Court File No. CV-19-629552-00CL

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 ARRANGEMENT OF DEL EQUIPMENT INC.

Applicant

BOOK OF AUTHORITIES OF THE APPLICANT

(returnable May 5, 2020)

April 29, 2020

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INDEX

INDEX

1

1983 CarswellMan 154
Supreme Court of Canada, Laskin C.J.C.

R. v. Wilson

1983 CarswellMan 154, 1983 CarswellMan 189, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, [1984] 1 W.W.R. 481, 11 W.C.B. 200, 26 Man. R. (2d) 194, 37 C.R. (3d) 97, 4 D.L.R. (4th) 577, 51 N.R. 321, 9 C.C.C. (3d) 97, J.E. 84-70

James Stephen Wilson, Appellant and Her Majesty the Queen, Respondent

Dickson, Estey, McIntyre and Chouinard JJ.

Heard: March 14, 1983
Judgment: December 15, 1983
Docket: 16931

Proceedings: Affirmed, 65 C.C.C. (2d) 507, 13 Man. R. (2d) 155, 1982 CarswellMan 69, [1982] 2 W.W.R. 91 (Man. C.A.)

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Considered by majority:

Bador Bee v. Habib Merican Noordin, [1909] A.C. 615 (P.C.) — *referred to*

Bidder v. Bridges (1884), 26 Ch. D. 1 (C.A.) — *referred to*

Boyle v. Sacker (1888), 39 Ch. D. 249 (C.A.) — *referred to*

Can. Tpt. (U.K.) Ltd. v. Alsbury, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385 , affirmed *(*sub nom. *Poje v. A.G.B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785 — *applied*

Charette v. R., [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158 , affirming *(*sub nom. *R. v. Parsons)* 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161 — *considered*

Clarke v. Phinney, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Dickie v. Woodworth (1883), 8 S.C.R. 192 — *applied*

Gibson v. Le Temps Publishing Co. (1903), 6 O.L.R. 690 — *applied*

Goldman v. R., [1980] 1 S.C.R. 976, 13 C.R. (3d) 228, 51 C.C.C. (2d) 1, 108 D.L.R. (3d) 17, 30 N.R. 453 — *referred to*

Gulf Islands Navigation Ltd. v. Seafarers' Int. Union (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 (B.C.C.A.) — *applied*

Maynard v. Maynard, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Miller and Thomas, Re (1975), 28 C.C.C. (2d) 128 (B.C. Co. Ct.) — *referred to*

Pashko v. Can. Accept. Corp. Ltd. (1957), 12 D.L.R. (2d) 380 (B.C.C.A.) — *referred to*

R. v. Blacquiere (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336, 79 A.P.R. 336 (P.E.I.S.C.) — *considered*

R. v. Bradley, [1980] C.S. 1051, 19 C.R. (3d) 336 (Que. S.C.) — *referred to*

R. v. Cardoza (1981), 61 C.C.C. (2d) 412 (Ont. C.A.) — *referred to*

R. v. Crease (1980), 53 C.C.C. (2d) 378 (Ont. C.A.) — *referred to*

R. v. Dass, [1979] 4 W.W.R. 97, 8 C.R. (3d) 224, 47 C.C.C. (2d) 194 , leave to appeal to S.C.C. refused 30 N.R. 609n — *considered*

R. v. Donnelly, [1976] W.W.D. 100, 29 C.C.C. (2d) 58 (Alta. T.D.) — *considered*

R. v. Gabourie (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.) — *referred to*

R. v. Gill (1980), 56 C.C.C. (2d) 169 (B.C.C.A.) — *considered*

R. v. Hancock, [1976] 5 W.W.R. 609, 36 C.R.N.S. 102, 30 C.C.C. (2d) 544 (B.C.C.A.) — *referred to*

R. v. Haslam (1977), 36 C.C.C. (2d) 250 (Nfld. T.D.) — *referred to*

R. v. Ho (1976), 32 C.C.C. (2d) 339 (B.C. Co. Ct.) — *referred to*

R. v. Hollyoake (1975), 27 C.C.C. (2d) 63 (Ont. Prov. Ct.) — *referred to*

R. v. Johnny (1981), 62 C.C.C. (2d) 33 (B.C.S.C.) — *referred to*

R. v. Kalo (1975), 28 C.C.C. (2d) 1 (Ont. Co. Ct.) — *referred to*

R. v. Miller, [1976] 1 W.W.R. 97, 32 C.R.N.S. 192, *(*sub nom. *Re Miller and Thomas)* 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679 (B.C.S.C.) — *referred to*

R. v. Newall (1982), 67 C.C.C. (2d) 431, 136 D.L.R. (3d) 734 (B.C.S.C.) *referred to*

R. v. Robinson, [1977] 4 W.W.R. 697, 39 C.R.N.S. 158 (B.C. Co. Ct.) — *referred to*

R. v. Turangan, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 , affirmed 32 C.C.C. (2d) 254n (B.C.C.A.) — *referred to*

R. v. Welsh (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A.) — *applied*

R. v. Wong (1976), 33 C.C.C. (2d) 506 (B.C.S.C.) — *considered*

R. and Collos, Re, [1977] 5 W.W.R. 284, 37 C.C.C. (2d) 405 , reversing [1977] 2 W.W.R. 693, 34 C.C.C. (2d) 313 (B.C.C.A.) — *referred to*

R. and Kozak, Re (1976), 32 C.C.C. (2d) 235 (B.C.S.C.) — *referred to*

Royal Comm. Inquiry into Royal Amer. Shows Inc. (1978), 40 C.C.C. (2d) 212 (Alta. T.D.) — *referred to*

Royal Trust Co. v. Jones, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292 — *applied*

Stewart and R., Re (1975), 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 , affirmed 13 O.R. (2d) 260, 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592 (H.C.) — *referred to*

Stewart v. Braun, [1924] 2 W.W.R. 1103, [1924] 3 D.L.R. 941 (Man K.B.) — *applied*

Zaduk and R., Re (1977), 37 C.C.C. (2d) 1 (Ont. H.C.) — *referred to*

***McIntyre J.*:**

1 The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV. 1 of the *Criminal Code* from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Chemiak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

2 At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(b) of the *Code* had been satisfied. That section reads:

> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied.
>
> [...]
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

3 No objection was taken by the Crown to this line of examination.

4 On the basis of the cross-examination of the police officer, the trial judge made the following finding:

> No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency.

5 As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the *Criminal Code* and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

6 On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of the *Code*. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

7 In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

8 I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally-and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

9 Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in *Can. Tpt. (U.K.) Ltd. v. Alsbury*, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385, affirmed *(*sub nom. *Poje v. A.G. B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785, a judgment of the British Columbia Court of Appeal. In that case striking employees picketed the wharf where a vessel was waiting to take on cargo. The shipowner secured an ex *parte* injunction in the Supreme Court restraining the defendant and others from picketing. The injunction was disobeyed and contempt proceedings were commenced against the defendant. At first instance before the Chief Justice of the Supreme Court of British Columbia the defendants contended that an attachment for contempt should not issue for the reason that the injunction order, made by a judge of the Supreme Court, was a nullity and could not therefore form the basis for a contempt order. This collateral attack was rejected by the Chief Justice, attachment issued, and penalties for contempt including fines and imprisonment were imposed. In the Court of Appeal the appeal was dismissed with one dissent and, at p. 406, Sidney Smith J.A. said:

> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned Judge's order, chief among them being: (1) that it was based on improper and inadmissible evidence; (2) that the injunction was in conflict with the *Trade-unions Act* [R.S.B.C. 1948, c. 342] and the *Laws Declaratory Act*[R.S.B.C. 1948, c. 179]; (3) that the injunction was in permanent form and no Court could grant a permanent injunction *ex parte*.
>
> To this the general answer is made that the order of a Superior Court is *never* a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General, *viz., Scott v. Bennett* (1871), L.R. 5 Hi. 234 at p. 245; *viz., Scott v. Bennett* (1871), L.R. 5 H.L. 234 at p. 245; *Revell v. Blake* (1873), L.R. 8 C.P. 533 at p. 544 (Ex. Ch.); *Scotia Const. Co. v. Halifax*, [1935] S.C.R. 124, [1935] 1 D.L.R. 316; and to these I might add *Re Padstow Total Loss & Collision Assur. Assn.* (1882), 20 Ch.D. 137 at p. 145 (C.A.), and *Hughes v. Northern Elec. & Mfg. Co.* (1915), 50 S.C.R. 626 at pp. 652-3, 21 D.L.R. 358. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in Kerr on Injunctions, 6th éd., p. 668, and 7 Hals., p. 32, which include the authoritative decision in *Eastern Trust Co. v. MacKenzie, Mann & Co.*, [1915] A.C. 750 at p. 761, 31 W.L.R. 248, 22 D.L.R. 410, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are *Leberry v. Braden* (1900), 7 B.C.R. 403, and *Bassel's Lunch Ltd. v. Kick*, [1936] O.R. 445 at p. 456, 67 Can. C.C. 131 at p. 135.
>
> [1936] 4 D.L.R. 106 at p. 110 (C.A.)

10 Bird J.A., who wrote a separate concurring judgment, made the following comments, at p. 418:

> The order under review is that of a Superior Court of Record, and is binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.

and later, at pp. 418-19:

> In *Eastern Trust Co. v. MacKenzie, Mann & Co.*, 22 D.L.R. at p. 418, [1915] A.C. at p. 760, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said: "(The injunction) was, or course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged."
>
> Duff C.J.C., approved the same principle in *Scotia Const. Co. v. Halifax*, [1935], 1 D.L.R. 316, S.C.R. 124, and expressed the principle in these terms (p. 317 D.L.R., p. 128 S.C.R.) "In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing ... authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction."
>
> In my opinion these submissions must be rejected.

11 On appeal to this Court, *Poje v. A.G. B.C.*, [1953] 1 S.C.R. 516, the appeal was dismissed. The question of a collateral attack upon a court order was not specifically dealt with. Kerwin J. expressed no opinion on the matter, but Estey J. in a short concurring judgment said at p. 528:

> I agree the appeal should be dismissed. The learned Chief Justice, in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal, both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

12 The case was referred to in *Pashko v. Can. Accept. Corp. Ltd.* (1957), 12 D.L.R. (2d) 380, in the British Columbia Court of Appeal.

13 In addition to these authorities and those referred to in judgments of the majority in the *Canadian Transport* case, reference may be made as well to the words of Osier J.A. in *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690 (Ont. H.C. [In Chambers]) at 694-95, where a judgment was attacked on the basis of a deficiency in service during the earlier proceedings which gave rise to the judgment. Osier J.A. said:

> If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager: Snow's Annual Practice, *1902, p. 655;* Yearly Practice, *1904*, p. *504*. Or the firm might have moved to set aside the faulty service on the manager: *Nelson v. Pastorino & Co.* (1883), 49 L.T. 564 . Neither of these courses was taken and there is now a judgment against a partnership firm, which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands, the plaintiff has the right to enforce it by any means open to him under Rule *228*.

14 Further authority in support of the rule against collateral attack may be found in *Clarke v. Phinney* (1895), 25 S.C.R. 633; *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241; *Bador Bee v. Habib Merican Noordin*, [1909] A.C. 615 (P.C.) and particularly in *Royal Trust Co. v. Jones*, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292. In that case the validity of a codicil to a will was upheld in proceedings in the Supreme Court of British Columbia. The trial judgment was affirmed in the Court of Appeal. The unsuccessful party brought a new action to set aside this judgment which succeeded notwithstanding the confirmation on appeal of the earlier judgment. No appeal was taken and the trustee proceeded for a period of fifteen years to administer the estate on the basis that the codicil was invalid. On an application for directions on a matter which did not

directly involve the validity of the codicil and which involved parties not in the first proceeding, the Court of Appeal on its own motion declared that the trial judge, Manson J., who had declared the codicil invalid and set aside the earlier judgment, was without jurisdiction to do so and reversed his judgment. On appeal to this Court the appeal was allowed. Cartwright J. (as he then was) said, at p. 145:

> An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.

15 The first judgment had therefore been properly challenged by a direct action. The second judgment, not having been appealed or directly challenged, was binding. Cartwright J. said, at p. 146:

> It follows that Manson J. had jurisdiction to entertain the action which was brought before him and his judgment in that action, not having been appealed from or otherwise impeached, *is* a valid judgment of the Court binding upon all those who were parties to it.

16 The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

17 The authorizations in question here are all orders of a superior court. Unless Parliament has altered or varied the rule above-described, it would apply in this case. It would then follow that in this action to determine the guilt or innocence of the accused the trial judge was in error in entertaining a collateral attack on the validity of the authorizations and, in effect, going behind them. Support for this view, with some qualifications for cases where there has been a defect on the face of the authorization or fraud, is to be found in *R. v. Welsh* (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363 at 371-72, 74 D.L.R. (3d) 748 (C.A.), where Zuber J.A., at pp. 371-72, said:

> Ordinarily the trial Court is obliged to simply accept the authorization at face value. Cases in which a trial Court could decline to accept the authorization would be rare indeed and, without attempting to set out an exhaustive list, would include cases in which the authorization was defective on its face, or was vitiated by reason of having been obtained by a fraud. However, even an authorization that was said to be defective on its face may attract the curative provisions of s. 178.16(2)(b) *[now s.* 178.16(3)(b)].

18 In the case at bar, the trial judge preferred to follow the reasoning of Meredith J., of the British Columbia Supreme Court, in *R. v. Wong* (1976), 33 C.C.C. (2d) 506, where he asserted a broader power in the trial judge to go behind the authorization.

19 The question then is: has Parliament by the enactment of Part IV. 1 of the *Criminal Code* altered the rule which would render the authorizations immune from collateral attack? In my opinion, the answer must be no.

20 Section 178.16(1) deals with the admissibility of evidence obtained under the authority of the authorization. Subsection (3) gives the trial judge a discretion to admit evidence that is inadmissible under subs. (1) "by reason only of a defect of form or an irregularity in procedure not being a substantive defect or irregularity, in the application for or the giving of the authorization". The trial judge may be required to determine whether he will admit under subs. (3) evidence otherwise inadmissible under the provisions of Part IV.1 of the *Code*. This step, it would seem, would require some examination of the procedures followed in obtaining the authorization in order to determine whether evidence has been rendered inadmissible only by a defect or an irregularity of a nonsubstantive nature.

21 It is my opinion that the trial judge in reaching a conclusion on this subject is limited to a consideration of defects and irregularities which are apparent on the face of the authorization and he may not go behind it. Such a step would involve a collateral attack upon the authorization. It would require, in my opinion, much clearer statutory language than that employed in subs. (3) of s. 178.16 to permit such a step in the face of the clearly established rule. I find additional support for this view

in the fact that once an authorization is granted s. 178.14 provides that all documents connected with it, save the authorization itself, be sealed in a packet and kept in the custody of the court, to be opened only for the purposes of a renewal or by an order of a judge of a superior court of criminal jurisdiction or a judge defined in s. 482 of the *Code*. Many trial judges will not fall into either of those categories and accordingly will not have authority to direct the opening of the sealed packet. It follows that a trial judge *qua* trial judge has not, and was not intended to have, access to the materials necessary to review the granting *of* the authorization. This makes any collateral attack on the authorization a virtual impossibility.

22 It should be observed as well that subs. (3) of s. 178.16 gives no power to go behind the authorization and no power to vary or question it. It merely provides that if in the performance *of his* task of determining the admissibility of evidence the trial judge forms the opinion that a relevant, private communication is inadmissible because of subs. (1) of s. 178.16 he may, if the admissibility results only because of a defect in form or an irregularity in procedure which is not substantive in the giving of the authorization, admit the evidence notwithstanding subs. (1). This subsection gives a power to the trial judge in appropriate circumstances to admit evidence despite its inadmissibility under the authorization, but it includes no power to attack the authorization itself. I have not overlooked the fact that this Court in *Charette v. R.*, [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158, affirming *(*sub nom. *R. v. Parsons)* 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161, approved the judgment of Dubin J.A. in the Ontario Court of Appeal in *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), and that Dubin J.A. said in that case, at pp. 501-02:

> *A voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to the admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

23 In my view, these words do not support the notion that the trial judge may go behind the authorization. They indicate that consideration of the validity of the authorization on the part of the trial judge is limited to matters appearing on its face, and it is my opinion that Dubin J.A. did not in that case assert a power in the trial judge to do more.

24 Since no right of appeal is given from the granting of an authorization and since prerogative relief by *certiorari* would not appear to be applicable (there being no question of jurisdiction), any application for review of an authorization must, in my opinion, be made to the court that made it. There is authority for adopting this procedure. An authorization is granted on the basis of an *ex parte* application. In civil matters, there is a body of jurisprudence which deals with the review of *ex parte* orders. There is a widely recognized rule that an *ex parte* order may be reviewed by the judge who made it. In *Dickie v. Woodworth* (1883), 8 S.C.R. 192 at 195, Ritchie C.J.C. said, at p. 195:

> The judge having in the first instance made an *ex parte* order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted ... .

25 This view is reflected in the words of Mathers C.J.K.B. in the case of *Stewart v. Braun*, [1924] 2 W.W.R. 1103, [1924] 3 D.L.R. 941 at 945 (Man. K.B.), at p. 945:

> But it frequently happens that Judges and judicial officers are called upon to make orders *ex parte*, where only one side is represented and where the order granted *is* not the result of a deliberate judicial decision after a hearing and argument. An application to rescind or vary an *ex parte* order is neither an appeal nor an application in the nature of an appeal and therefore the Judge or officer by whom such an order has been made, has since the Judicature Act, as he had before, the right to rescind or vary it... .

26 Such power of review has been asserted and exercised in respect of authorizations to intercept private communications in *Re Stewart and R.* (1975), 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 (Ontario County Court, Ottawa-Carleton Judicial District), application for *certiorari* dismissed, 13 O.R. (2d) 260, 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592 (H.C.) (1976); *R. v. Turangan*, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 (B.C.S.C), appeal dismissed for lack of jurisdiction, affirmed 32 C.C.C. (2d) 254n (B.C. C.A.)

27 The exigencies of court administration, as well as death or illness of the authorizing judge, do not always make it practical or possible to apply for a review to the same judge who made the order. There is support for the proposition that another judge of the same court can review an *ex parte* order. See, for example, *Bidder v. Bridges* (1884), 26 Ch.D. 1 (C.A.), and *Boyle v. Sacker* (1888), 39 Ch.D. 249 (C.A.). In the case of *Gulf Islands Navigation Ltd. v. Seafarers' Int. Union* (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 at 626-27 (B.C. C.A.) Smith J.A. said, at pp. 626-27:

> After considering the cases, which are neither as conclusive nor as consistent as they might be, I am of opinion that the weight of authority supports the following propositions as to one Judge's dealings with another Judge's *ex parte* order: (1) He has power to discharge the order or dissolve the injunction; (2) he ought not to exercise this power, but ought to refer the motion to the first Judge, except in special circumstances, e.g., where he acts by consent or by leave of the first Judge, or where the first Judge is not available to hear the motion; (3) if the second Judge hears the motion, he should hear it *de novo* as to both the law and facts involved.

28 I would accept these words in the case of review of a wiretap authorization with one reservation. The reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the *ex parte* review should the authorization be disturbed. It is my opinion that, in view of the silence on this subject in the *Criminal Code* and the confusion thereby created, the practice above-described should be adopted.

29 An application to challenge an authorization should be brought as soon as possible. In most cases, because of the requirement for reasonable notice of intention to adduce wiretap evidence, it may be that the application can be made before trial. Otherwise, defence counsel wishing to challenge an authorization may, in accordance with the suggestion made by O'Sullivan J.A. in the case at bar, have to apply for an adjournment for this purpose.

30 It may be argued that where a trial judge happens to be of the same court that made the authorization order (as was the case in *Wong (No. 1), supra)* an application to review the authorization could be made to him directly, rather than incurring extra expense and needless delay by instituting completely separate proceedings. There may be some merit to this argument but, if such a review were undertaken, it would be done by the judge in his capacity as a judge of the court that made the original order and not in his capacity as trial judge.

31 In the case at bar, the trial judge held the wiretap evidence to be inadmissible and at the same time he stated that he did not need to go behind the authorizations. In my opinion, he did go behind the authorizations even though he did not consider it necessary to open the sealed packets. In so doing, for the reasons discussed above, he exceeded his jurisdiction. I am in substantial agreement with the Manitoba Court of Appeal that the trial judge was in error in refusing to admit the evidence which was tendered by the Crown. I would therefore dismiss the appeal and confirm the order for a new trial.

***Dickson J.*:**

32 The issue is whether a trial judge, who is a provincial court judge, can look behind an apparently valid wiretap authorization given by a superior court judge and rule intercepted private communications inadmissible in evidence.

I The Facts and Judicial History

33 The appellant, James Stephen Wilson, was tried before Dubienski Prov. Ct. J. of the Manitoba Provincial Court (Criminal Division) on nine counts, all related to betting. The Crown sought to adduce wiretap evidence. Dubienski Prov. Ct. J. ruled

the evidence inadmissible as having been illegally obtained. The Crown's case collapsed and Wilson was acquitted on all nine counts. The issue on appeal is whether Dubienski Prov. Ct. J. exceeded his jurisdiction in refusing to admit the intercepted communications in evidence.

34 The tapes were made pursuant to four authorizations, obtained from judges of the Manitoba Court of Queen's Bench, concerning the accused Wilson and authorizing interceptions at named addresses. In each of the authorizations the following words appear:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

35 Counsel for Wilson concedes all four authorizations are valid on their face. Police Inspector Anton Cherniak testified as to the manner in which the authorizations had been obtained. Cherniak said, in respect of the first authorization:

> ... while in company with Mr. John Guy [a Crown counsel and designated agent] we attended in judges chambers before Mr. Justice Hunt. Mr. Justice Hunt was supplied with an application. He appeared to read it. He was supplied with an affidavit. He appeared to read it. He was then supplied with an authorization. He appeared to read it and he then applied his signature, in my presence, to the authorization.

36 Testimony with respect to the other authorizations was virtually the same. On cross-examination, Inspector Cherniak added that he might have been asked a number of questions. Wilson's counsel spent considerable time cross-examining Cherniak about the matters referred to in ss. 178.12(1)(g) and 178.13(1)(b) of the *Criminal Code:*

> 178.12 (1) An application for an authorization shall be made *ex parte* and in writing ...
>
> and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:
>
> [...]
>
> (g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
>
> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied
>
> (a) that it would be in the best interests of the administration of justice to do so; and
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

37 The questions related to the actual state of facts at the time the authorizations were applied for and not to the contents of the affidavits. The Crown made no objection to this line of questioning. On the basis of Cherniak's testimony at trial, Dubienski Prov. Ct. J. decided none of the three alternative pre-conditions of s. 178.13(1)(h) had been met at the time the authorizations were given: (i) no other investigative procedures had been tried and failed, (ii) there was no evidence other investigative procedures were unlikely to succeed, (iii) there was no urgency. The judge concluded that the improper granting of the authorizations was not due to any error on the part of the authorizing judges, but due to the fault of the police.

My whole problem was that the evidence that was before me, as presented by the police, was quite different from the evidence that would appear to have been given and upon which the authorizations were based.

38 He further commented:

I am inclined to say the police have developed a pattern of application based on routine.

39 It would be carrying it too far to say Dubienski Prov. Ct. J. concluded the authorizations had been obtained by fraud, but, at least, he assumed there had been insufficient or false information in the affidavits. This determination was reached without examination of the affidavits. They remain in sealed packets, pursuant to s. 178.14 of the *Code*, and Dubienski Prov. Ct. J., as a provincial court judge, had no authority to order the opening of the packets. The judge decided the interceptions of private communications had not been lawfully made and to admit the evidence would bring the administration of justice into disrepute. He therefore excluded the evidence.

40 The Crown appealed the acquittals to the Manitoba Court of Appeal, which unanimously allowed the appeal and ordered a new trial. Monnin J.A., as he then was, and Matas J.A. concurring, concluded that an authorization issued by a superior court could not be collaterally challenged in a provincial court. In separate reasons, O'Sullivan J.A. said that an authorization granted in a superior court could not be collaterally attacked in any court and could not be attacked at all in an inferior court.

41 In the Manitoba Court of Appeal and in this Court counsel for Wilson argued, as an additional point, that the requirement under s. 178.16(4) to give notice of intention to adduce wiretap evidence had not been proven at trial. The Manitoba Court of Appeal rejected this argument. In this Court we gave our opinion on the day of hearing that notice had been sufficiently proven. Thus, the only outstanding issue is the trial judge's treatment of the authorizations.

II The Reviewability of Authorizations

42 An authorization to intercept a private communication is an *ex parte* order which may be made by a judge of a superior court of criminal jurisdiction, as defined in s. 2 of the *Criminal Code*, or a judge, as defined in s. 482. That means that in Manitoba authorizations may be obtained from judges of the Court of Appeal, the Court of Queen's Bench, or a County Court. The designations in other provinces are slightly different; I will use the Manitoba references in the following discussion.

43 To what extent, if any, and in what manner are authorizations reviewable? The Manitoba Court of Appeal identified two problems in the present case: (i) an inferior court had refused to accept the validity of superior court authorizations, and (ii) collateral attack. I will deal with the latter point first.

(A) Collateral Attack

44 In dealing with the issue of collateral attack I will, for the moment, put to one side the question of a trial judge assessing an authorization given by a higher court. I will assume that the trial judge is of the same court, or a higher court, than the judge who gave the authorization.

45 The collateral attack issue is this: in the absence of an actual application to set aside the authorization, can a trial judge, *qua* trial judge, consider the validity of an authorization in order to determine the admissibility of evidence? O'Sullivan J.A., as I indicated, expressed the view that a superior court authorization could not be collaterally attacked in any court. That was perhaps implicit in the judgment of Monnin J.A. In the earlier case of *R. v. Dass* (1979), [1979] 4 W.W.R. 97, 8 C.R. (3d) 224, 47 C.C.C. (2d) 194 (Man. C.A.), leave to appeal to S.C.C. refused 30 N.R. 609n, Huband J.A., speaking for a five judge Court, said this, at p. 214:

A question arose as to whether objection could be taken in this Court, to evidence flowing from an interception which had been authorized by a Court order made by a Justice of the Manitoba Court of Queen's Bench .... There *is* a well-recognized rule that the orders of a superior Court cannot be made the subject of a collateral attack: see *Re Sproule* (1886), 12 S.C.R. 140 at 193. In this instance, however, defence counsel does not complain that an application to intercept communications

was made. He does not complain that an order was granted. He does not complain as to the terms or the wording of the order, except for the substitution of one location for another as previously discussed. The complaint is not as to the order itself, but rather as to the means by which the order was implemented. The issue raised is therefore not an attack on the order itself, and consequently it is an appropriate subject-matter for the consideration of this Court on appeal. [Emphasis added.]

46 The exception was, however, a broad qualification. There had been a renewal of the authorization in which a new location had been added; the Court of Appeal concluded that was improper; to that extent the renewal was invalid, and any communications intercepted at the new location should not have been admitted in evidence. (Nonetheless, s. 613(1)(b)(iii) was applied.) Despite its asseveration to the contrary, it *is* hard to conclude that the Manitoba Court of Appeal did not, in effect, collaterally attack the authorization in *Dass*.

47 I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs. This general rule is, however, subject to modification by statute. In my view, Parliament has indeed modified the rule in the enactment of two provisions of Part IV.1 of the *Criminal Code, ss.* 178.16(1) and 178.16(3)(b):

> 178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> (3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings
>
> (a) is relevant to a matter at issue in the proceedings, and
>
> (b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,
>
> he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

48 The present s. 178.16(3) was formerly, with slightly different wording, s. 178.16(2).

(i) Invalidity on the Face of the Authorization

49 On what basis can a trial judge assess the validity? This Court has been receptive to the view that a trial judge can collaterally attack an authorization. In *Charette v. R.*, [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158, affirming, sub nom. *R. v. Parsons*), 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161 (Ont. C.A.), the trial judge had concluded the superior court authorization was invalid on its face and refused to admit the evidence obtained pursuant to it. The Ontario Court of Appeal disagreed, holding the authorization was valid on its face, but the Court accepted the submission that the trial judge had jurisdiction to consider the validity of the authorization. In Charette this Court adopted the reasons of Dubin J.A., which included the following passage at pp. 501-02:

> A *voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to admissibility of the tendered evidence immediately arise. In order to render evidence of

intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge and are properly determined in a voir dire. [Emphasis added.]

50 The trial judge has the responsibility of deciding upon the admissibility of evidence. Section 178.16(1) says that, absent consent, evidence of a private communication can only be introduced if the interception was lawful. Absent consent, an interception is only lawful if made pursuant to an authorization given in accordance with Part IV. I of the *Criminal Code*. The fact that an authorization purports to be made under Part IV. I is insufficient. Section 178.16(3)(6) gives the trial judge discretion to admit unlawfully obtained evidence if there is a *non-substantive* defect in form or irregularity in procedure in the giving of the authorization. The corollary would seem to be that if the defect or irregularity is *substantive*, there is no such discretion and the evidence is inadmissible. If a court order authorizing the interception were conclusive, even if it did not comply with Part IV.I, there would be no need for the curative provisions of s.178.16(3)(b). The combination of ss. 178.16(1)(a) and 178.16(3)(b) requires the trial judge to consider whether the authorization was valid. The fact that it amounts to what might be called a collateral attack is no bar.

(ii) Going Behind an Apparently Valid Authorization

51 Does the same rationale apply when the question is one of going behind an apparently valid authorization? In the present case Dubienski, Prov. Ct. J. claimed he was not going behind the authorizations. In my view that position is untenable. When a trial judge rules evidence inadmissible because the authorization, although valid on its face, was not lawfully obtained, it can scarcely be said that he is not going behind the authorization. He is not necessarily declaring the authorization invalid for all purposes; he is not actually setting it aside; but he is, for the purpose of determining the admissibility of evidence, going behind the authorization. Is there jurisdiction to do so?

52 I am of the view that ss. 178.16(1)(a) and 178.16(3)(b) apply to give the trial judge authority to go behind an apparently valid authorization. There is nothing in the language of the sections justifying a distinction between that which appears on the face of the record and that which is dehors the record. There is nothing limiting the trial judge to an examination only of what appears on the face of the authorization. To impose such a restriction as a matter of statutory interpretation would unnecessarily fetter his ability to determine whether the wiretap evidence is admissible. In many cases wiretap evidence may be the only evidence against the accused. It must be noted that not only does s. 178.16(3)(b) refer to defects or irregularities in the *giving of* the authorization, but also in the *application for* the authorization. Once again, since s. 178.16(3)(b), in effect, gives a discretion to cure for *non-substantive* defects or irregularities it would seem to follow as a necessary inference that *substantive* defects or irregularities *in the application for* the authorization will result in the evidence being inadmissible. In *R. v. Gill* (1980), 56 C.C.C. (2d) 169 at 176 (B.C.C.A.), Lambert J.A. expressed this view at p. 176:

Subsection (2)(b) [now 178.16(3)(b)] of that section contemplates that any defect or irregularity in the application for or the giving of the authorization may make a private communication inadmissible, and that if it is inadmissible and if the defect or irregularity is a substantive one, then there is no discretion in the trial Judge to admit the private communication.

I think that s. 178.16 defines its own concepts and that if, in the application for the authorization, or in the giving of the authorization, there is a substantive defect or irregularity, then the interception cannot be regarded as being lawfully made within the meaning of s. 178.16(1)(a). A private communication intercepted under such an authorization would be inadmissible. In reaching that conclusion, I disagree on this narrow point with the reasons of Anderson J. of the Supreme Court of British Columbia in *R. v. Miller*, [1976] 1 W.W.R. 97, 32 C.R.N.S. 192, *(*sub nom. *Miller and Thomas)* 23 C.C.C.

(2d) 257, 59 D.L.R. (3d) 679, and with the reasons of McDonald J. of the Alberta Supreme Court, Trial Division, in *R. v. Donnelly*, [1976] W.W.D. 100, 29 C.C.C. (2d) 58.

53 A view similar to that of Lambert J.A. was expressed by Meredith J. in *R. v. Wong* (1976), 33 C.C.C. (2d) 506 at 509-510 (B.C.S.C.), a case relied upon by Dubienski Prov. Ct. J. *Wong* involved, as does the present case, a question of compliance with s. 178.13(1)(6).

54 Notwithstanding what has been said by D.C. McDonald, J., in the case cited above [*R. v. Donnelly*, supra], it seems to me to follow by necessary inference that a substantive defect of form or irregularity in procedure in an application for or the giving of the authorization may render the evidence of the communication intercepted as a result, inadmissible as unlawful. Thus, it seems to me that as I am the Judge who must rule on the admissibility of evidence in this case, I must consider whether there has been a substantive defect of form or irregularity in procedures as might render the evidence inadmissible. I do not think that such an examination requires that the ex parte order by which the authorization was granted be reviewed or set aside. [At pp. 509-10].

55 *R. v. Ho* (1976), 32 C.C.C. (2d) 339 (B.C. Co. Ct.) is to the same effect. See Krever J. in *Re Stewart and R.* (1976), 30 C.C.C. (2d) 391 at 400 (Ont. H.C.). See also Manning, *The Protection of Privacy Act*, (1974) at pp. 135-37; Bellemare, *La révision d'une autorisation en écoute électronique* (1979), 39 Revue du Barreau 496.

56 As noted in the above-quoted passages, there is a contrary view, expressed most strongly by McDonald J. in *R. v. Donnelly*, supra, and by Anderson J. in *R. v. Miller*, supra. I will refer specifically to the arguments raised by McDonald J. in considerably influenced by the wording of s. 178.14:

> 178.14 (1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be
>
> (a) opened or the contents thereof removed except
>
> (i) for the purpose of dealing with an application for renewal of the authorization, or
>
> (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and
>
> (b) destroyed except pursuant to an order of a judge referred to in subparagraph (a)(ii).
>
> (2) An order under subsection (1) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application was made for the authorization to which the order relates has been given an opportunity to be heard.

57 McDonald J. started with the assumption that, but for s. 178.16(2)(b) (now 3(b)), he would have thought "lawfully made" in s. 178.16(1)(a) meant in accordance with an apparently valid authorization. He conceded that s. 178.16(2)(6) appeared to imply that the evidence was inadmissible if there were a substantive defect in form or irregularity in procedure in the application for the authorization. He declined, however, to draw this inference, at the same time acknowledging that this relegated portions of s. 178.16(2)(b) to mere surplusage. He sought to avoid three consequences he asserted would flow if s. 178.16(2)(6) were interpreted to enable a trial judge to go behind an apparently valid authorization.

> (1) That which was on its face lawfully done, pursuant to an order (i.e., the authorization) of a Judge of a superior or district Court, would be held to have been unlawful. The trial Judge would retrospectively render unlawful that which had appeared to be lawful. I should think that a statute which is said to give a trial Judge such a power should be scrutinized very carefully to determine whether such a power has in fact been given by Parliament.

(2) The contents of the affidavit would be disclosed to public view even though it might reveal investigations not only which led to the prosecution of the accused but also those which might relate to continuing or concluded investigations of other persons not yet charged or tried. I should think that a statute which is said to enable a trial Judge to do an act with such a consequence should be held to do so only if that power is given expressly or by necessary inference.

(3) The *Protection of Privacy Act*, 1973-74 [Can.], c. 50, amended both the *Criminal Code* and the *Crown Liability Act*, R.S.C. 1970, c. C-38 [s. 7.2(1), (2) [en. 1973-74, c. 50, s. 4].

> 7.2(1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.
>
> (2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of
>
> > (a) was lawfully made;
> >
> > (b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or
> >
> > (c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

Whatever interpretation is placed upon the words "lawfully made" in s. 178.16(1)(a) of the *Criminal Code* must surely be given also to s. 7.2(2)(a) of the *Crown Liability Act*, both those provisions having been created by the same statute. It would follow as well that where the issue arises not as one of the admissibility of an intercepted communication (or derivative evidence at a trial but as one of liability under the *Crown Liability Act*, the contention of the defence would entail that liability would flow from an act of interception which when done by a servant of the Crown had been done pursuant to an authorization which on its face made the interception lawful. [At pp. 64 and 65.]

