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so

it is very difficult to generalize about how any particular type of relationship will be structured.

[31] All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

[32] In ***Smith Brothers***, Bauman J. concluded that s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the ***CCAA***. He says:

> 56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

[33] And further, at para. 61:

> 61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

[34] ***Smith Brothers*** has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow

construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

[35] I turn, then, to the two creditors in this case, Maxim and Stoughton. I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.

[36] I say this because a review of Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment – it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.

[37] It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

[38] The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on ***Western Express Air Lines Inc., Re***, 2005 BCSC 53, (2005), 10 C.B.R. (5th) 154, over that in ***Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.***, (2005), 18 C.B.R. (5th) 125 (Ont. Superior Court of Justice).

[39] The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a). In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

[40] The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.

THE LAW

[41] I turn, then, to the question of principles of allocation of Court Ordered Charges under the ***CCAA***. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in ***Hunters Trailer & Marine Ltd., Re***, 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the ***CCAA*** make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

[42] In ***Re Hickman Equipment (1985) Ltd. (In Receivership)***, 2004 NLSCTD 164, at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

> (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
>
> (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
>
> (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that

> certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;
>
> (5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

[43] I also agree with the decision in ***Sulphur Corp. of Canada Ltd. (Re)***, 2002 ABQB 682, (2002), 5 Alta. L.R. (4th) 251, where LoVecchio J. concluded that the court has jurisdiction to grant a charge for debtor in possession financing which ranks in priority to provincial statutory liens, in that case a builder's lien.

ANALYSIS AND DECISION

[44] I begin with the observation that the s. 11 stay in this case has accomplished exactly what the ***CCAA*** intends that it do – it allowed a company in desperate financial circumstances the opportunity to restructure so that part of its business which was viable could carry on.

[45] Having said that, good news under the ***CCAA*** is a relative thing. Substantial financial carnage occurred along the way, not just to the secured creditors, almost all of whom have recovered at least something, but more so to a long list of unsecured creditors as well as the investors. The overriding theme of the individual submissions before me was that each of the parties would have

been in a much better position had they been able to simply realize on their security. That may or may not have been so, but of course the point of the ***CCAA*** is that the collective good and the benefit to all stakeholders governs.

[46] The starting point, then, on this motion is the recommendation of the monitor to allocate the Court Ordered Charges among the secured creditors on the basis of a pro rata share using total recovery. This method, in effect, amounts to requiring the secured creditors to pay a fee to collect its outstanding receivables. This certainly is not a novel concept in debt collection.

[47] In my view, the methodology proposed by the monitor on its face is fair. It has an objective basis and is being applied uniformly. Utilizing an "outstanding indebtedness approach", which has been applied in other cases, would not be better as it ends up favouring Heller substantially at the expense of most of the secured creditors.

[48] I agree with the view expressed in ***Hunjan International Inc., Re*** (2006), 21 C.B.R. (5th) 276 (Ont. Superior Court of Justice), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

[49] So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted,

and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

[50] As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

[51] My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. Ramwinn's effort, cost and delay in having its accounts paid was substantially less than had it been required to engage in collecting from the equipment lessors, institute court proceedings, and potentially undergo the process of realizing on equipment in its possession. Those creditors, including Heller, BDC and Ramwinn, who shared in the proceeds from the sale of redundant assets or the purchase by Newco, also received real and meaningful

benefit from the efforts of WME and the monitor in conducting the sale and the purchase by Newco would not have happened without the restructuring.

[52] Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the ***CCAA***.

[53] I am also of the view that the relative loss – the issue raised by Paccar – results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and Alterinvest's loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

[54] At the same time, I do not accept Ramwinn's argument that requiring it to pay the allocation recommended by the monitor is also a violation of this principle. The allocation proposed is not at all disproportionate, in my view, to the benefit accrued to Ramwinn.

[55] I also conclude that there is no basis on which I can or should direct that the funds be held to pay for the outstanding claim Ramwinn advances against WME.

[56] As to equipment obtained directly by lessors, I am of the view that regardless of how lessors recovered equipment, any equipment recovered post stay should be included in the allocation as suggested by the monitor. Self-help is not to be condoned, and a potential benefit not realized due to a creditor's actions, should not be discounted in this analysis, as to do so falls into a detailed cost benefit analysis.

[57] There is one adjustment, however, that I do feel is in order. A discount rate of 9.25% on the present value of GE's leases was used by the monitor. I am not persuaded that this is justifiable. I accept what I take to be the monitor's secondary position of 6% as being reasonable.

EQUIPMENT LEASES

[58] Much attention was paid during these proceedings to the situation of equipment lessors who hold financing leases. Paccar, in particular, but also others, advocated forcefully that they were unduly prejudiced by the stay. They maintain that not only are they not being paid while their assets are being used to the benefit of the other stakeholders, but their underlying security is being rapidly and substantially deteriorated in the process. This, they say, violates one of the fundamental objectives of preventing one creditor from obtaining an advantage over other creditors during the stay period.

[59] It strikes me that the fact that true lessors are entitled to be paid further aggravates this problem in circumstances such as WME's where it has a variety of arrangements with equipment suppliers, including some true leases. It is

clearly in a debtor company's economic interests to use financed rather than leased equipment during restructuring. This is what seems to have occurred here (although I make no criticism of WME for doing so).

[60] It is difficult to know how this situation can be remedied, given that the whole point of the ***CCAA*** is to relieve a company of ongoing financial burden to allow it the opportunity to restructure. In this case, for example, WME would not have succeeded had been obliged to pay for its equipment during the entirety of the restructuring.

[61] On the particular facts of this case, this issue became somewhat easier to address given the nature of WME's business. Equipment to a transportation company is akin to raw goods to a manufacturer, and I was of the opinion that if WME was going to be viable, at a certain point it would have to demonstrate it could pay for the essential means of production. Otherwise, there would be no purpose to continue the stay. Accordingly, I ordered that financing leases would be paid as of August 1, 2008.

[62] I say all this not to justify or revisit the basis for my earlier decision, but to get to the point that in considering what is equitable, undue prejudice is a reason to adjust what would otherwise be a uniform approach. I am satisfied that equipment lessors in a business operation such as WME's do suffer undue prejudice. In this case, however, the equipment lessors were paid as of August 1. Being financing leases, those payments were not just for use, but included some amount on account of equity. I conclude, then, that the undue prejudice

suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount to justify the uniform application of the methodology proposed by the monitor.

[63] The last issue is one that perhaps is more controversial. Maxim, the only true lessor, has, in my view, derived the same benefit as the financing lessors from these proceedings. Its trailers were part of WME's network which stretched across North America. As a result of WME's continued operations, its equipment was gathered in and ultimately it was able to assign its leases to Newco without any interruption. While s. 11.3(a) specifically allows for payments for use of equipment despite the stay, I do not see that there is any statutory prohibition against requiring a contribution to the Court Ordered Charges against such a party. Taking a broad and purposive approach to the ***CCAA***, which I am obliged at law to do in determining an equitable distribution of the costs of the restructuring, I conclude that Maxim should share in these charges on some basis.

[64] I do this, recognizing that the only authority on point that was provided to me, ***Western Express Air Lines***, came to a different conclusion. However, I note that there, Brenner C.J.S.C. specifically found that:

> 20 ... If costs are to be allocated in the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. As ordinary creditors for the outstanding lease payments they will likely receive nothing. ...
>
> . . .

> 22 Accordingly under the general equitable principles of the *CCAA* I see no basis for requiring the aircraft lessors to bear a portion of the Existing Charges.

[65] Here, I have found the situation to be otherwise. There was a real and meaningful benefit to Maxim.

[66] However, just as GE's assumed lease was discounted for the risk of non-performance by Newco, so, too, should Maxim's. Subject to hearing further submissions on the matter, the amount of Maxim's total recovery should be discounted by the same discount rate, namely, 6%.

CONCLUSION

[67] At the outset of the hearing before me, several disputes remained which concerned the value of various creditors' total recovery.

[68] I understand that through a combination of information provided during the hearing and the findings I have made this afternoon, these have all been resolved.

[69] I trust that these reasons will allow the monitor to calculate the precise allocation among the parties. However, I recognize that it may be that some aspect of my reasons require either clarification or some addition. Should that be the case, I invite the parties to let me know.