58 With respect, I do not find these three arguments to be wholly persuasive. As to the third consequence, a majority of this Court was not convinced by an argument along the same line in *Goldman v. R.*, [1980] 1 S.C.R. 976 at 998-99, 13 C.R. (3d) 228, 51 C.C.C. (2d) 1, 108 D.L.R. (3d) 17, 30 N.R. 453. Mr. Justice McDonald's first and third consequences are related. It does not necessarily follow that a determination of "not lawfully made" for the purposes of admissibility makes an interception unlawful for all purposes under Part IV.I. The evidence may be inadmissible yet there might be a defence to a criminal or civil proceeding arising from the interception. That question does not arise in this case and need not be decided here. The second consequence predicted by McDonald J. tends to overstatement. The affidavit would not need to be made public in order to rule evidence inadmissible; selected aspects only could be made public. As Stanley A. Cohen suggests in his work *Invasion of Privacy: Police and Electronic Surveillance in Canada* (1983), the integrity of the packet might be preserved "through initial judicial screening, and, if necessary, judicial editing" (p. 155). Due regard to the confidentiality provisions of s. 178.14 is not inconsistent with ruling evidence inadmissible under s. 178.16.

59 I therefore conclude that s. 178.16(1)(a) and 178.16(3)(b) do enable a trial judge to go behind an apparently valid authorization.

(iii) Examining the Contents of the Sealed Packet

60 In most cases it will be necessary to examine the contents of the sealed packet in order to determine whether there was a defect or irregularity in the application for the authorization.

61 In the present case Dubienski Prov. Ct. J. ruled that the requirements of s. 178.13(1)(b) had not been met, without examining the contents of the sealed packet. In this respect he followed Meredith J. in *Wong*, supra, and in my view fell into error. It is important to note that s. 178.13 does not require that the authorization contain a list of the reasons which prompted the judge to give the authorization. In order finally to determine whether other investigative procedures had been tried and failed, other investigative procedures were unlikely to succeed, or that there was urgency, it would be necessary to examine the affidavits. This would enable the trial judge to say whether the apparent conflict between the evidence at trial and what can be assumed to have been said in the affidavits is actual. It may be that the comparison will give rise to clarification, showing that one of the three pre-conditions had been met. For example, in the present case little was said in the testimony at trial as to whether other investigative procedures were unlikely to succeed. If one were to examine the affidavits, there might be an explanation that would satisfy the requirements of s. 178.12(1)(g) and 178.13(1)(b) and hence make the authorizations valid. I therefore conclude Dubienski Pray. Ct. J. could not properly decide the interceptions were not lawfully made without examining the contents of the sealed packets.

62 If this case had been before a superior court trial judge would it have been proper for the judge to order the opening of the sealed packet under s.178.14? Most of the cases have assumed that only rarely is this proper; there appears to be a reticence to go behind an apparently valid authorization; *R. v. Gill*, supra; *Re Stewart and R.*, supra; *Re Miller and Thomas* (1975), 28 C.C.C. (2d) 128 (B.C. Co. Ct.); *R. v. Newall* (1982), 67 C.C.C. (2d) 431, 136 D.L.R. (3d) 734 (B.C.S.C.); *R. v. Johnny* (1981), 62 C.C.C. (2d) 33 (B.C.S.C.); *R. v. Bradley* (1980), 19 C.R. (3d) 336 (C.S. Que.); *Re Royal Comm. Inquiry into Royal Amer. Shows Inc.* (1978), 40 C.C.C. (2d) 212 (Alta. T.D.); *Re Zaduk and R.* (1977), 37 C.C.C. (2d) 1 (Ont. H.C.); *R. v. Haslam* (1977), 36 C.C.C. (2d) 250 (Nfld. D.C.); *Re R. and Kozak* (1976), 32 C.C.C. (2d) 235 (B.C.S.C.); contra: *R. v. Kalo* (1975), 28 C.C.C. (2d) 1 (Ont. Co. Ct.). It is not necessary to decide whether this restricted view of s. 178.14 is correct. There is a broad consensus that prima fade evidence of fraud or non-disclosure is a valid reason for opening the packet. Misleading disclosure would be in the same category. The present case is one in which the trial judge made a prima facie finding of either misleading disclosure or nondisclosure.

63 Opening the sealed packet, and holding an authorization to be invalid, on the basis of fraud, non-disclosure, or misleading disclosure, is, in a sense, a less serious interference with the authorizing judge's decision than a finding of invalidity on the face of the authorization. The latter conclusion connotes that the authorizing judge did something wrong — he signed an order not in accordance with the Criminal Code. On the other hand, a finding of invalidity based on fraud, non-disclosure, or misleading disclosure means that the authorizing judge acted properly on the basis of evidence before him — the invalidity arose because the evidence was false or incomplete — the fault of others.

64 Once a foundation is laid for the opening of the packet, I would say that the trial judge, assuming him to be a judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, can open the packet and make a full review for compliance with Part IV.I. He cannot, of course, decide whether, in the exercise of his discretion, he would have granted the authorization. He can only decide whether it was lawfully obtained. He can also apply the curative provisions of s. 178.16(3)(b) to non-substantive defects or irregularities. A failure to comply with a mandatory provision such as 178.12(1)(g) or 178.13(1)(b) would, in my view, amount to a substantive and non-curable defect.

65 Although I conclude that Dubienski Prov. Ct. J. was in error in holding the authorizations to have been unlawfully made without examining the contents of the sealed packet, I also conclude, contrary to the Manitoba Court of Appeal, that a collateral attack by a trial judge, either in respect of invalidity on the face of the authorization or going behind an apparently valid authorization, is contemplated by Part IV.I of the *Criminal Code*.

(iv) Cross-examination of the Deponent

66 Cross-examination was conducted in the present case in order to determine whether any of the preconditions of s. 178.13(1)(6) had been met. The Crown made no objection, but in other cases objections have been made, and in some instances successfully. Such cross-examination of the deponent to the affidavit was ruled improper in *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336, 79 A.P.R. 336 (P.E.I.S.C.); *R. v. Collos*, [1977] 5 W.W.R. 284, 37 C.C.C. (2d) 405, reversing

on other grounds [1977] 2 W.W.R. 693, 34 C.C.C. (2d) 313 (B.C.C.A.); *R. v. Haslam*, supra; and *R. v. Robinson*, [1977] 4 W.W.R. 697, 39 C.R.N.S. 158 (B.C. Co. Ct.) . The rationale was that permitting such cross-examination would, by implication at least, reveal the contents of the sealed packet declared to be confidential by s. 178.14. On the other hand, cross-examination has been permitted in *R. v. Johnny*, supra, and in *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63 (Ont. prov. Ct.). I prefer the latter view. These authorizations are made *ex parte and in camera*. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure. The questioning can be such as to enable defence counsel to get some indication of whether the authorization was properly obtained, without the disclosure of information which, in the opinion of the judge, ought to be kept confidential. Examples of such confidential information would be the identity of undercover agents and informers or specific information which would jeopardize a continuing police investigation. The interest in confidentiality expressed in s. 178.14 and defence counsel's interest in testing the validity of the authorization need not lead to conflict.

v) Review by a Judge Other than the Trial Judge

67 I have said that in my view Part IV.I contemplates that the trial judge is the proper person to review the validity of the authorization whether on its face or otherwise. The Manitoba Court of Appeal, as I have indicated, thought otherwise. O'Sullivan J.A. said that Part IV.I contemplated a different form of review of authorizations; he suggested the trial could be adjourned and the review of the validity of the authorization would be conducted in the court that gave the authorization. At the hearing before this Court, Crown counsel adopted this position, adding that it was preferable that the actual judge who gave the authorization be the one to review it. Absent the statutory scheme of interception of private communications, and, in particular, s. 178.16, I would agree with this view. The law recognizes a general right of review of an ex parte order by the court which made the order and preferably by the judge who made the order. The statutory provisions, however, override the common law rules. As I read s. 178.16 Parliament mandated that the trial judge conduct such a review.

68 The language of s. 178.16 does not suggest review by anyone other than the trial judge. The only other provision that seems to say anything about review is s. 178.14, concerning the opening of the sealed packet. This would normally be used where an attempt was being made to go behind an apparently valid authorization. As a matter of statutory construction s. 178.14 seems to contemplate that the packet may be opened by any judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, and is not confined to either the court or the judge who granted the authorization. The policy consideration underlying this broader approach may lie in a desire to avoid any suggestion that the judge who granted the authorization might be inclined simply to reaffirm his previous order without serious consideration.

69 I do find statutory support for the proposition that the trial judge shall review an authorization, and I find no statutory support for the proposition that only the judge or court that made the order can review an authorization.

70 There is a further point. Any decision of the trial judge regarding admissibility of evidence, therefore including questions as to the validity of authorizations, will be subject to appeal on a question of law in the ordinary way. In contrast if only the court that made the order can review an authorization, there is no right of appeal from this review because the Criminal Code does not grant an appeal.

71 The suggestion of O'Sullivan J.A. that the trial be adjourned for review of the authorization by the court granting the authorization would result in needless delays and be costly in terms of trial economy.

(B) Trial Judges Dealing with Authorizations Given By Judges of Higher Courts

72 One issue identified by the Manitoba Court of Appeal remains to be addressed. Does the situation which I have been describing change when, as here, a provincial court judge is dealing with an authorization given by a superior court judge? There are examples in the cases of inferior courts purporting to review superior court authorizations, particularly for invalidity

on the face of the authorization. In none of these cases, however, was the question of a trial judge in an inferior court assessing the validity of a superior court authorization mentioned as a problem or an issue.

73 As earlier noted, in *Charette v. R.*, this Court approved the statement [found at (1977), 37 C.C.C. (2d) 497, at pp. 501-02]:

> ... it is for the trial Judge to pass upon such matters as the validity of the authorization ....
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge ....

74 The appeal case in Charette discloses that the trial judge was a county court judge and the authorization had been given by a superior court judge.

75 Other examples of an inferior trial court assessing the validity of a superior court authorization are: *R. v. Welsh* (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A.); *R. v. Crease* (1980), 53 C.C.C. (2d) 378 (Ont. C.A.); *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412 (Ont. Co. Ct.); *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.); and *R. v. Hancock*, [1976] 5 W.W.R. 609, 36 C.R.N.S. 102, 30 C.C.C. (2d) 544 (B.C.C.A.).

76 None of the above cases is persuasive in view of the fact that the inferior court/superior court problem was not addressed, but it is curious that it was not identified as a problem.

77 In my opinion the implicit assumption that an inferior court can attack a superior court authorization is correct. At first glance, this may sound heretical, but I think the justification lies in the statutory language. As discussed earlier, I conclude that ss. 176.16(1)(a) and (3)(b) give the trial judge, qua trial judge, the authority to decide the validity of an authorization. There is nothing in the wording of s. 178.16 which suggests that certain trial judges are in a different position than other trial judges. I would not be prepared to read in such a distinction.

78 If an inferior court trial judge can determine the validity of a superior court authorization for the purpose of deciding admissibility of evidence, what happens when, as in the present case, the trial judge is not authorized to order the opening of the sealed packet? The answer must be, in obedience to the statutory language, that the trial be adjourned to allow counsel to apply under s. 178.14 for an order permitting the opening of the packet. The judge acting under s. 178.14 would not examine the contents of the packet or decide the validity of the authorization (see Bellemare, supra). That is the responsibility of the trial judge. This does not mean that the judge acting under s. 178.14 is performing a mere formality. He has a discretion whether to order opening of the packet. He may refuse, and if so the provincial court judge will have to abide by that decision: see *Re R. and Kozak*, supra.

III Bringing the Administration of Justice into Disrepute

79 After concluding that the interceptions were not lawfully made, Dubienski Prov. Ct. J. went on to hold that to admit the evidence would bring the administration of justice into disrepute. In the circumstances, this was an irrelevant consideration. Section 178.16(2) contains the only reference to bringing the administration of justice into disrepute:

> 178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

> (2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

80 Section 178.16(2) deals with derivative evidence only, i.e. evidence discovered as a result of intercepting the private communication. It does not relate to primary evidence, i.e. evidence of the private communication itself-the wiretap. That was what was under consideration in this case. Once the interception is held to have been unlawful (and absent consent) it is inadmissible unless the curative provisions of s. 178.16(3)(b) are applied.

IV Conclusion

81 I conclude that Dubienski Prov. Ct. J. erred in deciding, without examining the contents of the sealed packet, that none of the three alternate preconditions of s. 178.13(1)(6) had been met.

82 I would dismiss the appeal and confirm the order of the Manitoba Court of Appeal directing a new trial on all counts.

83 *Appeal dismissed*.

Appeal dismissed.

2

1993 CarswellAlta 160
Supreme Court of Canada

R. v. Litchfield

1993 CarswellAlta 160, 1993 CarswellAlta 568, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, [1994] A.W.L.D. 031, 145 A.R. 321, 14 Alta. L.R. (3d) 1, 161 N.R. 161, 21 W.C.B. (2d) 369, 25 C.R. (4th) 137, 55 W.A.C. 321, 86 C.C.C. (3d) 97, J.E. 93-1895, EYB 1993-66902

R. v. BRYANT FLOYD LITCHFIELD

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

Heard: June 7, 1993
Judgment: November 18, 1993
Docket: Doc. 22896

Counsel: *Goran Tomljanovic*, for the Crown.
Robert B. White, Q.C., and *D. Stam*, for respondent.

***Iacobucci J. (La Forest, L'Heureux-Dubé, Sopinka, Gonthier* and *Cory JJ.* concurring):**

1 There are several issues in this appeal. First, does this Court have jurisdiction to review a pre-trial order dividing and severing counts in an indictment? Second, if so, should the order in this case be set aside? The third issue in this appeal concerns the admissibility of the testimony of various witnesses. Finally, did the trial judge err in granting the respondent's motion for a non-suit and entering acquittals?

I. Facts

2 The respondent was a family physician practising in Edmonton. The respondent was charged with fourteen counts of sexual assault involving seven complainants who were his patients at all relevant times. The assaults were alleged to have occurred while the complainants attended at the respondent's office for medical treatment and diagnosis. Each of the complainants consented to being touched in intimate areas of her body but that consent was predicated upon the touching being carried out for valid medical purposes.

3 Prior to trial, the respondent applied for an order that each of the counts alleged against him be tried separately. He requested in the alternative that the counts be severed by complainant. McDonald J., who was not the trial judge, heard the application. He did not order a separate trial for each count, but instead ordered that three different trials be held depending on the part of the complainant's body that was involved in the assault [(1991), 119 A.R. 317]. McDonald J. ordered one trial for allegations involving the complainants' genitalia, a second trial for allegations concerning the complainants' breasts, and a third trial for any other matters. This resulted in an order that not only severed but also divided counts, such that separate trials were to be held for events that occurred within one visit to the respondent's office by the same complainant.

4 The respondent elected to be tried by judge alone. The Crown proceeded to trial first on those counts relating to vaginal examinations (nine counts in total), and sought to have the admissibility of the evidence relating to the severed counts determined at a voir dire at the outset of the trial. Hope J., the trial judge, refused to hold a voir dire and ruled that the Crown could proceed by calling all of the evidence relating to the severed counts, subject to a subsequent ruling on admissibility. The Crown called all of the evidence relating to the severed counts, as well as the evidence of the complainants in the trial going to the counts before the court and the evidence of two medical experts. After a voir dire during the trial, the trial judge admitted the evidence of the police officer who testified to the respondent's statement to the police. After another voir dire, the trial judge refused to admit

the evidence of several other women who stated on the voir dire that they had experienced similar assaults by the respondent. He also refused to admit the testimony of the respondent's ranking medical officer as to counselling the respondent had received from her after complaints were lodged against the respondent while he practised in the military. The trial judge subsequently ruled all the evidence relating to the severed counts inadmissible as irrelevant or, even if relevant, too prejudicial.

5 At the close of the Crown's case, the respondent brought a motion for a non-suit. The trial judge granted the application and the respondent was acquitted. The Crown's appeal was dismissed by the Court of Appeal (1992), 120 A.R. 391, and this Court granted leave to appeal.

II. Relevant Legislation

6 *Criminal Code*, R.S.C. 1985, c. C-46, as amended:

265.(1) A person commits an assault when

(*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly ...

(2) This section applies to all forms of assault, including sexual assault ...

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(*c*) fraud ...

590 ...

(3) The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

591 ...

(3) The court may, where it is satisfied that the interests of justice so require, order

(*a*) that the accused or defendant be tried separately on one or more of the counts ...

(4) An order under subsection (3) may be made before or during the trial ...

645 ...

(5) In any case to be tried by a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone ...

686 ...

(4) Where an appeal is from an acquittal, the court of appeal may

(*a*) dismiss the appeal; or

(*b*) allow the appeal, set aside the verdict and

(i) order a new trial ...

693. (1) Where a judgment of a court of appeal ... dismisses an appeal taken pursuant to paragraph 676(1)(*a*) ... the Attorney General may appeal to the Supreme Court of Canada

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

III. Issues

7 1. Does this Court have jurisdiction to review a pre-trial severance order?

8 2. If so, should the pre-trial severance order be set aside?

9 3. Should any of the evidence excluded by the trial judge have been admitted?

10 4. Did the trial judge err in granting a non-suit?

IV. Analysis

11 Before directly discussing the issues raised in this appeal, I think it is important to keep in mind the nature of the offence of sexual assault as well as the specific manifestation of the alleged sexual assaults in a doctor-patient relationship.

12 The sexual aspect of a sexual assault forms part of the actus reus; there is no requirement that a person accused of sexual assault have any mens rea with respect to the sexual nature of a sexual assault. This was the holding of this Court in *R. v. Chase*, [1987] 2 S.C.R. 293, which decided that sexual assault is a crime of general intent and that the Crown did not have to prove a specific intent with respect to the sexual nature of the assault. As McIntyre J. wrote for the Court at p. 302:

> The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual ... It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

13 The test to be applied in determining whether an accused's conduct had the requisite nature to constitute a sexual assault is therefore an objective one. As this Court indicated in *Chase*, all the circumstances surrounding the conduct in question will be relevant to the question of whether the touching was of a sexual nature and violated the complainant's sexual integrity. It is therefore important in individual cases that courts not create unnecessary barriers to considering all the circumstances surrounding conduct which is alleged to constitute a sexual assault. This is particularly true where the complainant has consented to some touching but not to touching of a sexual nature: in such a case, the court must have at its disposal as much relevant information as possible in order to determine whether the conduct was of a nature to which the complainant did not consent.

14 The importance of looking to all the circumstances surrounding an accused's impugned conduct is thrown into relief by a case such as that under consideration in this appeal, where a doctor-patient relationship is concerned. Certainly, medical evidence will be important to assessing the nature of an accused physician's conduct. However, when determining whether a complainant in fact consented to that which occurred, courts must also ensure that they neither ignore the testimony of a patient who complains of sexual assault nor underestimate the position of vulnerability in which a patient often finds herself when she is in the care of a professional medical doctor. All of the opinions in the judgment of this Court in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 [[1992] 4 W.W.R. 577], recognized the imbalance of power that may occur between a doctor and a patient where an alleged sexual assault is concerned.

15 La Forest J. (Gonthier and Cory JJ. concurring) stated at p. 258: "An unequal distribution of power is frequently a part of the doctor-patient relationship". McLachlin J., who also wrote for L'Heureux-Dubé J., focused on the fiduciary nature of the doctor-patient relationship and wrote at p. 272:

> I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship — trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests.

Thus the nature of a complainant's relationship to her alleged assaulter, including the patient's lack of power and knowledge as well as the doctor's duty to perform medical examinations *only* for the good of the patient and in the patient's best interest, must be kept in mind when determining whether the patient in fact consented to the conduct in question. As Sopinka J. wrote in *Norberg* at p. 304 in the context of tortious sexual battery:

> In assessing the reality of consent and the existence and impact of any of the factors that tend to negate true consent, it is important to take a contextually sensitive approach. In relation to medical procedures, several courts have emphasized the need to consider all relevant surrounding circumstances in assessing whether there was valid consent ...
>
> Certain relationships, especially those in which there is a significant imbalance in power or those involving a high degree of trust and confidence may require the trier of fact to be particularly careful in assessing the reality of consent.

16 With these considerations in mind, I now turn to the issues in this case.

1. Does this Court have jurisdiction to review a pre-trial division and severance order?

17 As an introductory matter, McDonald J. should have noted that he was not only severing the existing counts in the indictment but was also dividing the counts. The indictment against the respondent contained 14 counts, each of which related to one entire visit by the relevant complainant to the respondent's office. For example, count 13 alleged that the respondent committed a sexual assault on one complainant on July 28, 1989. The complainant's testimony about that visit referred to both a breast examination and a vaginal examination. McDonald J. ordered that count 13 should be tried in one trial as far as the breast examination was concerned, and that count 13 should be tried in another trial as far as the internal examination was concerned. In proceeding as he did, McDonald J. divided some of the counts and then severed the divided counts. However, he made no reference in his ruling to dividing the counts, which a court is enabled to do under s. 590(3) of the *Criminal Code*, and the indictment was never amended to reflect the division. As I mentioned above, the respondent did not request this particular order, but rather brought an application seeking separate trials for each count or, alternatively, for each complainant.

18 When it appealed the respondent's acquittals, the Crown sought to have the division and severance order set aside. The respondent sub mitted before this Court that the division and severance order was the result of an interlocutory motion from which no appeal lies. Appeals in the criminal context are entirely statutory and the *Criminal Code* contains no provision for immediate appeal from an interlocutory order. See, e.g., *R. v. Mills*, [1986] 1 S.C.R. 863, at p. 959, where McIntyre J. stated for the majority:

> It has long been a settled principle that all criminal appeals are statutory and that there should be no interlocutory appeals in criminal matters ... It will be observed that interlocutory appeals are not authorized in the *Code*.

It is not disputed that the Crown could not have appealed the division and severance order prior to the trial. However, the question in this appeal is whether the Crown can appeal the division and severance order as part of its appeal of the respondent's acquittal.

19 The answer to this question is not straightforward. The division and severance order in this case was not made by the trial judge. It was made by a superior court judge on a motion brought prior to the trial. At first blush, the order cannot be appealed as part of the respondent's acquittal without violating the rule against collateral attack. This rule holds that "a court order, made by a court having jurisdiction to make it," may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (*R. v. Wilson*, [1983] 2 S.C.R. 594, per McIntyre J., at p. 599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. However, where a judge, sitting as a member of a court having the capacity to make the relevant type of order, erroneously exercises that jurisdiction, the rule against

collateral attack applies. See, e.g., *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 129 [[1991] 4 W.W.R. 507] (S.C.), at p. 141, and *R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.), at pp. 498-99, per Bayda C.J.S. Such an order is binding and conclusive until set aside on appeal.

20 The rule against collateral attack has been re-affirmed by this Court on numerous occasions, such as in *R. v. Meltzer*, [1989] 1 S.C.R. 1764, *R. v. Garofoli*, [1990] 2 S.C.R. 1421, and *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, per McLachlin J. at p. 973, citing R.J. Sharpe, *Injunctions and Specific Performance* (1983).

21 The respondent's trial would not have been a proceeding in which the specific object was the reversal, variation or nullification of the division and severance order. Therefore, under a strict application of the rule against collateral attack, the trial judge would have had no power to review the division and severance order. Consequently, there would have been no error of law committed with respect to proceeding on the division and severance order at the trial upon which an appeal of the verdict reached during the trial could be founded. The result would be that neither the Court of Appeal nor this Court would have jurisdiction to review, much less to set aside, the division and severance order.

22 In my opinion, however, this is not the case for a strict application of the rule against collateral attack which was not intended to immunize court orders from review. The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro*, supra, at p. 497). However, these principles behind the rule against collateral attack are not applicable in the case of a pre-trial division and severance order.

23 A pre-trial division and severance order does not govern the conduct of the parties but rather regulates the judicial process itself. Such an order is purely related to the procedure of an accused's trial. Another way of stating the matter is that a pre-trial division and severance order is only concerned with a court's controlling its own process within the confines of the same litigation. Therefore, to allow a collateral attack at trial before a superior court on a pre-trial division and severance order made by a superior court would not jeopardize the rule of law or damage the repute of the administration of justice. Further, if the order had been made by a trial judge, it would have been subject to review by appellate courts along with the verdict. To permit an order to stand which is so erroneous that it results in a trial process that is fundamentally flawed would result in procedure governing substance; a result that cannot be accepted.

24 Accordingly, in the narrow circumstances of this case, I would recognize some flexibility in the rule against collateral attack and hold that the pre-trial division and severance order was liable to be reviewed and, if made erroneously, set aside by the trial judge. The failure of the trial judge to refuse to follow the pre-trial division and severance order, if erroneous, would constitute an error of law reviewable on appeal to this Court.

25 As the next portion of my reasons will show, there should be little occasion for this exception to the rule against collateral attack to be applied in the future since I am of the opinion that only the trial judge ever has jurisdiction to issue a division and severance order.

2. Should the division and severance order be set aside?

26 The division and severance order is anomalous in that severance orders are usually made by the trial judge, in which case the order would be appealable as part of the verdict. Indeed, for the reasons that follow, I am of the opinion that no one but the trial judge has jurisdiction to issue a severance order.

27 Logically, an accused cannot bring a motion to quash an indictment, or to divide or sever counts in an indictment, until the indictment has been preferred. Until the indictment has been preferred, it does not exist as against the accused, it is not legally effectual, and therefore is not subject to being altered or quashed.

28 That motions respecting the indictment can only be brought once the indictment is preferred was recognized by the Alberta Court of Queen's Bench in *R. v. Deol* (1979), 20 A.R. 595 [11 Alta. L.R. (2d) 82]. The same conclusion was reached by the Prince Edward Island Supreme Court in *R. v. Martel* (1986), 63 Nfld. & P.E.I.R. 39. See also Salhany, *Canadian Criminal Procedure* (5th ed., 1989), at p. 189:

> *Once an indictment is preferred*, the defence is entitled to bring an application to quash that indictment for a defect of substance or form. Similar applications may be brought for particulars of the indictment, to sever the counts in the indictment or to sever the trial of accused who are jointly charged. [Emphasis added.]

Statements to the same effect have been made by this Court. For example, in *R. v. Chabot*, [1980] 2 S.C.R. 985, Dickson J., as he then was, stated for the Court at p. 990: "After presentment of the indictment, the accused is free to move to quash the indictment by motion made in the trial court ..." Similarly, in *R. v. Barbeau*, [1992] 2 S.C.R. 845, Cory J. wrote for the Court at p. 856: "After the preferment of the indictment for sexual assault, defence counsel could have challenged ... this indictment ..."

29 The next question to ask is when is an indictment preferred against an accused. In *Chabot*, this Court held that an indictment is preferred only when it is lodged with the trial court properly constituted and ready to proceed, at the opening of the accused's trial. Dickson J. (as he then was) held for the Court as follows at p. 999:

> ... I would hold that an indictment based upon a committal for trial without the intervention of a grand jury is not "preferred" against an accused until it is lodged with the trial court at the opening of the accused's trial, with a court ready to proceed with the trial.

30 According to the *Chabot* test, the indictment against the respondent was not preferred until it was lodged with Hope J. at the opening of the respondent's trial. Therefore, McDonald J. had no jurisdiction to divide or sever the counts since the indictment had not been preferred against the respondent at the time of the application. A further conclusion is that no one except the trial judge ever has jurisdiction to divide or sever counts since an indictment is only preferred at the opening of an accused's trial.

31 This does not mean that an accused must wait until the actual trial date to bring an application to divide or sever counts. Once a trial judge has been assigned to the matter, the indictment can be preferred against the accused by lodging it with the trial judge. Since *Chabot*, the *Criminal Code* has been amended such that in jury trials the trial judge need not be ready to proceed with the trial to deal with matters such as the validity of the indictment. Section 645(5) of the *Criminal Code* provides:

> 645 ...
>
> (5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

32 Thus, under s. 645(5), the trial judge can deal with matters concerning the indictment prior to the selection and calling of a jury, in the case of a jury trial. It was always open to a trial judge in the case of a trial by judge alone to hear pre-trial motions before preparing to hear evidence. The judge hearing the application for severance of counts in an indictment would either have to have been assigned as the trial judge or else would be seized of the trial upon the preferring of the indictment and the subsequent hearing of the severance application.

33 The statement in s. 591(4) of the *Criminal Code* that a severance order may be made "*before* or during the trial" is not deprived of its meaning under this approach to jurisdiction. A severance application brought after the indictment is preferred but before the court is constituted to begin hearing evidence would be brought before the trial.

34 Moreover, as a matter of practice and policy, it is obviously preferable that the trial judge hear applications to divide and sever counts so that such orders are not immunized from review. Otherwise, procedure begins to govern substance. Indeed, it makes sense that the trial judge consider applications to divide and sever counts since an order for division or severance of counts will dictate the course of the trial itself. Courts have recognized that it is preferable that trial judges make division and

severance orders (see, e.g., *R. v. Watson* (1979), 12 C.R. (3d) 259 (B.C.S.C.), and *R. v. Auld* (1957), 26 C.R. 266 [22 W.W.R. 336] (B.C.C.A.)). Not only are trial judges better situated to assess the impact of the requested severance on the conduct of the trial, but limiting severance orders to trial judges avoids the duplication of efforts to become familiar enough with the case to determine whether or not a severance order is in the interests of justice. It seems desirable, therefore, that in the future only trial judges can make orders for division or severance of counts in order to avoid injustices such as occurred in this case.

35 Even had McDonald J.'s order been solid on jurisdictional grounds, I would be inclined to set it aside. The criteria for when a count should be divided or a severance granted are contained in ss. 590(3) and 591(3) of the *Criminal Code*. These criteria are very broad: the court must be satisfied that the ends or interests of justice require the order in question. Therefore, in the absence of stricter guidelines, making an order for the division or severance of counts requires the exercise of a great deal of discretion on the part of the issuing judge. The decisions of provincial appellate courts have held, and I agree, that an appellate court should not interfere with the issuing judge's exercise of discretion unless it is shown that the issuing judge acted unjudicially or that the ruling resulted in an injustice. See, for example, *R. v. Kestenberg* (1959), 126 C.C.C. 387 (Ont. C.A.), in which Porter C.J.O. stated, at p. 392, with regard to the trial judge's refusal to order a severance:

> Unless it is shown that he acted unjudicially in the exercise of his discretion or that an injustice might have resulted from the joint trial, his decision should not be disturbed ...

36 McDonald J.'s order for division and severance resulted in an injustice in this case when it divided and severed the counts based on the body parts of the complainants. This arbitrary distinction greatly amplified the difficulties in assessing the alleged sexual assaults in the context of all of the circumstances surrounding the conduct by creating an evidentiary problem which would not have existed but for the order. With respect, the order reveals a misapprehension about the nature of the offence of sexual assault and the considerations that go into assessing if a particular procedure alleged to be medically proper and necessary constitutes a sexual assault.

37 McDonald J. held that proof that the respondent had performed one act (such as a breast examination) on the complainant which was not for the purposes of treatment or diagnosis would have no probative value with regard to whether or not another act (such as a vaginal examination) performed by the respondent on the complainant was for the purposes of treatment or diagnosis. In so holding, McDonald J. was in error. As stated above, this Court emphasized in *Chase* that the court must look to all the circumstances surrounding the conduct in determining the nature and quality of the act. For example, if the respondent acted improperly towards a complainant during one part of a physical examination, evidence of that improper conduct would be relevant to assessing the respondent's conduct at other times during the examination.

38 The practical effect of McDonald J.'s order for division and severance was to create an unnecessary evidentiary problem by rendering evidence about one part of one visit to the respondent potentially inadmissible as regards another part of the same visit to the respondent's office since different parts of the same visit to the respondent would be contained in separate counts. McDonald J.'s discussion of the irrelevance and lack of probative value of the evidence of one type of act (breast examinations) to another type of act (internal examinations) was referred to directly by Hope J. in his decision to declare the evidence going to the severed counts inadmissible. As I will discuss below, the decision to exclude the evidence going to the severed counts was in error and prejudiced the Crown in its ability to make out its case. The division and severance order worked an injustice towards the Crown, the complainants and the administration of justice in that it placed an artificial barrier to the trial judge's ability to consider the respondent's conduct in all the circumstances.

39 I do not wish to leave this matter without making one final comment on McDonald J.'s severance order. The order denies the reality of how the complainants experienced the conduct which they have alleged constituted sexual assaults. Each aspect of one complainant's contact with the respondent interlocks with all the other aspects to form the larger context within which that complainant felt that the respondent's actions were inappropriate. Further, the message that a division and severance order in a sexual assault case based on the complainant's body parts sends to women is that the complainant's physical attributes are more important than her experience as a whole person. The order severed the complainants as well as the counts. In my opinion, the message sent by the order, although not intended to have this effect and although not amounting to an error of law, is inappropriate.

40 Given these jurisdictional and substantive flaws in McDonald J.'s order for division and severance of the counts, and that it was an error for Hope J. to apply the order, it must be set aside.

3. Should any of the evidence excluded by the trial judge have been admitted?

(a) Evidence going to the severed counts

41 As I stated above, Hope J. was in error to exclude the evidence going to the severed counts. Hope J. declared that the evidence of the complainants going to the severed counts was generally inadmissible as irrelevant or, in the alternative, too prejudicial. He ruled as follows:

> Having regard to the severance order of Justice McDonald, which in effect has said there is to be for trial purposes at least two trials, based upon the sections of the body, I am unable to say that I can find relevancy of evidence which I would expect to come from complainants in the second trial to the counts in this trial. In the event that I am in error, I would not admit that evidence since, in my opinion, the prejudicial effect of admission of such evidence would be greater than its probative value.

With respect, I disagree.

42 The counts should not have been divided so as to separate a breast examination from a vaginal examination or any other type of touching that occurred during a single visit to the respondent. However, even with the counts divided as they were, there should have been no question as to the admissibility of the evidence of other touching that occurred during the same appointment with the respondent as the vaginal examination being considered by the trial judge, or of evidence given by one complainant about other visits she had with the respondent.

43 The evidence of one complainant about one visit to the respondent is simply evidence of the events surrounding the alleged sexual assault. This evidence raises no similar fact or similar act evidence considerations and was clearly relevant. The trial judge did not determine the probative value of the evidence, specify its prejudicial effect, or weigh one against the other. I am of the opinion that the evidence regarding acts other than vaginal examinations was not prejudicial at all where the evidence of one complainant with respect to her experience with the respondent is concerned since it is simply evidence about the nature of the complainant's professional relationship with the respondent. On the other hand, that evidence if accepted by a trier of fact would be probative of the circumstances in which the internal examinations occurred which in turn would be probative of the nature of the respondent's conduct. In my opinion, the prejudicial effect of the evidence would not outweigh its probative value. Accordingly, evidence given by one complainant about events that occurred during the same visit to the respondent's office as the vaginal examination forming the subject of the count before the trial judge would be admissible as against that count. The trial judge erred in excluding this evidence.

44 For the same reasons, evidence given by one complainant about other appointments she had with the respondent was also properly admissible as against the counts before the trial judge in which the complainant was named.

45 I am also of the opinion that the evidence of one complainant as regards the severed counts should have been admitted with respect to the counts relating to each of the other complainants. While this evidence could be characterized as evidence of similar acts or events, the evidence was not tendered solely to show that the respondent was a person of bad character or of a disposition likely to commit the alleged offences. Rather, the evidence provided information highly relevant to understanding the context in which the alleged offences occurred and shed light on the nature of the respondent's relationship with his patients, particularly the standard of medical treatment he provided. The evidence provided a different perspective on the alleged assaults from that afforded by the medical evidence. The evidence going to the severed counts, if accepted by a jury, would also tend to show a distinct pattern of behaviour engaged in by the respondent. While the probative value of one complainant's evidence with respect to other complainants' allegations is somewhat less than that described above, and the prejudicial effect higher, I would nonetheless find that the probative value outweighs the prejudicial effect.

46 In summary, all the evidence going to the severed counts should have been admitted with respect to all the counts before the trial judge. This evidence was relevant to several important issues in the case, and its prejudicial effect would not outweigh its probative value.

(b) Evidence of the respondent's ranking medical officer

47 Hope J. ruled that the evidence of the respondent's ranking medical officer, Colonel MacKenzie, who was qualified as an expert in the field of the general practice of medicine, was inadmissible on the basis that it is irrelevant since it "only tells us what she advised the accused do to improve his practice at an army station some seven years ago".

48 I disagree with Hope J. that this evidence was irrelevant. The substance of the Colonel's evidence was that, in response to complaints made against the respondent by female patients while he was practising medicine in the military, she counselled the respondent on the proper way to conduct a medical practice. Among the suggestions she gave the respondent were that he should have a female medical personnel present in the office when he did any intimate examinations and that he should be careful about how he touched patients. He was also counselled to stop spending unduly long amounts of time with his patients, and not to invade patients' privacy by watching them undress and dress. In my opinion, this evidence was very relevant to the nature and quality of the acts which the respondent performed on the complainants and specifically to whether or not he was carrying out proper medical procedures. Further, one of the respondent's defences was that of good faith even if his practices were unorthodox. The Colonel's evidence would go to rebutting this defence since an inference could be drawn that the respondent had been made aware of problems with his practice in this respect. Hope J. was therefore in error to reject this evidence on the basis of irrelevance. The Colonel's testimony should have been admitted.

49 Hope J. also rejected the Colonel's evidence on the basis of a rule which he described as follows:

> [Her evidence] may well be inadmissible under the rule that in the absence of any assent by the accused, either by word or conduct, to the correctness of the statements made in his presence, has no evidentiary value and should be discarded.

Whether or not the respondent accepted or rejected the advice has no bearing on the admissibility of what the Colonel told the respondent. The rule on which Hope J. relied actually relates to the admissibility of *hearsay* statements, made in the presence of an accused and adopted by the accused as an admission. For example, the leading case in the area concerned the admissibility of a mother's testimony about accusations made against the accused, and in the presence of the accused, by her young son (*R. v. Christie*, [1914] A.C. 545 (H.L.)). The Colonel's testimony was not hearsay since it was not evidence, presented for the truth of the matter stated, of what someone else told her. Therefore, the rule to which Hope J. referred has no application in this case.

(c) Evidence of non-complainants

50 On a voir dire, the Crown called five women who had been patients of the respondent in the army as well as three women, also past patients, who had come forward with complaints about the accused after the preliminary inquiry as a result of media reports regarding the charges against the respondent. These women all testified that they felt the respondent had acted inappropriately towards them during medical examinations, including breast and vaginal examinations. Hope J. ruled that all of this evidence was inadmissible.

51 Given the errors already committed in the severance order, in the exclusion of other evidence, and in the motion for a directed verdict (which I will discuss below), I do not think it is necessary to discuss the admissibility of this evidence and will leave it to the discretion of the trial judge in the respondent's new trial. Recognizing that this evidence can correctly be characterized as similar fact evidence, it will be for the trial judge to consider whether or not the evidence falls within the decision of this Court in *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763.

52 Another factor for the trial judge to consider will be the availability of medical records regarding the witnesses from the army. The trial judge may decide that the lack of medical records for these witnesses' visits with the respondent renders the prejudicial effect of the evidence too high for it to be admissible.

53 Before leaving this evidence, I would note that Hope J. approached the decision regarding the admissibility of this evidence improperly when he assessed the witnesses' credibility and made determinations as to the weight he would give their evidence. The credibility of witnesses and weight to be given evidence are matters to be considered by the trier of fact when making a determination as to a verdict after the Crown and the defence have presented their cases and are not factors properly before a trial judge when ruling on the admissibility of evidence.

4. Did the trial judge err in granting the respondent's motion for a non-suit?

54 I am of the opinion that Hope J. erred in granting the respondent's motion for a non-suit at the close of the Crown's case. An application for a directed verdict or a non-suit is a matter of common law since there is no provision in the *Criminal Code* for such an application. This Court reviewed the test to be applied on such an application in *R. v. Monteleone*, [1987] 2 S.C.R. 154. In that case, McIntyre J. wrote for the Court that the test to be applied is derived from the decision in *United States v. Shephard*, [1977] 2 S.C.R. 1067. That test (at p. 161) is whether there is "any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction". McIntyre J. stated at p. 161:

> It is not the function of the trial judge to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury.

55 The respondent elected to be tried without a jury, and therefore Hope J. was to fulfil the roles of both trial judge and trier of fact. It was in his role as trial judge, rather than as trier of fact, that he was to make a determination on the application for a non-suit. Hope J. was not to make determinations of weight and credibility prior to reaching a decision on the application for a non-suit.

56 The trial judge opened his ruling on the application by stating the correct test. He held:

> ... counsel for the accused applied for a directed verdict. That is, there is no case to answer on the basis that there has been no evidence to prove an essential ingredient or element of the offence, or, put another way, there is no evidence upon which a properly instructed jury acting reasonably might convict the accused. In deciding this application, I do not weigh the evidence.

57 Despite articulating the correct standard at the outset, Hope J. began to commit errors over the course of his ruling on the motion. First, he stated that in relation to consent, the Crown had "to prove beyond a reasonable doubt the procedures carried out were not appropriate or necessary for diagnostic or treatment purposes". There are two errors in this statement. First, proof beyond a reasonable doubt is not an element of the test for a directed verdict; the proper test is some evidence. Second, the Crown did not have to submit evidence proving that the procedures were not appropriate or necessary for diagnostic or treatment purposes. What the Crown had to lead was evidence that the conduct of the respondent had a sexual character in addition to whatever medical character that conduct might have had.

58 Hope J. next erred when he stated that the only evidence going to show whether or not there was a lack of consent was that of the two medical experts. The evidence of the medical experts produced opinions on the necessity of and the proper procedures for the types of medical examinations in question. However, the testimony of the complainants as to their feelings of specific distress and discomfort, as well as their testimony that they had never had similar experiences with other doctors, was evidence going to lack of consent. The complainants' testimony also afforded evidence that the respondent's practices varied from visit to visit, or from complainant to complainant, which might tend to throw doubt on the nature of the touching. Further, the investigating officer testified that the respondent had stated that he was "probably" sexually aroused by one of the complainants. The police officer also testified that when he was read part of one of the complainant's statement to police, the respondent stated something like, "I'm human, I need to stop here ... That's going to happen every so often". This supported that complainant's testimony that the respondent apologized to her after the alleged sexual assault, saying something like, "... I'm sorry. I got carried away [involved]," and "... at least I know I'm human". Therefore, there was admissible evidence aside from that of the medical experts going to the issue of lack of consent.

59 Next, in my opinion, Hope J. broadly overstated the matter when he stated that both medical experts approved the respondent's procedures. The doctors' testimony was long and complex, and contained many statements from which a jury could have concluded that the respondent's conduct was inappropriate in terms of accepted medical practice. It was for the trier of fact to weigh the experts' evidence and reach a conclusion about the inferences to be drawn from that evidence. It was not the function of the trial judge on a motion for a non-suit to do so.

60 I note also that it was no barrier to the reception of the evidence that the experts testified on occasion to their own practices. There is no rule of evidence that experts may not testify as to their own practices (see, for example, the sections on expert opinion evidence in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at pp. 533-74, and McWilliams, *Canadian Criminal Evidence* (3rd ed., 1993), at pp. 9-9 — 9-45). *Deyong v. Weeks* (1983), 43 A.R. 342 [25 Alta. L.R. (2d) 117] (Q.B.), on which Hope J. relied for his ruling, was a civil case concerning expert opinion evidence regarding the proper standard of care to be expected of the profession in a suit for professional negligence and was therefore inapplicable. Finally, at the point when Hope J. was considering the motion for the non-suit, the expert evidence has already been admitted. It was improper for Hope J. to make statements on the admissibility of the expert evidence after the close of the Crown's case.

61 As I have stated, along with weighing the evidence and drawing inferences from some witnesses' testimony, Hope J. erroneously applied a "proof beyond a reasonable doubt" as opposed to a "some evidence" standard, an error which he made explicit by concluding, "the Crown has failed to prove beyond a reasonable doubt an essential ingredient in each of the counts". His errors were not cured by the statement at the end of his judgment that there was "no evidence upon which a properly instructed jury acting reasonably might convict the accused". Indeed, the fact that Hope J. left out a key part of the test, i.e., no evidence *which if believed* could form the basis for a conviction, indicates that he directed a verdict based on his disbelief of the evidence rather than on a neutral assessment.

62 Given these errors, the order for the non-suit cannot stand. Even under the trial judge's rulings on the admissibility of evidence, there was some evidence, both direct and circumstantial, which if believed by a properly instructed jury acting reasonably could have resulted in convictions. Under a correct approach to the admissibility of the evidence, there would have been all the more evidence to satisfy the standard.

V. Conclusion and Disposition

63 The pre-trial order for division and severance of the counts contained apparent flaws in jurisdiction and in substance, and in the circumstances should not have been applied by the trial judge. Further, the trial judge erred in his rulings on the admissibility of the evidence going to the severed counts, as well as the testimony of the respondent's ranking medical officer. Finally, the trial judge erred in granting the non-suit. Accordingly, the matter must go back for a new trial.

64 For the foregoing reasons, I would allow the appeal, set aside the order dividing and severing the counts, set aside the acquittals, and order a new trial.

McLachlin J. **(concurring):**

65 I have had the advantage of reading the reasons of Justice Iacobucci and agree with them. I wish only to add a comment on the question of whether this Court has jurisdiction to review the order for severance made by McDonald J. in chambers.

66 The problem, it is said, is that the order in question was not made by the trial judge as part of the trial. It was made prior to the trial by McDonald J.This Court, in *R. v. Chabot*, [1980] 2 S.C.R. 985, commented in obiter dicta at p. 1000 that the preferral of the indictment occurs and the trial begins when the accused is called upon to plead "before a trial court constituted to dispose of the case". In the case at bar, that occurred only sometime after McDonald J. had made his severance order. Had the judge who presided over the trial proper, Hope J., made the severance order, as happens elsewhere in some parts of Canada, it would have been appealable as part of the proceedings in the trial. The difficulty is that the order was made before trial by another judge before, it is argued, the indictment was preferred. Since no appeal was (or could be) taken from that order, it stands, by virtue

of the rule against collateral attack: See *R. v. Wilson*, [1983] 2 S.C.R. 594. My colleague concludes that to meet this argument, it is necessary to entertain an exception to the rule against collateral attack so that substance may triumph over form.

67 It has been questioned, however, whether *Chabot*, which says the indictment is preferred and the trial begins when the court is ready to hear the case, applies in Alberta. It appears that in that province, it is standard practice to arraign an accused before the trial for purposes of taking pleas and pre-trial orders. It has been held that under this Alberta procedure, the indictment must be regarded as having been preferred before the trial begins. In *R. v. Brackenbury* (1981), 61 C.C.C. (2d) 6 [16 Alta. L.R. (2d) 103] (Alta. Q.B.), Cavanagh J. considered the effect of *Chabot* on Alberta criminal procedure. He determined that *Chabot* is inapplicable in Alberta as it is based, first, upon practice in provinces which had previously used a system of grand juries and, second, primarily upon Ontario practice which is considerably different than that in Alberta.

68 After discussing the historical basis for the decision in *Chabot*, Cavanagh J. briefly outlines at p. 11 the practice in Ontario upon which the decision was based:

> The Ontario practice seems to be that some time shortly after the preliminary hearing, an agent of the Attorney-General signs and files an indictment with the Clerk of the Supreme Court. That is step No. 1. It appears that the cause then goes to an Assignment Court at which time a trial date is fixed. It appears that there is no reading of the indictment and indeed it is not clear that the accused must be present. That is step No. 2. Step No. 3 in Ontario appears to be the trial, which is commenced by a presentation of the indictment to the Court, acceptance of it, reading of it to the accused, and upon his pleading not guilty commencement of the trial itself with a Judge and jury.

69 He then discusses the practice in Alberta at pp. 11-12.

> The Alberta practice is as follows: step No. 1 — some time shortly after the completion of the preliminary inquiry, an agent of the Attorney-General signs and files an indictment with the Clerk of the Queen's Bench. Step No. 2 — arraignment. At or after committal the accused is notified of the date he is to be arraigned in Court [sic] of Queen's Bench ... All accused to be arraigned appear on that day before a Judge of the Court of Queen's Bench. There is no jury. The indictment is presented to the presiding Judge who causes it to be read to the accused, and if the accused pleads not guilty, a trial date usually four to six months later is fixed. If the accused objects to the indictment then no plea is taken, the matter is adjourned to the next arraignment date on the understanding that the objection will be heard by a Judge and ruled upon before the next arraignments. If at arraignments the accused pleads guilty, the presiding Judge will sentence him.
>
> *It should be noted that if it is said that the indictment is not preferred against the accused at arraignments, then those who plead guilty and are sentenced would have to be convicted without an indictment ever having been preferred against them*. [Emphasis added.]

70 Procedure in Alberta allows severance motions to be heard by judges in chambers prior to trial without seizing the judge of the matter: *R. v. Deol* (1979), 20 A.R. 595 [11 Alta. L.R. (2d) 82] (Q.B.). This procedure, as well as others such as the taking of guilty pleas on arraignment, appears to be premised on the assumption that the indictment is preferred against the accused and trial proceedings begin upon arraignment, even though that may be months before a judge and jury are empanelled. If one applies *Chabot* literally to the Alberta practice, many problems arise, including the one we face in this appeal.

71 One way to meet the problem is to state, as Cavanagh J. did in *Brackenbury*, supra, at p. 10, that the suggestion in *Chabot* that the indictment is not preferred until it is presented in the presence of the accused "before a court constituted to dispose of the case", does not apply to pre-trial arraignments in Alberta. On this view, the trial begins for purposes of plea and appeal at arraignment, even though a judge and jury ready to hear the case are not in place. The rule against collateral attack would present no difficulty in cases like this one, since the severance order is part of the trial proceedings. In my view, this makes sense. *Chabot* was predicated on the procedure in Ontario. It should not be applied literally to different procedures in different provinces when to do so results in anomaly and injustice.

72 Historically and linguistically, there is no reason why an indictment could not be preferred prior to the time when the court is fully constituted to dispose of the matter. As Cavanagh J. points out in *Brackenbury*, at p. 10:

> The English word "To prefer" is defined in the Oxford English Dictionary as follows: "To lay [a matter] before anyone formally for consideration, approval, or sanction; to bring forward, present, submit [a statement, bill, indictment, information, prayer, etc.]". In the French version the verb used is "presenter". This word incorporates a similar idea of placing something before a Court for consideration and action ... the indictment is presented to the Court, the Court accepts or rejects it; if it is accepted, as is usually the case, it is read to the accused and he is called upon to plead to it. That, in my view, completes preferment.

The preferment was historically effected when a bill of indictment was presented to and returned by a grand jury. This typically occurred at the point when the judge and jury were in place, ready to hear the case, as described in *Chabot*. In provinces such as Alberta, where there have never been grand juries, it is done by the Attorney General or his or her agent: see Salhany, *Canadian Criminal Procedure*, at p. 182. This has often occurred prior to the time when a judge and jury ready to hear the evidence were in place. In short, the time when the indictment is preferred and the trial proceedings begin is a matter of historical incident and practice, rather than one of principle.

73 Viewing the matter thus, I incline to the view that the order of McDonald J. occurred after preferment of the indictment and commencement of the trial proceedings and should be regarded as part of the trial. As such, it is appealable. In the alternative, if I were to proceed from the premise that the order of McDonald J. preceded the preferment of the indictment and was not part of the trial, I agree with my colleague that there should be an exception to the rule against collateral attack where the Alberta procedure outlined above has been followed. To do otherwise would be to insulate severance orders by Alberta courts against appeals which could be brought in other parts of the country where the judge who actually presides at the trial makes the order. That would be manifestly unjust.

74 Whatever approach is adopted, I agree that this Court has jurisdiction to entertain an appeal from the severance order of McDonald J.

75 I would dispose of the appeal as proposed by Iacobucci J.

Appeal allowed.

3

United Kingdom House of Lords Decisions

[1981] UKHL 13

HOUSE OF LORDS

19 November 1981

Lord Diplock
Lord Russell
of Killowen
Lord Keith of Kinkel
Lord Roskill
Lord Brandon

HUNTER (APPELLANT)
v.

CHIEF CONSTABLE OF THE WEST MIDLANDS POLICE AND OTHERS (RESPONDENTS)

Lord Diplock

My Lords,

This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

The matter comes before your Lordships by way of an interlocutory appeal in a civil action in the High Court in which the appellant (" Hunter") seeks damages for assaults causing him physical injuries which he alleges were inflicted upon him by police officers while he was in their custody between 22 and 24 November 1974. The respondent chief constables, who are the first and second defendants to the action, are sued under section 48 of the Police Act 1964 as vicariously liable for the tortious acts of the individual police officers (whom I shall call

collectively "the Police ") who were members of the West Midlands and Lancashire police forces respectively.

The Home Office is a third defendant to the action as vicariously liable in damages for other assaults causing him additional physical injuries which Hunter alleges were inflicted upon him by prison officers at Winson Green Prison between 25 and 27 November 1974 while he was detained there on remand. Your Lordships are not, however, concerned directly with these later injuries in respect of which the civil action against the Home Office is still continuing. The only question with which your Lordships are concerned is whether Hunter's action *against the Police* ought to be struck out as an abuse of the process of the court. Cantley J., before whom the application to strike out was made, declined to do so. On appeal from his refusal, the Court of Appeal (Lord Denning M.R., Goff L.J. and Sir George Baker) were unanimously of opinion that the action was an abuse of the process of the court and that the statement of claim against the first and second defendants ought to be struck out.

Hunter is one of six murderers ("the Birmingham Bombers"), members or supporters of the I.R.A., who were responsible for planting and exploding two bombs in public houses in the centre of Birmingham on 22 November 1974; as a result twenty-one people were killed and eight score of other innocent victims injured. For a detailed account of what happened in relation to Hunter and the other Birmingham Bombers after the holocaust until the launching of this action by Hunter and similar actions by those others on November 1977, reference should be made to the judgment of the Master of the Rolls which appears in the Law Reports for 1980 under the title *McIlkenny* v. *Chief Constable* [1980] 1 Q.B. 283 at pp.312/6. To paraphrase it would only be to spoil it, to improve upon it I should findimpossible. So I shall limit myself to as brief a summary as possible of those salient features in the Master of the Rolls's account to which I find it necessary to refer in order to explain my own reasons for dismissing this appeal.

Hunter and four other of the Birmingham Bombers were arrested on the night of 22 November 1974 at Heysham where they were en route to Belfast. They remained in custody of the Police initially at Morecambe and subsequently at Birmingham until the morning of 25 November when they were brought before the magistrate and committed by him to Winson Green Prison on remand until their next appearance before him on 27 November. Photographs of all six Birmingham Bombers, including one of Hunter, were taken before the men left the police station at Birmingham. No facial injury to Hunter was apparent on inspection of these photographs, at any rate by an un-instructed eye; nor (except for a black eye in the case of one defendant which, it was accepted, had been caused accidentally) was any facial injury to any of the Birmingham Bombers observed by any of the many keen observers who were present when they appeared in court on the morning of 25 November, or by the duty solicitors who were allotted to them on that occasion and who interviewed them in their cells. On their next appearance in court on 27 November, however, it was apparent to even the most casual glance that all six men including Hunter had sustained severe and painful facial injuries. It is not disputed, and was not disputed at their trial for murder, that by this time there were present on other parts of their bodies also physical injuries which could not have been self-inflicted; but, for reasons which will become apparent later in connection with Hunter's claim that "fresh evidence" has become available since the date of his conviction on 15 August 1975 on twenty-one counts of murder, it is only facial injuries that call for specific mention here.

The trial of all six Birmingham Bombers for murder took place jointly before Bridge J. and a jury. The principal evidence against each one of them consisted of confessions made to the Police either in writing or in the case of Hunter orally only. Against some, but not against Hunter, there was forensic evidence of faint traces of nitro-glycerine being perceptible on their hands or clothing and against the five of them, including Hunter, who were arrested at Heysham there was evidence of conduct after the time at which the bomb must have been

planted, that, in the absence of any other credible explanation, was capable of arousing suspicion that they had some knowledge of the plot. But all this amounted to suspicion only; unless the confessions were admissible and, if admitted, were accepted by the jury in the case of each defendant as being true then no reasonable jury could be satisfied that the prosecution's case against that defendant was proved beyond a reasonable doubt and it would be their duty to acquit him.

If it were voluntary, Hunter's oral confession, like the confessions of each of his co-defendants, bore the ring of truth; as the jury must have found when they convicted him. [That they must also have rejected his denial that he ever made it is not germane to the only matters that fall to be decided by your Lordships in this appeal.] So it became of crucial importance to Hunter and to each of the defendants to obtain a ruling from the judge on a *voir dire* that the confessions were not voluntary and so prevent their being admitted in evidence. This they set out to do by claiming in the " trial within a trial" before the learned judge in the absence of the jury, that the confessions were forced out of them by the infliction of severe physical violence on them by the Police and by threats of calamitous consequences of what would happen to them or to their families if they did not make confessions of their guilt in the terms that Police demanded of them. The physical injuries in respect of which Hunter claims damages in the present civil action for assaults by the Police are identical with those of which he gave evidence at the trial within a trial as having been inflicted upon him by the Police in order to extract from him a confession.

At the trial within a trial the issue which Bridge J. had to determine was whether the prosecution had satisfied him beyond reasonable doubt that the confessions were voluntary; and that involved his being satisfied to this high standard of proof that in the case of each defendant there had been no assault upon him by the Police before or in the course of obtaining his confession. Assaults upon any of the defendants by prison officers at Winson Green Prison after the confessions had been made could not affect admissibility; but the fact that all the defendants had unquestionably been subject to severe physical violence by the time of their second appearance in the magistrates court on 27 November 1974 provided an added complica□tion to the investigation of the issue that the judge had to determine on the *voir dire.*

So it is not surprising that the trial within a trial lasted eight days. Each of the police officers who it was claimed had participated in or was present at any of the alleged assaults gave evidence, so did each of the defendants; in addition other witnesses were called and the photographs of the defen□dants taken on 24 November 1974, to which I have referred were put in evidence. At the conclusion of this evidence the judge ruled that each of the confessions was admissible. Unusually, but very helpfully for the purpose of the instant appeal to your Lordships' House, he gave full and detailed reasons for his ruling. He made it clear that he accepted the evidence of the Police as establishing beyond all reasonable doubt that there had been no physical violence or threats by them to the defendants and that in his opinion the evidence taken as a whole showed that there had been what he described as "gross perjury" on the part of each of the defendants.

The confessions were accordingly admitted and the trial resumed. The same allegations as to physical violence and threats by the Police that had been made on the *voir dire* were repeated before the jury as relevant to the weight which they should attach to the confessions and the whole ground was gone over again in evidence given before them. In the course of what I can only describe as a model and meticulous summing up, of which no criticism has been made by counsel for Hunter in the instant appeal, Bridge J. gave to the jury a firm direction that if they inclined to the view that the account by any defendant of the circumstances in which his confession was obtained might be true, they should reject the confession as worthless and acquit the defendant, since the other evidence against each of them did no more than raise

suspicion and was insufficient to satisfy the burden of proof beyond reasonable doubt that lay upon the prosecution.

Despite this direction the jury convicted Hunter and each of the other Birmingham Bombers on 21 counts of murder. The appellants appealed to the Criminal Division of the Court of Appeal against the convictions. No complaint about the judge's ruling on the *voir dire* that the confessions were admissible was made in this appeal on behalf of any of the appellants and their appeals were dismissed on 30 March 1976.

To complete the history of the matter it may be added in parenthesis that later in 1976, fourteen prison officers from Winson Green Prison were tried before Swanwick J. and a jury on charges of assaulting the Birmingham Bombers. All fourteen made unsworn statements from the dock, each denying that he himself was implicated in any violence inflicted on the Birmingham Bombers between 25 and 27 November 1974; and all fourteen were acquitted. In the instant civil action by Hunter, however, it is admitted by the Home Office that *some* violence was inflicted upon him by prison officers employed at Winson Green. For this the Home Office accepts civil liability in damages but puts Hunter to proof of the extent and severity of the resulting injuries.

The statement of claim in the present civil action alleging against the Police the identical assaults that had been canvassed for eight days before Bridge J. on the *voir dire* and again before the jury on Hunter's trial for murder, was delivered in January 1978. Prompt steps were taken by the Police to have the statement of claim against them struck out and the action against them stayed or dismissed under Order 18 rule 19 or else under the inherent jurisdiction of the court, on the grounds, *inter alia,* that it was an abuse of the process of the court.

The summons claiming this relief in the instant case together with summonses claiming similar relief in parallel actions in which the other five Birmingham Bombers were plaintiffs came on for hearing before Cantley J. in November 1978.

At that hearing there were put in evidence statements from prison officers that had not been used although they had been made available to plaintiffs at their trial for murder and a report from an expert, Dr. Paul, upon inferences which he felt able to draw from the photographs of the plaintiffs taken on 24 November 1974, and used at the murder trial, to which reference has already been made. It would appear that in the argument on the summonses, counsel for the Police sought in the first place to persuade that learned judge that what had happened at the murder trial gave rise to an estoppel *per rem judicatam* of a kind which in recent years it had been found convenient to describe as "issue estoppel". The fact that even if what had happened did not create as against the plaintiff in favour of the Police what could be strictly classified as "issue estoppel", it nevertheless made the initiation of the present civil action against the Police an abuse of the process of the court took second place in counsel's argument both chronologically and in plenitude of citation of authority.

Cantley J. in a fully reasoned judgment dismissed the summonses both on the narrow ground that there was no "issue estoppel" in the strict sense of that term and on the broader ground that he ought not to dismiss the action as an abuse of the process of the court if, in the light of evidence that was not called at the murder trial, even though it had been available then, but which the plaintiffs intended to adduce in the civil action, it was "reasonably conceivable that another tribunal acting judicially might accept at least part of the plaintiffs' case "; and this he, hesitantly, thought was " reasonably conceivable" if the expert evidence of Dr. Paul (which could have been available to the plaintiffs at the murder trial if they had chosen to call it) were admitted at the hearing of the civil action.

Much the same course was taken in the argument in the Court of Appeal upon the appeal by the Police against the dismissal of the summonses. The hearing there took twelve days and involved the citation of seventy-seven authorities including a number of American decisions. All three members of the court were of opinion that Cantley J. was wrong on the broader ground; he had applied the wrong tests as to the previous availability and the degree of cogency of evidence, unadduced at the murder trial but proposed to be adduced in the civil action, that the plaintiffs would need in order to prevent its being an abuse of the process of the court for them to initiate civil proceedings to mount a collateral attack upon the finding of Bridge J. at the murder trial that they had *not* been assaulted by the Police.

The Master of the Rolls and Sir George Baker were also in favour of extending the description "issue estoppel" to cover the particular example of abuse of process of the court presented by the instant case - a question to which much of the judgment of Lord Denning is addressed. Goff L.J., on the other hand, expressed his own view, which had been shared by Cantley J., that such extension would involve a misuse of that expression. But if what Hunter is seeking to do in initiating this civil action is an abuse of the process of the court, as I understand all your Lordships are satisfied that it is, the question whether it also qualifies to bear the label "issue estoppel" is a matter not of substance but of semantics. Counsel for the appellant was therefore invited to address this House first upon the broader question of abuse of process and to deal in particular with the reasoning contained in the judgment of Goff L.J. who dealt with the matter more closely than the other members of the court and bases his decision solely on that ground. In the result, counsel for the appellant, Hunter, who argued the case with their accustomed ability and diligence, were quite unable to persuade any of us that there was any error in the reasoning of Golf L.J. in what proved to be the last judgment that he prepared before his much lamented and untimely death. In the result it became unnecessary to call on counsel for the Police. So the debate upon semantics did not take place. It could not possibly affect the outcome of the appeal or justify the public expense that would have been involved in prolonging the hearing any further.

Nevertheless it is my own view, which I understand is shared by all your Lordships, that it would be best, in order to avoid confusion, if the use of the description "issue estoppel" in *English law, at any rate* (it does not appear to have been adopted in the United States), were restricted to that species of estoppel *per rem judicatam* that may arise in civil actions between the same parties or their privies, of which the characteristics are stated in a judgment of my own in *Mills* v. *Cooper* [1967] 2 Q.B. 459 at 468/9 that was adopted and approved by this House in *Reg.* v. *Humphrys* [1977] A.C. 1, the case in which it was also held that "issue estoppel" had no place in English criminal law.

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

The proper method of attacking the decision by Bridge J. in the murder trial that Hunter was not assaulted by the Police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous, a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do. Had he or any of his fellow murderers done so, application could have been made on that appeal to tender to the court as "fresh evidence" all material upon which Hunter would now seek to rely in his civil action against the Police for damages for assault, if it were allowed to continue. But since, quite apart from the tenuous character of such evidence, it is not now seriously disputed that it was available to the defendants at the time of the murder trial itself and could have been adduced then had those who were acting for him or

any of the other Birmingham Bombers at the trial thought that to do so would help their case, any application for its admission on the appeal to the Court of Appeal (Criminal Division) would have been doomed to failure.

It would call for a degree of credulity too extreme to be expected even from judicial members of your Lordships' House, to fail to recognise that the dominant purpose of this action, and the parallel actions brought by the other Birmingham Bombers so far as they are brought against the Police, has not been to recover damages but is brought in an endeavour to establish, long after the event when memories have faded and witnesses other than the Birmingham Bombers themselves may be difficult to trace, that the confessions on the evidence of which they were convicted were induced by police violence, with a view to putting pressure on the Home Secretary to release them from the life sentences that they are otherwise likely to continue to serve for many years to come. A significant indication that the recovery of monetary damages is not the principal object of the civil action may be discerned in the manner in which the action has been conducted as against the Home Office. Despite the fact that ever since August 1979, when the Home Office amended their defence by admitting liability for assaults by the prison officers, Hunter has been in a position to obtain judgment against the Home Office on liability and proceed to an assessment of damages, no step has yet been taken on his behalf to do so.

My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A. L. Smith, L.J. in *Stephenson* v. *Garnett* [1898] 1 Q.B. 677 and the speech of Lord Halsbury L.C. in *Reichel* v. *Magrath* 14 App. Cas. 665 which are cited by Golf L.J. in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A. L. Smith L.J.:

> " the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court."

The passage from Lord Halsbury's speech deserves repetition here in full:

> " I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

In the instant case the relevant final decision by a competent court in which the identical question sought to be raised has been already decided is the ruling of Bridge J., on the *voir dire* in the murder trial, that Hunter's confession was admissible. Initially his ruling may have been provisional in the limited sense that up to the time that the jury brought in their verdict he had power to reconsider it in the light of any further evidence that might emerge when the whole question of the circumstances in which the confession was obtained was gone into again before the jury on the question of the weight to be attached to it, *Reg.* v. *Watson (Campbell)* [1980] 1 W.L.R. 991. But his ruling became final when the trial ended with the return of the jury's verdict of guilty and the pronouncement by the judge of the mandatory sentence of life imprisonment. Bridge J. thereupon became *functus officio.* His ruling that the confession was not obtained by the use of violence by the Police, as Hunter had alleged, could there□after only be upset upon appeal to the Court of Appeal.

The fact that the whole matter of the circumstances in which the con□fession was obtained was gone into a second time before the jury and that the jury, in view of the judge's direction

to them, must clearly also have been satisfied beyond reasonable doubt that Hunter's account of the assaults upon him by the Police was a fabrication does not affect the finality of the judge's ruling, though it would exacerbate the public scandal to the administration of justice that would be involved if Hunter, by changing the form of the proceedings to a civil action, were to be permitted to set up in that action the same case that must have been decided against him not only once but twice, even though technically it was only the first of those decisions that eventually qualified as the final decision against him by a competent court upon the very question that he seeks now to raise.

My Lords, this is the first case to be reported in which the final decision against which it is sought to initiate a collateral attack by means of a civil action has been a final decision reached by a court of criminal jurisdiction. This raises a possible complication that the onus of proof of facts that lies upon the prosecution in criminal proceedings is higher than that required of parties to civil proceedings who seek in those proceedings to prove facts on which they rely. Thus a decision in a criminal case upon a particular question *in favour* of a defendant, whether by way of acquittal or a ruling on a *voir dire,* is not inconsistent with the fact that the decision would have been *against* him if all that were required were the civil standard of proof on the balance of probabilities. This is why acquittals were not made admissible in evidence in civil actions by the Civil Evidence Act 1968. In contrast to this a decision on a particular question *against* a defendant in a criminal case such as Bridge J.'s ruling on the *voir dire* in the murder trial, is reached upon the higher criminal standard of proof beyond all reasonable doubt and is wholly inconsistent with any possibility that the decision would *not* have been *against* him if the same question had fallen to be decided in civil proceedings instead of criminal. That is why convictions were made admissible in evidence in civil proceedings by the Civil Evidence Act 1968.

That Act and the case of *Hollington* v. *Hewthorn* [1943] K.B. 587, which sections 11 and 13 of the Act were passed to overrule, call for some examination at this point. Despite the eminence of those who constituted the members of the Court of Appeal that decided it (Goddard, Greene and du Parcq, L.JJ.) that case is generally considered to have been wrongly decided, even in the context of running-down cases brought before the Law Reform (Contributory Negligence) Act 1945 was passed and contributory negligence ceased to be a complete defence; for that is what *Hollington* v. *Hewthorn* was about. The judgment of the court delivered by Goddard L.J. concentrates on the great variety of additional issues that would arise in a civil action for damages for negligent driving but which it would not have been necessary to decide in a prosecution for a traffic offence based on the same incident, and on the consequence that it would still be necessary to call in the civil action all the witnesses whose evidence had previously been given in a successful prosecution of the defendant, or a driver for whose tortious acts he was vicariously liable, for careless or dangerous driving, even if evidence of that conviction were admitted. So no question arose in *Hollington* v. *Hewthorn* of raising in a civil action the identical question that had already been decided in a criminal court of competent jurisdiction, and the case does not purport to be an authority on that matter.

The occasion for the reference of the decision in *Hollington* v. *Hewthorn* that evidence of criminal convictions was not admissible in civil actions to the Lord Chancellor's Law Reform Committee, was a notorious libel case in which despite a defence of justification a criminal who had been convicted of serious offences was awarded damages by a jury in a civil action against a newspaper for stating that he had committed the identical offences of which he had been found guilty upon his trial. So here, unlike the case of *Hollington* v. *Hewthorn* the civil action did raise the identical question that had already been decided against the plaintiff by a competent court; yet under the rule in *Hollington* v. *Hewthorn* even the fact of his conviction was inadmissible in evidence on the plea of justification in the civil action. This is the mischief, the initiation of civil proceedings in a court of justice for the purpose of mounting a

collateral attack upon a final decision against the intending plaintiff which has been reached by a competent court of criminal jurisdiction, that section 13 of the Civil Evidence Act 1968 was designed to cure. It is to be observed that it makes the conviction not merely *prima facie* evidence of the plaintiff's guilt but conclusive evidence. The provisions of section 13 are thus consistent with and give statutory recognition to the public policy of prohibiting the use of civil actions to initiate a collateral attack on a final decision *against the intending plaintiff* which has been made by a criminal court of competent jurisdiction.

Section 13 is to be contrasted with section 11. Although section 11 is not in express terms confined to convictions of *defendants* to civil actions or persons for whose tortious acts defendants are vicariously liable, this must in practice inevitably be the case. It is the plaintiff who will want to rely upon a conviction of the defendant, or a person for whose tortious acts he is vicariously liable, for a criminal offence which also constitutes the tort for which the plaintiff sues. It is scarcely possible to conceive of a civil action in which a plaintiff could assist his cause by relying upon his own conviction for a criminal offence. So section 11 is not dealing with the use of civil actions by plaintiffs to initiate collateral attacks upon final decisions against them which have been made by a criminal court of competent jurisdiction; and the public policy that treats the use of civil actions for this purpose as an abuse of the process of the court is not involved.

Section 11 makes the conviction *prima facie* evidence that the person convicted did commit the offence of which he was found guilty; but does not make it conclusive evidence; the defendant is permitted by the statute to prove the contrary if he can. The section covers a wide variety of circumstances; the relevant conviction may be of someone who has not been made a defendant to the civil action and the actual defendant may have had no opportunity of determining what evidence should be called on the occasion of the criminal trial; the conviction, particularly of a traffic offence, may have been entered upon a plea of guilty accompanied by a written explanation in mitigation; fresh evidence, not called on the occasion of his conviction, may have been obtained by the defendant's insurers who were not responsible for the conduct of his defence in the criminal trial, or may only have become available to the defendant himself since the criminal trial. This wide variety of circumstances in which section 11 may be applicable includes some in which justice would require that no fetters should be imposed upon the means by which a defendant may rebut the statutory presumption that a person committed the offence of which he has been convicted by a court of competent jurisdiction. In particular I respectfully find myself unable to agree with the Master of the Rolls that the only way in which a defendant can do so is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence (which he could not have obtained by reasonable diligence before) which is conclusive of his innocence. The burden of proof of "the contrary" that lies upon a defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing this is likely to be an uphill task.