_____ J.

Citation: Winnipeg Motor Express Inc. et al., Re, 2009 MBCA 110
Date: 20091110
Docket: AI 09-30-07191

IN THE COURT OF APPEAL OF MANITOBA

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED	***R. A. McFadyen*** *for Paccar Financial Services Ltd.* ***H. G. Chaiton*** *for Heller Financial Canada Holding Company and GE Canada Leasing Services Company* ***D. G. Ward, Q.C.*** *for Business Development Bank of Canada* ***D. R. M. Jackson*** *for Ernst & Young* ***K. A. McCandless*** *on a watching brief for RamWinn Diesel Inc.* *Chambers motion heard:* ***October 6, 2009*** *Decision pronounced:* ***November 10, 2009***
AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD., and 5275634 MANITOBA LTD.	

FREEDMAN J.A.

OVERVIEW

1 This is an application by Paccar Financial Services Ltd. (Paccar) for leave to appeal an order (the Order) made by the judge supervising the proceedings under the *Companies' Creditors Arrangement Act* (the *CCAA*) in respect of Winnipeg Motor Express Inc. and related entities (WME). The

Order allocates among secured creditors of WME liability to pay certain court-ordered charges (the Charges) relating to the *CCAA* proceedings. I have concluded that leave to appeal the Order should be denied.

BACKGROUND

2 WME was in the transportation business. Paccar leased certain equipment to WME, and Heller Financial Canada Holding Company and GE Canada Leasing Services Company (Heller) provided financing to WME.

3 WME has been under the protection of the *CCAA* since May 15, 2008, when the judge made her initial order (the Initial Order). In the Initial Order, the judge provided for the Charges to facilitate efficient and orderly proceedings under the *CCAA*. The Charges comprise expenses incurred since the date of the Initial Order, such as a debtor-in-possession (DIP) loan, the fees of Ernst and Young (the monitor), the monitor's and WME's legal fees and other items. The aggregate amount of the Charges, some $1.8525 million, was not at issue before the judge. What was at issue was by whom and in what proportion the Charges should be borne.

4 The resolution of this matter is the last step in the *CCAA* proceedings relating to WME. During the course of those proceedings, the monitor made a number of reports about the restructuring and the judge made a number of orders. At one point, subsequent to the Initial Order, when it appeared that WME could not reorganize and continue in business successfully, its assets were sold. An order of bankruptcy against WME was made by the judge on July 2, 2009.

5 The monitor filed its Twelfth Report dated February 10, 2009, in which it recommended to the judge a method for the allocation of the Charges among the secured creditors of WME. That report led to a number of questions from creditors which were answered in the monitor's Fourteenth Report dated April 22, 2009, and the supplement thereto dated April 28, 2009.

6 The monitor recommended that the Charges be allocated among WME's secured creditors based on *pro rata* recovery of the amounts of their claims, using actual or estimated recovery. As the judge stated (at para. 5), the monitor relied on certain principles in making its recommendations, including that a strict accounting on a cost/benefit basis was impractical and that the allocation should be equitable rather than equal.

7 Paccar opposed the recommendation, arguing that Heller, which had a multi-million dollar loan outstanding with WME at the time of the Initial Order, had suffered virtually no loss and should pay a larger proportion of the Charges. In contrast, said Paccar, it had suffered a very substantial loss and was being asked to absorb a disproportionate amount. Some other creditors opposed while some supported the monitor's recommendation.

THE JUDGE'S DECISION

8 The judge took into account the applicable legal principles; this is not challenged by Paccar. She noted (at para. 41) that the determination of a method of allocation is a matter for the judge's discretion, and said that any means of calculating a precise percentage would be arbitrary. She relied on several of the cases frequently cited in such applications, including *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 30 C.B.R. (4th) 206, *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164, 5 C.B.R. (5th) 56, *Hunjan*

International Inc., Re (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), and *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154.

9 She observed that the monitor's recommendation, in effect, simply required the secured creditors to pay a fee to collect their outstanding receivables, which was "not a novel concept in debt collection" (at para. 46). She found the methodology to be fair, objective and uniformly applied. Thus, the onus shifted to those opposing the recommendation (see *Hunjan* at para. 73) to demonstrate that the proposal was unfair or prejudicial.

10 She was cognizant of the fact that she could take into account the different nature of security held by creditors, as well as the potential benefit to them when deciding whether the proposed allocation was equitable. She then said (at para. 51):

> My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' [including the present applicant, Paccar] effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. ….

11 She declined any attempt to undertake an analysis of precisely what benefit each creditor had received as a result of the *CCAA* proceedings. She considered and rejected Paccar's suggestion that relative loss suffered be used as a basis for allocation, saying that would amount to readjusting priorities among creditors. She did, however, note that equipment lessors (such as Paccar) in a business operation like WME's "do suffer undue prejudice" (at

para. 62), but in this case that was mitigated by the payment for leased equipment which started about 10 weeks after the Initial Order. Thus her conclusion was that: "the undue prejudice suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount [*sic*] to justify the uniform application of the methodology proposed by the monitor" (*ibid*.).

12 She approved the methodology proposed by the monitor, with one relatively minor adjustment relating to a discount rate on certain leases.

THE LEAVE APPLICATION

13 Paccar now seeks leave to appeal the Order, leave being required by s. 13 of the *CCAA*. Paccar was the only creditor which sought leave to appeal. Its application was opposed by Heller and Business Development Bank of Canada. Counsel for another creditor, RamWinn Diesel Inc., attended on a watching brief, and counsel for the monitor was present to provide assistance if needed.

14 In a previous leave application in these proceedings (*Winnipeg Motor Express Inc. et al., Re*, 2008 MBCA 133, 236 Man.R. (2d) 3), my colleague Monnin J.A. referred to the principles governing decisions by judges on leave applications such as this. He noted that leave is to be granted sparingly; see, e.g., *Edgewater Casino Inc. et al., (Re)*, 2009 BCCA 40, 265 B.C.A.C. 274 at para. 18. He referred to the dicta of the Alberta Court of Appeal in *Canadian Airlines Corp., Re*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (at paras. 6-7):

> …. … [T]here must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River*

> *Coal Ltd.*, (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.*, (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp*., (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.*, (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).
>
> Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) at 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:
>
> > (1) whether the point on appeal is of significance to the practice;
> >
> > (2) whether the point raised is of significance to the action itself;
> >
> > (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> >
> > (4) whether the appeal will unduly hinder the progress of the action.
> >
> > ….

PACCAR'S ARGUMENT

15 Paccar observed that leave may be granted where the appellate court decides that the judge has given no or insufficient weight to relevant considerations, resulting in a wrongful exercise of discretion by the judge. It relied on the decision of the Saskatchewan Court of Appeal in *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, 43 C.B.R. (5th) 42 (which I will discuss below), where leave was granted to appeal part of an order of allocation of *CCAA* charges.

16 Paccar argued that its application satisfied all the tests described in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) (see para. 14 above). It said that there are few reported decisions on the allocation of charges such as those here, as between major secured creditors, so the matter is of significance to the practice under the *CCAA*. As well, the point is important to the proceedings themselves, if only because of the magnitude of money involved. And clearly an appeal of the Order will not interfere with the progress of the proceedings, since the restructuring process has come to an end.

17 Paccar said that the real issue here was whether its proposed appeal was meritorious. It said that the judge had treated all secured creditors equally by requiring each to pay a *pro rata* allocation based on total recovery, but this approach was flawed. Paccar argued that the judge gave no weight to the differences in the security held by it and other equipment lessors and by Heller, and to the potential benefit Paccar and Heller received from the proceedings. On this latter point, Paccar said that Heller's projected losses were about $50,000 whereas Paccar's were over $2.7 million. Thus it was reasonable to infer that Heller "benefitted mightily" from the *CCAA* proceedings as compared to Paccar, even taking into account the different nature of their respective security.

18 The judge erred, said Paccar, in deciding that allocations of the Charges should be based on total recovery, thus treating all secured lenders on an equal basis. She erred in placing little or no weight on the differences in security and on the benefit received. Paccar reiterated its position that it never stood to gain from the *CCAA* process and suffered significantly from it.

19 It said that the allocation ought to follow the result in *Hunters Trailer*, where a mortgagee was allocated the burden of charges on other than a proportionate basis (at para. 21):

> … UMC [the mortgagee] is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of ***CCAA*** costs.