There remains to be considered the circumstances in which the existence at the commencement of the civil action of "fresh evidence" obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court.

I can deal with this very shortly, for I find myself in full agreement with the judgment of Golf L.J. He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail *in limine* because the so-called "fresh evidence" on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would

justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in *Phosphate Sewage Co. Ltd.* v. *Molleson,* namely that the new evidence must be such as "entirely changes the aspect of the case ". This is perhaps a little stronger than that suggested by Lord Denning M.R. in *Ladd* v. *Marshall* [1954] 1 WLR 1489, 1491, as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz., that the evidence " would probably have an important influence on the result of the case, though it need not be decisive ".

The latter test, however, is applicable where the proper course to upset the decision of a court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division), is by way of a re-hearing. I agree with Goff L.J. that in the case of collateral attack in a court of co-ordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate.

I need not repeat Goff L.J.'s critical examination of the "fresh evidence" which Hunter sought to adduce in his civil action for assault. It fell far short of satisfying either test.

I would dismiss this appeal.

Lord Russell of Killowen

My Lords,

I concur with the speech of my noble and learned friend, Lord Diplock, and therefore would dismiss this appeal.

Lord Keith of Kinkel

My Lords,

I agree entirely with the speech of my noble and learned friend Lord Diplock, which I have had the benefit of reading in draft, and would accordingly dismiss the appeal.

Lord Roskill

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. For the reasons therein contained I am clearly of the opinion that to allow this action to proceed would indeed be an abuse of the process of the court. I therefore agree that this appeal fails and should be dismissed.

Lord Brandon of Oakbrook

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. I agree with it and would dismiss the appeal accordingly.

Die Jovis 19° Novembris 1981

Upon Report from the Appellate Committee to whom was referred the Cause Hunter (Assisted Person) against the Chief Constable of the West Midlands Police and another, That the Committee had heard Counsel as well on Monday the 19th as on Tuesday the 20th and

Wednesday the 21st days of October last upon the Petition and Appeal of Robert Gerard Hunter at present detained in Her Majesty's Prison Long Lartin, South Littleton, Evesham, Worcester praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 17th day of January 1980 might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; and Counsel appearing for the Respondents the Chief Constable of the West Midlands and the Chief Constable of the Lancashire Police but not called upon; and due consideration had this day of what was offered on either side in this Cause:

It is *Ordered* and *Adjudged,* by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 17th day of January 1980 complained of in the said Appeal be, and the same is hereby, **Affirmed** and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further *Ordered,* That the Appellant's Costs in this House be taxed in accordance with the provisions of Schedule 2 to the Legal Aid Act 1974; And it is also further *Ordered,* That the Costs of the First and Second Respondents in this House be paid out of the Legal Aid Fund pursuant to Section 13 of the Legal Aid Act 1974, the amount thereof to be certified by the Clerk of the Parliaments.

4

COURT FILE NO.: 08-CL-7415
DATE: 20080716

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

RE: 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 COTTON GINNY INC., CG OPERATIONS (H/O) LIMITED, CG OPERATIONS I LIMITED AND CG OPERATIONS II LIMITED

BEFORE: Morawetz J.

COUNSEL: *E. Patrick Shea*, for Applicant

M.D. Abramowitz, for Mintz & Partners Limited, Monitor

David S. Murdoch, for Black Saxon QRC and CSBA Asset Management

Richard B. Jones, for 6301533 Canada Inc.

Jason Wadden and Daniel Cappe, for Effigi Inc.

Linda Galessiere, for Oxford, 20 Vic, Ivanhoe, Morguard

Colby Linthwaite, for the Province of British Columbia

HEARD: June 5, 20 and July 2, 2008

ENDORSEMENT

[1] Cotton Ginny Inc. ("CG Inc."), CG Operations HO Limited ("H/O"), CG Operations I Limited ("CG Operations I") and CG Operations II Limited ("CG Operations II") and, together with CG Inc., H/O and CG Operations I, (the "Applicants" or "Cotton Ginny") brought a motion seeking an order sanctioning the first amended plan of compromise or arrangement in respect of CG Inc. and H/O dated May 30, 2008 (the "Amended Plan"). I heard argument on June 5 and June 20, 2008, and on July 2, 2008 I gave oral reasons granting the motion of the Applicants with reasons to follow. These are those reasons.

[2] Effigi Inc. ("Effigi") also brought a motion. It sought an order declaring that no person has a proven interest in or entitlement to approximately $2.1 million (the "Garnishment Funds"), that Effigi garnished from H/O, in priority to Effigi's interest in the Garnishment Funds. It also sought an order directing the Sheriff of the Regional Municipality of Peel, who is currently holding the Garnishment Funds, to deliver the Garnishment Funds to Effigi. On July 2, 2008, I dismissed the motion of Effigi with reasons to follow.

[3] The Province of British Columbia also brought motions. B.C. sought to have a claim that it asserted against CG Inc. and H/O either placed into a separate class for the purposes of the Amended Plan; or treated as an unaffected claim. B.C. also sought an order directing that the Applicants pay to B.C. the sum of $65,822.14 in Provincial Sales Tax collected by CG Inc. prior to

February 21, 2008, but which became due after February 21, 2008, which amounts B.C. asserts Cotton Ginny is required to pay pursuant to the terms of the Initial Order dated February 21, 2008. On July 2, 2008, I dismissed the motion of B.C. to be placed in a separate class and I granted the motion of B.C. to require payment of the amounts which became due post-filing.

Background and Corporate Structure

[4] Cotton Ginny is a national retailer of privately branded casual women's wear. As of the date of the Initial Order, Cotton Ginny operated 129 retail stores located in all provinces, with the exception of Quebec. Cotton Ginny employed approximately 1,281 full and part-time employees.

[5] CG Operations I and CG Operations II are lease holding companies that hold the leases for Cotton Ginny stores.

[6] The Applicants contend that CG Inc. is the beneficial owner of all of Cotton Ginny's inventory and the other assets necessary to carry on the Cotton Ginny business (aside from leasehold interests). CG Inc. alleges that it acquired a beneficial interest in the operating assets of Cotton Ginny in 2004 when it purchased those assets from the limited partnership that purchased Cotton Ginny out of insolvency in 2003.

[7] The Applicants further contend that H/O was incorporated when the Cotton Ginny business was first acquired by the limited partnership in order to provide head office services and to, among other things, manage the Cotton Ginny business on behalf of the limited partnership. The Applicants acknowledged that issues appear to have arisen in 2004 when the operating assets were transferred from the limited partnership to CG Inc. The Applicants contend that it appeared that, in the course of the transition, the distinction between CG Inc. and H/O was not respected and there was no clear transition of the management of Cotton Ginny over to CG Inc.

[8] The division or distinction between CG Inc. and H/O was identified as being an issue early on in these proceedings. Mintz and Partners Limited (the "Monitor") conducted an analysis of H/O operations and delivered reports detailing the results of its analysis.

[9] The Monitor noted in its various reports that no clear distinction appeared to have been drawn between CG Inc. and H/O by Cotton Ginny's management or by Cotton Ginny's suppliers. This confused situation was compounded by the use of the business name "Cotton Ginny" by both CG Inc. and H/O. This business name was registered by CG Inc.

Financial Difficulties Leading to the Initial Order

[10] Cotton Ginny experienced poor financial performance in fiscal 2008. Cotton Ginny takes the position that the poor financial performance resulted from the impact of Effigi's garnishment. It contends that the garnishment reduced available working capital and thereby restricted Cotton Ginny's ability to purchase inventory. The reduction in inventory consequently resulted in reduced sales and cash flow difficulties. While Cotton Ginny may wish to allocate the blame for its financial difficulties on other parties, I note that the garnishment efforts undertaken by Effigi were pursuant to a Court authorized process. Effigi did obtain a judgment against H/O.

[11] On February 6, 2008, Retail Funding Inc. ("RFI") applied to this Court for the appointment of an Interim Receiver and Receiver and Manager of the Applicants. On February 8, 2008, the Applicants responded by bringing an application under the CCAA.

[12] On February 11, 2008, I granted RFI's receivership application and dismissed the Applicants' CCAA Application with the proviso that there was no prohibition on the Management or Board of Cotton Ginny from continuing ongoing activities to refinance.

[13] On February 21, 2008, the Applicants again applied for CCAA protection, based on the representation that new financing had been arranged, such that RFI could be repaid in full. CCAA protection was granted through the Initial Order and an order was made terminating the receivership proceedings.

CCAA Plan

[14] On May 20, 2008, the "Plan Filing and Meeting Order" was granted. This order had the effect of accepting for filing the plan of compromise in respect of CG Inc. and H/O dated May 15, 2008 (the "Plan") and approved May 30, 2008 as the date for the meeting of affected creditors to consider the Plan.

[15] The Plan provides for one class of creditors -- "Affected Creditors" -- that includes creditors of CG Inc. and H/O, both secured creditors and unsecured creditors. The Plan also contemplates that CG Inc. and H/O will be amalgamated in accordance with s. 177 of the *Business Corporations Act* (Ontario). All Affected Creditors with claims not exceeding $25,000 and all Affected Creditors with claims greater than $25,000 that elect to value their claims at $25,000 for distribution purposes are to receive their pro rata share of the $400,000 pool funds. Affected Creditors with claims greater than $25,000 who do not elect to value their claims at $25,000 are to receive certificates in the amount of their claims in full and final satisfaction of their claims. Commencing in fiscal 2009, Cotton Ginny is to distribute to the Monitor an amount equal to 40% of Cotton Ginny's net cash flow from operations, up to a maximum of $4,700,000, to be distributed among these remaining creditors.

[16] Black Saxon QRC ("Black Saxon") and CSBA Asset Management Inc. ("CSBA"), both being secured creditors of CG Inc., are designated to be unaffected by the Amended Plan. Counsel to the Monitor has opined that, in Ontario, the security interest of Black Saxon appears to have been properly perfected, and the security interest of CSBA appears to have been properly perfected with respect to "other assets".

[17] The Plan does not provide for a compromise of any claims of CG Operations I or CG Operations II. The Plan provides for Cotton Ginny to provide these two entities with sufficient funds to pay any outstanding obligations owed by those companies.

[18] At the meeting, Cotton Ginny tabled the Amended Plan, making one technical amendment to the Plan. The financial terms of the Plan were not altered. The Plan Filing and Meeting Order had authorized Cotton Ginny to amend the Plan at the meeting. The Monitor provided Affected Creditors with notice of the meeting and prepared a report in accordance with the Plan Filing and Meeting Order.

[19] The Monitor's Report on the Plan commented on the effect of the Plan. Assuming that CG Inc. makes the payments provided for in the Plan, the Monitor estimates that the creditors who have claims greater than $25,000, who receive certificates in final satisfaction of their claims, will be eligible to receive 17.2% of their claims.

[20] The meeting proceeded on May 30, 2008. The Monitor confirmed that a quorum was present and a resolution to adopt the Amended Plan was duly proposed and seconded. The Monitor also reported that a majority in number, representing more than two thirds in value of the Affected Creditors who voted at the meeting, voted in favour of the Amended Plan. In addition, the required majorities in favour of the Amended Plan were also achieved when the votes were tabulated on the basis of there being two separate classes -- one for CG Inc. Affected Creditors and one for H/O Affected Creditors. In a previous endorsement, I directed the Monitor to ensure that a separate tabulation was kept in respect of these two classes.

[21] The voting particulars were:

Claims Subject to the Plan

Company	No. of Admitted Claims	$ Amount of Admitted Claims
Cotton Ginny Inc.	135	$21,912,139
CG Operations (H/O) Limited	56	8,950,892
Total	191	$30,863,031

Voting Results

	Number of Claims			Value of Claims		
	In favour	Total	% in favour	In favour	Total	% in favour
Affected Creditors of CG Inc.	73	77	94.8%	$12,444,479.12	$14,778,917.40	84.20%
Affected Creditors HO	27	29	93.1%	$5,455,523.90	$7,766,629.38	70.24%
All Affected Creditors	100	106	94.3%	$17,900,003.02	$22,545,546.78	79.39%

[22] The Applicants take the position that CG Inc. and H/O have complied with all statutory requirements of the CCAA and all previous orders of the Court and that they have not done or purported to have done anything that was not authorized by the CCAA.

[23] The Monitor, in its Eleventh Report, stated that it believes that the Amended Plan will result in a better prospect of a recovery for Affected Creditors than the liquidation of Cotton Ginny. The Monitor expressed the views that in the event of a receivership, there would be no funds available for any creditor, other than those secured by a priority charge.

[24] The Monitor also reported that the Amended Plan received a strong level of support from the stakeholders. The Monitor is of the view that the terms of the Amended Plan are fair and reasonable and the Monitor recommended that the Amended Plan be sanctioned.

Claim of Effigi

[25] Effigi filed a proof of claim asserting a $2,091,835.76 unsecured claim against H/O. Effigi's claim is based on a judgment obtained by Effigi against H/O.

[26] Effigi's motion seeks an order that the Garnishment Funds be paid to Effigi. The Applicants take the view that if this motion were granted, Effigi's affected claim would be paid in full and would seriously prejudice Cotton Ginny's ability to implement the Amended Plan.

[27] Assuming the Amended Plan is sanctioned, Cotton Ginny intends to use the Garnishment Funds to:

a. pay professional fees subject to the administrative chart;

b. pay the electing creditors;

c. fund the claims of the landlord; and

d. purchase inventory, the proceeds of which fund Cotton Ginny's going forward operations.

[28] The Applicants contend that the money in the H/O bank account was being held by H/O in trust for CG Inc., and CG Inc.'s secured creditors have asserted claims to the Garnishment Funds. CG Inc. has also confirmed to Effigi that it is asserting a claim to the Garnishment Funds.

[29] The Garnishment Funds are also subject to certain of the priority charges granted by the Initial Order. The liquidation analysis prepared by the Monitor indicates that, in liquidation, there is not likely to be sufficient funds realized to pay the priority charges created by the Initial Order. Under the liquidation analysis, B.C. and the affected creditors, including Effigi, would receive no recoveries.

Claim of British Columbia

[30] The Province of British Columbia filed a proof of claim asserting that it is a secured creditor of CG Inc., CG Operations I and CG Operations II. The Applicants contend that as a result of an oversight, the Monitor has not yet disallowed B.C.'s claims. The Applicant accepts that B.C. may have an unsecured claim against CG Inc.

[31] H/O registered in British Columbia as a "vendor" under the Social Services Tax Act (the "SSTA") on the basis that it was the entity that was operating the Cotton Ginny stores in British Columbia.

[32] Cotton Ginny's SSTA account was in the name of H/O and "Cotton Ginny". CG Inc. registered the business name "Cotton Ginny".

[33] Prior to the commencement of the CCAA proceedings, B.C. registered its security interest against H/O (but not against CG Inc.) for $143,000 in unremitted provincial sales tax ("SST") relating to the period prior to the commencement of these proceedings. B.C. did not register against CG Inc., CG Operations I and CG Operations II.

[34] B.C.'s claim for unremitted SST was included in the same class as the claims of Cotton Ginny's unsecured creditors, based on the realizable value of Cotton Ginny's assets, the relative ranking of B.C.'s security and the quantum of the claims ranking in priority to B.C.'s security. In a liquidation, the Applicants contend that there appears to be no possibility that B.C. would receive a return on its secured claim.

[35] B.C. has taken steps to enforce a claim for unremitted SST against Ms. Julie Rulli, a former director of CG Inc. and H/O. Such steps were taken notwithstanding the stay of proceedings imposed by the Initial Order.

[36] In addition, SST in the amount of $43,930.16 was accrued by H/O in January 2008 and became owing by H/O on February 25, 2008. SST in the amount of $29,209.70 was accrued by H/O from February 1, 2008 through to February 21, 2008 and became owing by H/O on March 25, 2008. B.C. registered a lien against H/O in B.C. on February 18, 2008. B.C. takes the position that pursuant to paragraph 7(b) of the Initial Order, these amounts (together with interest, $65,822.14) are Post-Filing Sales Tax and must be paid in full.

Issues

[37] With respect to the proposed sanctioning of the Amended Plan, the issues to be determined are:

a. Has there been strict compliance by Cotton Ginny with all statutory requirements and adherence to previous orders of the Court?

b. Has anything been done or purported to be done in the Amended Plan that is not authorized by the CCAA?

c. Is the Amended Plan fair and reasonable?

[38] With respect to the motion brought by Effigi, Cotton Ginny submits that the issue to be determined depends on whether the Amended Plan is sanctioned. If sanctioned, the issue to be determined is whether Effigi is bound by the Amended Plan. If the Amended Plan is not sanctioned, the issue to be determined is whether Effigi should receive the Garnishment Funds prior to determination as to whether the Garnishment Funds are necessary to satisfy the claims secured by the priority charge created by the Initial Order and the claims of the Applicants' other secured creditors.

[39] Effigi approaches the situation differently. It seeks a declaration that no person has proven an interest in or entitlement to the Garnishment Funds that Effigi garnished from H/O in priority to Effigi's interest and seeks an order directing the sheriff, who is currently holding the Garnishment Funds, to pay the Garnishment Funds to Effigi, plus any interest, or alternatively, its proportionate share.

[40] In my view, Effigi's argument presupposes that the *Creditors' Relief Act* governs the distribution of the Garnishment Funds.

[41] It also presupposes that the CCAA proceedings do not impact on the distribution of the Garnishment Funds.

[42] I have concluded that the position put forth by Effigi with respect to its entitlement to the Garnishment Funds is flawed for a number of reasons.

[43] The garnishment process has not been completed. The monies remain with the sheriff. The garnishment has been disputed by 6301533 Canada Inc. ("630") and by Black Saxon. CGI has also provided notification that it has an interest in the funds. Black Saxon holds a security interest over CG Inc. for approximately $2 million. 630 is a secured creditor of Continental Saxon (CG) Limited

Partnership and obligations of the Limited Partnership have arisen from secured promissory notes delivered by the Limited Partnership which were subsequently assigned in favour of 630.

[44] H/O is a CCAA debtor that has declared itself to be insolvent. A stay of proceedings is in effect and H/O has filed an Amended Plan. The Plan provides for a compromise to be offered to unsecured creditors. Notwithstanding its judgment, Effigi is still an unsecured creditor. Fifty-six unsecured claims have been filed in the amount of $8,950,892.

[45] To give effect to the position being put forth by Effigi would require this Court to ignore the CCAA plan. It would also provide Effigi with preferred treatment over all other unsecured creditors of H/O (without even considering the issue of consolidation). It would also require this Court to ignore one of the fundamental tenets of insolvency law, namely that all unsecured creditors rank equally.

[46] To give effect to the position put forth by Effigi would result in Effigi receiving full payment or substantial payment of its outstanding debt. In my view, such a result cannot be justified.

[47] If the Amended Plan, as proposed, is sanctioned, Effigi will have an unsecured claim. This potential recovery of 17.2% is not what Effigi wants to achieve.

[48] If the Amended Plan is not sanctioned, the result for Effigi will also not be what it seeks on this motion. If the Amended Plan is not sanctioned, the parties do not return to the pre-February 21, 2008 status.

[49] The Monitor indicated that if the Plan is not sanctioned the likely outcome will be bankruptcy or receivership. I agree.

[50] Effigi has put forth the position that the Sheriff should pay out the monies to Effigi. However, the priority charges created in the CCAA process would have to be addressed. Further, the stay of proceedings in the CCAA proceeding is still in effect and if the Amended Plan is not sanctioned, it does not automatically mean that the stay is vacated. Black Saxon and 630 previously gave notice of their intention to enforce security under section 244 of the BIA and did so as part of the garnishment dispute. Black Saxon and 630 are part of the CCAA process, albeit they are unaffected creditors. However, they are not unaffected by the stay of proceedings currently in effect. In the event that the Amended Plan is not sanctioned, the status of the stay of proceedings will still have to be addressed.

[51] Given the impact of the CCAA and the admitted insolvency of H/O, the argument that the distribution of the Garnishment Funds falls under the *Creditors' Relief Act* -- to the benefit of Effigi and to the detriment of the other creditors of H/O -- is not tenable. Priority and secured claims will be recognized and unsecured creditors will share pro rata. Effigi's argument on this point is consequently rejected.

[52] Turning to the issue of consolidation, the Amended Plan treats creditors of CG Inc. and creditors of H/O as one large pool of creditors. The evidence put forth by the Applicants is that following the reorganization, H/O, to the extent that it holds assets, holds such assets in trust for CG Inc. The Monitor has set forth its view that consolidation is appropriate. The Monitor has stated that H/O did not have an independent existence in the minds of either Cotton Ginny or its creditors. From the Monitor's standpoint, there was a great deal of confusion in the minds of any party that was dealing with Cotton Ginny.

[53] The issue of whether consolidation was appropriate was identified early in the proceedings, yet it was not challenged by any party until this sanction hearing. On the other hand, the Applicants did not take any steps to clarify the situation, notwithstanding being invited by the Court to do so.

[54] Effigi points to a number of references in the affidavits and the reports filed by the Monitor that suggest that H/O did have an independent existence. Effigi points to the provisions of the 2003 Accounting and Services Agreement executed as between Continental Saxon (CG) Limited, Continental Saxon CG Limited Partnership and CG Operations H/O Limited. This agreement, according to Effigi, provides that H/O operates its bank account in trust for Continental Saxon (CG) Limited Partnership (now CG Inc.) and that the beneficiary of the trust, in this case CG Inc. (as a successor), is only entitled to the net cash flow after payment of all expenditures. Expenditures in this case include the debt owing to Effigi.

[55] The Accounting and Services Agreement makes reference to the "Business". Business is defined as the business consisting of the retail sale of women's clothing under the name and with the brand of what is known as "Cotton Ginny", "Cotton Ginny Plus" and "Plus Intimates" as carried on by Continental LP from time to time. It seems to me that the Business has to be considered in the broad perspective, namely the overall retail operation. Inventory is obtained from suppliers. Inventory is sold through the retail outlet. Proceeds are received by the operating entity and suppliers are ultimately paid. In order for suppliers, such as Effigi, to be paid, it follows that there must be proceeds being generated by the retail operations. The Accounting and Services Agreement depends upon the entire cycle being completed. When considering the legal position of H/O, it seems to me that one has to consider the overall cycle and not one particular aspect.

[56] In my view, the interpretation of the Accounting and Services Agreement urged by Effigi is too narrow. It does not give effect to the nature of Cotton Ginny operations. The comments of the Monitor at paragraph 37 of the Fourth Report bear repeating:

> Counsel for the purchasers of the Cotton Ginny assets also advised that the only reason for the incorporation of and indeed the existence of H/O was to hold certain obligations, such as those to employees, of the Cotton Ginny operation. H/O was not intended to nor did it operate, or generate any revenue or income of any kind. As H/O held the employee liabilities it needed funds to pay those employee liabilities, such as payroll. Those funds were provided to it by CSCGLP, while it was operating the business, and subsequently by CGI.

[57] In *Re Atlantic Yarns Inc.*, 2008 Carswell NB 195, Glennie J. referred to the text "Rescue! The Companies' Creditors Arrangement Act", by Dr. Janis Sarra, Carswell 2007, where the author writes at page 242:

> Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case.

[58] Justice Glennie went on to list seven factors that the Courts have developed to assist in the balancing of interests. Those factors are:

1. difficulty in segregating assets;
2. presence of consolidated financial statements;
3. profitability of consolidation at a single location;

4. co-mingling of assets and business functions;

5. unity of interests in ownership;

6. existence of intercorporate loan guarantees; and

7. transfer of assets without observance of corporate formalities.

[59] In this case, I find that factors 1, 4, 5, 6 (evidence of intercorporate loan guarantees were before me on the RFI receivership application) and 7 are present, and that a consideration of these factors leads to a conclusion that consolidation is appropriate. Even though consolidation by its very nature will benefit some creditors and prejudice others, I am satisfied that in this case it would be neither fair nor reasonable to accept the position of Effigi, which would provide Effigi, or Effigi and all other H/O creditors with preferential treatment over the other suppliers and creditors of Cotton Ginny and CG Inc. I also note that the required majority of the creditors of H/O voted in favour of the Amended Plan.

[60] I have concluded that, in the circumstances of this case, it is both fair and reasonable to consolidate the claims of creditors of CG Inc. and H/O as proposed in the Amended Plan.

[61] With respect to B.C.'s motion seeking payment of the pre-February 21, 2008 SST, which became due after February 21, 2008, Cotton Ginny submits that the issue to be determined is whether it is appropriate for Cotton Ginny to pay this claim in the context of a procedure which prohibits the Applicants from paying other pre-February 21, 2008 claims on the basis of what appears to be a "hole" in the model initial CCAA order.

[62] In my oral reasons of July 2, 2008, I made it clear that I was in agreement with the Province's counsel that the SST amounts that came due on February 25, 2008 and March 25, 2008 had to be considered Post-Filing Sales Tax and in accordance with paragraph 7(b) of the Initial Order had to be paid. Even though, as Mr. Shea argued, there may be a "hole" in the model Initial Order, the fact remains that this provision of the Initial Order was not varied or appealed and a plain interpretation of this provision accords with the position put forth by B.C.

[63] Since I delivered my oral reasons, the Monitor has filed a Certificate confirming that payment of the Post-Filing Sales Tax claim has been made to B.C.

[64] With respect to B.C.'s classification motion, Cotton Ginny submits that the issue to be determined is whether, given the value of Cotton Ginny's assets and the relative priority of B.C.'s security interest, B.C.'s claim should be included in the class of Affected Creditors. B.C. seeks to have its claim against CG Inc. and H/O either placed in a separate claim for the purposes of the Amended Plan; or treated as an unaffected claim. It seems to me that portions of the argument put forward by B.C., under the heading of "The Bare Trustee Agreement", are really a challenge to the proposed consolidation plan. I have already determined that consolidation is appropriate in this case.

[65] B.C. has put forth evidence that establishes that the Province was operating under the belief that H/O was the operating entity in B.C. I accept this evidence, but it does not alter the fact that a number of creditors were uncertain as to whether they were dealing with CG Inc. or H/O, or whether they were dealing with "Cotton Ginny". The fact that B.C. thought they were dealing with H/O does not, in this case, entitle them to be placed in a separate class.

[66] On the issue of being treated as an unaffected claim, B.C. relies on the *Atlantic Yarns* case for the proposition that it is not proper for Cotton Ginny or the Monitor to ascribe a liquidation or zero security valuation for its claim.

[67] In *Atlantic Yarns*, Glennie J. was of the view that the secured creditor was attempting to manoeuvre for a better voting position among the Companies' secured creditors in order to negotiate a better deal. It seems to me that in many respects that is what B.C. is trying to do. In this case, the secured claim of B.C. is subordinate in priority to the charges created in the CCAA process, as well as the security of Black Saxon. The Monitor has reported that the liquidation value of its security is zero. To give effect to the argument of B.C. would result in a situation where the claim of B.C. would be unaffected based on the claim being treated as "secured" -- notwithstanding that the security is worth zero. Such an outcome would not be fair and reasonable to the Applicants and to all of the creditors. In my view, the treatment ascribed to the claim of B.C. is fair and reasonable and is consistent with the object and intent of the CCAA.

[68] In the result, I am satisfied that the secured claim of the Province of B.C. is appropriately classified as an Affected Claim.

Disposition

[69] The Certificate in respect of the Post-Filing Sales Tax Claim of B.C. having been filed, I am satisfied that

(a) there has been strict compliance by Cotton Ginny with all statutory requirements and adherence to previous orders of the court; and

(b) Nothing has been done or has been purported to be done in the Amended Plan that is not authorized by the CCAA.

[70] The remaining issue is whether the Amended Plan is fair and reasonable to the Affected Creditors. Notwithstanding the very limited anticipated return to the Affected Creditors, the Amended Plan was approved by the requisite majority of creditors on a consolidated basis. In addition, on a company by company basis, the required majority voted in favour of the Amended Plan.

[71] The voting results create the inference that the Affected Creditors find the Amended Plan to be acceptable.

[72] It is also noted that the alternative is likely to be liquidation of Cotton Ginny with a nil return to Affected Creditors.

[73] In addition, the sanctioning of the Plan enables Cotton Ginny to remain in operation and provide continued employment to its workforce and also to provide ongoing business to its continuing suppliers.

[74] It is important to recognize that the parties opposed to Cotton Ginny, namely Effigi and the Province of B.C., do have justifiable positions. However, for the reasons set forth above, the motion by Effigi and the motion of B.C. to be treated as an unaffected creditor have been rejected.

[75] The fact that Affected Creditors are being asked to accept a significant compromise does not make the Amended Plan unfair or unreasonable, and the fact that dissenting Affected Creditors are, pursuant to the CCAA, bound by the vote of the majority of the Affected Creditors does not result in

a "confiscation" of rights absent a finding of bad faith. (See *Re Canadian Airlines Corp.*, (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.).

[76] In this case, no findings of bad faith had been made. I am satisfied that the Amended Plan is fair and reasonable.

[77] The Amended Plan is sanctioned. The Stay Period is extended to December 31, 2008 to permit the Amended Plan to be implemented.

[78] The Effigi Motion is dismissed but in recognition that the position taken by Effigi in the garnishment proceedings and in its motion was, in my view, justified, costs are payable by Cotton Ginny to Effigi. Costs for the proceedings resulting in the garnishment should be based on s. 70(2) of the BIA. If the parties cannot agree on quantum, brief written submissions (3 pages maximum) can be made within 15 days. Costs in respect of the Effigi motion in these proceedings are payable in the agreed upon amount of $2,000.

[79] The motion of B.C. in respect of Post-Filing Sales Tax claim is granted, with costs.

[80] The motion to declare B.C.'s secured claim as an Unaffected Claim is dismissed, but in recognition that, in my view, the actions of B.C. were justified, costs are payable by Cotton Ginny to B.C. If the parties cannot agree on quantum, brief written submissions (3 pages maximum) can be filed within 15 days.

Morawetz J.

Released: July 16, 2008

Oral Reasons: July 2, 2008

5

2011 SCC 10
Supreme Court of Canada

Kerr v. Baranow

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

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

Michele Vanasse (Appellant) and David Seguin (Respondent)

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

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

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

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***Cromwell J.*:**

I. Introduction

1 In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

2 In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property

interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention" of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

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

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

5 In the *Vanasse* appeal, the central problem is how to quantify a monetary award for unjust enrichment. It is agreed that Mr. Seguin was unjustly enriched by the contributions of his partner, Ms. Vanasse; the two lived in a common law relationship for about 12 years and had two children together during this time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth was due to Ms. Vanasse's efforts as an equal contributor to the family venture (2008 CanLII 35922). The Court of Appeal set aside this finding and, while ordering a new trial, directed that the proper approach to valuation was to place a monetary value on the services provided by Ms. Vanasse to the family, taking due account of Mr. Seguin's own contributions by way of set-off (2009 ONCA 595, 252 O.A.C. 218 (Ont. C.A.)). In short, the Court of Appeal held that Ms. Vanasse should be treated as an unpaid employee, not a co-venturer. The appeal to this Court challenges this conclusion.

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

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

8 The third area requiring clarification relates to mutual benefit conferral. Many domestic relationships involve the mutual conferral of benefits, in the sense that each contributes in various ways to the welfare of the other. The question is how and at

what point in the unjust enrichment analysis should this mutual conferral of benefits be taken into account? For reasons I will develop below, this issue should, with a small exception, be addressed at the defence and remedy stage.

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

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

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

II. Resulting Trusts

12 The resulting trust played an important role in the early years of the Court's jurisprudence relating to property rights following the breakdown of intimate personal relationships. This is not surprising; it had been settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, "results" to the person who advances the purchase money: *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, at p. 93, 30 E.R. 42 (Eng. Ch. Div.). The resulting trust, therefore, seemed a promising vehicle to address claims that one party's contribution to the acquisition of property was not reflected in the legal title.

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

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

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

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

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

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

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

20 The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example, in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

21 That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423 (S.C.C.). Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (U.K. H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

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

23 The Court's development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-3. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated

in *Becker v. Pettkus* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

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

25 First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that counts. As Professor Waters puts it, "In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention (*Waters'*, at p. 431)." The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition. The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property: *Waters'*, at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: "... a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property": p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

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

27 Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters'*, at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

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

29 I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch* and *Rathwell*, no longer has a useful role to play in resolving property and financial disputes in domestic cases.

I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

III. Unjust Enrichment

A. Introduction

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

B. The Legal Framework for Unjust Enrichment Claims

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

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

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

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

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

C. The Elements of an Unjust Enrichment Claim

(1) Enrichment and Corresponding Deprivation

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

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

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

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

(2) Absence of Juristic Reason

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

41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.); *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

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

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

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery [...] The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra)*, a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

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

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

(3) Remedy

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

(a) Monetary Award

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

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

or Quantum Meruit?", in J.W. Neyers, M. McInnes and S.G.A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

49 A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly — in effect, on a value survived basis — by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26 (B.C. C.A.), at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C. C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (B.C. C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108 (N.B. C.A.), at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40 (B.C. C.A.), at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also: *Matrimonial Property Law in Canada*, vol 1, by J.G. McLeod and A.A. Mamo, eds.(loose-leaf), at pp. 40.78-40.79.

(b) Proprietary Award

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

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

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

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

D. Areas Needing Clarification

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

E. Is a Monetary Award Restricted to Quantum Meruit?

(1) Introduction

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

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

(2) The Remedial Dichotomy

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

(3) Why the Remedial Dichotomy Should Be Rejected

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

(a) Life Experience

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

60 At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The

required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

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

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

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

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

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

66 I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

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

68 The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "[I]t is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the

relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

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

(b) Flexibility

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

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

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

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

(c) History

74 Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value

placed on the benefit by the recipient: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), vol. 1 at § 4:200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) Peter v. Beblow

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

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

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

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

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

(4) The Approach to the Monetary Remedy

80 The next step in the legal development of this area should be to move away from the false remedial dichotomy between *quantum meruit* and constructive trust, and to return to the underlying principles governing the law of unjust enrichment. These

underlying principles focus on properly characterizing the nature of the unjust enrichment giving rise to the claim. As I have mentioned above, not all unjust enrichments arising between domestic partners fit comfortably into either a "fee-for-services" or "a share of specific property" mold. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of what McLachlin J. referred to in *Peter* (at p. 1001) as a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

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

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

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

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

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

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

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

87 My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

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

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

(a) Mutual Effort

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

91 Joint contributions, or contributions to a common pool, may provide evidence of joint effort. For instance, in *Murdoch*, central to Laskin J.'s constructive trust analysis was that the parties had pooled their efforts to establish themselves in a ranch operation. Joint contributions were also an important aspect of the Court's analyses in *Peter*, *Sorochan*, and *Pettkus*. Pooling of efforts and resources, whether capital or income, has also been noted in the appellate case law (see, for example, *Birmingham v. Ferguson* [2004 CarswellOnt 3119 (Ont. C.A.)], 2004 CanLII 4764; *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54 (Man. C.A.), at para. 14). The use of parties' funds entirely for family purposes may be indicative of the pooling of resources: *McDougall*. The parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce (see *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.) and *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382 (Alta. C.A.), at para. 27).

(b) Economic Integration

92 Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson; Panara*).

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

(c) Actual Intent

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

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

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

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

(d) Priority of the Family

98 A final category of factors to consider in determining whether the parties were in fact engaged in a joint family venture is whether and to what extent they have given priority to the family in their decision making. A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. As Professor McCamus puts it, the question is whether the parties have been "[p]roceeding on the basis of understandings or assumptions about a shared future which may or may not be articulated" (p. 365). The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare of the collective or family unit. Whether the roles of the parties fall into the traditional wage earner/homemaker division, or whether both parties are employed and share domestic responsibilities, it is frequently the case that one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment (Parkinson, at p. 243). This may occur in a number of ways including: leaving the workforce for a period of time to raise children; relocating for the benefit of the other party's career (and giving up employment and employment-related networks as a result); foregoing career or educational advancement for

the benefit of the family or relationship; and accepting underemployment in order to balance the financial and domestic needs of the family unit.

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

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

(6) Summary of Quantum Meruit Versus Constructive Trust

100 I conclude:

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

2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions.

3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.

4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.

F. Mutual Benefit Conferral

(1) Introduction

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

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

103 Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.)). Others have looked at mutual benefits as an aspect of the juristic

reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (B.C. C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in *Wilson*). It is apparent that some clarity and consistency is necessary with respect to this issue.

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

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

106 In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid $350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required. The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: (B.C. S.C.).

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

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

(2) The Correct Approach

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

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

111 An unjust enrichment claim based on a fee-for-services approach is analogous to the traditional claim for *quantum meruit*. In *quantum meruit* claims, the fact that some benefit had flowed from the defendant to the claimant is taken into account by reducing the claimant's recovery by the amount of the countervailing benefit provided. For example, in a *quantum meruit* claim where the plaintiff is seeking to recover money paid pursuant to an unenforceable contract, but received some benefit from the defendant already, the claim will succeed but the award will be reduced by an amount corresponding to the value of that benefit: Maddaugh and McCamus (loose-leaf), vol. 2, at § 13:200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Man. C.A.). In that case, two employees recovered in *quantum meruit* for services provided to the defendant under an unenforceable agreement, but the amount of the award was reduced to reflect the value of benefits the defendant had provided to them. Thus, taking the benefits conferred by the defendant into account at the remedy stage is consistent with general principles of *quantum meruit* claims. Of course, if the defendant has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that defence or claim.

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

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

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

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

(3) Summary

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

G. Reasonable or Legitimate Expectations

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

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

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

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

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

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

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

124 To summarize:

1. The parties' reasonable or legitimate expectations have little role to play in deciding whether the services were provided for a juristic reason within the existing categories.

2. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.

3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

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

IV. The *Vanasse* Appeal

A. Introduction

126 In the Vanasse appeal, the main issue is how to quantify a monetary award for unjust enrichment. The trial judge awarded a share of the net increase in the family's wealth during the period of unjust enrichment. The Court of Appeal held that this was the wrong approach, finding that the trial judge ought to have performed a *quantum meruit* calculation in which the value that each party received from the other was assessed and set off. This required an evaluation of the defendant Mr. Seguin's non-financial contributions to the relationship which, in the view of the Court of Appeal, the trial judge failed to perform. As the record did not permit the court to apply the correct legal principles to the facts, it ordered a new hearing with respect to compensation and consequential changes to spousal support.

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

1. Did the Court of Appeal err by insisting on a strict *quantum meruit* (i.e. "value received") approach to quantify the monetary award for unjust enrichment?

2. Did the Court of Appeal err in finding that the trial judge had failed to consider relevant evidence of Mr. Seguin's contributions?

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

B. Brief Overview of the Facts and Proceedings

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

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

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

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

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

134 Ms. Vanasse brought proceedings in the Superior Court of Justice. In addition to seeking orders with respect to spousal support and child custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr. Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

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

136 The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the

separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportional.

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

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

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

Again at para. 137, the trial judge found that

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

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

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

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

C. Analysis

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

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

(2) Existence of a Joint Family Venture

143 The trial judge, after a six-day trial, concluded that "Ms. Vanasse was not a nanny/housekeeper". She found that Ms. Vanasse had been at least "an equal contributor to the family enterprise" throughout the relationship and that, during the period of unjust enrichment, her contributions "significantly benefited Mr. Seguin" (para. 139).

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

(a) Mutual Effort

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

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

(b) Economic Integration

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

(c) Actual Intent

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

149 While a promise to marry or the discussion of legal marriage is by no means a prerequisite for the identification of a joint family venture, in this case the parties' intentions with respect to marriage strongly suggest that they viewed themselves as the equivalent of a married couple. Mr. Seguin proposed to Ms. Vanasse in July 1996 and they exchanged rings. While they were "devoted to one another and still in love", a wedding date was never set (para. 14). Mr. Seguin raised the topic of marriage again when Ms. Vanasse found out she was pregnant with their first child. Although they never married, the trial judge found that there had been "mutual expectations [of marriage] during the first few years of their 12 year relationship" (para. 64). Mr. Seguin continued to address Ms. Vanasse as "my future wife", and she was viewed by the outside world as such (para. 33).

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

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

Again, at para. 98:

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

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

(d) Priority of the Family

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

153 As a final point, I would refer to the arguments made by Mr. Seguin, which were accepted by the Court of Appeal, that the trial judge failed to give adequate weight to sacrifices Mr. Seguin made for the benefit of the relationship. Later in my reasons, I will address the question of whether the trial judge actually failed in this regard. However, the points raised by Mr. Seguin to support this argument actually serve to reinforce the conclusion that there was a joint family venture. Mr. Seguin specifically notes a number of factors, including: agreeing to step down as CEO of Fastlane in September 1997 to make himself more available to Ms. Vanasse, causing friction with his co-workers and partners, and reducing his remuneration; agreeing to relocate to Ottawa at Ms. Vanasse's request in 1998; and making increased efforts to work at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

(e) Conclusion on Identification of the Joint Family Venture

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

(3) Link to Accumulation of Wealth

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

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

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

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

(4) Calculation of the Award

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

159 Mr. Seguin submits, very briefly, that a proper application of the "value survived" approach in this case would require a careful determination of the contributions by third parties to the growth of Fastlane during the period his own contributions were diminished, as a result of what counsel characterizes as Ms. Vanasse's "demands" that he reduce his hours and move back to Ottawa. This argument is premised on the notion that the money he received from the sale was not justly his to share with Ms. Vanasse. I cannot accept this premise. Unexplained is why he received more than his share when the company was sold or why, having received more than he was due, Ms. Vanasse is still not entitled to an equitable share of what he actually received.

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

D. Disposition

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

V. The *Kerr* Appeal

A. Introduction

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

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

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

(1) a resulting trust arose in her favour;

(2) she had unjustly enriched Mr. Baranow; and

(3) spousal support should begin as of the date she instituted proceedings.

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

B. Overview of the Facts

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

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

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

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

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

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

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

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

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

175 In 1991, Ms. Kerr suffered a massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work. Her health steadily deteriorated, and relations between the couple became increasingly strained. Mr. Baranow took an early retirement in 2002. The trial judge acknowledged that Mr. Baranow claimed to have done this to care for Ms. Kerr, but noted that early retirement was also favourable to him. The trial judge found that Mr. Baranow started to experience "caregiver fatigue" and began exploring institutional care alternatives in June 2005. The next summer, in August 2006, Ms. Kerr had to

undergo surgery on her knee. After the surgery, Mr. Baranow made it clear to the hospital staff that he was not prepared to have her return home. Ms. Kerr was transferred to an extended care facility where she remained at the time of trial. The trial judge found that, in the last 18 months Ms. Kerr resided at the Wall Street property, Mr. Baranow did most of the housework and helped her with her bodily functions.

C. Analysis

(1) The Resulting Trust Issue

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

(a) Gratuitous Transfer

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

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

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

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

(b) Ms. Kerr's Contributions

181 The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of $60,000: $37,000 in equity from the

transfer of the Coleman Street property to Mr. Baranow; $20,000 for the value of the Cadillac also transferred to Mr. Baranow; and $3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title of Coleman, Mr. Baranow was able to "re-mortgage both properties for $116,000.00 and apply the $16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the extent of the resulting trust which he imposed on the Wall Street property.

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

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

(c) Common Intention Resulting Trust

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

(d) Conclusion With Respect to Resulting Trust

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

(2) Unjust Enrichment

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

a. $37,000 equity in the Coleman Street property

b. the automobile

c. the furnishings

d. $16,000 in refinancing permitted by the Coleman transfer and applied to the Wall Street property

e. $22,000 gained on the resale of the Coleman Street property

f. household expenses and insurance paid on both properties

g. spousal services such as housework, entertaining guests and preparing meals until Ms. Kerr's disability made it impossible to continue

h. assistance with planning and decoration of the Wall Street house

i. financial contributions towards the purchase of chattels for the new home

j. a disability tax exemption

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

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

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

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

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

191 I will deal with these submissions in turn.

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

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

(b) Analysis of Offsetting Enrichments

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

(c) The "Family Property Approach"

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

(d) Disposition of the Unjust Enrichment Appeal

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

196 The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separated from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

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

198 In this respect, the *Kerr* appeal is in marked contrast to the *Vanasse* appeal. There, an unjust enrichment was conceded and the trial judge's findings of fact closely correspond to the analytical approach I have proposed. In the present appeal, while the findings made do not appear to demonstrate a joint family venture or a concomitant link to accumulated wealth, it would

be unfair to reach that conclusion without giving an opportunity to the parties to present their evidence and arguments in light of the approach set out in these reasons.

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

(3) Effective Date of Spousal Support

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

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

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

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

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

> (5) An order under this section may also provide for one or more of the following:
>
> . . . . .
>
> (d) payment of support in respect of any period before the order is made;

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

206 I will not venture into the semantics of the word "retroactive": see *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 (S.C.C.), at paras. 2 and 69-70; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (B.C. C.A.), at paras. 55-57. Rather, I prefer

to follow the example of Bastarache J. in *S. (D.B.)* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

207 While *S. (D.B.)* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

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

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

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

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

212 Other relevant considerations noted in *S. (D.B.)* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award. The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example concealing assets or failing to make

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

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

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

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

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

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

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

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

D. Disposition

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

a. allow the appeal on the spousal support issue and restore the order of the trial judge with respect to support;

b. allow the appeal with respect to the Court of Appeal's decision to dismiss Ms. Kerr's unjust enrichment claim and order a new trial of that claim;

c. dismiss the appeal in relation to Ms. Kerr's claim of resulting trust and the ordering of a new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

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

Appeal by V allowed; appeal by K allowed in part.

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

6

2010 BCCA 226
British Columbia Court of Appeal

Wilson v. Fotsch

2010 CarswellBC 1158, 2010 BCCA 226, [2010] 11 W.W.R. 29, [2010] B.C.W.L.D. 4335, [2010] W.D.F.L. 2531, [2010] B.C.J. No. 850, 286 B.C.A.C. 276, 319 D.L.R. (4th) 26, 484 W.A.C. 276, 57 E.T.R. (3d) 159, 81 R.F.L. (6th) 241, 8 B.C.L.R. (5th) 1

Leigh Richard Wilson (Respondent / Plaintiff) And Patricia Dale Elizabeth Fotsch (Appellant / Defendant)

Huddart, Chiasson, Bennett JJ.A.

Heard: November 17-18, 2009
Judgment: May 10, 2010
Docket: Vancouver CA036138

Proceedings: varying *Wilson v. Fotsch* (2008), 2008 BCSC 548, 2008 CarswellBC 962 (B.C. S.C.)

Counsel: J.G. Dubas for Appellant
R.A. Anderson for Respondent

***Huddart J.A.*:**

1 This appeal from an order to pay damages for unjust enrichment requires this Court to address a fundamental issue about the application of that doctrine to a common law relationship - how account is to be taken of benefits received by the claimant. The appellant alleges error in the trial judge's finding that she had been unjustly enriched by the respondent and in the assessment of damages for that enrichment: 2008 BCSC 548 (B.C. S.C.). The underlying issue derives from the mutuality implicit in a marriage-like relationship.

2 This feature of mutuality suggests reciprocal claims for unjust enrichment will commonly follow the termination of a marriage-like relationship as they do the end of a marital relationship. Where such a claim is pleaded expressly, either as a cross-claim or by way of set-off, account will be taken of mutual enrichments. See, for example, *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C. C.A.) at paras. 2, 6-7, 10-12; *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.), leave to appeal ref'd, (S.C.C.); and *Kerr v. Baranow*, 2009 BCCA 111 (B.C. C.A.) at paras. 64-79.

3 Such pleading, however, is the exception rather than the rule. Where a cross-claim for unjust enrichment is not specifically pleaded, such a claim may be implicit, as this Court recognized in *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (B.C. C.A.) at para. 13:

> [13] It is not clear to me whether the majority of the Court intended to endorse this approach and to lay down as a rule that spousal services must generally be *assumed* to have benefitted one party to the deprivation of the other. Taken to its logical conclusion, this would mean that in a relationship between two adults each of whom has provided spousal services to the other, each must be assumed to have benefitted and to have suffered a deprivation at the same time. The first to sue will have an obvious advantage in that he or she will be assumed to have suffered a deprivation, and the defendant will be compelled to make a counterclaim on exactly the same basis. (This in fact is what one commentator assumes was intended: see K. Farquhar, "Unjust Enrichment - Special Relationship - Domestic Services - Remedial Constructive Trusts: *Peter v. Beblow*" (1993) 72 Can. Bar. Rev. 538 at 541.)
>
> [Italic emphasis in original; underline emphasis added.]

Although this Court identified the potential importance of implicit reciprocal claims in marriage-like relationships in *Ford*, it did not discuss how they might or should be considered.

4 These claims derive from characteristics common to family relationships identified in the authorities in various terms, all reflective of an on-going partnership in which each partner benefits the other: sharing of love and mutual trust, sharing of expenses, reasonable expectation of sharing in the economic fruits of a union (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 1013-16, 1018 (Cory J.)), and looking towards the long term (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.)). Although the specifics will vary from relationship to relationship and from individual to individual, a marriage-like relationship is infused with mutuality.

5 This quality inherent in marriage-like relationships must inform the application of the unjust enrichment analysis. Nevertheless, "the basic principles governing the rights and remedies for unjust enrichment remain the same" in commercial and family cases, as "the concern for clarity and doctrinal integrity" requires: *Peter* at 996-97.

6 In a commercial case, unjust enrichment is usually the result of a one-way transfer of wealth from plaintiff to defendant. Their larger relationship will be bounded by contract and purely commercial considerations. While parties enter into a relationship from which both anticipate profit, they do so without any underlying expectation that the profits each creates in the conduct of their own affairs will be for the benefit of both. The limits of their relationship are tightly drawn. The qualities of love, sharing, and selfless reciprocity fall outside the defined scope of the relationship. The focus of the inquiry is on whether the defendant has been enriched at the expense of the plaintiff.

7 In a marriage-like relationship, it will be more difficult to say that a plaintiff has not received something in return for the defendant's enrichment. The mutuality of the relationship may mean that benefits conferred by one party on the other are compensated in some way - by the reciprocal receipt of shelter, food, or other things of value. The nature of the relationship is not as narrowly circumscribed and more things of value pass between the parties, meaning the inquiry must be about the totality of the value passing back and forth, and not focus solely on the defendant's benefit to the detriment of the plaintiff. In other words, regard must be had for reciprocal benefits.

8 But that regard must respect the nature of the particular relationship. Express agreements must be respected (*Rathwell*; *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550 (S.C.C.)) and so must be the decision to remain unmarried, by the courts as by the parties (*Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.)). A marriage-like arrangement is not tantamount to marriage, particularly where the parties have deliberately imposed limits on their respective contributions to the relationship.

9 My review of the authorities persuades me that courts have found ways to off-set reciprocal enrichments for many years with unpredictable and at times inconsistent results. In my view, the proper approach to reciprocal benefits can be found in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), where the Supreme Court explained that mutual enrichments should be considered at the juristic reason stage for the limited purpose of assessing the parties' legitimate expectations; otherwise, they should be considered at the remedy stage. Jurisprudence predating *Garland*, including past decisions of this Court such as *Toth v. de Frias* (1996), 78 B.C.A.C. 34 (B.C. C.A.), must be approached cautiously in view of its conclusions.

10 Since *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), Canadian authorities have treated unjust enrichment as an equitable cause of action for which constructive trust is one potential remedy. Restitution by way of a monetary award is another. The entitlement to either remedy arises on the date the duty to make restitution arose: *Clarkson v. McCrossen Estate* (1995), 3 B.C.L.R. (3d) 80 (B.C. C.A.) at paras. 75-76. In matrimonial or quasi-matrimonial actions, this will usually be no later than when the parties separate, divorce or when a plaintiff has reasonable grounds to believe that the relationship has become permanently dissolved: P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 2009) at 3:500.30. Thus, unjust enrichment analysis focuses on the end of a relationship, not the beginning: *Roseneck v. Gowling* (2002), 62 O.R. (3d) 789 (Ont. C.A.) at para. 29.

11 The basic outline for that analysis can be summarized this way:

1. Benefit/Enrichment

2. Detriment

3. Absence of a juristic reason for the enrichment

    a. Established categories

        i. Contract

        ii. Disposition of law

        iii. Donative intent

        iv. Other valid common law, equitable, or statutory obligations

    b. Reason to deny recovery

        i. Public policy considerations

        ii. Legitimate expectations

        iii. Potential new category

Defences

Change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; counter-restitution not possible

Choice of Remedy

a. Is a monetary remedy sufficient?

b. Is a constructive trust required (or equitable damages for the value of the trust interest)?

Quantification of the Remedy

a. Value received (*quantum meruit* basis)

b. Value survived (proportionate share basis) Set-Off (equitable and legal) Pre-judgment interest

I. Benefit/Enrichment

12 A court must define the benefit at the outset because the definition informs each stage of the unjust enrichment analysis and is particularly relevant to the determination of the appropriate remedy. A benefit may be positive (the payment of money or delivery of services to or for the benefit of the defendant) or negative (like the saving of an inevitable expense by the defendant): *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), at 44-45; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at 790; *Garland* at para. 31. To both, a court should take a "straightforward economic approach." Non-economic considerations belong at the juristic reason stage: *Peter* at 990; *Garland* at para. 31. An incidental collateral benefit will not support an unjust enrichment claim - the benefit must be "conferred directly and specifically on the defendant": *Peel* at 797.

13 It will be unusual for a court to find that a defendant has not received some benefit in a marriage-like relationship. Given the breadth of the definition of "benefit" and the sharing inherent in such a relationship, even one where the parties have carefully limited their contribution to joint expenses, something of value will usually have been received and retained not only by the defendant, but also by the plaintiff. This being so, courts must resist the urge to examine the flow of reciprocal benefits between

the plaintiff and the defendant at this stage. The collapse of the three stages of analysis into one may result in an erroneous conclusion there has been no enrichment, as McLachlin J. suggested when she wrote in *Peter* at 988:

> ... There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a 'benefit' to the defendant or a 'detriment' to the plaintiff.

14 Courts should not focus on the fact that, while the defendant may have received *some* benefit from the plaintiff, the defendant suffered a net loss because he or she provided the plaintiff with *more* benefits in return. This kind of set-off or balancing of mutual enrichments is not appropriate at this stage. That is the error the Supreme Court identified in *Garland*, at paras. 33-36, as having been made by the majority of the Ontario Court of Appeal in their reasons for judgment: (2001), 57 O.R. (3d) 127 (Ont. C.A.) at paras. 62-66. *Garland* was a commercial class action in which the plaintiff class alleged that certain late payment penalties collected by the defendant utility were the result of unjust enrichment. The defendant argued that the fees were passed back to consumers in the form of lower rates overall, and not collected to profit the utility. The Supreme Court found that attempting to "set-off" or balance reciprocal or mutual contributions between plaintiff and defendant so as to wipe out any net benefit to the plaintiff is not appropriate at the benefit inquiry. So did the court in *Panara v. Di Ascenzo*, 2005 ABCA 47 (Alta. C.A.) at para. 28.

15 In *Garland*, at para. 37, the Supreme Court also rejected an argument that funds received but not retained permanently do not constitute a "benefit". In the Supreme Court's view, such an argument ought to be considered under a change of position defence.

16 If a benefit is found, then it is appropriate to proceed to the second stage of the unjust enrichment analysis.

II. Detriment

17 It will be unusual to find a plaintiff has not suffered a deprivation if the defendant has received a benefit, so long as the plaintiff can establish a causal link between the contribution and the enrichment: *Pettkus* at 852; *Peter* at 1012-13 (Cory J.). Deprivation may derive from a transfer of wealth by the plaintiff to the defendant or from an infringement of an interest of the plaintiff.

18 In a marriage-like relationship, the full-time devotion of one's labour and earnings without compensation or with less than complete remuneration can be viewed as a deprivation: *Sorochan* at 45-46, 50; *Panara* at para. 34. Where the benefits received by the defendant are unpaid household or domestic services, the deprivation is the fact that those services were uncompensated. Where the benefits received by the defendant are money or its equivalent, the deprivation is the transfer of that value from the plaintiff to the defendant. The precise *quantum* of the deprivation is not the focus; that is left for the assessment phase. But the identification and definition of the detriment corresponding to the enrichment is essential to this stage.

19 As during the benefit analysis, courts must resist the temptation to evaluate the reciprocal exchange of benefits. Attempting to set-off or account for reciprocal benefits to show that the plaintiff has not suffered any detriment and is, in fact, better off than before, is not appropriate. That is the error this Court made in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.), at 270-72 when the majority accepted the argument that the plaintiff had lived rent-free and at the defendant's expense over the course of their relationship, despite the fact that she also provided uncompensated domestic services. Such arguments belong at the third stage of the unjust enrichment analysis: *Peter* at 990 (McLachlin J., as she was then) and 1009 (Cory J.); or at the remedy stage: *Hubar v. Jobling*, 2000 BCCA 661 (B.C. C.A.) at para. 22. In *Peter*, at 1012-13, Justice Cory went so far as to say that a finding of deprivation is "virtually automatic" if there is enrichment in a matrimonial or long-term common law relationship.

20 If a detriment is found at the second stage, the analysis will move to the question of juristic reason.

III. Absence of Juristic Reason

21 In *Garland*, the Supreme Court reformulated the approach to be taken to this requirement for unjust enrichment by setting down a two-step categorical approach. At the first step, the plaintiff must show that no juristic reason from an established category exists to deny recovery. If the plaintiff establishes the absence of a juristic reason from the established categories, a *prima facie* case under this component is made out: *Garland* at para. 44. The established categories include a contract (*Pettkus*), a disposition of law (*Pettkus*), a donative intent (*Peter*), and other valid common law, equitable or statutory obligations (*Peter*).

22 At the second step of the juristic reason analysis, the defendant may rebut this *prima facie* case by establishing "another reason to deny recovery": *Garland* at para. 45. Under this "category of residual defence," the defendant has the *de facto* burden of showing why the enrichment should be retained: *Garland* at para. 45. Two factors should be considered: the "reasonable" (*Garland*; *Sorochan*) or "legitimate" (*Pettkus*; *Peter*) expectations of the parties, and "public policy considerations".

23 I note that *Garland* does not appear to have been put before the trial judge; she made no reference to it. It was not included in the authorities provided to this Court. Nevertheless, all the authorities preceding *Garland* must be read in the context of the approach it prescribes. *Garland* is clear that the only onus on the plaintiff at the juristic reason stage of the analysis is to show the absence of juristic reason within the established categories. It is for the defendant to rebut the presumption of an unjust enrichment by reference to public policy or legitimate expectations. To the extent a court has placed an onus on the plaintiff to show that enrichment was unjust without reference to the test in *Garland*, its analysis must be read with caution.

24 In view of this analysis, caution must also be used when considering a line of cases of this Court including *Ford*, *Thomas v. Fenton*, 2006 BCCA 299 (B.C. C.A.), and, most recently, *Kerr* (currently on reserve at the Supreme Court of Canada with the appeal from *Vanasse v. Seguin* (2009), 96 O.R. (3d) 321 (Ont. C.A.)). These cases have suggested that, in relationships where there are reciprocal contributions, benefits received by the plaintiff from the defendant can constitute a juristic reason for the defendant to retain his or her enrichment.

25 Reciprocal benefits do not fit easily within any of the established categories enumerated in *Garland*.

26 In *Peter* at 991-95, McLachlin J., as she was then, explained why natural love and affection do not provide a juristic reason for enrichment flowing from domestic services. In *Garland* terms, love and affection do not ground a "donative intent". Nor, I am persuaded, do casual family arrangements between spouses or extended family members provide a contractual reason to retain an enrichment: *Bruyninckx v. Bruyninckx* (1995), 4 B.C.L.R. (3d) 341 (B.C. C.A.)(Lambert J.A.) at paras. 87-89, 92. On the other hand, a written contract may: *Rathwell*; *Hartshorne*; *Waters v. Conrod*, 2007 BCCA 230 (B.C. C.A.).

27 It may be that the statutory obligation of parents to support their children under the *Divorce Act*, R.S.C.1985, c. 3 (2nd supp.), the *Family Relations Act*, R.S.B.C.1996, c. 128, and the *Criminal Code* could provide a juristic reason, if the transfer of wealth from plaintiff to defendant is determined to be entirely or partly to provide for a child of their relationship, but that issue has not been considered in any authority of which I am aware and has not been suggested as applicable in this case.

28 In this case, the suggestion is made that reciprocal benefits received by the plaintiff come within the fourth established category (other valid obligations). This comes to a submission that "equitable set-off" is a juristic reason for a defendant to retain enrichment. Because the necessity to off-set reciprocal benefits arises out of the inherent nature of a marriage-like relationship, receipt of those benefits is not suited to constitute a juristic reason for enrichment. The receipt of reciprocal benefits does not have the same juridical force as a contract, a disposition of law or a donative intent. In most family cases reciprocal benefits will not be specifically pleaded, either by way of a counterclaim or as a defence (they were not in this case). Technically, equitable set-off (when not pleaded as a counterclaim) is a defence. Any reciprocal benefit qualifying for the application of equitable set-off should be treated as such in an unjust enrichment analysis and brought into account after the enrichment has been valued.

29 Nor do attempts to balance benefits passing between the parties fit easily into the second step of the juristic reason analysis where the relevant factors are the parties' expectations and public policy considerations. In *Garland*, Iacobucci J. commented about this residual category at para. 46:

> [46] ... 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 that further cases will add additional refinements and developments.

30 Whether seen as a proposed new category of juristic reason or as flowing from legitimate expectations of the parties, too narrow a focus on reciprocal benefits in the juristic reason analysis has the potential to blend the existence of enrichment with the question of its extent. While a court should be justifiably concerned with protecting a defendant from an excessive award where he or she has provided the plaintiff with benefits over the course of the relationship, that is not the question being asked at the juristic reason stage. The juristic reason analysis is intended to establish whether there is a reason for the defendant to *retain* a proven enrichment, not to determine its value or off-set reciprocal enrichment by the plaintiff. The issues of *quantum* and set-off are for the quantification of the award following a finding of unjust enrichment. By interposing the issue of extent into the juristic reason stage, the full unjust enrichment analysis is short-circuited.

31 The result of finding that the defendant had a juristic reason for the enrichment is a declaration that any enrichment was not unjust. To permit such a result at the second step of the juristic reason analysis where the other preconditions are present is to deny the existence of an unjust transfer of wealth which, from the perspective of the plaintiff, is patently unfair because it does not recognize his or her contributions. The receipt of benefits by a plaintiff from a defendant does not mean *ipso facto* that the defendant has not been unjustly enriched. That is the point the Supreme Court made in *Peter*.

32 A defendant can be preserved from any unfair effect of an unjust enrichment award by careful consideration of the value of the enrichment at the assessment phase, with appropriate deductions made for the benefits the defendant provided to the plaintiff. The finding of unjust enrichment itself does not need to be disturbed.

33 This reasoning also applies to the consideration of reciprocal benefits within the inquiry into the parties' "reasonable" or "legitimate" expectations. This inquiry is noted in *Sorochan* (at 46, 52-53), *Pettkus* (at 848-49), *Peter* (at 990-91), and *Garland* (at paras. 55-56). It is not to be confused with the search for "phantom intent" necessary for a resulting trust that Dickson J. decried in *Rathwell* (at 442-44). This inquiry at the second step of the juristic reason analysis risks a focus on the defendant's expectations which all too easily may avoid the Supreme Court's instruction in *Garland* to look at the legitimate expectations of *both* parties. If the value of reciprocal benefits is considered in that inquiry, that risk is amplified.

34 It is at this point of the unjust enrichment analysis that the Supreme Court of Canada's decision in *Walsh*, and this Court's decision in *Crick v. Ludwig* (1994), 117 D.L.R. (4th) 228 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (S.C.C.), matter. In *Walsh*, the Supreme Court concluded that the decision to marry or not to marry is a choice deserving of respect. Each choice carries with it consequences. If the decision to remain unmarried is to be respected, courts should be mindful of the limits parties place on their relationship when looking at whether their expectations provide a residual reason for a defendant to retain an enrichment. This point was made in *Kerr* (at para. 50):

> [50] The distinction between claims arising from the breakdown of a marriage and claims arising from the breakdown of a marriage-like or common law relationship is essential. Its importance was reiterated in *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325, where the Court noted that unmarried partners may choose to cohabit outside of a community of property regime and courts should not infer an intention to share in one another's assets simply by reason of their cohabitation.

35 On an inquiry into the reasonable or legitimate expectations of parties in a marriage-like relationship, there are neither presumptions nor a default position. Although it is unlikely the absence of a legitimate expectation of a share in the value created during a relationship would be sufficient reason to deny recovery, regard must be had to the evidence of the nature of the particular relationship. The proper approach is to find the parties' expectations from the evidence of their particular relationship and evaluate this aspect of the juristic reason analysis in light of those findings. Reciprocal benefits may be relevant to that

analysis, but they cannot be decisive. The questions at this step are those set down by Dickson J. (as he was then) in *Pettkus* at 848-49 and discussed in *Bruyninckx* at para. 86: Did the plaintiff suffer prejudice in the expectation of an interest in property or a monetary reward? Did the defendant accept the benefit in circumstances where its retention would be unfair given his or her knowledge of that expectation?

36 Little has been said in the authorities about public policy considerations. They will, however, include not allowing a wrongdoer to profit from their wrongdoing: *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at 631-32; *Garland* at para. 57.

37 For these reasons, the question of whether set-off (either legal or equitable) of mutual debts and mutual benefits is appropriate is better left for either the defence stage or the remedy stage. It makes the most sense to account for benefits received by the party claiming unjust enrichment only after an unjust enrichment has been established and that enrichment valued.

Conclusions on Juristic Reason Analysis

38 If the defendant shows a juristic reason for the enrichment at this second step of the analysis, there is no unjust enrichment. This is not the same as a finding of unjust enrichment for which the defendant has a defence. If the defendant fails to rebut a *prima facie* finding of unjust enrichment established at the first step, the enrichment can be said to be unjust. The question of whether any defence may defeat in whole or in part the finding of unjust enrichment is the next stage in the required analysis: *Garland* at para. 62.

Defences

39 None of the potential defences to an unjust enrichment claim have been put forward in his case. I mention them only to complete the analysis and explain why I have concluded reciprocal benefits should be considered at the remedy stage, even where, arguably, some might come within a defence.

Change of Position

40 While a change of position is a defence to claims of unjust enrichment generally, it is difficult to conceive of a situation where it could apply in a family action. To successfully make out this defence, a defendant must establish it had "materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned" (*Garland* at para. 63). In *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.), at 164, the Court suggested this can be established by "evidence of any special projects being undertaken or special financial commitments made because of the receipt" of the enrichment. However, "[t]he mere fact that the moneys were spent does not, by itself, furnish an answer to the claim for repayment" (*Storthoaks* at 164). The increased spending must be directly attributable to the receipt of the enrichment. The mutuality of enrichment and deprivation in the family context will preclude that proof in practice.

Estoppel

41 Estoppel is a defence to unjust enrichment generally: *Storthoaks* at 166-67, which may apply in family situations of unjust enrichment: *Pettkus* at 851-52.

Laches & Acquiescence

42 Laches and acquiescence are defences to unjust enrichment: George B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) at 242-44; and G.H.L. Fridman, *Restitution*, 2d ed. (Toronto: Carswell, 1992) at 469. Trial courts have found extraordinary delay and applied it to claims for unjust enrichment in family cases: *Lawrence v. Lindsey* (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.); *Angeletakis v. Thymaras* (1989), 95 A.R. 81 (Alta. Q.B.).

Statutory Defences

43 Statutory defences may relieve a defendant of the consequences of a finding of unjust enrichment: *Garland* at paras. 67-69. However, it is not clear what statutory defences, if any, might be available in the family context. Trust claims are preserved under Part 5 of the *Family Relations Act*, s. 69(2). However, in most circumstances, the provisions of that Part will pre-empt an unjust enrichment claim unless the claim is for unjust enrichment prior to the s. 65 triggering event not adequately recognized by the statutory division.

Equitable Considerations

44 Peter Birks in *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) discusses (at 415) one further equitable defence: counter-restitution not possible. This term refers to the giving up which a plaintiff must do in order to qualify for restitution from the defendant. It is clear that in normal circumstances a plaintiff cannot expect both to get back something given to the defendant and at the same time retain something received from him: if there is to be a taking back there must also be a giving back. Hence, the impossibility of counter-restitution is a defence to restitution.

45 Courts appear to have glossed over this defence in family proceedings. Whether they have done so for want of pleading, on the assumption many benefits are not capable of restitution, either in specie or monetarily, or because services and intangibles, while compensable, should not bar recovery, the result seems sensible. The mutuality inherent in a family relationship puts beyond the scope of an unjust enrichment analysis that which has no retained value to be "given up".

Choice of Remedy

46 After unjust enrichment has been established and any defences have been addressed, a court's next task is to determine whether a monetary award is adequate or whether a proprietary interest is merited. Only if a monetary award is inadequate and there is a "sufficiently substantial and direct" contribution to the acquisition, preservation, maintenance or improvement of the property in which the trust is claimed, may a proprietary interest be considered: *Pettkus* at 852. A minor or indirect contribution is insufficient: *Peter* at 997.

47 In considering whether a monetary award is adequate, the question of whether a monetary award will be paid is relevant: *Peter* at 999-1000; and *Pickelein* at para. 27. The court may also take into account any special interest in the property acquired as a result of the plaintiff's contributions: *Peter* at 999-1000. The minority reasons in *Peter* suggest some situations in which a monetary award may be the most appropriate remedy (at 1023-24):

> a) is the "plaintiff's entitlement ... relatively small compared to the value of the whole property in question";
>
> b) is the "defendant ... able to satisfy the plaintiff's claim without a sale of the property" in question;
>
> c) does "the plaintiff [have any] special attachment to the property in question";
>
> d) what "hardship might be caused to the defendant if the plaintiff obtained the rights flowing from [the award] of an interest in the property"?

48 "[A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right to property": *Lac Minerals* (La Forest J.) at 678. A constructive trust requires "a link between the contribution that founds the action and the property in which the constructive trust is claimed": *Peter* at 988. If, however, the nexus is not made out, but a monetary award will not suffice (usually because of an inability to pay), a proprietary remedy may nevertheless be ordered.

49 Since *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (B.C. C.A.), *Crick*, and *Pickelein*, this Court has recognized that the consideration of the adequacy of a monetary award must include not only an award assessed on the basis of value received, but also one assessed on the basis of value survived at the date of separation. It has also recognized that a monetary award can be secured and that an award of interest can compensate for the effects of the delay in payment of a monetary restitutionary award. Unless there is reason for a continued sharing of the rights, obligations and risks of ownership, there is no practical benefit to a

proprietary award and there is a downside, not least of which is the need for an accounting between the owners on a continuing basis. Given that a restitutionary remedy speaks from the date the right to restitution arose, any proprietary award implies an accounting for the use, maintenance and improvement of the property as tenants in common from the date of separation until the date when the property is sold and the proceeds divided.

50 Because the sharing of the benefits and risks of ownership proportionate to the owners' contributions is implicit in the grant of a constructive trust, the finding of entitlement to a proprietary remedy is usually only notional in family cases. Most plaintiffs in family cases claim a constructive trust, and then ask for an award of damages on a value survived basis as at the date of trial. While this may occasionally result from the difficulty of proof on a *quantum meruit* basis, more often it is seen as necessary to provide a meaningful remedy, whether to allow increases (or losses) in property value to accrue to the true title holder, to permit the plaintiff to receive priority in a bankruptcy, or to permit access to consequential remedies such as tracing and following. Not all of these factors can be satisfied by a monetary award. To the extent they can be, a monetary award will be appropriate and there will be no need for a declaration of trust.

Quantification of the Remedy

51 In practice, the real issue in most family cases is the choice of a "value received" or a "value survived" approach to the quantification of an award. Commonly, factors that would permit the imposition of a constructive trust, were it appropriate for the parties to share continuing ownership, will support the value survived approach to quantification of the alternative monetary award: See the discussions in *Beard v. Beard* (1980), 35 A.R. 448 (Alta. C.A.), aff'd [1982] 1 S.C.R. 282 (S.C.C.); *Sorochan* at 51-52; and *Pickelein* at paras. 30-43. Otherwise, a value received approach is taken.

52 The value received approach looks for the value of the benefits determined by their cost on the open market. In his reasons for the dissenting minority in *Peter* at 1025, Cory J. approved the *quantum meruit* approach adopted by Waite J. in *Herman v. Smith* (1984), 34 Alta. L.R. (2d) 90 (Alta. Q.B.), at 93-94. Waite J. suggested a choice between two calculations:

> i. the annual earnings of equivalent occupations (housekeeper, servants, and related occupations) based on available data over the term of the relationship, or
>
> ii. the number of hours worked over the term of the relationship multiplied by
>
> (a) wages earned per hour by equivalent workers, or
>
> (b) the minimum wage.