20 Paccar suggested that the equipment lessors should share in not more than ten per cent of the Charges. The effect of the Order is to allocate about 15.5 per cent of the Charges to Paccar and about 65.6 per cent to Heller. Paccar acknowledged that it took no issue with the principle that in *CCAA* proceedings the collective good prevails and that secured creditors should bear a share of the Charges; it was unhappy with the amount of the charges it was ordered to bear. It did not allege any error of law by the judge, but argued rather that in her exercise of discretion she erred in failing to give weight to the differences in security and to the benefits received.

DECISION

21 I am far from persuaded that a case has been made out for leave to be granted.

22 Of the four factors subsumed in the general criterion which is applicable in these situations (see para. 14), two are at issue. Heller does not dispute that the appeal would be significant to the action itself, since it is the Order which determines who bears the Charges. Further, the appeal would obviously not delay the proceedings, which are complete except for this particular matter.

23 The other two factors are at issue, and in my opinion Paccar must fail on each.

24 First, and most importantly, in my view the proposed appeal lacks merit.

25 If leave were to be granted, this court would apply a standard of review regarding the Order which would vary depending on the nature of the issue under consideration. See *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 at paras. 22-28. The court would only modify or set aside the Order if one (or more) of three circumstances existed.

26 First, applying a standard of correctness, the court would have to conclude that the judge erred at law. That is not argued or at issue here. Or, second, applying a standard of palpable and overriding error, the court would have to conclude that the judge made such an error on a factual matter. That is also not argued or at issue here. Or, finally, applying a standard of considerable deference, the court would have to conclude that in exercising her discretion the judge misdirected herself, or the Order was so clearly wrong as to amount to an injustice. See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1374-75. Paccar argued, in effect, that this is what had occurred.

27 The judge had a detailed and intimate knowledge of the affairs of WME in the *CCAA* proceedings. She gave full consideration to the objections of those creditors who opposed the monitor's recommendation. She was fully familiar with the positions of the parties, and with the implications of her Order. She advised herself properly on the law and relied on the applicable decisions to assist her reasoning process. She made no error in her factual analysis. Against that backdrop of her thorough consideration of all relevant

matters she exercised her discretion in favour of adopting the monitor's recommendation.

28 That recommendation was based on sound practice and precedent, as the judge found. See the observations of C. Campbell J. in *Hunjan* (at paras. 4-5, 57):

> Canadian courts have recognized that the allocation of costs arising from insolvency proceedings must be done on a case-by-case basis and is a task involving a receiver's or trustee's discretion. It has also been recognized that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery. See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) at 89; *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (Ont. C.A.); *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-210.
>
> Costs should be allocated in an equitable manner and in a manner that does not readjust the priorities between creditors. When determining what is an equitable allocation of costs, the Court in *Hunters Trailer & Marine Ltd., Re* noted that it would be unfair to ignore the degree of potential benefit that each creditor might derive, but also recognized that "any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical."
>
> The test for the allocation proposed by the Receiver is that it be in a manner that is fair and equitable. This exercise of discretion, while it must not ignore benefit or detriment to any creditor, does not require a strict accounting on a cost benefit basis or that the costs be borne equally or on a pro rata basis [see *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) pp 209-212.]

29 As noted, Paccar acknowledges that the judge made no legal error. It did not assert that she had made a palpable and overriding error (or, indeed, any error) in relation to factual matters. There is no issue of jurisdiction. But

the decision, argued Paccar, shows that the judge "failed to adequately consider the arguments advanced by Paccar." It shows, in Paccar's submission, that the judge failed to give any weight to the degree of potential benefit to Paccar and Heller from the *CCAA* proceedings and to the difference in security held by those creditors.

30 But, as a review of the reasons of the judge amply demonstrates, there is no substance to Paccar's arguments. The judge did, in fact, consider all the issues raised by Paccar. She rejected Paccar's arguments and adopted a different approach. She did not give to certain matters the weight which Paccar urged her to give, but she was fully cognizant of the issues and clearly explained why she was taking a different approach.

31 For example, Paccar agreed that it was open to the judge to find that it received some benefit from the *CCAA* proceedings, but it complained that she did not analyze the potential benefit to the parties. The judge expressly dealt with this, saying, when referring to the benefits received by the secured creditors (at para. 52):

> Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to [the] objectives of the ***CCAA***.

32 Similarly, the judge was well aware of the differences in the nature of the security held by the secured creditors. She rejected Paccar's suggested solution in these words (at para. 53):

> I am also of the view that the relative loss – the issue raised by Paccar – results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and [another creditor's] loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

33 The present dispute is not based on any principle; rather, it relates only to the dollar amount of the Charges which Paccar has to bear. As Heller stated succinctly in its motion brief: "[t]he Court is not being asked to establish a general principle or a new test for the allocation of the Charges – it is simply being asked to lower the amount allocated to Paccar."

34 In any given case there may be more than one legitimate method of cost allocation. That simply emphasizes the high degree of deference an appellate court would give to a supervising judge's cost-allocation order. As C. Campbell J. said in *Hunjan* (at para. 71):

> … [E]ach creditor from its own particular perspective will have a view of what is or is not fair in terms of allocation. There is unlikely to be one specific method that can objectively point to absolute fairness to all parties. The exercise is inevitably one of viewpoint for the creditor and exercise of discretion for the Court.

35 I see no flaw in the judge's reasoning or in her analysis. The relevant factors were properly considered, and the weight to be accorded to the factors was for her discretion. See *Muscletech Research and Development Inc., Re,* [2006] O.J. No. 4583 (C.A.) (QL) at para. 9. She exercised her discretion judicially and in accordance with the applicable principles. See *Stelco Inc., Re [Court of Appeal]* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para 63.

36 More to the point, there was no misdirection by the judge and I see no injustice in the result, which is based on a reasonable recommendation of the monitor. While Paccar is unhappy with the result, it cannot justifiably complain about the judge's reasoning process, nor has it persuaded me that this court might find that such result is unjust.

37 I can see no basis upon which this court would act to upset the judge's exercise of discretion in this matter. Thus, the proposed appeal lacks merit.

38 Paccar also fails in respect of the other factor, that is, whether the point on appeal is of significance to *CCAA* practice. I agree with the argument of Heller's counsel, to the effect that the decision of the judge raises no issues of general application and thus has little, if any, precedential value. See *Blue Range Resource Corp.*, *Re*, 1999 ABCA 255, 12 C.B.R. (4th) 186 at paras. 5, 17, and *Repap British Columbia Inc.*, *Re* (1998), 9 C.B.R. (4th) 82 at para. 9.

39 Paccar argued that *Stomp Pork* shows that the allocation of court-ordered charges may be a proper subject for appellate review. As described by Jackson J.A. for the court, the issue to be determined was the extent to which a chambers judge had authority "to allocate priority among the assets of pre-filing creditors for debtor in possession … financing early in the process" (at para. 1) (emphasis added) of *CCAA* proceedings. The court (at para. 12) refused leave to appeal the decision regarding priority for financing that had already been advanced, but did grant leave to appeal the allocation regarding future financing. That is clearly not this case.

40 The court said (at para. 16) that the question whether the restructuring judge can allocate priority before the outcome of the restructuring is known was a matter of first instance. The restructuring judge had acknowledged as

much, noting in her decision that "[t]he issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152 at para. 21). The Court of Appeal granted leave to appeal her decision. In my view, the decision granting leave is of no assistance or application here.

41 Paccar's proposed appeal simply seeks a lesser participation in the burden of the Charges. There is nothing in this proposed appeal that is of significance to the practice in *CCAA* proceedings.

42 Assessing the matter in its entirety, to determine whether the applicant has advanced "serious and arguable grounds" (*Canadian Airlines Corp*. at para. 6), I am satisfied that, if leave were to be granted, the applicant would be very unlikely to succeed on any appeal.

43 For these reasons, I deny the application for leave, with costs to Heller and Business Development Bank of Canada.

_____ J.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Worldspan Marine Inc. (Re),* 2011 BCSC 1758

Date: 20111221
Docket: S113550
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products Ltd.