Justice Cory preferred the annualized approach Justice Waite had applied. So do I.

53 In contrast, the value survived approach looks for the value created in an asset by the plaintiff's contributions. Although the lines can get blurred between the two where cohabitation is long and the parties' contributions are difficult to identify (*Nasser* at para. 44), a court must identify which approach it is taking, explain why, and not confuse the two methods.

54 Where equitable damages are being awarded to compensate for a constructive trust interest, the proper approach is value survived, as McLachlin J. stated (*Peter* at 999-1000):

> The value of that trust is to be determined on the basis of the actual value of the matrimonial property - the "value survived" approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

55 Awarding equitable damages in lieu of a proprietary remedy is not a practice limited to unjust enrichment claims. In *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.), the Supreme Court recognized that a monetary award made in place of specific performance may be valued on the date of trial so as to take into account any change in value. This is analogous to valuing a monetary award for unjust enrichment on the value survived approach, instead of ordering a constructive trust.

56 The jurisprudential difficulty is that few plaintiffs in a marriage-like relationship want a proprietary remedy. They want a monetary award determined by the value survived approach so they may share in the current value of the property to the acquisition, preservation and improvement of which they contributed. This difficulty is exemplified by two decisions of the Ontario Court of Appeal: *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.) at paras. 32-38; and *Vanasse*.

57 While this Court takes the view either value received or value survived can be used to quantify a monetary award (*Pickelein* at paras. 30-44; and see also *MacFarlane v. Smith*, 2003 NBCA 6 (N.B. C.A.) at para. 34), the Ontario Court of Appeal has taken the view that a monetary remedy should be calculated on the basis of value received: *Bell* at paras. 32-38, esp. 34. The difference may be less significant than it appears because, in most cases, the primary reason for using the value survived approach will be an inflationary increase in the value of the property to which neither contributed. At para. 40 in *Bell*, the court noted that account should be taken for the "probability" that the property may have increased in value "quite apart from anything either party did to enhance its value."

58 Elsewhere, it appears, only the value survived approach to valuation takes account of inflationary increases in value. Where the plaintiff has contributed directly to the property and a proprietary award is ordered, inflation will be taken into account because the benefit accrues to both owners: *Hubar* at paras. 19-21; *Treanor v. Smith* (1992), 44 R.F.L. (3d) 165 (Ont. Gen. Div.)); and *Boucher v. Koch* (1988), 87 A.R. 78 (Alta. C.A.). So, where damages are awarded as an alternative to a proprietary award, inflation or deflation should be taken into account. However, where a *quantum meruit* award is found to be appropriate, it would be more consistent logically to compensate for the delay in receipt of restitution by an award of interest.

Value Received Approach

59 When an award is made on a value received basis, it should be equal to the benefit received by the defendant. "In order to determine the value of the services rendered ... it is necessary first to determine which of the services provided ... are compensable": *Clarkson* at para. 69. To this inquiry, any agreement of the parties will be relevant, as will be the *Walsh* factors. If the parties had a *de facto* agreement on the amount of their individual contributions to their relationship, or about which services each was to provide for the benefit of both or to the property of one, the court should be careful not to compensate out of proportion to their agreed roles. This factor is not intended to wipe out an award, where unjust enrichment has been found, but to ensure that the amount of the award is congruent with the parties' circumstances and expectations. Although there may be additional discounts to factor in (such as equitable set-off, discussed below), there is no assessment of a plaintiff's proportionate share in an asset, or of the increase in value of an asset. Those issues are specific to awards assessed on the value survived approach.

Value Survived Approach

60 On the valued survived approach, there is no requirement to determine the precise value of the services and other benefits received by the defendant. As a general rule, a party's proportionate contribution to the value of an asset will entitle that party to a comparable share in its value. A ten percent contribution will yield a value equivalent to 10% of the asset; likewise a 50% contribution will yield a half-share. Once the proportionate share has been determined, it need only be assessed against the value of the asset to determine the *quantum* of the award. If equitable damages are to be awarded in lieu of a proprietary remedy, the value of the property at the date of trial will determine the *quantum* of the award, subject to any adjustments as between tenants in common for use and maintenance of the property following separation.

61 The key features of the assessment on the value survived approach are the identification of the value available for apportionment and the parties' proportionate contributions to that value. There is no presumption of equality: *Rathwell* at 447-49.

62 The first step is to determine the value of the asset at the outset of the relationship or on its later acquisition, as the case may be, and at the relationship's end. Courts should be chary of making this assessment, discovering there has been a decrease in the asset's value, and then going back and changing the remedy from the proprietary to the personal or the approach from value survived to value received. That an asset has lost value may militate in favour of a *quantum meruit* award, but that is not the object of the inquiry at this stage. Generally speaking, the increase in the value of the asset during the relationship will be

the value available for apportionment, although in a long relationship contributions to the preservation of the capital brought to the relationship may suggest that value also be apportioned.

63 Once the value available for apportionment has been ascertained, the second step is to analyze the parties' respective contributions to determine the share to which the plaintiff is entitled. As I noted in *Pickelein*, at para. 44, in some circumstances, this may require a preliminary determination of the net appreciation of value during the relationship attributable to the contribution of the parties, for example where third parties also contributed to that value.

64 At this point again, the Supreme Court's decision in *Walsh* should be borne in mind. If the relationship was one in which the parties strictly defined their roles, a plaintiff's claim should be closely scrutinized to ensure it accords with the expectations they created in each other: *Hartshorne*; *Waters*. As it is in the choice of remedy, the length of a relationship will also be a factor at the apportionment stage. Although the significance of the length of the relationship depends to some extent on the age of the parties at its beginning, my review of the case law suggests that marriages can be categorized for this purpose into at least three groups: long (12 or more years); medium (6 to 11 years); and short (5 or fewer years). Long marriages are more likely to suggest a family venture and equality of sharing of all the family's assets. The same can be said of marriage-like relationships.

Set-Off

65 Only after a remedy has been chosen and the value of the claim quantified can account properly be taken of reciprocal claims pleaded or of evidence of mutual benefits conferred. Reciprocal claims of unjust enrichment arise where each party claims to have been deprived to the benefit of the other as a result of the relationship. When reciprocal claims are made, both parties are usually seeking damages, whether on a *quantum meruit* basis or in lieu of a proprietary remedy to which entitlement is established. These specifically pleaded reciprocal claims present an easy case. Both parties have claimed that, as a result of their relationship, the other party has been unjustly enriched. That claims are reciprocal does not negate their simultaneous enrichment. The claims can be set off one against the other at this quantification stage of the analysis: *Pickelein* at paras. 14-15.

66 However, set-off for a reciprocal benefit is also being applied at this quantification stage in family cases where a claim for unjust enrichment is not specifically pleaded as a counter-claim or by way of set-off: *Peter* at 1025 (Cory J.); *Shannon v. Gidden*, 1999 BCCA 539 (B.C. C.A.) at para. 38; *Harrison* at paras. 24-25. Given that the quality of mutuality informs all aspects of marriage-like relationships, it seems to be thought unjust to penalize one partner (the defendant) for failing to bring a separate claim for unjust enrichment. Consequently, the exchange of value as a result of the sharing is being accounted for in the quantification of the remedy even in cases where mutual claims of unjust enrichment are not pleaded, with little principled discussion.

67 A brief review of legal and equitable set-off will help to ground this discussion of what courts have been doing.

68 True legal set-off is unproblematic. It has two principal requirements - both obligations must be debts and both debts must be mutual cross obligations: see *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.), at 205 where the court cites from *Royal Trust v. Holden* (1915), 22 D.L.R. 660 (B.C. C.A.), at 662-63:

> ... "mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading.

69 Where both are established, the amount due will be deducted from the award for unjust enrichment.

70 Where one or both of these requirements cannot be established, legal set-off is not available. Equitable set-off may be: *Holt* at 205-206. By its nature, equitable set-off is more difficult in application. In *Irving Oil Ltd. v. Blanchard*, 2002 PESCTD 52 (P.E.I. T.D.), DesRoches C.J.T.D. helpfully explained its essence at para. 9:

> [9] Equitable set-off arises where there are certain equitable circumstances which give a right to a person who sets them up against an opposing party to an action. It is a doctrine based on fairness. Equitable set-off is available provided there is

a relationship between the cross-obligations such that it would be unfair or inequitable to permit one to proceed without taking the opposing claim into account.

71 The authorities "are clear that a defendant's claim will not be viewed as an equitable set-off ... unless it is closely or intimately connected with, or directly impeaches, the plaintiff's claim": *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 (B.C. C.A.) at para. 44.

72 The leading modern statement on the application of equitable set-off is a judgment of Macfarlane J.A. for this Court in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (B.C. C.A.). It was adopted by Wilson J. in *Holt*, and most recently cited by this Court in *Jamieson v. Loureiro*, 2010 BCCA 52 (B.C. C.A.) at para. 35.

73 *Coba Industries* sets out the requirements for a claim of equitable set-off (at 38):

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: [*Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.)].
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt. (U.K.) Ltd*., [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: [*Fed. Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: [*Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*].
>
> 5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld. Govt. v. Nfld. Ry. Co.* (1888), 13 App. Cas. 199 (P.C.)].
>
> [Citations added.]

74 The nature of the set-off taking place in unjust enrichment cases has never been defined as either legal or equitable. It is unlikely that it is true legal set-off, because the requirements of legal debt and liquidated sums are not features of a marriage-like relationship: Mutual sharing of all or many of life's expenses, and contributions to property over the course of a relationship of five, ten, or twenty years are not readily reducible to certainties, nor are they true debts created by formal agreement. It would be a fiction to qualify the set-off being applied in such circumstances as legal set-off.

75 Equitable set-off is the mechanism that more accurately describes (and justifies) the off-setting of mutual enrichments in family cases. Equitable set-off makes sense within the family context because of the reciprocal enrichment: While no legal debts subsist between the parties (as a result of the enrichment), it would be inequitable not to allow the defendant to reduce the amount he or she owes to the plaintiff as a result of the enrichment by any corresponding gain to the plaintiff as a result of the relationship.

76 The *Coba* requirements will be met in family situations where mutual unjust enrichment is found, even if only the plaintiff pleaded the cause of action. It would be inequitable to allow the plaintiff to recover in full for any unjust enrichment of the defendant, without considering whether the plaintiff has him- or herself been unjustly enriched. The failure to discount the plaintiff's award by his or her corresponding enrichment would amount to more than perfect compensation at the expense of the defendant.

77 If a contract is relevant to the proceeding, it will have been considered at the juristic reason stage and, where necessary, at the apportionment stage. More often, in family proceedings, there is no relevant contract.

78 In a family context, the *quantum* of the damages is not defined at the outset of the action. As a result, the claim will always be for an unliquidated sum. (In fact, the claims will be for mutual unliquidated sums, a situation described in Kelly Palmer, *The Law of Set-off in Canada* (Aurora, Ont.: Canada Law Book, 1993) at 73-74.)

79 Equitable set-off provides the doctrinal and juridical basis for what has proven to be a necessary exercise in family cases. The application of this recognized doctrine at the assessment of damages stage avoids "up in the air" analyses at earlier stages of an unjust enrichment analysis and permits full consideration to be given to all the factors the Supreme Court has been at pains to set out as it developed the Canadian approach to unjust enrichment.

Equitable Set-off

80 Whether mutual claims of unjust enrichment are pleaded, equitable set-off is pleaded as a defence, or evidence of a reciprocal enrichment is led but not pleaded, they should all be treated in the same fashion. In principle, the amount of the set-off should be determined by the same analysis that would be applied to a counterclaim for unjust enrichment.

81 In examining the contributions to property, only those contributions that allowed the other party to acquire, increase, or maintain the value of an asset will be considered. For example, with a vehicle, payment by the defendant to the plaintiff to buy the car in the first place would be a set-off. Payment by the defendant of the costs of maintenance (brake re-alignment) or new parts (carburetor; tires) that preserve or enhance the value of the vehicle would be set-off. Payment of the ordinary operating expenses (gas; AirCare; insurance) would not be set-off, because they do not enhance or maintain any value that is capable of surviving the end of the relationship. This will be a question to be determined on the evidence.

82 The property must be assessed using its value at the end of the relationship. In this way, any decline or increase in value will be properly taken into account.

83 Only if the property survives the relationship will set-off be permissible. If a plaintiff's car is written off, for example, contributions to its preservation or maintenance by the defendant will not be set-off because the property no longer exists in the hands of the plaintiff. Where property has been sold prior to the end of the relationship, contributions to that property may properly be set-off to the extent the residual value existed as liquidity at the end of the relationship. Thus, where the proceeds of sale were spent during the relationship on living expenses, a deduction would not be appropriate. Where they were spent after the end of the relationship, a deduction would be appropriate.

84 Relieving the other party of a liability (such as the payment of a debt to a third party) should also be set-off.

85 To give a global example, if a plaintiff (Mr. "Y") entered the relationship with a speedboat, a truck, a small cottage, and nothing else, and he contributed to the relationship by renovating the defendant partner's (Ms. "X") house (to which she held sole title), the court could well find that Ms. X was unjustly enriched. However, when it comes time to quantify the value of the enrichment, the court must account for the fact that Ms. X paid for maintenance, a new motor and winter storage costs for the boat, new tires and a carburetor for his truck, and a roof for the cottage. All of those contributions to the improvement and preservation of the plaintiff's assets must be off-set against the defendant's unjust enrichment to determine the final award.

86 In determining what, if any, equitable set-off against an award is appropriate, care must be taken not to set-off contributions that have already been included at the quantification stage. This will be particularly important where a set-off is claimed for the other party's reciprocal contribution of domestic services or payment for the ordinary incidents of family life not specifically referable to property.

87 This does not mean the provision of food and shelter or domestic services are not to be considered in an unjust enrichment analysis. Where the contributions of one have enabled the other to acquire property, that contribution will have been measured at the valuation stage on both the value received and the value survived approach. On the value received approach, the provision of food and accommodation or uncompensated domestic services will be included in the determination of the monetary value

of unremunerated domestic services. On the value survived approach, they will be included in the determination of the parties' contributions and thus the appropriate apportionment.

88 Once the value to be set-off has been quantified, on the value received approach, that amount will be deducted from the plaintiff's award as a dollar figure. On the value survived approach, the set-off amount may be deducted as a percentage from the plaintiff's proportionate share. While it would be possible to allow for the set-off amount when initially determining the proportionate share that calculation unnecessarily combines two distinct steps in the analysis - the determination of proportionate share based on contribution, and set-off based on a reciprocal benefit to property. Transparency values support an independent analysis.

89 In circumstances where the plaintiff's benefits outweigh the defendant's, a plaintiff might well have established unjust enrichment, but would not receive an award: *Harrison* at para. 15.

Legal Set-off

90 There may be cases in which legal, as opposed to equitable, debts exist between the parties within the family relationship. No such case was brought to our attention although a legal debt is admitted by the respondent in this case and acknowledged to be payable, at least in its original amount, without interest or gross-up, by way of deduction from any award.

91 It seems logical, if not self-evident, that a court which identifies legal debts between the parties in the course of finding unjust enrichment in the family context should adjust the amount of the final judgment to take that debt into account, whether or not set-off is pleaded as a defence or by way of counterclaim. For example, if a judge finds a debt for a specific amount of money owing from the plaintiff to the defendant as a result of a promissory note, then the value of that note could be set-off against any award for damages for unjust enrichment.

92 While legal set-off is a defence, in family proceedings for unjust enrichment, it will usually be practical to deal with legal set-off at the damages assessment stage. Only if a debt is larger than the total value of the claim and legal set-off would provide a complete defence to a claim for unjust enrichment would it be practical to deal with legal set-off at the defence stage. Where the legal debt is worth less than the total value of the claim, legal set-off is probably best incorporated into the determination of the final award.

Pre-judgment interest

93 This is a narrow point, but one worth emphasizing. For monetary awards, prejudgment interest runs from the date the duty to make restitution arose: see *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.), at 91-92 (Cory J.); and *Clarkson* at paras. 75-78 (McEachern C.J.B.C.). For an award of damages in lieu of a proprietary award, risk is shared by the parties and should be reflected by valuation at the date of trial with adjustments as between tenants-in-common from the date of separation until the date when the property is sold and the proceeds divided.

Application to this case

Background facts

94 In September 1995, about two months after they met, the respondent moved into a small travel trailer located on the appellant's mother's property on Gimse Road (the "Gimse Road property"), where the appellant was living with her three children, sharing meals and family time with her mother in her mother's mobile home.

95 The appellant had separated from her ex-husband a year or two earlier. She was employed as a teacher's assistant at a school in the Pemberton area, where she also operated a sole proprietorship, Valley Maintenance Janitorial. It held contracts for janitorial services in the Pemberton Valley. Her annual income was about $32,000. She had just settled matrimonial property and personal injury actions, from which settlements she had received about $125,000 in the previous four months. From those proceeds, she had used $25,000 to purchase a half interest in the Gimse Road property. In September 1995, she bought her mother's remaining interest in the Gimse Road property for a further $25,000.

96 The respondent was unemployed, having recently lost a well-paying job as a result of criminal charges for cultivating marijuana and his addiction to cocaine. He was convicted of possession for the purposes of trafficking and told the appellant he had resolved his addiction. He had a significant debt to the Canada Revenue Agency, was involved in a foreclosure proceeding regarding property at Nanoose Bay, and was facing charges for sexual assault. He told the appellant those charges were baseless allegations fabricated by a drug dealer. His only assets were a 1986 Ford pickup truck, a Bobcat 825 tractor worth about $5,000 and a trailer worth about $2,500.

97 In October, the appellant began to loan the respondent monies to make the payments required to keep the mortgage on the Nanoose Bay property in good standing. That same month, she paid $13,000 for an old trailer the respondent had located and promised to set up on the Gimse Road property. Subsequently, the respondent obtained the necessary permit and moved the trailer there.

98 In February 1996, the respondent offered to help out with the Valley Maintenance Janitorial work for "no more than $600-$800 per month in order to avoid any liability to file a tax return" (at para. 20 of the trial judge's reasons). With the appellant's agreement, he began that work. In March 1996, he began to work on the installation of the trailer on the Gimse Road property with the pouring of trailer pads. Subsequently, he installed electricity, a sewer system, and a water pump. The appellant paid for the materials and about $3,000 for the work of others, taking out a construction loan in May. After they moved into the trailer that year, work continued slowly until 1998. The appellant was heavily involved in this project, but was not as active physically because of her other work obligations.

99 In December 1996, the respondent repaid most of the Nanoose Bay loan with the proceeds from the sale of that property.

100 In February 1997, the respondent hired a Vancouver law firm to deal with his sexual assault charges. The trial judge found the appellant had paid the firm $5,000 "mistakenly characterized as Wilson's contract wages" (at para. 27) and mortgaged the Gimse Road property to consolidate the construction loan and obtain funds, characterized as "Fotsch's own proprietor's drawings on her Valley Maintenance account" (at para. 27), which she loaned to the respondent to pay the balance of $14,649.60. The charges were ultimately stayed by reason of prosecutorial delay. The respondent acknowledges a debt in the amount of $14,649.60 remains unpaid.

101 Between 1997 and 2001, as the respondent's duties for Valley Maintenance came to include more managerial duties, his janitorial labour hours dropped off. He never sought or suggested an increase in his wages. Nor did he find alternate or additional employment as the appellant had anticipated he would. He contributed only a "small minority" of his income to family expenses (at para. 21). He did not have a bank account. Throughout the relationship, he was the main cook and did laundry. As well, he continued to develop the Gimse Road property, erecting side buildings, developing a garden, and building a fence with the help of transient labour for which the respondent paid in cash or kind.

102 The appellant performed all other household chores, much of the garden work and the RCMP janitorial contract at Whistler (for which the respondent did not have the requisite security clearance) and provided the majority of the care for her son with special needs, aided by her two older children. She made all mortgage payments, purchased all food, liquor, household and building supplies, covered all gasoline and vehicle leasing costs, and paid any miscellaneous home and business expenses. As well, she paid the monthly fees for the respondent's storage locker in Nanaimo. The respondent used the Valley Maintenance leased vehicle for his personal transportation, including trips to Nanaimo and Vancouver.

103 In April 2001, the appellant purchased vacant land on Portage Road (the "Portage Road property") for $219,000, using the proceeds of a mortgage on that property ($189,000) and loans from her family ($30,000). When she sold the Gimse Road property in May for $129,900, she used some of the net proceeds (about $90,000 after deduction of the mortgage of $25,284, a loan of $13,077, and legal fees of $458) to reduce the mortgage by $77,000.

104 Almost immediately, she took out a further mortgage of $49,000 to cover anticipated costs to improve the Portage Road property, and in June 2002 another mortgage of $48,448 to cover costs of the proposed subdivision into two lots. After a refinancing in June 2002, the registered mortgages totalled $192,574.00.

105 The appellant bought an old trailer for $250.00 the respondent had located and claimed he could fix. Damaged on its move to the property, the trailer proved uninhabitable and in need of significant rebuilding. While that work was being done, the family lived in a trailer on a neighbour's property, without adequate heat or hot water. The trial judge concluded the respondent's efforts added nothing of value to the Portage Road property. His work was shoddy and not of workmanlike quality. It was unlikely the Home Depot prefabricated garage the respondent installed on the property (for which the appellant paid) would pass building inspection; it would probably have to be torn down and rebuilt.

106 By September 2002, the appellant learned the respondent was again using cocaine, and left him. She moved her mother's trailer onto the Portage Road property. The respondent tried to block her access to the property by putting a chain on the driveway. She was able to overcome that obstacle, and then, with the help of her family, she worked in earnest on the property to make it liveable for her and the children by October. Throughout November and December, the parties saw each other occasionally, including overnight visits, until one evening the respondent arrived, unexpected and uninvited, impaired and hostile, at the Portage Road property while she was entertaining her mother and stepfather. When he refused to leave, he was taken into custody and ordered not to return to the property. The trial judge rejected the respondent's evidence there had been a reconciliation after September.

107 Meanwhile, throughout 2001, as the parties' relationship was deteriorating, the respondent had established his own janitorial business, and named it Valley Maintenance 2001, without the appellant's knowledge or consent. In September 2002, he unilaterally began working on two of the appellant's most profitable janitorial contracts, keeping the gross monthly revenue of about $2,000 for himself. The appellant first learned of this misappropriation from documents she found in the company truck when she reclaimed possession of it in December 2002. At some point after that month, the respondent, or someone else at his direction, removed a Stealth carpet cleaner (valued by the trial judge at $2,300) from the appellant's property without her permission and did not return it after Master Bishop ordered its return on 5 October 2006.

108 After the separation, the respondent gained access to the appellant's documents and added his signature as "owner" to a contract only she had made with the Resort Municipality of Whistler to provide cleaning services. By the time of the trial, he had lost the contracts he had misappropriated "due to complaints regarding quality of work" and had given the carpet cleaner to a girlfriend who used it as collateral for a loan to start a limousine business in Whistler. His net revenue from the contracts between 30 September 2002 and 30 September 2004 would have been about $24,000, according to the appellant.

109 The parties' experts valued the Portage Road property at separation at $709,000 (the respondent) and $560,000 (the appellant). In addition to the two janitorial contracts, the respondent retained the proceeds from the sale of his Ford truck ($1,200) and the Bobcat and trailer. The appellant retained a boat she had purchased in 2001 and her motor vehicle.

110 The respondent started his action claiming spousal support and unjust enrichment on 23 December 2002 and filed a Certificate of Pending Litigation against the title to the Portage Road property on 8 January 2003. By a consent order made 12 June 2003, the respondent obtained possession of the carpet cleaner and a floor polishing machine and delivery of the personal possessions he had left on the Portage Road property. After Justice Preston made two orders relating to the respondent's tractor and trailer in July, the action proceeded slowly. Some orders for disclosure were made in 2005. Then, on 29 July 2006, the appellant applied for an order to strike the respondent's pleadings. When that application was heard on 7 November 2006, Master Bishop dismissed all the respondent's claims on the basis of excessive delay in their prosecution and ordered the removal of the Certificate of Pending Litigation. Mr. Justice Rice set aside the orders dismissing the claim for unjust enrichment and removing the Certificate of Pending Litigation on 12 March 2007. The trial began on 9 October 2007 before Boyd J. and continued over 19 days until 7 March 2008. Reasons for judgment were released on 1 May 2008. The trial judge valued the Portage Road property at $770,000 on the basis of a two-lot subdivision.

111 The respondent did not impress the trial judge as a truthful witness. Nevertheless, in a blended discussion of benefit, detriment, absence of juristic reason and the respondent's reciprocal benefits, the trial judge found the respondent had contributed to the increase of the appellant's equity in the Gimse Road property and thus, indirectly to her acquisition of the Portage Road property. His contribution was in the work he did to improve the Gimse Road property and the benefit the appellant received

from her underpayment for the work he did for Valley Maintenance Janitorial. At para. 71, she found that, had the money from the Gimse Road property sale not been used to obtain the Portage Road property, there would have been a notional equity of $20,000 following the sale that could have been shared between the parties.

112 The trial judge had earlier found, at para. 59, that the respondent chose to live as the appellant's part-time employee, and that the appellant had paid for the respondent's food and shelter, liquor, vehicle maintenance, holidays, storage locker and legal fees. At para. 60, she found the respondent had spent the vast majority of the wages he received on himself. At para. 65, she found his effort had not appreciably increased the appellant's business income. The trial judge also noted that the appellant and respondent had discussed a division of the janitorial contracts after the separation in September 2002, because "she believed the [respondent] was entitled to some of the contracts as a means of making a living." (at para. 46) However, before an agreement was reached, she withdrew her offer (of the Home Hardware and Credit Union contracts) when the December 2002 incident occurred. Finally, at para. 77, the trial judge concluded that the respondent had gained more than he had contributed to the relationship.

113 Ultimately, the trial judge found (at para. 76) that despite the respondent's receipt of numerous benefits from the appellant, she had been "minimally" enriched by his contributions (reduced wages, labour on and use of his Bobcat, its trailer and his truck for the development of the Gimse Road property); he had suffered "minimal" detriment, by reason of those contributions (at para. 77); and there was no juristic reason explaining the enrichment (at para. 78). At para. 77, she re-iterated that the respondent had "given up nothing and lost no career, education or financial opportunities."

114 After determining that a monetary award was the appropriate remedy, taking guidance from *Peter*, she determined it should be assessed on the value survived approach, appropriate to a long-term marriage-like relationship where property had appreciated in value. On that approach she decided the respondent was entitled to 20% of the net value of the Portage Road property at its current value of $770,000. After accounting for the outstanding debts on the property and the appellant's expenses incurred to preserve the property since December 2002, she awarded the respondent 20% of the appellant's net equity in the property of $495,457 for an award of $99,091.14.

115 She explained her reasoning at paras. 83 to 85:

> [83] In *Peter* at [1014 per Cory J. for the minority] the Supreme Court of Canada noted that in the case of a long common-law relationship, "[b]oth the reasonable expectations of the parties and equity will require that upon termination of the relationship, the parties will receive an appropriate compensation based on the contribution each has made to the relationship." The "value survived" approach to valuation is particularly appropriate where there has been a long-term marriage-like relationship in which the property at issue has appreciated in value: see *Pegler* at para. 57.
>
> [84] Under the value survived approach, a plaintiff may be awarded a percentage of the net increase in value of property based on a mathematical approach, or a dollar figure which reflects the court's view of the parties' relative contributions to the property's increase in value: see *Pegler* at para. 58.
>
> [85] On a review of the whole of the evidence, in terms of the assessing the parties' proportional contributions, I find that Wilson's contributions entitle him to a 20% interest in the increased net value of the Portage Road property.
>
> [Emphasis added.]

116 The appellant raises three issues:

> a. Did the trial judge err in finding that the defendant had been unjustly enriched by the plaintiff?
>
> b. Did the trial judge err in her valuation of the Portage Road property? (As to the date? The value?)
>
> c. Did the trial judge err in failing to reduce the award to account for certain amounts owed to the appellant by the respondent? [Value of the carpet cleaner ($2,300); balance of debt owing for legal fees ($14,649.60); value of misappropriated contracts ($14,000)]

117 I find no error in the trial judge's valuation of the Portage Road property on the basis of a two-lot subdivision as at the date of trial, once she determined a value survived monetary award was appropriate, nor in her choice of that remedy. The respondent did not seriously dispute the reduction of the award by the amount of the loan or the value of the carpet cleaner. The real issue on this appeal is whether the trial judge erred in finding the respondent had unjustly enriched the appellant. No claim was made, nor could the evidence support a claim, that the appellant unjustly enriched the respondent. None of his property gained value during the relationship to which the appellant could have made a contribution, although it appears she assisted him to maintain what value they had upon separation.

118 The essence of the appellant's submission on this ground of appeal is that the trial judge effectively awarded spousal support to the respondent in circumstances where his claim for spousal support had been dismissed, notwithstanding her finding that he had received more from the relationship than he contributed to it and, in particular, parted with two contracts that would produce at least $43,000 income to him. There is much in the reasons for judgment to support that reading. However, the record does support the findings of fact of the trial judge and her finding that the respondent had established both benefit to the appellant and detriment to the respondent, primarily by way of his contribution of labour and services to the improvement of the Gimse Road property, and the absence of a juristic reason for that enrichment. Where the trial judge fell into error was in her apportionment of the increased net value of the Portage Road property.

119 This error began with the trial judge's approach to determining the value of the respondent's contribution to the Gimse Road property. At para. 71 she explained:

> [71] The Gimse Road property was sold in May 200[1] for $129,900, of which $100,000 was allocated to the land and $29,900 to the mobile home. Deducting the first mortgage of $25,284, the personal loan of $13,077, and legal fees of $458, there was remaining equity of some $90,000. Deducting Fotsch's initial investment of $50,000 and the trailer purchase of $13,000, there was a small notional equity of under $20,000 which might have been shared by the parties had the second property not been acquired.

120 Neither counsel was able to explain how the trial judge arrived at the notional equity. Both suggested an arithmetical error and that the correct figure would be $27,000. Although the trial judge did not apportion that notional equity between the parties, it is reasonable to assume she meant they should share equally in the increase in value to which both had contributed; the respondent's share would flow through as a contribution to the investment of $77,000 she found the appellant had made in the Portage Road property with some of the equity from the sale of the Gimse Road property. The trial judge did not make a finding as to what the appellant did with the remaining $13,000 she received from the sale proceeds, and I decline to speculate.

121 The trial judge's error is in her disregard of the effect of the legal fees loan on the notional equity and its apportionment. The property was bought for $50,000 and the trailer for $13,000, and they were sold for $129,900. When the effect of the $14,645.60 legal fees loan is extracted from the $25,284 mortgage valuation, the value of the gross equity becomes $129,900 minus [$10,634 (mortgage minus legal fees loan) + $13,077 (personal loan) + $458 (legal fees on sale)], equalling $105,731. The notional net appreciation during the relationship was about $40,000, or $20,000 each. Taking into account the effect of the legal fees loan whose cost the appellant was still carrying, the notional apportionment of the gross equity would have been about $35,000 (plus $63,000 in equity and $3,000 on account of the money paid for work on Gimse Road) to the appellant and $5,000 to the respondent. That apportionment would have recognized the respondent's total contribution to Gimse Road, whether by way of labour and services to its development or indirectly by underpayment for his services to the appellant's company. Had the parties separated in May 2001, the respondent would have been entitled to receive $5,000.

122 That notional division of the net appreciation of the value of the Gimse Road property would establish the parties' proportional contributions to the Portage Road property at 93.5% by the appellant and 6.5% by the respondent.

123 That leaves for consideration the proper apportionment of the increase in value of the Portage Road property during the remaining 18 months of the parties' relationship. At paras. 70 and 76, the trial judge explained:

> [70] As I have already noted, Wilson's description of the nature and extent of his contributions, both in terms of domestic services and construction labour, is much exaggerated. However, it remains that he did make some positive contributions to the Gimse Road project and that his efforts did indeed assist Fotsch in creating some equity which she was able to lever so as to acquire Portage Road.
>
> . . . . .
>
> [76] Despite the plaintiff's receipt of the many benefits financed by Fotsch over the seven-year period, I find that the defendant has been enriched by the plaintiff's contributions, albeit minimally. The plaintiff's reduced wage draws enabled her, at least to at certain extent, to free up the money necessary to both purchase and carry the mortgages for the Gimse Road and Portage Road properties. The plaintiff also made positive contributions to the Gimse Road project that assisted Fotsch in creating some equity which she was able to use to acquire Portage Road. In the same vein, I find that the plaintiff has suffered a detriment, although also minimal, by way of his work at a reduced wage, his labour toward the Gimse Road property, and his initial contributions to the relationship in terms of the use of his Bobcat, trailer, and truck.

124 The question is what additional value the respondent created in the Portage Road property by his "work at a reduced" wage for the appellant's company between May 2001 and the separation in September 2002, after which time he worked on the two contracts he had misappropriated, keeping the entire proceeds for himself while the respondent paid the expenses attributable to those contracts until December. The trial judge called this contribution "minimal" and incapable of precise valuation. Minimal usually means insufficiently significant to require restitution. Nevertheless, she found this contribution to require restitution. Having found no other contribution to the Portage Road property and much done to the detriment of the appellant's equity, it behoved the trial judge to explain how she was quantifying that contribution in her apportionment analysis.

125 Between May 2001 and September 2002, the appellant's monthly net income from Valley Janitorial averaged about $1,000. The most generous estimate of the respondent's contribution by way of reduced wage to the appellant's capacity to make mortgage payments would be $400 monthly for 16 months or $6,400. The mortgage payments would have totalled at least $19,000. While the payments preserved the appellant's ownership of the Portage Road property, they did not increase her equity. If the entire $400 were treated as a notional contribution to the value survived and added to the $5,000 he would have notionally contributed following the sale of Gimse Road in May 2001, the monetary value of his contribution to the value survived in Portage Road as at the separation would total $11,400. On the same basis, the appellant's contribution would total $84,600. In the circumstances of this case, that assessment would fix his maximum possible share at 11.9%. Clearly, the trial judge erred in assessing his proportionate contribution at 20%.

126 The appellant asks this Court to take into account an allowance of "at least" $25,200 for room and board received during the relationship in quantifying the parties' proportionate contributions to the value survived. During the trial, at the trial judge's invitation, respondent's counsel estimated that to be the value of the room and board the respondent received during the relationship, about $300.00 monthly. At trial, he acknowledged that amount would be an appropriate deduction from any award, presumably on the basis of the comments about the trial judge's quantification of a value received award in *Peter* by McLachlin J. at 1000-1001 and Cory J. at 1025. On appeal, he took the position the trial judge had factored that allowance into her assessment of the respondent's contribution to the Portage Road property.

127 However, the trial judge rejected the value received approach in favour of a value survived approach based on her reading of Justice Cory's reasons in *Peter*, as discussed in *Pegler v. Avio*, 2008 BCSC 128 (B.C. S.C.). While I consider she erred in determining the appropriate proportion on her findings of fact, as I indicated earlier, I see no error in her choice of approach to quantification of the remedy.

128 In the circumstances, the most the evidence and the trial judge's findings of fact with regard to the unjust enrichment could support is an award of 7.5%. Such an award would generously recognize the respondent's contributions to the value survived in the Portage Road property, while also acknowledging the parties' legitimate expectations, as the trial judge described them in her juristic reason analysis at paras. 78-80:

[78] Was there any juristic reason for such deprivation? In determining whether there is an absence of juristic reason for an enrichment, the court will consider whether the enrichment is "unjust", whether the expectation to share in the property is legitimate, and whether there is a contractual, statutory or other legal obligation for the enrichment: *Massincaud v. Logie*, 2005 BCSC 1665at para. 48, 144 A.C.W.S. (3d) 683.

[79] Fotsch insisted Wilson was never more than her "boyfriend" and that there was no plan for any long-term relationship. She said that the relationship could not be considered a marriage since there was no sharing of any expenses.

[80] While I find that the defendant did indeed carry the vast majority of the financial load, this alone does not negate the fact the parties lived in a "marriage-like" relationship for 7 $^{1}/_{2}$ years. That said, while the relationship featured some of the indicia of marriage, (such as her naming him as a beneficiary on her health care insurance plan; his liberal access to her ATM and Visa cards; the joint assumption of the management of the household; and sharing of family holidays), I find, as Wilson well realized, that Fotsch clearly drew a line concerning the limits of the relationship. She deliberately chose not to name him as a beneficiary of her estate or any School District life insurance plan, instead naming her eldest daughter as beneficiary. None of the vehicles were registered in Wilson's name or the parties' joint names. None of the properties were ever registered in joint names. None of the bank accounts were in their joint names. For all intents and purposes, while Wilson had generous access to the accounts, albeit subject to an expectation of current reporting for accounting purposes, he never had any control over the parties' finances. I am satisfied that there was no juristic reason for the defendant's enrichment, and accordingly find that the plaintiff has proved the necessary elements of unjust enrichment.

[Emphasis added.]

129 While the appellant was generous with her income and understood that, given the nature of their relationship, the respondent would require some support to become independent as he had during the seven years they lived together, she drew the line at her property and the respondent knew that. She did so to protect her children. The parties chose not to marry. The appellant defined herself throughout the relationship as a single parent. They incurred no joint debts. When she made the respondent's mortgage payments and paid his legal fees, she required repayment. The length of the relationship was in the low medium range for a couple in their late thirties and forties. On these findings, the parties' relationship cannot be characterized as a "joint venture" or "family enterprise" as McLachlin J. characterized the long term relationships in *Pettkus* and *Peter*, at 1001 of the latter. It was a relationship better characterized as a loving and supportive medium-term partnership between two people who sought to give primacy to their own personal and economic interests throughout. In the appellant's case, her personal interests included the well-being of her children, in the future as well as the present.

130 An award of 7.5% would accord more appropriately with the arrangement the parties made early in their relationship and with which both lived, without serious complaint, throughout their relationship. They agreed he would receive $600 to $800 monthly for his work with Valley Janitorial, look for another job to supplement his income, share the household duties, and contribute to the household expenses. In fact he did not find another job or contribute significantly to the household expenses. While his T4 returns showed a monthly income from Valley Janitorial of $600, his drawings averaged $765 monthly. While the appellant did not seek interest on the legal fees loan taken out for the respondent's benefit during the relationship, interest on the proceeds of that loan was included in the mortgage payments she made.

131 If the trial judge's valuation of the equity to be apportioned is adjusted by adding back the portion of the mortgage debt attributable to the legal fees loan, the equity to be divided is $510,107, of which $38,260 is attributable to the unjust enrichment.

132 It is not disputed that the legal fees loan ($14,650) and the value of the carpet cleaner at $2,300 should be deducted from the award, the former as a legal debt and the latter as an equitable set-off. Because the trial judge's valuation of the equity to be apportioned took into account the mortgage payments made since December 2002, I would not add an amount for interest with regard to the legal fees loan. However, the appellant is entitled to set off interest on $2,300 at the Registrar's rate from 25 October 2006, the date by which Master Bishop ordered him to return the carpet cleaner, to the date of trial.

133 The appellant asks this Court to deduct at least $25,200 from the award for household expenses. On the analysis I set out earlier in these reasons at paras. 86-87, a set-off for household expenses is not warranted. To the extent the respondent's failure to contribute to household expenses is relevant, they, along with the interest payments she made on the legal fees loan, are taken into account in determining the respondent's contribution to the appellant's capacity to make the mortgage payments on the Portage Road property.

134 The appellant also asks this Court, as she did the trial court, to set off, if not the gross income in the amount of $43,000.00 she would have received had the respondent not misappropriated the two cleaning contracts, then the $24,000 he did receive. The respondent acknowledges a net profit from the contracts of $14,000. While the figures are not readily reconcilable, that seems a reasonable amount to set off against the respondent's award. By his misappropriation of the contracts, he deprived the appellant of an income stream that was rightfully hers. Disgorgement of his profit after an allowance for the work he performed is a reasonable set-off. In these circumstances, I would set off that amount from the award.

135 It follows I would allow the appeal, set aside the order of the trial judge and substitute an award of $7,310 less interest on $2,300 from 25 October 2006 to 1 May 2008, the date as of which the trial judge made her award and on which she released her reasons for judgment.

136 The appellant has been successful in very substantially varying the order of the trial judge and in my view should receive 90% of her costs of this appeal.

***Bennett J.A.*:**

I agree.

***Chiasson J.A.*:**

Introduction

137 I have had the privilege of reading a draft of the reasons for judgment of Madam Justice Huddart, in which she provides an extensive review of the law of unjust enrichment. I agree with much of her analysis, but do not consider it necessary for the disposition of this appeal.

138 I also do not agree that the appellant was unjustly enriched with respect to the so-called underpayment of wages. With respect to the modest contribution the respondent made to the Gimse property, it is my view that, after adjusting for the appellant's set-off claims, the respondent is not entitled to compensation from the appellant.

139 In the result, I would allow the appeal and dismiss the respondent's action.

Discussion

140 I agree with my colleague that reciprocal benefits should form no part of the benefit, detriment analysis and should be considered only at the juristic reason or quantification stages. I also agree that in this case, household expenses should not be taken into account, but I would not foreclose the possibility that in some cases it may be appropriate to do so (*Blake v. Wells Estate*, 2007 BCCA 617 (B.C. C.A.)).

141 I part company with my colleague at the juristic reason stage of the analysis, although I also question the trial judge's conclusion the respondent suffered detriment as a result of the reduced wages.

142 In this case, the trial judge found that the respondent minimally had enriched the appellant by being paid less than a market wage and by his work on the Gimse property. The corollary of this was the conclusion that the respondent thereby minimally suffered detriment. I shall address the work on the Gimse property in the context of remedy and I shall return to comment on detriment as it relates to the wages, but in my view there was a juristic reason for the wage enrichment.

143 A benefit or enrichment that derives from a contract is not unjust. The contract is a juristic reason for the benefit. Employment for wages is a contract. In a family relationship, the contractual arrangements may reflect that context and lead to the conclusion that notwithstanding the contractually based enrichment, the contract does not provide a juristic reason for the enrichment and it is unjust. In this case, there was no such analysis and no such finding of fact.

144 In the evidence the respondent's remuneration is referred to as "contract wages". There is no suggestion in the judge's reasons the respondent's arrangement with the company was anything other than contractual. The judge accepted the appellant's evidence that the appellant offered the respondent "employment" and describes the payments to him as "paycheques" or "salary" (paras. 21-23).

145 The respondent was paid what he asked to be paid. The judge found that the appellant set the amount "to avoid any liability to file a tax return" (para. 20). She also found that the respondent "neither discussed nor suggested to [the appellant] that he be paid any greater salary since he was aware of the many benefits beyond his monthly salary which [the appellant] was financing on his behalf" (para. 23).

146 These benefits were placed into the employment relationship by the judge in para. 59: "while [the respondent] was not paid a regular hourly wage in compensation for all his labour, unlike a regular employee he was the recipient of a number of other benefits apart from wages". I shall have more to say about this in the context of detriment, but refer to the judge's comment in this context as illustrative of her findings of fact that support the contractual foundation for the so-called enrichment as a result of the respondent's reduced wages.

147 In my view, any such enrichment flowed from the contract of employment and payment of the wages in an amount requested by the respondent. There is no finding of fact to support the suggestion that the employment contract was tempered by the family-like relationship between the parties. To the contrary, the judge found that the appellant "clearly drew a line concerning the limits of the relationship", that the respondent knew this and that "he never had any control over the parties' finances" (para. 80).

148 There is nothing to suggest the employment arrangement was designed in any way to benefit the appellant other than by the provision of services. The respondent stipulated what he was to be paid to suit his objectives. The judge found that the appellant considered she was assisting the respondent by employing him "while he sorted out his legal issues and ultimately sought some permanent employment" (para. 20).

149 I also consider the reduced wages in the context of the reasonable expectation of the parties.

150 My colleague notes in para. 22 that a defendant may address the absence of an established category of juristic reason, "by establishing 'another reason to deny recovery'". This includes the reasonable expectations of the parties. I agree with my colleague's observation in para. 9 that "mutual enrichments should be considered at the juristic reason stage for the limited purpose of assessing the parties' legitimate expectations; otherwise, they should be considered at the remedy stage".

151 There is no finding of fact that the parties had an expectation that the respondent would be entitled to compensation from the appellant as a result of being paid reduced wages. As noted, he was paid the amount he requested. He never suggested he should get more. He well knew he was the recipient of additional benefits. These benefits were above and beyond what another employee would receive. The appellant considered she was assisting by employing him.

152 The business was that of the appellant. As noted, the judge found she drew a line in the relationship concerning her financial affairs. The respondent's lack of any interest in the business is evidenced by the fact he felt obliged secretly to establish a competing company and to steal contracts from the appellant.

153 In my view, the judge's findings of fact, which are supported by the evidence, establish that the appellant was entitled to retain any benefit she derived from the reduced wages because neither party had an expectation that the respondent would be compensated further as a result of the payment to him of the wage he requested.

154 As noted, I also question whether the receipt of reduced wages was a detriment to the respondent. Although Cory J. stated in *Peter v. Beblow* [1993 CarswellBC 44 (S.C.C.)] that detriment likely invariably follows benefit, I do not take that to be absolutely the case.

155 In this case, the amount of the reduced wage was requested by the respondent. He obviously felt that receiving a reduced wage and not having to file a tax return was of more benefit to him than receiving a higher wage and being required to do so. Where is the detriment in that?

156 In addition, the judge's conclusion the respondent recognized he received benefits additional to those available to other employees suggests no detriment. This is not a matter of inserting reciprocal benefits into the benefit, detriment analysis, but of determining the substance of the respondent's remuneration.

157 I conclude the appellant was not enriched unjustly by the respondent's receipt of reduced wages.

158 The judge described the benefit of the lower wages and the respondent's work on the Gimse property as minimal. On the basis that the lower wages were not an unjust enrichment, the value of the respondent's contribution to the Gimse property clearly approaches *de minimus*.

159 My colleague has undertaken a thorough analysis of the value of the respondent's contribution as a percentage of the values of the properties. She concludes the respondent is entitled to 7.5% of the value of the Portage Road Property. After appropriate deductions, the trial judgment is varied to "$7,310 less interest on $2,300 from 25 October 2006 to 1 May 2008, the date as of which the trial judge made her award and on which she released her reasons for judgment".

160 If half of the unjust enrichment figure arrived at by my colleague were attributable to the minimal work on the Gimse property, an attribution I consider to be generous, the value of the unjust enrichment would be $19,130. Deducting the value of the legal fees loan, stolen equipment and stolen contracts eliminates any right of recovery the respondent might have.

Conclusion

161 In my view, the appellant was not enriched unjustly by the payment of reduced wages to the respondent.

162 The minimal contribution of the respondent to the Gimse property might better have been recognized as value received, but I am content to proceed on the basis of value survived. On either approach, his minimal contribution is off-set by the value of the lawyers' fees loan, stolen equipment and stolen contracts which the appellant was entitled to recover.

163 As a general observation, whether one focuses on the juristic reason or quantum stages of the analysis, it is difficult to see how a claimant who is found to have gained more from a relationship than he contributed to it is entitled to an equitable remedy based on unjust enrichment. In this case, I see no findings of fact that would support such a result.

164 I would allow this appeal and dismiss the respondent's action.

Appeal allowed.

7

2002 CarswellOnt 218
Ontario Court of Appeal

Pinnacle Bank, N.A. v. 1317414 Ontario Inc.

2002 CarswellOnt 218, [2002] O.J. No. 281, 111 A.C.W.S. (3d) 169

Pinnacle Bank, N.A. (Plaintiff / Respondent) and 1317414 Ontario Inc., cob as Jay-B Conversions and William Gibbs (Defendants / Appellants)

Carthy J.A., Weiler J.A. and Austin J.A.

Heard: January 8, 2002
Judgment: January 29, 2002
Docket: CA C35982

Counsel: *Randolph D. Mills*, for Appellants
Christine Tabbert, for Respondent

***Austin J.A.*:**

1 The defendants appeal from the decision of Kerr J. granting summary judgment with costs against all defendants.

2 The facts are not complex. The plaintiff ("Pinnacle") is a bank in Georgia, U.S.A. One of Pinnacle's clients is Kustom Marketing Inc. ("Kustom"). Kustom did business with 1317414 Ontario Inc. carrying on business as Jay-B Conversions ("Jay-B"). William Gibbs ("Gibbs") is a principal of Jay-B.

3 The nature of the business was that Kustom bought goods and services from Jay-B and paid for such goods and services by having Pinnacle wire funds from Kustom's account at Pinnacle to Jay-B's account at the Royal Bank of Canada ("RBC").

4 On the occasion in question Kustom directed Pinnacle to transfer $60,101. U.S. to Jay-B's account at RBC. Pinnacle carried out this direction on December 24, 1999. As a result of its own purely clerical error Pinnacle wired a further sum in precisely the same amount on December 27, 1999 to Jay-B's account at RBC. About two weeks later Pinnacle discovered its error and requested Gibbs to return the second payment. It was not returned. Jay-B's position is that Kustom owed the additional $60,101. U.S. to Jay-B in any event and that the money has been used to pay the business that supplied the goods which Jay-B sold to Kustom.

5 The motion judge found that the state of accounts as between Kustom and Jay-B was in issue but that that fact did not provide the defendants with any defence. He ordered the defendants to repay the second payment of $60,101. U.S. to the plaintiff together with costs and pre-judgment interest.

6 The defendants ask for the dismissal of the action as against all defendants, in the alternative for dismissal as against Gibbs and in the further alternative that the summary judgment be set aside and the action proceed to trial.

7 The motion judge rested his decision in favour of the plaintiff on two different bases. The first was the decision of Dysart J. in *Royal Bank v. R.*, [1931] 2 D.L.R. 685 (Man. K.B.). The second was the decision of the Supreme Court of Canada in *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.). As the latter is binding upon this court and in the circumstances, of clearer application, it should be dealt with first.

8 Mobil held oil and gas leases pursuant to which it paid royalties to the municipality in which the lands were located. In error, Mobil continued to pay royalties after surrendering the leases. When it discovered its error, Mobil demanded repayment.

The municipality refused the claim and Mobil sued. The trial judge dismissed the action basing his decision on the fact that an officer of Mobil was aware of the surrender of the leases. The Alberta Court of Appeal allowed Mobil's claim and appeal upon the ground that the monies were paid under mistake of fact. The Supreme Court of Canada dismissed the appeal upon the ground that:

> . . . where money is paid on the supposition that a specific fact is true which would entitle the other to receive it, which fact is untrue and the money would not have been paid if the fact had been known to be untrue, it can be recovered "and it is against conscience to retain it." (p. 159)

9 That authority is sufficient to dispose of this appeal.

10 *Royal Bank v. R.* is a somewhat more complicated case but in it Dysart J. purported to set out the law with respect to the right to recover money paid under mistake of fact in the form of four principles as follows:

> First: that the mistake is honest. There must be on the part of the person paying the money the genuine *bona fide* belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to have learned. His last laches or negligence will not of themselves affect his belief. Knowledge will not be imputed to him, however ample may be the means of knowledge which he has on hand, however readily accessible those means may be, they do not constitute knowledge; and knowledge will not be imputed to him or inferred against him, unless he wilfully abstains from enquiry. [Authorities omitted.]
>
> The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it : 21 Hals., p. 30; *Skyring v. Greenwood*, 4 B. & C. 281, 107 E.R. 1064; *Chalmers v. Miller*, 32 L.J.C.P. 30; *Pollard v. Bank of England*, L.R. 6 Q.B. 623; *Thomson v. Clydesdale Bank, Ltd.*,[1893] A.C.282.
>
> The third condition is that the facts, as they are believed to be, impose an obligation to make the payment. This obligation must be legal or equitable or moral, as will appear from a reading of the cases already referred to. It is not enough that the payment is desirable or advantageous, the compulsion must at least be practical. [Authority omitted.]
>
> The fourth condition to recover is that the receiver of the money has no legal or equitable or moral right to retain the money as against the payer. This proposition is not the exact converse of the third condition. The money may be owing to the receiver from a third person who has induced the payment,, but the existence of such a debt is not enough to defeat recovery : see *John v. Dodwell & Co.* and *Reckitt v. Barnet, Pembroke & Slater Ltd., supra*. Thus, the mere volunteering cannot defeat recovery : *Banque Belge v. Hambrouck*, [1921] 1 K.B. 321. As was stated in *O'Grady v. Toronto* (1916), 31 D.L.R. 632, 37 O.L.R. 139, the money ought not to be retained if it cannot be retained honestly and conscionably.

11 Counsel in the instant case, both here and below, were agreed that conditions one and three had been met. Counsel for the appellants argued that conditions two and four had not been met. The motion judge found that all four conditions had been met.

12 As to condition four, the appellants rely upon the evidence of Gibbs that Kustom owed even more than the two payments of $60,101. U.S. and on the finding of the motion judge that there was in fact a difference of opinion as to what debt was owing by Kustom to Jay-B.

13 The motion judge went on to find that that difference of opinion did not afford the defendants any defence to this action. He did not say why but I agree with his conclusion because Kustom is not a party to these proceedings. The fourth condition requires that the receiver of the money has no legal, equitable or moral right to retain the money as against the payer. The payer is Pinnacle, not Kustom. To constitute a defence, Jay-B must have some claim against Pinnacle and none is disclosed on the evidence. Accordingly condition four is met.

14 This leaves for consideration the second condition which Dysart J. set out as follows:

The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it.

15 In finding that the second principle had been met, Kerr J. relied on *Royal Bank v. R.*, but appears in my view to have mixed the second and third principles. His reasons in this regard read as follows:

With respect to the second condition, counsel relies on the *Royal Bank* decision, above-cited, which she submits closely resembles the factual situation presented in the case at bar, where in that case, the provincial authorities who were found liable had no previous knowledge of the intended action of Mr. Rheaume, yet they subsequently received and retained the money as the fruit of his actions, and when they learned the facts, they refused to refund the money.

It was said there that by receipt of the money, and that refusal to return it, the province adopted Mr. Rheaume's action in issuing the cheque in the name of, and as attorney for, the Manitoba Tax Commission, and by implication, adopted his action in making the said deposit.

With respect to the second condition, it is said the mistake must be as between the person paying the money and the person receiving the money; that is to say, the receiver must in some way be a party to that mistake, either by inducing it, or is responsible for it, or connected with it.

Counsel for the defendant submits that the receiver must in some way be a party to the mistake, and that in this case, the defendant was not a party to the mistake, but that he must be party to the mistake before he can be liable, either by inducing the mistake, or as actually responsible for the mistake itself, or having a connection with it.

On the subject of the third principle, the *Law of Contract* at page 62 makes the following comment upon which the defendant relies:

> "In much the same way, it appears to have been suggested that there can be no recovery on the basis of money had and received, in the older terminology, or restitution in more modern language. unless some equivalent 'privity' exists between the parties."

It is submitted by defence counsel that no such privity exists here.

But Fridman, at page 65 of the same volume states as follows:

> "The cases in which privity appears to have been a possible issue concern payments made by or to banks. This is hardly surprising since in other instances, money will have gone in the form of cash directly from the mistaken payer to the disentitled payee. In 'bank' cases, either the payer of the money is a bank acting for or on behalf of its customers, or the payee is the bank, in which event the bank may be receiving the money for its own purposes or use. It seems clear that courts will regard the relationship between a bank acting as agents for the third party, and payee as being sufficiently direct to give rise to the necessary privity. It would appear that the precise nature of the mistake is of no significance as long as the party paying made a mistake in regard to the payment in question.

Now, I gather from that, and it is my understanding of that, that on that basis, there is privity between the bank, the defendant, and Custom (*sic*) Marketing Inc. sufficient to form a basis for the fulfilment of condition two above-cited.

16 The references to the "*Law of Contract*" at pages 62 and 65 is to *Restitution* by G.H.L. Fridman, 2d Edition 1992 (Toronto; Carswell). These references deal with a related subject, namely, "privity" as between payer and payee. With respect, privity is not relevant to the instant case. Pinnacle did not act on behalf of Kustom in making the second payment and the fact that the second payment was received by RBC on behalf of Jay-B is irrelevant. For all practical purposes, the two payments may as well have been received directly by Jay-B.

17 The authorities cited by Dysart J. for his second principle are as follows:

> 21 Hals., p. 30; *Skyring v. Greenwood*, 4 B. & C. 281, 107 E.R. 1064; *Chalmers v. Miller*, 32 L.J.C.P. 30; *Pollard v. Bank of England*, L.R. 6 Q.B. 623; *Thomson v. Clydesdale Bank, Ltd.*,[1893] A.C.282.

None of those authorities can be related directly to the facts of the instant case. The reference to the Halsbury is to the law as it stood in 1912. Halsbury today deals with the recovery of money paid under a mistake as "part of the law known as quasi-contract, which has now developed into the law of restitution, the central principle of which is the reversal of unjust enrichment". 32 Halsbury's Laws of England, 4th Edition re-issue, *Mistake* paragraph 69 (Butterworths; London 1999). That law provides no basis whatever for the retention of the second payment by the defendants.

18 In these circumstances, Jay-B must be found to be connected with and a party to the mistake of Pinnacle by virtue of Jay-B having received the second payment, thus fulfilling Dysart J.'s second condition.

19 Accordingly, the appeal must be dismissed with respect to 1317414 Ontario Inc., carrying on business as Jay-B Conversions.

20 The motion judge gave judgment for the plaintiff without distinguishing as amongst the defendants. Counsel for Pinnacle did not respond to the appellant's argument with respect to Gibbs personally. No basis has been shown upon which to find personal as opposed to corporate liability. In the result, the appeal as against Gibbs is allowed and the action as against him is dismissed without costs either here or below. The appeal as against 1317414 Ontario Inc., carrying on business as Jay-B Conversions, is dismissed with costs.

***Carthy J.A.*:**

I agree.

***Weiler J.A.*:**

I agree.

Order accordingly.

8

1931 CarswellMan 20
Manitoba King's Bench

1931 CarswellMan 20, [1931] 1 W.W.R. 709, [1931] 2 D.L.R. 685

Royal Bank of Canada v. Regem

Dysart, J

Judgment: March 23, 1931

Counsel: *W. P. Fillmore, K.C.*, for petitioner.
H. A. Bergman, K.C., and *John Allen, K.C.*, Deputy Attorney-General, for the Crown.

***Dysart, J.*:**

1 This is the trial of a petition of right filed by the Royal Bank of Canada praying His Majesty the King to refund the sum of $1,871 which the petitioner paid to the province of Manitoba under a mistake of fact.

2 In order to understand how the petitioner made this mistake, it will be necessary to set out the circumstances in which the mistake occurred. For some years prior to July 15, 1926, the petitioner maintained and operated a branch at the village of Ste. Rose du Lac, in the municipality of Ste. Rose in the province of Manitoba, and there carried upon its books one account for the village, two for the municipality and three for the province. Two of the provincial accounts had, with the authority of the province, been opened by the bank for the receipt and remittance of certain provincial taxes — "Unoccupied Land Tax" and "Drainage Tax." All deposits into these two accounts had been made by one Z. H. Rheaume, who, as secretary-treasurer of the municipality, collected these taxes or became custodian of them; and all withdrawals from these accounts were made by Rheaume by cheque payable to the municipal commissioner and to the provincial treasurer respectively. With the third provincial account Rheaume had nothing whatever to do. That was an account which the petitioner itself had opened under the heading of "Manitoba Tax Commission," in connection with certain other provincial taxes which the petitioner was authorized to collect from rate-payers and remit to the province. Until the transaction now to be considered, all deposits into this account had been made by the individual taxpayers themselves, and all withdrawals from it had been made by the petitioner by cheque or draft payable to the said commission. The province had no knowledge — certainly no direct knowledge — of the existence of this account. In addition to all his banking activities, Mr. Rheaume was empowered by the province to sell automobile licences for the province and to collect and remit the revenues therefrom; and this additional business he carried on, but kept no separate bank account for the proceeds. Holding so many positions of trust and responsibility, and being very prominent in the life of the village, Rheaume was well known to the petitioner's local manager, and was highly respected and trusted by him.

3 On the morning of June 30, 1926, Rheaume came into the bank and asked the local manager how best to remit money to the provincial Government at Winnipeg, and was advised to do so by way of certified cheque. He then said he had with him several cheques, all payable to the municipality, aggregating nearly $4,000, but that $1,871 of this sum belonged to the province as taxes, which had been paid into the municipality in respect of lands lying outside thereof, and which had to be remitted to the province forthwith. After some further discussion on the point, and without examining the cheques, the manager told Rheaume that if he would deposit the province's share of these cheques into the "Manitoba Tax Commission" account, and would draw a cheque against the account for the amount deposited, and sign it on behalf of the Manitoba Tax Commission, the cheque would be certified by the bank.

4 The suggested course was followed. Rheaume made out two deposit slips, one for $1,871 to the credit of the Manitoba Tax Commission account, and the other for the balance of the cheques, $1,974.82, to the credit of the municipality, and handed

both slips, together with all the cheques — six in number — to the receiving teller, who accepted them for deposit, made the necessary entries, and passed the deposit slips on to the ledger keeper for entry in the appropriate accounts. Rheaume then drew a cheque for $1,871, payable to the Manitoba Tax Commission, and signed it "Z. H. Rheaume, for Manitoba Tax Commission," and presented it for certification. The cheque was duly "certified" by the ledger keeper. Rheaume then left the premises with the cheque.

5 On the same day he sent the cheque by mail to "W. McKnight, c/o Manitoba Tax Commission, Parliament Bldgs., Winnipeg," along with a "Report" of his sales of automobile licences. Though not expressly so stated, the cheque was intended to cover the amount of said sales as so reported. The cheque was duly received by the said commission, and having been stamped as "Revenue of the Province," was, by the said commission as payee thereof, endorsed "for deposit to the credit of the Provincial Treasurer;" was later deposited in a bank; was "cleared" on July 12; and was paid on July 14. The proceeds of the cheque were applied, as they were intended by Rheaume to be applied, upon Rheaume's liability to the province in respect of his sales of automobile licences.

6 The six cheques Rheaume had so deposited with the petitioner were at the close of banking hours, on the day of their deposit, submitted along with other cheques, to the local manager, and were by him sent to Winnipeg to be "cleared." In due time they also were paid.

7 Shortly after these transactions Rheaume died, and a subsequent audit of his municipal accounts disclosed extensive defalcations and misappropriations. The whole of the $1,871 deposited was found to belong to the said municipality, and the petitioner has since been compelled under a judgment of this Court to restore the money to its rightful owner: *Ste. Rose R.M. v. Royal Bank of Canada*, [1928] 1 W.W.R. 663. Protracted efforts had been made by the petitioner to have the province refund this money, but these efforts have met with repeated refusal.

8 It is well settled law that in proper cases money that has been paid under a mistake of fact may be recovered: *Kelly v. Solari* (1841) 9 M. & W. 54, 11 L.J. Ex. 10; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49, 72 L.J.P.C. 1; *Hood of Avalon (Lady) v. Mackinnon*, [1909] 1 Ch. 476, 78 L.J. Ch. 300; *John v. Dodwell & Co.*, [1918] A.C. 563, 87 L.J.P.C. 92; *Holt v. Markham*, [1923] 1 K.B. 504, 92 L.J.K.B. 406; *Jones & Co. v. Waring & Gillow*, [1926] A.C. 670, 95 L.J.K.B. 913; *Reckitt v. Barnett*, [1929] A.C. 176, 98 L.J.K.B. 136.

9 The proper cases in which the above-stated general principle applies are those in which, as I understand the law, the following four conditions are to be found:

10 First, that the mistake is honest. There must be on the part of the person paying the money the genuine *bona-fide* belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to have learned. His laches or negligence will not of themselves affect his belief. Knowledge will not be imputed to him; however ample may be the means of knowledge which he has on hand, or however readily accessible those means may be, they do not constitute knowledge; and knowledge will not be imputed to him or inferred against him, unless he wilfully abstains from enquiry. Lord Blackburn in *Brownlie v. Campbell* (1880) 5 App. Cas. 925, at 952, quoting from Tindal, C.J. [in *Bell v. Gardiner* (1842) 4 Man. & G. 11, 134 E.R. 5] says:

> We can, in fact, regard the possession of the means of knowledge as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances; but there is no conclusive rule of law that, because a party has the means of knowledge, he has knowledge itself.

11 And Williams, J. in *Townsend v. Cowday* (1860) 8 C.B. (N.S.) 477, 29 L.J.C.P. 300, 141 E.R. 1251, states the rule in this language:

> Since *Kelly v. Solari* [*supra*] it has been established that it is not enough that the party had the means of learning the truth, if he had chosen to make the enquiry. The only limitation now is that he must not waive *all enquiry*.

12 The same proposition is to be found in the cases already cited, as well as in *Dominion Bank v. Union Bank of Canada* (1908) 40 S.C.R. 366.

13 The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it: 21 *Halsbury*, p. 30; *Skyring v. Greenwood* (1825) 4 B. & C. 281, 1 Car. & P. 517; *Chambers v. Miller* (1862) 13 C.B. (N.S.) 125, 32 L.J.C.P. 30; *Pollard v. Bank of England* (1871) L.R. 6 Q.B. 623, 40 L.J.Q.B. 233; *Thomson v. Clydesdale Bank*, [1893] A.C. 282, 62 L.J.P.C. 91.

14 The third condition is that the facts, as they are believed to be impose an obligation to make the payment: *Aiken v. Short* (1856) 1 H. & N. 210, at 215, 25 L.J. Ex. 321. This obligation must be legal or equitable or moral, as will appear from a reading of the cases already referred to. It is not enough that the payment is desirable or advantageous, the compulsion must at least be practical: *Can. Mtge. Assn. v. Regina City*, [1917] 1 W.W.R. 1130, 10 Sask. L.R. 30, 33 D.L.R. 43; *Confederation Life Assn. v. Merchants Bank of Canada* (1894) 10 Man. R. 67.

15 The fourth condition to recovery is that the receiver of the money has no legal or equitable or moral right to retain the money as against the payer. This proposition is not the exact converse of the third condition. The money may be owing to the receiver from a third person who has induced the payment, but the existence of such a debt is not enough to defeat recovery: See *John v. Dodwell & Co.* (*supra*) and *Reckitt v. Barnett* (*supra*). Thus, the mere volunteering cannot defeat recovery: *Banque Belge Pour L'Etranger v. Hambrouck*, [1921] 1 K.B. 321, 90 L.J.K.B. 322. As was stated in *O'Grady v. Toronto City* (1916) 37 O.L.R. 129, the money ought not to be retained if it cannot be retained honestly and conscionably.

16 The above four conditions are based upon the cases cited for them, as well as cases cited in support of the general proposition, and they sum up, in my opinion, the principles which should govern this case. Applying them therefore to the case in hand, I find that all four conditions are satisfied.

17 The mistake made by the petitioner's local manager was made honestly and in good faith. Neither he nor the petitioner stood to make anything out of the transaction, which was put through merely to oblige Rheaume in his capacity as trustee of provincial moneys. It was a case of petitioner being disarmed by over-confidence in Rheaume. It is true that the course suggested by the manager and followed was irregular, considered from a banking point of view, but there was a certain plausibility about the representations. Rheaume had acted with the bank in so many different capacities for collecting and remitting so many different kinds of taxes that it is not surprising that the manager accepted his word in respect of the taxes in question. Moreover, Rheaume's responsibilities had secured for him a certain amount of leeway in dealing with the accounts to which he had access, and never before did such indulgence lead to misfortune so far as the petitioner knew or was concerned with. On the other hand, the petitioner, in complying with Rheaume's request, accepted two deposit slips without any particulars upon them. None of the six cheques were noted upon either of the deposit slips, and no combination of these cheques could aggregate the amount of either deposit. At least one of the cheques had to be divided between the two accounts. This is loose banking practice. The cheques which were offered for deposit demonstrated on their face that Rheaume was misrepresenting the facts. Most of them were months old. One of them, dated April 1, 1926, bore on its face a memorandum to the effect that the cheque was for "Drainage Tax;" another, dated April 13, was likewise noted for "Taxes;" the third, dated May 6, was "To redeem from 1923 tax sale" certain lands therein described; the fourth, dated May 18, was made by the Manitoba Farm Loans; the remaining two, dated April 30 and June 4 respectively, had been issued by the province of Manitoba, the one on "Capital Account" and the other on "General Account" of the province. All six cheques were made payable to the order of the municipality, and were endorsed by means of a rubber stamp with the signature of Rheaume appended thereto as the secretary-treasurer of the municipality. The stamped portion of the endorsement in each case reads:

> The Royal Bank of Canada, deposit to the credit of the Municipality of Ste. Rose.

18 This stamp was the one usually, if not invariably, used by Rheaume when endorsing cheques for deposit in the municipality's accounts. Its restrictive effect is self-evident. Finally, there were no such "taxes" as those which Rheaume represented to be included in these cheques.

19 Some or most of these irregularities and defects were noticed by the receiving teller when he accepted the deposits. But because he had overheard the conversation between Rheaume and the manager, he took it for granted that the whole matter had been arranged to go through as outlined, and so he did not bring the irregularities to the manager's attention. However, the manager himself had an opportunity at the close of banking hours to see the cheques when they were laid upon his desk with other cheques to be despatched to Winnipeg for clearance. As he made no comment upon these cheques then or at any material time thereafter, I infer that in despatching the cheques he did not stop to examine them. On the whole I find that, although the petitioner's officials had ample means of knowledge, they did not in fact learn of the fraud which Rheaume had practised upon them until after the payment was made. Thus the first condition is satisfied.

20 As to the second condition: In the part that Rheaume played he acted either as a stranger to the petitioner, as well as to the province, or as the agent of one or the other of them. There can be no suggestion that either of these parties directly or indirectly authorized the fraud. If, therefore, there was any agency it was because of ratification or adoption of Rheaume's acts; but because he had his own fraudulent ends to attain, it is hardly conceivable that he would disclose the true state of facts to either of the parties. His guilty knowledge therefore is not to be imputed to either of them: See *Smith v. Hunt* (1901) 2 O.L.R. 134, at 137; *MacArthur v. Hastings* (1905) 15 Man. R. 500, at 506, 1 W.L.R. 285.

21 It is idle to suggest that Rheaume could have been the agent of the petitioner, because, while it is true that he got the suggestion from petitioner's manager, and put the deal through on the lines of those suggestions, he himself, by his false representations, had induced the manager to make them, and therefore was responsible for them. The petitioner cannot be forced into the role of principal by such means.

22 On the other hand, while the provincial authorities had no previous knowledge of Rheaume's intended action, they subsequently received and retained the money as the fruit of those actions, and when they learned the facts they refused to refund. By that receipt of the money and that refusal to return it, the province adopted Rheaume's action in issuing the cheque in the name of and as attorney for the Manitoba Tax Commission and by implication, adopted his action in making said deposit: *Millburn v. Wilson* (1901) 31 S.C.R. 481.

23 Ratification relates back to the beginning of the transaction, and has the effect of conferring authority to do it as from the beginning: *Reversion Fund & Insur. Co. v. Maison Cosway Ltd.*, [1913] 1 K.B. 364, 82 L.J.K.B. 512. Ratification or adoption, if extended to any part of the transaction, must be extended to the whole. It must embrace all or none — there is no middle way. Hence, by adopting the proceeds of that cheque, the province adopted the whole of Rheaume's actions in procuring the cheque, and has linked itself with the mistake: *Bowstead on Agency*, 6 ed., p. 46; 2 *Corpus Juris*, pp. 481-4; *Millburn v. Wilson (supra); Mount Hope R.M. v. Findlay*, [1921] 3 W.W.R. 658, 15 Sask. L.R. 40.

24 As to the third condition: The facts, as the petitioner believed them to be, were that the deposited moneys belonged to the province as trust moneys, and had been deposited as such in a trust account for the special purpose of providing funds for this cheque. If those facts had been true, the petitioner would have been bound in every way, legally, equitably and morally, to pay the moneys to the Manitoba Tax Commission.

25 And finally, as to the fourth and last condition: The province received payment of a cheque drawn by the said commission, through Rheaume, payable to itself against an account standing in its own name in the petitioner's branch. What right had it to receive the proceeds of this cheque — its own cheque — unless it had a right to the moneys upon which the cheque was drawn? As stated before, these moneys have since been proven to belong to the municipality. To say that Rheaume owed this sum to the province in respect of automobile licences is, I think, beside the point, and the cases that I have referred to in support of the general proposition and other aspects of this question, will amply support this view.