Petitioners

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Petitioners Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products	J.R. Sandrelli & J.D. Schultz
Counsel for Wolrige Mahon (the "VCO"):	K. Jackson & V. Tickle
Counsel for the Respondent, Harry Sargeant III:	K.E. Siddall
Counsel for Ontrack Systems Ltd.:	J. Leathley, Q.C.

Counsel for Mohammed Al-Saleh:	D. Rossi
Counsel for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.:	G. Wharton & P. Mooney
Counsel for Canada Revenue Agency:	N. Beckie
Counsel for Comerica Bank:	J. McLean, Q.C.
Counsel for The Monitor:	G. Dabbs
Place and Date of Hearing:	Vancouver, B.C. December 16, 2011
Place and Date of Judgment:	Vancouver, B.C. December 21, 2011

INTRODUCTION

[1] On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

POSITIONS OF THE PARTIES

[2] The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

[3] The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

[4] The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

[5] These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

[6] The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May

2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

[7] Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

[8] Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

[9] Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

[10] Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

[11] As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

DISCUSSION AND ANALYSIS

[12] On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
>
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

[13] In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

[14] In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

> ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[15] A frequently cited statement of the purpose of the *CCAA* is found in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 at p. 3 where the Court of Appeal held:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

[16] In *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

[17] In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the Court of Appeal set aside the extension of a stay granted to the

debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

[18] At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[19] In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[20] As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

[21] Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in

furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

[22] Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

[23] The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings , the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

Whether circumstances exist that make an extension appropriate

[24] The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

[25] There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

(a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the

determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.

(c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

[26] All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

[27] On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid $4 million into his solicitor's trust account on or before September 29, 2011.

[28] Mr. Sargeant failed to pay the $4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

[29] On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at $18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

[30] On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222 Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to

have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

[31] Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

[32] The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

[33] After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

Sargeant	$20,945.924.05
Capri Insurance Services	$ 45,573.63
Cascade Raider	$ 64,460.02
Arrow Transportation and CCY	$ 50,000.00
Offshore Interiors Inc.	$659,011.85
Continental Hardwood Co.	$ 15,614.99
Paynes Marine Group	$ 35,833.17
Restaurant Design and Sales LLC	$254,383.28

[34] The petitioner, Worldspan's, *in rem* claim in the amount of $6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

[35] In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for $9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of $28,800,000.

[36] The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

[37] The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately $10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be $28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

[38] An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

[39] Mr. Sargeant also relies on *Encore Developments Ltd. (Re)*, 2009 BCSC 13, in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the

shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through and orderly process supervised by this Court and the Federal Court.

[40] I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

[41] The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

[42] Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

[43] The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

[44] The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

[45] There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

[46] I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

Good faith and due diligence

[47] Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

[48] Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

[49] While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty, bad faith, of fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

[50] In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

[51] This case is distinguishable from *Re San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

[52] In *Re San Francisco Gifts Ltd*., at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

[53] The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

Conclusion

[54] The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

"PEARLMAN J."

Ibid

12. With respect to the additional considerations noted in the *Worldspan Marine* case and summarized in paragraph 9 above:

(a) **furthering the purposes of the *CCAA:*** the proposed extension of the Stay Period will further the remedial purposes of the *CCAA* by allowing the Monitor to complete outstanding administrative activities required to bring these proceedings to a close;

(b) **the Applicants' progress toward selling their assets during the Stay Period:** the Transactions closed in the preceding Stay Period; and

(c) **comparative prejudice if the extension is granted:** the Monitor is not aware of any party who will be materially prejudiced by the extension of the Stay Period.

Ibid

(ii) <u>The Monitor should be permitted to make the Interim Distribution to CIBC</u>

13. The Monitor currently holds approximately $36,925,000 as a result of the Transactions. The proposed Interim Distribution would result in CIBC receiving $35,925,000, and the Monitor maintaining a $1,000,000 holdback (the "**Holdback**") from the net proceeds of the Transactions, which the Monitor estimates will be sufficient to allow the Monitor to make any disbursements relating to the completion of Medco's year-end, indemnity claims against the D&O Charge, ongoing professional fees, and any unforeseen expenses incidental to the administration of the Applicants' estate. Any Holdback amounts remaining are likely to be distributed to CIBC as part of a future motion.

Seventh Report at paras 31 and 32

14. CIBC is the Applicants' only secured lender. As at November 23, 2022, Medco's indebtedness to CIBC totaled $5,108,112.58 and Realco's indebtedness to CIBC totaled $59,683,665.71.

Affidavit of Keith McConnell sworn November 28, 2022 at paras 43 and 44

15. The Applicants' indebtedness to CIBC is secured by various interests created under the following agreements, each of which was duly executed on August 22, 2017 (collectively, the "**CIBC Security**"):

(a) a general security agreement executed by Medco in favour of CIBC which granted CIBC a security interest in all of Medco's present and after-acquired personal property (the "**Medco GSA**");

(b) a general security agreement executed by Realco in favour of CIBC which granted CIBC a security interest in all of Realco's present and after-acquired personal property (the "**Realco GSA**"); and

(c) a demand debenture executed by Realco in favour of CIBC in the principal amount of $75,000,000 (the "**Facility Debenture**") which granted CIBC, among other things, a mortgage interest in the following lands owned by Realco (the "**Land**"):

Title No. 2821678/1
Lot 1 Plan 58713 WLTO
In RL 5 and 6 Parish of St John

16. The Medco GSA, Realco GSA, and the Facility Debenture are appended to the Affidavit of Keith McConnell sworn November 28, 2022, as Exhibits "12," "13," and "14," respectively.

17. The Monitor's Agent Counsel conducted a search of the Manitoba Personal Property Registry (the "**PPR**") for each of the Applicants on January 30, 2024. The PPR searches are collectively attached to the Affidavit of Alecia Iwanchuk sworn February 6, 2024 (the "**Iwanchuk Affidavit**") as Exhibit "A," and disclose the following registrations:

(a) in respect of Medco:

(i) CSI Leasing Canada Inc. ("**CSI Leasing**") has a registration against certain equipment formerly leased by Medco pursuant to Master Lease No. 301206 (the "**CSI Lease**"); and

(ii) CIBC has a registration against all of Medco's present and after-acquired personal property pursuant to the Medco GSA;

(b) in respect of Realco, CIBC has a registration against all of the present and after-acquired personal property of Realco.

18. The CSI Lease was a last minute addition to the Medco contracts that were assigned to 1439573 B.C. Ltd., and to facilitate that arrangement, CSI Leasing's PPR registration against the leased equipment was maintained as a permitted encumbrance in Schedule D to the Approval and Vesting Order – 1439573 B.C. Ltd. dated November 24, 2023. As shown in the PPR searches, the only encumbrances registered against the Applicants' personal property are CIBC's security interests pursuant to the Medco GSA and the Realco GSA. The security interests created by these security agreements have been duly perfected by way of registration in the PPR and therefore have priority over any unregistered security interests in the same collateral.

***The Personal Property Security Act,* C.C.S.M., c. P35 at ss. 35(1) [TAB C]**

19. The Monitor's Agent Counsel also conducted a search of the Manitoba Land Titles Registry (the "**Land Registry**") with respect to the Land on November 20, 2023. A copy of the Status of Title is attached to the Iwanchuk Affidavit as Exhibit "B," and discloses that the Facility Debenture (and other CIBC registrations) are the only monetary encumbrances that are registered against the Land. Therefore, CIBC also has priority to the funds derived from the sale of the Land.

***The Real Property Act,* C.C.S.M., c. R30 at s. 64 [TAB D]**

20. Against this backdrop, the Monitor recommends the Interim Distribution for the following reasons:

(a) based on the Monitor's review of the Security Opinion the Monitor is satisfied that the CIBC Security is valid and enforceable;

(b) the security interests created by the CIBC Security have been duly registered and perfected in the PPR and Land Registry;

(c) there are no other existing monetary encumbrances that are registered against the Applicants in either the PPR or the Land Registry;

(d) the Monitor is not aware of any other creditor that is asserting priority over CIBC with respect the net proceeds of the Transactions; and

(e) the Monitor has access to sufficient funds to finalize the outstanding administrative matters that are required to bring these *CCAA* proceedings to a close without the Interim Distribution amounts.

Seventh Report at paras 29 and 32-35

(iii) The Seventh Report should be approved

21. The Monitor requests this Court's approval of its Seventh Report and the activities described in that report. This is a routine request in *CCAA* proceedings and, where there is no opposition, this relief is regularly granted.

***Re Target Canada Co.,* 2015 ONSC 7574 at paras 1-2 [TAB E]**

22. The Seventh Report details the Monitor's activities since filing the Sixth Report. In addition to attending to the daily obligations associated with the Monitor's expanded mandate as per the ARIO and subsequently the Enhanced Powers Order, the Monitor and counsel spent a considerable amount of time negotiating and closing both of the Transactions.

Seventh Report at para 20

23. The Monitor is unaware of any objections to the relief sought or any allegations of wrongdoing or impropriety with respect to its activities to date, and therefore requests that the Seventh Report and the Monitor's activities described therein be approved.

(iv) The professional fees should be approved

24. The Monitor also seeks an order approving the professional fees and disbursements of the Monitor and its counsel pursuant to section 29 of the ARIO. Although not contemplated by the ARIO, the Monitor is additionally seeking the approval of the Applicants' counsel's fees and disbursements, as it has done on past motions.

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, *Joshua W. Winter* for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

[5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale;
>
> (c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which creditors were consulted;
>
> (e) the effects of the proposed sale or distribution on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.

[7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

[8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

[9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

[10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

[11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

[12] The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

(i) Release as a Condition Precedent

[13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

[14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

[15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that

representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

[16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

[17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:

> 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

[18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

[19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

[20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

[21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

[22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

[28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

[29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian,* it warrants separate identification on the facts of the case before me.

[30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

[31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

[32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

[33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

[34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

[35] The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled

the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

[36] The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

[37] If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

[38] At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

[39] The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

[40] It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

[41] With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

[42] Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

[43] On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

[44] Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

[45] First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

[46] Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth $20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

[47] Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over $100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

[48] In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a

nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

[49] In the circumstances described above, the quality of the claims released would incline me to approve the release.

Application of the Lydian Factors

[50] **Releasees necessary and essential:** The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

[51] **Rational connection between claims released and the purpose of the plan:** The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

[52] **Whether the plan can succeed without the releases** is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

[53] Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately $3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

[54] **Did the releasees contribute to the plan:** While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed $1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed $220,000. Dr. Jha initially contributed $500,000 and then increased his contribution to $1,250,000 in June 2020.

[55] **Does the release benefit the debtor as well as creditors:** The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

[56] **Creditors knowledge of the nature and effect of the release:** All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

[57] A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

[58] Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

[59] The release is found in paragraph 24 of the proposed order. Its material language provides:

> …the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be … released … from …all … claims …of any nature or kind whatsoever … based in whole or in part on any act or omission, … taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, … provided that nothing in this paragraph shall … release… any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the

> CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

[60] While the release appears broad at first blush, a closer reading narrows it scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, prima facie, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

[61] The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.

[62] Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors. " Just what that means was the subject of much argument on the motion.

[63] On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

[64] In *BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22 678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or

> officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

[65] This passage would appear to support Mr. Thornton's submission.

[66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

[67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

[68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

[69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

[70] The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

[71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

[72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

[73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

[74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

[75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

Disposition

[76] For the reasons set out above, I

a. approve the Transaction;

b. approve the release;

c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;

d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;

e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and

f. decline to extend the benefit of the release to Susan Basmaji.

Koehnen J.

Date: November 9, 2020

TAB 5

Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MADAM	)	**FRIDAY, THE 17TH**
	)	
JUSTICE DIETRICH	)	**DAY OF MAY, 2019**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF OLD API WIND-DOWN LTD.

Applicant

CCAA TERMINATION ORDER

THIS MOTION, made by Old API Wind-down Ltd. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an Order, among other things, terminating the CCAA proceedings upon the filing of the Monitor's Certificate (defined below) by Richter Advisory Group Inc. ("**Richter**") in its capacity as Monitor of the Applicant (the "**Monitor**") and granting the other relief set out herein, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Applicant filed in respect of this motion, including the affidavit of Christopher Freeland sworn May 8, 2019, the Ninth Report of the Monitor (the "**Monitor's Report**"), the affidavit of Lily Coodin, sworn May 3, 2019 (the "**Torys Affidavit**") and the affidavit of Pritesh Patel, sworn May 8, 2019 (the "**Richter Affidavit**"), and on hearing the submissions of counsel for the Applicant, the Monitor and Deerfield Private Design Fund III, L.P. and Deerfield Partners, L.P. (collectively, "**Deerfield**"), no one appearing for any other person on the service list, although properly served as appears from the affidavits of service of Shimshon E. Dukesz, sworn May 8, 2019 and May 14, 2019 and filed:

SERVICE

1. **THIS COURT ORDERS** that the time and method of service and notice of this Motion is hereby validated and that this Motion is properly returnable today without further service or notice thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms used and not defined herein shall have the meanings given to them in the Initial Order dated August 10, 2018, as amended and restated (the "**Initial Order**").

TERMINATION OF CCAA PROCEEDINGS AND RELATED PROVISIONS

3. **THIS COURT ORDERS** that effective at the date and time (the "**CCAA Termination Time**") on which the Monitor files the certificate, substantially in the form attached hereto as Schedule "A" (the "**Monitor's Certificate**"), certifying that it has been advised by the Applicant that all matters to be attended to in connection with the CCAA proceedings have been completed, the within CCAA proceedings shall be automatically terminated without any further act or formality and, except as otherwise expressly set out herein, the Initial Order shall have no further force or effect.

4. **THIS COURT ORDERS** that the Stay Period shall expire on the earlier of the CCAA Termination Time and July 31, 2019.

5. **THIS COURT ORDERS** that the Monitor shall, at least seven (7) days prior to the proposed CCAA Termination Time, post on the Monitor's website and serve on the service list for these CCAA proceedings notice of the Monitor's intention to file the Monitor's Certificate.

6. **THIS COURT ORDERS** that, effective as of the date of this Order, the DIP Lender's Charge and the Transactional Fee Charge (each as defined in the Initial Order), the Bid Protections Charge (as defined in the Order Re: Bidding Procedures Approval dated October 10, 2018), and the Key Employee Charge (as defined in the Order Re KEIP Approval & Related Charge dated November 28, 2018) shall be and are hereby fully and unconditionally terminated, released and discharged.

7. **THIS COURT ORDERS** that, as at the CCAA Termination Time, the Administration Charge and the D&O Charge shall be fully, unconditionally and automatically terminated, released and discharged.

CLAIMS BARRED AND EXTINGUISHED

8. **THIS COURT ORDERS AND CONFIRMS** that, notwithstanding the termination of these CCAA proceedings, the Claims Procedure Order dated October 10, 2018, including the bar dates set forth therein, remains in full force and effect.

APPROVAL OF MONITOR'S FEES AND DISBURSEMENTS

9. **THIS COURT ORDERS** that the fees and disbursements of the Monitor up to and including April 30, 2019, all as set out in the Monitor's Report and the Richter Affidavit, are hereby approved.

10. **THIS COURT ORDERS** that the fees and disbursements of the Monitor, as estimated not to exceed $50,000, to complete its remaining duties and the administration of these CCAA proceedings, are hereby approved without further Order of the Court.

11. **THIS COURT ORDERS** that the fees and disbursements of the Monitor's counsel up to and including April 30, 2019, all as set out in the Torys Affidavit, are hereby approved.

12. **THIS COURT ORDERS** that the fees and disbursements of the Monitor's counsel, as estimated not to exceed $25,000, incurred in connection with the completion by the Monitor of its remaining duties and the administration of these CCAA proceedings, are hereby approved without further Order of the Court

APPROVAL OF MONITOR'S ACTIVITIES

13. **THIS COURT ORDERS** that the Sixth, Seventh, Eighth and Ninth Reports of the Monitor and the activities and conduct of the Monitor referred to therein are hereby ratified and approved; provided, however, that only the Monitor in its personal capacity and only with respect to its personal liability, shall be entitled to rely upon or utilize in any way such approvals.

14. **THIS COURT ORDERS AND DECLARES** that the Monitor has duly and properly satisfied, discharged and performed all of its obligations, liabilities, responsibilities and duties in respect of the Applicant in compliance and in accordance with the CCAA, the Initial Order and any other Orders of this Court made in the within CCAA proceedings.

DISCHARGE OF MONITOR

15. **THIS COURT ORDERS AND DECLARES** that, effective as at the CCAA Termination Time, Richter shall be discharged as Monitor of the Applicant and shall have no further duties, obligations or responsibilities as Monitor in these CCAA proceedings.

RELEASES

16. **THIS COURT ORDERS** that the Monitor and its counsel and each of their respective affiliates, officers, directors, partners, employees and agents (collectively, the "**Released Persons**") shall be and are hereby released and discharged from any and all claims that any person may have or be entitled to assert against the Released Persons, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of this Order in any way relating to, arising out of or in respect of the within proceedings or with respect to their conduct in the within proceedings (collectively, the "**Released Claims**"), and any such Released Claims are hereby released, stayed, extinguished and forever barred, and the Released Persons shall have no liability in respect thereof, provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Released Persons.

17. **THIS COURT ORDERS** that, at the CCAA Termination Time, and subject to paragraph 18 hereof, the Released Persons shall be released and discharged from any and all claims that any person may have or be entitled to assert against the Released Persons, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or thereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place following the date of this Order in any way relating to, arising out of or in respect of the within CCAA proceedings or with respect to their respective conduct in the within CCAA proceedings (collectively, the "**Subsequent Released Claims**"), and any such

Subsequent Released Claims shall be released, stayed, extinguished and forever barred and the Released Persons shall have no liability in respect thereof, provided that the Subsequent Released Claims shall not include any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Released Persons.

18. **THIS COURT ORDERS** that in the event that any person objects to the release and discharge of the Subsequent Released Claims, that person must send a written notice of objection and the grounds therefor to the Monitor such that the notice of objection is received by the Monitor prior to the proposed CCAA Termination Time. If no objection is received by the Monitor prior to the CCAA Termination Time, the release and discharge of Subsequent Released Claims pursuant to paragraph 17 hereof shall be automatically deemed effective upon the CCAA Termination Time, without further Order of the Court.

19. **THIS COURT ORDERS** that if an objection to the release of the Subsequent Released Claims is received by the Monitor pursuant to paragraph 18 hereof, the release and discharge of the Subsequent Released Claims pursuant to paragraph 17 hereof shall not become effective pending further Order of the Court. For greater certainty, no objection received in accordance with paragraph 18 hereof shall affect the release and discharge of the Released Claims pursuant to paragraph 16 hereof, which shall be effective as of the date of this Order.

20. **THIS COURT ORDERS** that from and after the CCAA Termination Time no action or other proceeding shall be commenced against any of the Released Persons in any way arising from or related to the within CCAA proceedings, except with prior leave of this Court on at least seven days' prior written notice to the applicable Released Person, and provided that any such Order granting leave includes a term granting the applicable Released Person security for its costs and the costs of its counsel in connection with any proposed action or proceeding, such security to be on terms this Court deems just and appropriate.

21. **THIS COURT ORDERS** that, notwithstanding any provision of this Order, the termination of the CCAA proceedings or the discharge of the Monitor, nothing herein shall affect, vary, derogate from, limit or amend, and the Monitor and its counsel shall continue to have the benefit of, the approvals and protections in favour of the Monitor at law or pursuant to the Initial Order or any other Order of this Court in the CCAA proceedings, all of which are

expressly continued and confirmed, including in connection with any actions taken by the Monitor pursuant to this Order following the filing of the Monitor's Certificate.

ASSIGNMENT INTO BANKRUPTCY AND DISTRIBUTION OF RESERVE

22. **THIS COURT ORDERS** that the Applicant is authorized to file an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act* (Canada) in the City of Toronto, Province of Ontario, and the Stay Period is lifted in order to permit such application.

23. **THIS COURT ORDERS** that the Monitor is authorized and directed to set aside $100,000 from the funds remaining in the Reserve (as defined in the Order Re: Distribution Protocol dated December 17, 2018) to account for the funding of the bankruptcy proceedings (the "**Trustee Account**"). The Monitor is further authorized and directed to transfer the Trustee Account to the trustee in bankruptcy upon its appointment.

24. **THIS COURT ORDERS** that at or before the CCAA Termination Time, subject to the creation of the Trustee Account, the Monitor is authorized and directed without further Order of the Court, to distribute the remainder of the Reserve to Deerfield.

GENERAL

25. **THIS COURT ORDERS** that notwithstanding the discharge of the Monitor and the termination of the CCAA proceedings, this Court shall remain seized of any matter arising from these CCAA proceedings, and each of the Applicant, the Monitor and any other interested party shall have the authority from and after the date of this Order to apply to this Court to address matters ancillary or incidental to these CCAA proceedings notwithstanding the termination thereof. The Monitor is authorized to take such steps and actions as the Monitor determines are necessary to give effect to this Order following the date of this Order until the CCAA Termination Time.

26. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and the Monitor as may be necessary or desirable to give effect to this Order or to assist the Applicant, the Monitor and their agents in carrying out the terms of this Order.

D. Brian J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 17 2019

PER / PAR:

SCHEDULE A
FORM OF MONITOR'S CERTIFICATE

Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF OLD API WIND-DOWN LTD.

Applicant

MONITOR'S CERTIFICATE

RECITALS

A. Old API Wind-down Ltd. (the "**Applicant**") obtained protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to an Initial Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated August 10, 2018 (the "**Initial Order**").

B. Richter Advisory Group Inc. (in such capacity, the "**Monitor**") was appointed as the Monitor of the Applicant in the CCAA proceedings pursuant to the Initial Order.

C. Pursuant to the CCAA Termination Order granted ●, 2019, the Court approved, among other things, the termination of the CCAA proceedings effective at the date and time (the "**CCAA Termination Time**") on which the Monitor files this Monitor's certificate with the Court.

THE MONITOR CONFIRMS the following:

1. The Monitor has been informed by the Applicant that all matters to be attended to in connection with the CCAA proceedings have been completed.

2. Accordingly, the CCAA Termination Time has occurred at the date and time set forth below.

DATED at Toronto, Ontario this _____ day of _____, 2019.

RICHTER ADVISORY GROUP INC., solely in its capacity as Monitor of the Applicant and not in its personal capacity

Per: _____

Name:

Title:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF OLD API WIND-DOWN LTD.

Applicant

Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)
Proceeding commenced at Toronto

CCAA TERMINATION ORDER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

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Lawyers for the Applicant

TAB T

Court File No. CV-15-10869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	**FRIDAY , THE 28TH**
	)	
JUSTICE NEWBOULD	)	**DAY OF OCTOBER, 2016**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 9366016 CANADA INC.

Applicant

DISTRIBUTION AND CCAA TERMINATION ORDER

THIS MOTION made by 9366016 Canada Inc. (the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Ninth Report of Ernst & Young Inc. ("**EYI**") as the Court-appointed Monitor of the Applicant (the "**Monitor**") dated October 26, 2016 (the "**Ninth Report**") and the affidavits sworn in support of the approval of the fees and disbursements of the Monitor and its counsel, and on hearing the submissions of counsel for each of the Applicant, the Monitor and such other counsel as were present and wished to be heard, and on reading the affidavit of service, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms used and not otherwise defined herein shall have the meanings given to them in the Order of this Court granted February 10, 2015 (as amended, the "**Initial Order**"), and that the following terms shall have the following meanings for the purposes of this Order:

(a) "**CCAA Proceedings**" means these proceedings in respect of (i) the Applicant from and after the Transition Date, and (ii) the Former Applicants prior to the Transition Date;

(b) "**Charity**" means one or more registered charities with a primary focus on the provision of charitable activities in the City of Ottawa and surrounding region as determined by the Monitor in consultation with Goodmans LLP as counsel to the Applicant;

(c) "**Claim**" means any right or claim of any Person against the Applicant, whether or not asserted, in connection with any indebtedness, liability or obligations of any kind whatsoever, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, including for greater certainty any "equity claim" as defined in the CCAA, (i) in existence on the Filing Date, or (ii) arising out of the restructuring, disclaimer, resiliation, termination or breach by the Applicant on or after the Filing Date of any contract, lease or agreement of any nature whatsoever (a "**Restructuring Period Claim**");

(d) "**Claimant**" means a Person with a Distribution Claim;

(e) "**CWP**" means Canadian Water Projects Inc.;

(f) "**CWP Claim**" means the unsecured Claim of CWP against the Applicant in the amount of $21,673,250.50 as determined pursuant to the Global Settlement Agreement;

(g) "**Directors and Officers**" means, collectively (i) any current or former director or officer of the Applicant, and (ii) any director or officer of the Former Applicants that served in such capacity during the period commencing six months prior to the Filing Date and ending immediately prior to the Transition Date, and includes, for greater certainty, the Chief Restructuring Officer appointed pursuant to the Initial Order;

(h) "**Distributable Amount**" means the total amount of cash held by the Monitor in trust for the Applicant on the Distribution Date less the amount of the Reserve;

(i) "**Distribution Date**" means the date set by the Monitor to effect the Distributions pursuant to this Order;

(j) "**Distributions**" means the distributions of the Distributable Amount pursuant to this Order;

(k) "**Filing Date**" means February 10, 2015;

(l) "**Former Applicants**" means Plasco Energy Group Inc., Plasco Trail Road Inc. and Plasco Ottawa Inc.;

(m) "**Global Settlement Agreement**" means the Global Settlement Agreement dated as of August 14, 2015 between the Former Applicants, the Applicant, NSPG and CWP;

(n) "**Employee Claimants**" means former employees of the Applicant or the Former Applicants with Employee Claims;

(o) "**Employee Claims**" means the Claims of Employee Claimants against the Applicant, as determined by the Monitor with the assistance of the Applicant and with the assistance of Representative Counsel with respect to Represented Parties;

(p) "**NSPG**" means North Shore Power Group Inc.;

(q) "**NSPG Claim**" means the unsecured Claim of NSPG against the Applicant in the amount of $19,545,373.50 as determined pursuant to the Global Settlement Agreement;

(r) "**Other Unsecured Claims**" means, collectively, unsecured Claims against the Applicant (i) as set out in the books and records of the Applicant and Former Applicants, and (ii) any other unsecured Claim against the Applicant as accepted by the Monitor prior to the Distribution Date, provided that the CWP Claim, the NSPG Claim, the Promissory Notes Claims and the Employee Claims shall not constitute Other Unsecured Claims;

(s) "**Person**" means any individual, corporation, firm, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, government authority or agency, or any other entity, wherever situate or domiciled and whether or not having legal status;

(t) "**Promissory Notes Claims**" means the aggregate of all Claims in respect of the Promissory Notes;

(u) "**Promissory Notes**" means the unsecured convertible senior promissory notes issued by the Applicant in the principal amount of $68,000,004.00;

(v) "**Representative Counsel**" means Nelligan O'Brien Payne LLP and Shibley Righton LLP as co-counsel for the Represented Parties in the CCAA Proceedings;

(w) "**Representation Order**" means the Order of this Court dated March 3, 2015 pursuant to which, *inter alia*, Representative Counsel was appointed as counsel for the Represented Parties in the CCAA Proceedings;

(x) "**Represented Parties**" has the meaning given to it in the Representation Order;

(y) **"Reserve"** means a reserve of funds in an amount determined by the Monitor, in consultation with the Applicant, sufficient for the payment following the Distribution Date of:

(i) the professional fees and disbursements of the Monitor, counsel to the Monitor, and counsel to the Applicant in connection with these CCAA Proceedings;

(ii) any outstanding claims secured by the Administration Charge, the Directors' Charge and the KERP Charge;

(iii) any expense incurred by the Applicant that relates to the period after the Filing Date; and

(iv) any other contingent amounts appropriate in the circumstances to ensure the availability of sufficient funding to undertake and complete the orderly wind-down of the Applicant and all ancillary activities in connection therewith;

(z) **"Restructuring Period Claims Bar Date"** means November 15, 2016; and

(aa) **"Transition Date"** means September 25, 2015, being the date on which the Global Settlement Agreement became effective pursuant to its terms.

RESTRUCTURING PERIOD CLAIMS

3. **THIS COURT ORDERS** that any Person that does not deliver a proof of claim form in respect of a Restructuring Period Claim to the Monitor on or prior to the Restructuring Period Claims Bar Date shall not be entitled to a Distribution in respect of such Restructuring Period Claim and such Restructuring Period Claim shall be irrevocably barred and extinguished without any further act or notification.

4. **THIS COURT ORDERS** that, where a proof of claim form in respect of a Restructuring Period Claim is delivered to the Monitor on or prior to the Restructuring Period Claims Bar Date, the Monitor, in consultation with counsel to the Company, shall review such proof of claim and

shall either allow, partially allow or disallow such proof of claim for purposes of the Distribution. Where a proof of claim form in respect of a Restructuring Period Claim is allowed in its entirety, the Monitor need do nothing further and the Restructuring Period Claim as set out in the applicable proof of claim form shall be deemed to constitute a Restructuring Period Claim for Distribution purposes. Where a Restructuring Period Claim asserted in a proof of claim form is partially allowed or disallowed, the Person that delivered such proof of claim form shall be notified by the Monitor of the partial allowance or disallowance, as applicable, and the Monitor, with the assistance of counsel to the Applicant, shall attempt to resolve with such Person the validity and quantum of the asserted Restructuring Period Claim. Where any dispute is not resolved within a reasonable period of time as determined by the Monitor, the Monitor is authorized to bring the matter before this Court for determination.

DISTRIBUTIONS

5. **THIS COURT ORDERS** that the following Claims shall be allowed as against the Applicant for purposes of making Distributions to the Applicant's unsecured creditors (collectively, the "**Distribution Claims**"):

(a) the CWP Claim;

(b) the NSPG Claim;

(c) the Promissory Notes Claims;

(d) the Employee Claims; and

(e) the Other Unsecured Claims.

6. **THIS COURT ORDERS** that on the Distribution Date, the Distributable Amount shall be distributed by the Monitor to the Claimants in accordance with the following:

(a) each Claimant shall be entitled to a *pro rata* share of the Distributable Amount equal to the percentage that the value that such Claimant's Distribution Claim bears to the aggregate value of all Distribution Claims; and

(b) the aggregate *pro rata* share of the Distributable Amount allocable to the Promissory Notes Claims pursuant to subparagraph 6(a) of this Order (the "**Redirected Distribution**") shall, in lieu of distribution to the holders of such Promissory Notes Claims, be distributed to Employee Claimants, and each Employee Claimant shall be entitled, in addition to the Distribution to which it is entitled pursuant to subparagraph 6(a) of this Order, to a *pro rata* share of the Redirected Distribution equal to the value that such Employee Claimant's Employee Claim bears to the aggregate value of all Employee Claims.

7. **THIS COURT ORDERS** that the Monitor is authorized to rely on the books and records of the Applicant as necessary in connection with the performance of the Monitor's duties and obligations hereunder, including with respect to the determination and valuation of Distribution Claims and the addresses of Claimants for the purpose of making Distributions.

8. **THIS COURT ORDERS** that the Monitor is hereby authorized, directed and empowered to take any further steps and actions that it deems necessary or desirable to undertake and complete the Distributions.

9. **THIS COURT ORDERS** that if any Claimant's Distribution is returned as undeliverable or remains uncashed (an "**Undeliverable Distribution**"), no further Distribution to such Claimant shall be made unless and until the Monitor is notified by such Claimant of such Claimant's current address, at which time such Distribution shall be made to such Claimant. All claims for Undeliverable Distributions must be made on or before the date that is six months following the Distribution Date (the "**Distribution Deadline**"), after which date any entitlement with respect to such Undeliverable Distribution shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any federal or provincial law to the contrary. The aggregate of all Undeliverable Distributions remaining following the occurrence of the Distribution Deadline shall be paid by the Monitor to Charity.

10. **THIS COURT ORDERS** that any amount received following the Distribution Date by the Applicant, or the Monitor in trust for the Applicant, in connection with the wind-up of Plasco China Limited (Hong Kong), Chengdu Plasco Energy Technology Co. Ltd. (People's Republic of China) or Beijing Plasco Technology Co. Ltd. (People's Republic of China) shall be paid to

Charity by the Monitor promptly upon the receipt of such amount by the Monitor and, for greater certainty, any amount received in respect of the wind-up of such entities prior to the Distribution Date shall form part of the Distributable Amount to be distributed to Claimants pursuant to the terms of this Order.

11. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these CCAA Proceedings;

(b) the assignment in bankruptcy or any petition for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") and any order issued pursuant to such petition; or

(c) any provisions of any federal or provincial legislation,

the Distributions shall be binding on any trustee in bankruptcy or receiver that may be appointed and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

RELEASE

12. **THIS COURT ORDERS** that the Applicant, the Directors and Officers, and the Company's present and former direct and indirect shareholders, employees and advisors, and the Monitor (collectively, the "**Released Parties**") are hereby forever irrevocably released and discharged from any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, recoveries, and obligations of whatever nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the date of this Order in

respect of the Applicant, the Former Applicants, the business, operations, assets, property and affairs of the Applicant or the Former Applicant wherever or however conducted or governed, the administration and/or management of the Applicant or the Former Applicants, and the CCAA Proceedings (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing in this paragraph 12 shall waive, discharge, release, cancel or bar (i) the rights of Claimants to receive a Distribution pursuant to the terms of this Order, (ii) any claim against the Directors and Officers that is not permitted to be released pursuant to section 5.1(2) of the CCAA, or (iii) any claim against the Company that is not permitted to be released pursuant to section 19(2) of the CCAA.

MONITOR PROTECTIONS

13. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the Initial Order, the Monitor shall not be liable for any act or omission on the part of the Monitor pertaining to the discharge of its duties under this Order, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Monitor. Nothing in this Order shall derogate from the protections afforded to the Monitor by the CCAA, any other federal or provincial applicable law or the Initial Order.

14. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order and without in any way limiting the protections for the Monitor as set forth in this Order, the Initial Order and the CCAA, (a) the Monitor shall have no obligation to make any Distribution or other payment pursuant to this Order unless the Monitor is in receipt of, or holds in trust for the Applicant, adequate funds to effect any such payment, and (b) the Monitor shall have no liability to any Person as a result of a Claim of such Person not being recognized as a Distribution Claim for purposes of this Order or as a result of such Person not receiving a Distribution pursuant to this Order, save and except for any liability arising out of any gross negligence or wilful misconduct on the part of the Monitor.

15. **THIS COURT ORDERS** that any Distributions under this Order shall not constitute a "distribution" for the purposes of section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada), section 107 of the *Corporations Act Tax* (Ontario), section 22 of the

Retail Sales Tax (Ontario), section 117 of the *Taxation Act, 2007* (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively, the "**Tax Legislation**"), and that the Monitor in making any such Distributions is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Legislation, and the Monitor shall not incur any liability under the Tax Legislation in respect of its making any payments ordered or permitted under this Order, and is hereby forever released and discharged from any claims against it under or pursuant to the Tax Legislation or otherwise at law, arising in respect of Distributions or other payments under this Order and any claims of this nature are hereby forever barred.

APPROVAL OF MONITOR'S ACTIVITIES

16. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to or on the date hereof in relation to (a) the Applicant, (b) the Former Applicants, and (c) these CCAA Proceedings are hereby ratified and approved.

17. **THIS COURT ORDERS** that the Pre-Filing Report of the Monitor dated February 10, 2015, the First Report of the Monitor dated March 2, 2015, the Second Report of the Monitor dated April 24, 2015, the Third Report of the Monitor dated July 16, 2015, the Fourth Report of the Monitor dated September 22, 2015, the Fifth Report of the Monitor dated February 15, 2015, the Sixth Report of the Monitor dated March 29, 2016, the Seventh Report of the Monitor dated June 1, 2016, the Eighth Report of the Monitor dated September 28, 2016 and the Ninth Report and the activities and conduct of the Monitor described in each of such reports are hereby approved.

APPROVAL OF FEES AND DISBURSEMENTS OF THE MONITOR

18. **THIS COURT ORDERS** that the fees and disbursements of the Monitor in the amount of $493,910.99 (for the period from February 3, 2015 to September 23, 2016 inclusive, and including harmonized sales tax) and the Monitor's fees and disbursements, estimated not to exceed $35,000, to complete its remaining duties and the administration of these CCAA Proceedings, all as set out in the affidavit of Greg Adams and the Ninth Report, are hereby approved.

19. **THIS COURT ORDERS** that the fees and disbursements of Stikeman Elliott LLP, in its capacity as counsel to the Monitor, in the amount of $197,929.54 (for the period from February 6, 2015 to August 31, 2016 inclusive, and including harmonized sales tax) and its fees and disbursements, estimated not to exceed $30,000, in connection with the completion by counsel to the Monitor of its remaining duties and the administration of these CCAA Proceedings, all as set out in the affidavit of Ashley Taylor and the Ninth Report, are hereby approved.

TERMINATION OF CCAA PROCEEDINGS

20. **THIS COURT ORDERS** that upon the filing of a certificate of the Monitor substantially in the form attached hereto as Schedule "A" certifying that the Distributions have been made pursuant to the terms of this Order and that the Applicant has confirmed to the Monitor that all matters to be attended to in connection with the CCAA Proceedings have been completed, the CCAA Proceedings shall be terminated without any further act or formality (the "**CCAA Termination Time**").

21. **THIS COURT ORDERS** that the Administration Charge, the Directors' Charge and the KERP Charge shall be and are hereby terminated, released and discharged at the CCAA Termination Time.

DISCHARGE OF THE MONITOR

22. **THIS COURT ORDERS AND DECLARES** that effective at the CCAA Termination Time, the Monitor shall be and is hereby discharged as Monitor and shall have no further duties, obligations or responsibilities as Monitor from and after the CCAA Termination Time, save and except for any obligation to pay to Charity pursuant to the terms of this Order (a) the aggregate of all Undeliverable Distributions remaining following the Distribution Deadline, and (b) amounts received by the Monitor in connection with the wind-down of the Chinese Subsidiaries.

23. **THIS COURT ORDERS** that, notwithstanding any provision of this Order, the termination of the CCAA Proceedings, and the discharge of the Monitor, nothing herein shall affect, vary, derogate from, limit or amend, and the Monitor shall continue to have the benefit of,

any of the rights, approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, any other Order of this Court in the CCAA Proceedings or otherwise, all of which are expressly continued and confirmed, including, without limiting the generality of the foregoing, in connection with any payment by the Monitor to Charity following the CCAA Termination Time.

EXTENSION OF THE STAY OF PROCEEDINGS

24. **THIS COURT ORDERS** that the Stay Period (as defined in and used throughout the Initial Order) be and is hereby extended to and including the earlier of: (a) the CCAA Termination Time, and (b) March 31, 2017.

GENERAL

25. **THIS COURT ORDERS** that the Monitor may apply to the Court as necessary to seek further orders and directions to give effect to the Distributions and other matters proposed herein.

26. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

27. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant and Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and the Monitor and their respective agents as may be necessary or desirable to give effect to this Order, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 28 2016

PER / PAR:

Schedule A – Form of Monitor's Certificate

Court File No. CV-15-10869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 9366016 CANADA INC.

Applicant

MONITOR'S CERTIFICATE

RECITALS

A. Ernst & Young Inc. was appointed as the Monitor of the Applicant in the within CCAA Proceedings pursuant to an Order of the Ontario Superior Court of Justice (the "**Court**") dated February 10, 2015 (as amended, the "**Initial Order**").

C. Pursuant to the Order of this Court dated October 28, 2016 (the "**Distribution and CCAA Termination Order**"), the Monitor shall be discharged and the CCAA Proceedings shall be terminated upon the filing of this Monitor's Certificate with the Court.

D. Unless otherwise indicated herein, capitalized terms used in this Monitor's Certificate shall have the meanings given to them in the Distribution and CCAA Termination Order.

THE MONITOR CERTIFIES the following:

1. The Distributions have been made pursuant to the terms of the Distribution and CCAA Termination Order.

2. The Applicant has confirmed to the Monitor that all matters to be attended to in connection with the CCAA Proceedings have been completed.

ACCORDINGLY, the CCAA Termination Time as defined in the CCAA Termination Order has occurred.

DATED at Toronto, Ontario this _____ day of _____, 201___.

Ernst & Young Inc., in its capacity as Monitor of the Applicant, and not in its personal capacity

Per: _____

Name:

Title:

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Proceeding commenced at Toronto

DISTRIBUTION AND CCAA TERMINATION ORDER

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