26 The real reason why the province has refused to return the money is that it has no prospect of collecting the money from any other source. Rheaume has died, apparently insolvent, and nothing can be expected from that quarter. In his capacity as selling agent of automobile licences his integrity had been guaranteed to the province to the extent of $1,000 by a bond issued by the Canadian Surety Co. On October 22, 1926, a claim for $80.75, which the provincial Government had put forward in respect of Rheaume's shortages, was paid under the said bond "in full settlement of all liability" thereunder. Why this form of receipt was given is not explained. It was certainly not induced by the petitioner; and whether or not there was any mistake made which could now be set aside is immaterial, as far as this issue is concerned. The plea of estoppel thus set up by the province must fail, because the change of position which the province has undergone to its prejudice, by executing the release and allowing the two year period to elapse, was not brought about by any representations of the petitioner. In fact it is not shown that the petitioner was in any way, directly or indirectly, aware of, or instrumental in making, that change. Estoppel therefore cannot be recognized: See *Duchess of Kingston's* case, 2 Smith, L. Cas., 13th ed., 644, at p. 785 of notes; *Durrant v. Ecclesiastical Commrs.* (1880) 6 Q.B.D. 234, 50 L.J.Q.B. 30; *Imperial Bank of Canada v. Bank of Hamilton* (*supra*). Moreover, the cheque itself bore upon its face information which ought to have put the province upon its enquiry, and the failure to make such enquiry implies remissness or laches comparable to those attributed to the petitioner. The chief representation which the petitioner made in respect of this cheque was involved in its certification, which meant that there were sufficient funds behind the cheque to pay it: *Gaden v. Newfoundland Savings Bank*, [1899] A.C. 281, at 285, 68 L.J.P.C. 57. But these representations as to funds related to facts which ordinarily would be within the knowledge of the drawer and payee of this cheque.

27 In all the circumstances, and for the reasons given, I think that the petitioner is entitled to recover the money so paid. There will therefore be judgment for the petitioner for $1,871 and costs.

9

1997 CarswellOnt 1489
Supreme Court of Canada

Soulos v. Korkontzilas

1997 CarswellOnt 1489, 1997 CarswellOnt 1490, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 100 O.A.C. 241, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89, 212 N.R. 1, 32 O.R. (3d) 716 (note), 46 C.B.R. (3d) 1, 71 A.C.W.S. (3d) 194, 9 R.P.R. (3d) 1, J.E. 97-1111

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

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

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

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

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

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

I

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

II

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

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

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

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

III

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

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

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

IV

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

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

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

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with

a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

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

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

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

V

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

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

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

19 The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. See Dewar, *supra* , at p. 334. The fiduciary relationship underlies much of the English law of constructive trust. As Waters, *supra*

, at p. 33, writes: "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation". At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. As L. S. Sealy, "Fiduciary Relationships", [1962] *Camb. L.J.* 69, at p. 73, states:

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

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

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

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

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

> ... in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall.

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

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

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

24 M. M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust", (1988), 26 *Alta. L. Rev.* 407, at p. 414, sees unjust enrichment as a useful tool in rationalizing the traditional categories of constructive trust. Nevertheless he opines that it would be a "significant error" to simply ignore the traditional principles of constructive trust. He cites a number of Canadian cases subsequent to *Becker v. Pettkus, supra* , which impose constructive trusts for wrongful acquisition of property, even in the absence of unjust enrichment and correlative deprivation, and concludes that the constructive trust "cannot always be explained by the unjust enrichment model of constructive trust" (p. 416). In sum, the old English law remains part of contemporary Canadian law and guides its development. As La Forest J.A. (as he then was)

states in *White v. Central Trust Co.* (1984), 17 E.T.R. 78 (N.B. C.A.) , at p. 90, cited by Litman, *supra* , the courts "will not venture far onto an uncharted sea when they can administer justice from a safe berth".

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

VI

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

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

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

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

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

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

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

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

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

> Given the situation of [the defendants] when the last payment was received, any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the defendants] to take any benefit from the payment, and it would have seemed contrary to any ordinary notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure of consideration. Of course it is true that insolvency always causes loss and perfect fairness is unattainable. The bank, and other creditors, have their legitimate claims. *It nonetheless seems to me that at the time of its receipt [the defendants] could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred* . [Emphasis added.]

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

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

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

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

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

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

36 The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

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

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

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

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

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

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

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

42 Again, in *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) , a constructive trust was imposed on individuals who knowingly participated in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own

policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Becker v. Pettkus, supra* . Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, *supra* , at pp. 167-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

VII

45 In *Becker v. Pettkus, supra* , this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows ed., *Essays on the Law of Restitution* (1991), I would identify four conditions which generally should be satisfied:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

VIII

46 Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

47 First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

48 Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

49 Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms, supra, per* La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpins the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

51 I come finally to the question of whether there are factors which would make imposition of a constructive trust unjust in this case. In my view, there are none. No third parties would suffer from an order requiring Mr. Korkontzilas to convey the property to Mr. Soulos. Nor would Mr. Korkontzilas be treated unfairly. Mr. Soulos is content to make all necessary financial adjustments, including indemnification for the loss Mr. Korkontszilas has sustained during the years he has held the property.

52 I conclude that a constructive trust should be imposed. I would dismiss the appeal and confirm the order of the Court of Appeal that the appellants convey the property to the respondent, subject to appropriate adjustments. The respondent is entitled to costs throughout.

Sopinka J. **(dissenting) (Iacobucci J. concurring):**

53 I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

Standard of Review and the Exercise of Discretion

54 It is a matter of settled law that appellate courts should generally not interfere with orders exercised within a trial judge's discretion. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: see *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.) . As acknowledged by the majority in the Court of Appeal ((1995), 25 O.R. (3d) 257 (Ont. C.A.) , at p. 259), the decision to order a constructive trust is a matter of discretion. In *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) , the majority held that the order of a constructive trust in response to a breach of a fiduciary duty would depend on all the circumstances. La Forest J. stated at p. 674:

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. ... [A constructive trust] is but one remedy, and will only be imposed in appropriate circumstances.

The discretionary approach to constructive trusts is also consistent with the approach to equitable remedies generally: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.) , at p. 585.

55 Given that ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy. In my view, the trial judge committed no such error.

56 The majority of the Court of Appeal apparently found that the trial judge erred in failing to consider the moral blameworthiness of the appellants' actions. Similarly, McLachlin J. would hold that a constructive trust was appropriate in the present case simply because of considerations of "good conscience". In my view, the trial judge considered the moral quality of the appellants' actions and thus there is no room for appellate intervention on this ground. He stated ((1991), 4 O.R. (3d) 51 (Ont. Gen. Div.) , at p. 69) that, while "[n]o doubt the maintenance of commercial morality is an element of public policy and a legitimate concern of the court", morality should generally not invite the intervention of the court, except where it is required in aid of enforcing some legal right. Put another way, in my view the trial judge was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which statement of the law is in my view correct.

57 The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plaintiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have been ordered), the plaintiff could have sought exemplary damages — his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

58 The trial judge put significant emphasis on the absence of pecuniary gains in concluding that he would not order a constructive trust. For the reasons which I set out in detail below, I am of the opinion that the trial judge was correct in this regard. On the other hand, the majority of the Court of Appeal and McLachlin J. hold that the trial judge erred in improperly appreciating the deterrence role of a constructive trust in the present case. In my view, consideration of deterrence fails to disclose any error in principle on the part of the trial judge. Deterrence, like the morality of the acts in question, may be relevant to the exercise of discretion with respect to the remedy for a breach of a fiduciary duty (see, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.) , at pp. 421 and 453), but the trial judge in the present case did not fail to consider deterrence in deciding whether to order a constructive trust. As noted above, he stated that while "maintenance of commercial morality is ... a legitimate concern of the court" (p. 69), it would not alone justify ordering a remedy in the present case. In my view, his mention of the "maintenance of commercial morality" indicates that the judge considered deterrence, but held that it alone could not justify a remedy in the present case. Thus, even if failure to consider deterrence could be considered an error in principle, the trial judge in the present case did not so err.

59 In my view, the trial judge committed no error in principle which could justify a decision to set aside his judgment and order a constructive trust. Even if the trial judge did commit some error in principle, however, in my view the remedy of a constructive trust was not available on the facts of the present case. That is, even if no deference is owed to the trial judge, the majority below erred in ordering a constructive trust and the appeal should be allowed. The following are my reasons for this conclusion.

Unjust Enrichment and the Availability of a Constructive Trust

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may *only* be ordered where there has been an unjust enrichment. For example, passages in *LAC*

Minerals, supra , set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 . There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker* , [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker, supra* , set out a two-step approach. *First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment* . In *Hunter Engineering Co. v. Syncrude Canada Ltd.* , a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.
>
> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "*The principle of unjust enrichment lies at the heart of the constructive trust* ": see *Pettkus v. Becker* , at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

> *Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out* . The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. [Emphasis added.]

61 In *Brissette v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87 (S.C.C.) , the majority cited some of the passages above from *Lac* with approval and held at p. 96 that, "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust."

62 Citing only *Pettkus, supra* , specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Canadian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "The requirement of unjust enrichment is fundamental to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a *requirement* for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

63 Even aside from the case law, in my view, the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role. The respondent submitted that if no remedy is available in the present case, there would inappropriately be a right without a remedy. I disagree. Clearly, the beneficiary has a right to have the fiduciary adhere to its duty, and *if damages are suffered* , the beneficiary has a right to a remedy. In my view, this is analogous to remedial principles found elsewhere in the private law. Even if a duty is owed and breached in other legal contexts, there is no remedy unless a loss has been suffered. I may owe a duty to my neighbour to shovel snow off my walk, and I may breach that duty, but if my neighbour does not suffer any loss because of the breached duty, there is no tort and no remedy. Similarly, I may have a contractual duty to supply goods at a specific date for a specific price, but if I do not and the other party is able to purchase the same goods at the contract price at the same time and place, the party has not suffered damage and no remedy is available. It is entirely consistent with these rules to state that even if a fiduciary breaches a duty, if the fiduciary is not unjustly enriched by the breach, there is no remedy.

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out in *LAC*

Minerals . In *LAC Minerals* , La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd., supra* , had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; *a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property* . [Emphasis added.]

65 La Forest J. thus held that generally an aggrieved beneficiary will only be entitled to damages, not to the property itself. This implies that the beneficiary does not generally have a right to the property in question, but rather has a right to receive the value of the gains resulting from the acquisition of the property. Following this reasoning, if the value of the gains is zero, that is, there is no unjust enrichment, the beneficiary will not have a right to a remedy. Consequently, where there has been no unjust enrichment, there is no right to a constructive trust or any other remedy.

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by the plaintiff and the absence of any juristic reason for the enrichment: *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) ; *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.) . McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

67 In *Ontario (Wheat Producers' Marketing Board) v. Royal Bank* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.) , a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor. The bank was a secured creditor of the depositor, which depositor was in financial difficulty at the time of the deposits. Clearly, this case involved an unjust enrichment: the bank benefitted by gaining rights over the deposited money, as well as by increasing the likelihood of repayment of the depositor's credit; the plaintiff (a corporation whose agent, the depositor, breached his fiduciary obligations) was deprived of its right to its money; and there was no juristic reason for the enrichment. Thus, the order of a constructive trust responded to an unjust enrichment, whether or not the court adverted to such doctrine.

68 *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits, there was no "corresponding deprivation" and therefore no unjust enrichment.

69 I disagree with McLachlin J. that there was no unjust enrichment in *MacMillan Bloedel Ltd.* First of all, courts have consistently treated fiduciaries' profits explicitly as unjust enrichment, whether or not the beneficiary could have earned the profits itself. For example, in *Reading v. R.*, [1948] 2 All E.R. 27 (Eng. K.B.) , aff'd [1949] 2 All E.R. 68 (Eng. C.A.) , aff'd [1951] 1 All E.R. 617 (Eng. H.L.) , Denning J. stated at p. 28:

> It matters not that the master has not lost any profit, nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has *unjustly enriched himself* by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money. ... [Emphasis added.]

In *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.) , at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty *does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract* ; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages

awarded here be viewed as an accounting of profits or, what amounts to the same thing, *as based on unjust enrichment* , I would not interfere with the quantum. [Emphasis added.]

Reading and *Canadian Aero Service Ltd.* are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself. Thus, *MacMillan Bloedel Ltd.* involved unjust enrichment, contrary to McLachlin J.'s assertion.

70 I wish to add that the treatment of the profits as unjust enrichment in *Reading, O'Malley* , and *MacMillan Bloedel Ltd.* is not inconsistent with the general rules governing unjust enrichment. The plaintiff in each case had a right to have the fiduciary adhere to his duty. When the defendant breached that duty, the profits earned as a result of that breach are essentially treated in equity as belonging to the corporation, whether or not the corporation could have earned those profits in the absence of the breach. As an example of the proprietary analogy, Denning M.R. stated at p. 856 in *Phipps v. Boardman*, [1965] 1 All E.R. 849 (Eng. C.A.) , aff'd [1966] 3 All E.R. 721 (U.K. H.L.) , that:

> [W]ith *information or knowledge* which he has been employed by his principal to collect or discover, *or which he has otherwise acquired* , for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, *he is accountable ... for such information or knowledge is the property of his principal, just as much as an invention is* . ... [Italics in original; underlining added.]

71 Thus, in *MacMillan Bloedel Ltd.* , the retention of the profits by the fiduciary would have deprived the corporation of its right to the profits. The deprivation is represented by the monies obtained by the fiduciary as a result of infringing the rights of the plaintiff. In order for there not to have been deprivation and unjust enrichment in circumstances otherwise similar to *MacMillan Bloedel Ltd.* , the self-dealing could not have resulted in any secret profits — if a remedy were awarded in a case without profit, thus no enrichment nor deprivation, McLachlin J. could well point to the case for support. Given that there *was* profit in *MacMillan Bloedel Ltd.* , however, there was unjust enrichment which justified the order of a constructive trust, whether or not the court explicitly relied upon unjust enrichment.

72 In summary, McLachlin J. fails to refer to a single Canadian case where a constructive trust was ordered despite the absence of unjust enrichment. Given this conclusion and given that recent cases of this Court unambiguously foreclose the possibility of ordering a constructive trust in the absence of unjust enrichment, in my view McLachlin J. is in error in concluding that a constructive trust may be ordered in the absence of unjust enrichment.

73 Aside from Canadian case law, McLachlin J. attempts to rely on various scholars and foreign case law as providing support for her conclusion. Because of the clear statement of the law recently set out by this Court, in my view the scholarly writings and foreign cases are only useful insofar as the policy they set out suggests that the law in Canada should be modified. I will therefore simply address the policy upon which McLachlin J. relies, rather than each case and each article she cites.

74 Simply put, McLachlin J., reasoning similarly to the majority below, concludes that to fail to permit the order of a constructive trust where there has been a breach of a fiduciary duty, but no unjust enrichment, would inadequately safeguard the integrity of fiduciary relationships. She says at para. 33 that ordering a constructive trust simply on the basis of "good conscience",

> addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. ... The constructive trust imposed for breach of fiduciary relationship, thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of constructive trust as a remedy even where there has been no unjust enrichment.

75 In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

76 In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there *were* gains in value, and therefore unjust enrichment, he or she *would* be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.

Was There Unjust Enrichment?

78 In my opinion, there was no enrichment and therefore no unjust enrichment in the present case. It is first of all plain that there were no pecuniary advantages accruing to the appellants from the purchase of the property. The trial judge stated (at p. 68):

> I now consider the facts of the case at bar. The nature of the duty and of the breach have already been discussed. At an interlocutory stage, the plaintiff abandoned any claim for damages. *This step involved no sacrifice because the plaintiff could not have proved any* . [Emphasis added.]

Any enrichment from the purchase of the property was not pecuniary, which would suggest that there has in fact been no enrichment and therefore no unjust enrichment.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the defendant's pecuniary gains may not represent the enrichment of the defendant or the deprivation of the plaintiff. Analogizing to the award of specific performance in contract, where property that is the subject of a contract is unique or otherwise difficult to value, and the contract is breached, it may be held that monetary damages are inadequate and thus a remedy of specific performance must be ordered to compensate the plaintiff adequately. In such cases, pecuniary damages may not represent the loss to the plaintiff or the gain to the defendant from the breach. Thus, perhaps, an enrichment could be found in the absence of a change in market price if the property were unique or otherwise difficult to value.

80 Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the

purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of *Lee v. Chow* (1990), 12 R.P.R. (2d) 217 (Ont. H.C.) . In *Lee* , a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case. The trial judge in the instant appeal distinguished *Lee* in the following way (at p. 70):

> [The circumstances in *Lee*] included the following: a degree of dependence by the plaintiff which, in my view, is lacking in the case at bar; that it was a residential property meeting the specific requirements of the plaintiff, *rather than a commercial property having value only as an investment* ; and that it appeared probable that the acquisition price represented a bargain, while the property at issue in the case at bar did not. [Emphasis added.]

In *Lee* there were pecuniary gains, thus an enrichment, and the property had unique qualities which helped justify a constructive trust. In the present case there were no pecuniary gains, and the trial judge did not find any meaningful non-pecuniary advantages associated with the property — the property had value "only as an investment". In my view, given the absence of both pecuniary and non-pecuniary advantages from the property, there was no enrichment and therefore no unjust enrichment.

81 In the absence of unjust enrichment, in my view the trial judge was correct not to order the remedy sought, a constructive trust. The trial judge stated (at p. 69):

> A constructive trust was deemed appropriate in *Lac Minerals, supra* , because damages were deemed to be unsatisfactory. It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none.

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

82 Since the trial judge did not err in not ordering a constructive trust, but rather the majority of the Court of Appeal did in ordering one, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. In the circumstances, I would not award costs to the appellants either here or in the Court of Appeal.

Appeal dismissed.

Pourvoi rejeté.

10

2018 SCC 52, 2018 CSC 52
Supreme Court of Canada

Moore v. Sweet

2018 CarswellOnt 19478, 2018 CarswellOnt 19479, 2018 SCC 52, 2018 CSC 52, [2018] 3 S.C.R. 303, [2019] I.L.R. I-6120, 298 A.C.W.S. (3d) 401, 430 D.L.R. (4th) 315, 43 C.C.P.B. (2nd) 161, 84 C.C.L.I. (5th) 1

Michelle Constance Moore (Appellant) v. Risa Lorraine Sweet (Respondent)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: February 8, 2018
Judgment: November 23, 2018
Docket: 37546

Proceedings: reversing *Moore v. Sweet* (2017), 134 O.R. (3d) 721, 409 D.L.R. (4th) 312, 32 C.C.P.B. (2nd) 254, 65 C.C.L.I. (5th) 175, 2017 CarswellOnt 2958, 2017 ONCA 182, G.R. Strathy C.J.O., P. Lauwers J.A., R.A. Blair J.A. (Ont. C.A.); reversing in part *Moore v. Sweet* (2015), 2015 ONSC 3914, 2015 CarswellOnt 20995, H.J. Wilton-Siegel J. (Ont. S.C.J.)

Counsel: Ian M. Hull, Suzana Popovic-Montag, David M. Smith, for Appellant
Jeremy Opolsky, Jonathan Silver, for Respondent

***Côté J.* (*Wagner C.J.C., Abella, Moldaver, Karakatsanis, Brown, Martin JJ.* concurring):**

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 (the "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 (the "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 (Ont. S.C.J.), 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 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 monies unless he or she consents to being removed" (Court of Appeal decision, 2017 ONCA 182, 134 O.R. (3d) 721 (Ont. C.A.), 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) 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 (Ont. S.C.J.)

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). 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 (Ont. C.A.)

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 (S.C.C.). 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 (S.C.C.), 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 (S.C.C.), at p. 997; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), 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 (S.C.C.), 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 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 (Regional Municipality)*, 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 (S.C.C.), and *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423 (S.C.C.), 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 (*Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), 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 (Regional Municipality)* (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 (Regional Municipality)*, at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.), at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 (S.C.C.) ("*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 (Regional Municipality)*, at pp. 789-90, and *Kleinwort Benson v. Birmingham Council* (1996), [1997] Q.B. 380 (Eng. 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 (S.C.C.), 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 (S.C.C.), 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 Ltd.* 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 v. Lauréat Giguère Inc.* (1976), [1977] 2 S.C.R. 67 (S.C.C.), at p. 79; see also *Lacroix c. Valois*, [1990] 2 S.C.R. 1259 (S.C.C.), 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 (Sask. C.A.), 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 & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), 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 (Ont. 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 Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.) ("*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. 47.]

65 A similar issue arose in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 (S.C.C.). 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 (Sask. C.A.), 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 v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65 (Ont. C.A.), 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 (S.C.C.),

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 & Services Union of the P.S.A.C., Local 50057*, [1990] 1 S.C.R. 1298 (S.C.C.)). In *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273 (B.C. C.A.), 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. 21 and 27, citing *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47, [2010] 3 S.C.R. 3 (S.C.C.)). 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 (Ont. H.C.), 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 MBCA 96, 258 Man. R. (2d) 244 (Man. C.A.), 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.

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 (Ont. C.A.); see also *KBA Canada Inc.*).

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 (Ont. C.A.), at p. 69, aff'd [1991] 3 S.C.R. 593 (S.C.C.)). 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 monies 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 Ltd.*, 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 (S.C.C.), 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 Ltd.*, 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.

***Gascon, 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 (Ont. C.A.)). 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 (S.C.C.), at pp. 1202-1203). 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 (S.C.C.), 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 Ltd.*: "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 Ltd.* 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, but for the 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 (Sask. C.A.), at para. 10; *Holowa Estate v. Stell-Holowa*, 2011 ABQB 23, 330 D.L.R. (4th) 693 (Alta. Q.B.), at para. 14; *Richardson Estate v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65 (Ont. C.A.), at para. 18; *Roberts v. Martindale* (1998), 55 B.C.L.R. (3d) 63 (B.C. 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 (B.C. S.C.), at para. 3; *Ladner v. Wolfson*, 2011 BCCA 370, 24 B.C.L.R. (5th) 43 (B.C. C.A.), 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 (N.B. Q.B.), at para. 29; *Gregory v. Gregory* (1994), 92 B.C.L.R. (2d) 133 (B.C. S.C.); *Shannon v. Shannon* (1985), 50 O.R. (2d) 456 (Ont. 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 (S.C.C.), at para. 35; *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), 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 Ltd.*). 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 *PIPSC v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 (S.C.C.), "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.
>
> (L. Smith, "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" (McInnes, at 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 v. Lauréat Giguère Inc.* (1976), [1977] 2 S.C.R. 67 (S.C.C.), 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 (S.C.C.). 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 (S.C.C.), 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 (para. 45). 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" (para. 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 (S.C.C.), 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 (S.C.C.), 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 (S.C.C.), at para. 66; *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), 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 (Man. C.A.); *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 (B.C. S.C.), 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 (Ont. C.A.), 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 (Ont. S.C.J.), 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 (Ont. 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 (B.C. C.A.), 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 (B.C. C.A.), 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.

Pourvoi accueilli.

Footnotes

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).

2 The exception in subsection (4) does not apply in the circumstances of this case.

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).

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1973 CarswellOnt 236
Supreme Court of Canada

Canadian Aero Service Ltd. v. O'Malley

1973 CarswellOnt 236F, 1973 CarswellOnt 236, [1973] S.C.J. No. 97, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371

Canadian Aero Service Limited, (Plaintiff) Appellant and Thomas M. O'Malley, J.M. (George) Zarzycki, James E. Wells, Terra Surveys Limited, (Defendants) Respondents

Martland, Judson, Ritchie, Spence and Laskin JJ.

Judgment: May 11, 1972
Judgment: May 12, 1972
Judgment: May 15, 1972
Judgment: May 16, 1972
Judgment: May 24, 1972
Judgment: May 25, 1972
Judgment: June 29, 1973

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *C.L. Dubin, Q.C., R.W. McKimm* and *R.A. Blair*, for the plaintiff, appellant.
Hon. C.H. Locke, Q.C., and *Gordon Blair*, for the defendant, respondent, Wells.
John P. Nelligan, Q.C., and *Denis Power*, for the defendants, respondents, O'Malley, Zarzycki and Terra Surveys Ltd.

The judgment of the Court was delivered by *Laskin J.*:

1 This appeal arises out of a claim by the plaintiff-appellant (hereinafter referred to as Canaero) that the defendants had improperly taken the fruits of a corporate opportunity in which Canaero had a prior and continuing interest. The allegation against the defendants O'Malley and Zarzycki is that while directors or officers of Canaero they had devoted effort and planning in respect of the particular corporate opportunity as representatives of Canaero, but had subsequently wrongfully taken the benefit thereof in breach of a fiduciary duty to Canaero. The defendant Wells, who had been a director of Canaero but never an officer, was brought into the action as an associate of the other individual defendants in an alleged scheme to deprive Canaero of the corporate opportunity which it had been developing through O'Malley and Zarzycki; and the defendant Terra Surveys Limited was joined as the vehicle through which the individual defendants in fact obtained the benefit for which Canaero had been negotiating.

2 Canaero failed before Grant J. whose judgment on October 8, 1969, was affirmed by the Ontario Court of Appeal, speaking through MacKay J.A., on June 18, 1971. The trial judge fixed the damages at $125,000 in the event of a successful appeal, and this determination was implicitly endorsed by the Ontario Court of Appeal. The appeal to this Court is taken in the light of concurrent findings of fact on all points touching the course of events, but the Ontario Court of Appeal did not agree with Grant J. that the relationship of O'Malley and Zarzycki to Canaero, by reason of their positions as senior managerial officers, was of a fiduciary character, like that existing between directors and a company; rather, it was of the view that the relationship was simply that of employees and employer, involving no corresponding fiduciary obligations and, apart from valid contractual restriction, no limitation upon post-employment competition save as to appropriation of trade secrets and enticement of customers, of which there was no proof in this case.

3 Canaero was incorporated in 1948 under the *Companies Act* of Canada as a wholly-owned subsidiary of Aero Service Corporation, a United States company whose main business, like that of Canaero and other subsidiaries, was topographical mapping and geophysical exploration. In 1961, the parent Aero and its subsidiaries came under the control of another United States corporation, Litton Industries Inc. O'Malley joined Aero Service Corporation in 1936 and, apart from army service, remained with it until 1950 when he became general manager and president of Canaero whose head office was in Ottawa. He returned to the parent Aero company in 1957, but rejoined Canaero in 1964 as president and chief executive officer, and remained as such until he resigned on August 19, 1966. Acknowledgement and acceptance of the resignation followed on August 26, 1966.

4 Zarzycki, who attained a widely-respected reputation in geodesy, joined Canaero in 1953, soon becoming chief engineer. He was named executive vice-president in 1964 and made a director in March 1965. He resigned these posts on August 22, 1966, and received the acknowledgment and acceptance of his resignation in a letter of August 29, 1966.

5 Wells, a solicitor in Ottawa, knowledgeable about external aid programmes and the opportunities open in that connection to aeroplane companies, became a director of Canaero on March 15, 1950, at the same time as O'Malley. He was never an officer and was, on the evidence, an inactive director. When Survair Limited was incorporated in 1960 at Canaero's instance to provide it with flying services (at first, exclusively, but not so after February 1, 1966), Wells became a shareholder by reason of his association with Canaero. He submitted his resignation as a director of Canaero at the request of Litton Industries Inc. when the latter took control, the resignation to be effective at its pleasure. No such pleasure was indicated, and Wells submitted a resignation on his own on February 5, 1965. There is an uncontested finding that he ceased to be a director after that date.

6 The defendant Terra Surveys Limited was incorporated on August 16, 1966, following a luncheon meeting of O'Malley, Zarzycki and Wells on August 6, 1966, at which the suggestion to form a company of their own was made by Wells to O'Malley and Zarzycki. To Wells' knowledge, the latter were discontented at Canaero by reason of the limitations upon their authority and the scope of independent action imposed by the Litton company, and they also feared loss of position if Canaero should fail to get contracts. Nominal directors and officers of the new company were appointed, but O'Malley and Zarzycki became major shareholders when common stock was issued on September 12, 1966. One share was issued to Wells at this time but he made a further investment in the new company on November 6, 1966. There is no doubt that Terra Surveys Limited was conceived as a company through which O'Malley and Zarzycki could pursue the same objects that animated Canaero. O'Malley became president of Terra Surveys Limited and Zarzycki became executive vice-president shortly after its incorporation.

7 The legal issues in this appeal concern what I shall call the Guyana project, the topographical mapping and aerial photographing of parts of Guyana (known as British Guiana until its independence on May 25, 1965) to be financed through an external aid grant or loan from the Government of Canada under its programme of aid to developing countries. Terra Surveys Limited, in association with Survair Limited and another company, succeeded in obtaining the contract for the Guyana project which Canaero had been pursuing through O'Malley and Zarzycki, among others, for a number of years. There is a coincidence of dates and events surrounding the maturing and realization of that project, and the departure of O'Malley and Zarzycki from Canaero, their involvement with Wells in the incorporation of Terra Surveys Limited and its success, almost immediately thereafter, in obtaining the contract for the project. The significance of this coincidence is related, first, to the nature of the duty owed to Canaero by O'Malley and Zarzycki by reason of their positions with that company and, second, to the continuation of the duty, if any, upon a severance of relationship.

8 The coincidence aforementioned emerges from a review of the activities of Canaero in respect of the Guyana project. The business in which Canaero and other like companies were engaged involved technical, administrative and even diplomatic capabilities because, in the main, their dealings were with governments, both of countries seeking foreign aid for development and of countries, like United States and Canada, which had programmes for such aid. Companies like Canaero risked initiative and expenditure in preparatory work for projects without any assurance of return in the form of contracts; they saw their business as not only bidding on projects ripe for realization, but as also embracing suggestion and development of projects for which they would later seek approval and contracts to carry them out. In this latter aspect, the development of a project involved negotiation with officials of the country for whose benefit it was intended and the establishment of a receptive accord with a

country offering aid for such matters. Of course, a suggested project was more likely to be viewed favourably if its technical and administrative aspects were well worked out in the course of its presentation for governmental approval.

9 Canaero's interest in promoting a project in Guyana for the development of its natural resources, and in particular electrical energy, began in 1961. It had done work in nearby Surinam (or Dutch Guiana) where conditions were similar. It envisaged extensive aerial photography and mapping of the country which, apart from the populated coastal area, was covered by dense jungle. Promotional work to persuade the local authorities that Canaero was best equipped to carry out the topographical mapping was done by O'Malley and by another associate of the parent Aero. A local agent, one Gavin B. Kennard, was engaged by Canaero. In May 1962, Zarzycki spent three days in Guyana in the interests of Canaero, obtaining information, examining existing geographical surveys and meeting government officials. He submitted a report on his visit to Canaero and to the parent Aero company.

10 Between 1962 and 1964 Canaero did magnetometer and electromagnetometer surveys in Guyana on behalf of the United Nations, and it envisaged either the United Nations or the United States as the funding agency to support the topographical mapping project that it was evolving as a result of its contacts in Guyana and Zarzycki's visit and report. Political conditions in Guyana after Zarzycki's visit in May 1962 did not conduce to furtherance of the project and activity thereon was suspended.

11 It was resumed in 1965 when it appeared that funds for it might be made available under Canada's external aid programme. The United States had adopted a policy in this area of awarding contracts to United States firms. The record in this case includes a letter of October 22, 1968, after the events which gave rise to this litigation, in which the Canadian Secretary of State for External Affairs wrote that Canada's external aid policy was to require contractors to be incorporated in Canada, managed and operated from Canada and to employ Canadian personnel; and although preference in awarding external aid contracts was given to Canadian controlled firms, this was not an absolute requirement of eligibility to obtain such contracts. Canaero would hence have been eligible at that time for an award of a contract and, inferentially, in 1966 as well.

12 Zarzycki returned to Guyana on July 14, 1965, and remained there until July 18, 1965. By July 26, 1965, he completed a proposal for topographical mapping of the country, a proposal that the Government thereof might use in seeking Canadian financial aid. Copies went to a Guyana cabinet minister, to the Canadian High Commissioner there and to the External Aid Office in Ottawa. Zarzycki in his evidence described the proposal as more sales-slanted than technical. The technical aspects were none the less covered; for example, the report recommended the use of an aerodist, a recently invented airborne electronic distance-measuring device. Zarzycki had previously urged that Canaero purchase one as a needed piece of equipment which other subsidiaries of Litton Industries Inc. could also use. Canaero placed an order for an aerodist, at a cost of $75,000, on or about July 15, 1966.

13 A few days earlier, on July 10, 1966, to be exact, an internal communication to the acting director-general of the Canadian External Aid Office, one Peter Towe, informed him that the Governments of Guyana and Canada had agreed in principle on a loan to Guyana for a topographical survey and mapping. The Prime Minister of Guyana had come to Ottawa early in July, 1966, for discussion on that among other matters. O'Malley had felt that if the assistance from Canada was by way of a loan Guyana would have the major say in naming the contractor, and this would make Canaero's chances better than if the assistance was by way of grant because then the selection would be determined by Canada. Although a loan was authorized, its terms were very liberal, and it was decided that Canada would select the contractor with the concurrence of Guyana, after examining proposals from a number of designated companies which would be invited to bid. An official of the Department of Mines and Technical Surveys visited Guyana and prepared specifications for the project which was approved by the Cabinet on August 10, 1966. Towe was informed by departmental letter of August 18, 1966, of a recommendation that Canaero, Lockwood Survey Corporation, Spartan Air Services Limited and Survair Limited be invited to submit proposals for the project. There was a pencilled note on the side of the letter, apparently added later, of the following words: "general photogramy Terra Ltd.".

14 The Canadian External Aid Office by letter of August 23, 1966, invited five companies to bid on the Guyana project. Survair Limited was dropped from the originally recommended group of four companies, and Terra Surveys Limited and General Photogrammetric Services Limited were added. A briefing on the specifications for the project was held by the Department of Mines and Technical Surveys on August 29, 1966. Zarzycki and another represented Terra Surveys Limited at this briefing.

15 O'Malley and Zarzycki pursued the Guyana project on behalf of Canaero up to July 25, 1966, but did nothing thereon for Canaero thereafter. On July 9, 1966, they had met with the Prime Minister of Guyana during his visit to Ottawa, and on July 13, 1966, they had met with Towe (who had previously been informed of the inter-governmental agreement in principle on the Guyana project) and learned from him that the project was on foot. O'Malley had written to Kennard, Canaero's Guyana agent, on July 15, 1966, that he felt the job was a certainty for Canaero. By letter of the same date to Towe, O'Malley wrote that Zarzycki had spent about 20 days in Georgetown, Guyana, on two successive visits to inventory the data available and determine the use to which the control survey and mapping would be put, and that he had subsequently prepared a proposal for a geodetic network and topographical mapping which was submitted to the Honourable Robert Jordan (the appropriate Guyanese cabinet minister) on July 27, 1965. On July 22, 1966, O'Malley wrote to an officer of the parent company that the Prime Minister of Guyana had advised him that "the Canadian Government would honour the project". Finally, on July 25, 1966, O'Malley wrote to Kennard to ask if he could learn what position Guyana was taking on the selection of a contractor, that is whether it proposed to make the selection with Canada's concurrence or whether it would leave the selection to Canada subject to its concurrence.

16 Thereafter the record of events, subject to one exception, concerns the involvement of O'Malley and Zarzycki with Wells in the incorporation of Terra Surveys Limited, their resignations from their positions with Canaero and their successful intervention through Terra Surveys Limited into the Guyana project. As of the date of O'Malley's letter of resignation, August 19, 1966, Terra Surveys Limited had a post office box and a favourable bank reference. Zarzycki had then not yet formally resigned as had O'Malley but had made the decision to do so. O'Malley informed the Canadian External Aid Office on August 22, 1966, of the new company which he, Zarzycki and Wells had formed.

17 The exception in the record of events just recited concerns a visit of Zarzycki, his "regular trip to the External Aid Office" (to use his own words), to the man in charge of the Caribbean area. This was on or about August 13, 1966, after his return from holidays and after the luncheon meeting with O'Malley and Wells that led to the incorporation of Terra. The purpose of the visit related to two project possibilities in the Caribbean area for Canaero, that in Guyana and one in Ecuador. Zarzycki then received confirmation of what he had earlier learned from Towe, namely, that the Guyana project had been approved in principle.

18 Despite having lost O'Malley and Zarzycki and also a senior employee Turner (who joined the Terra venture and attended the briefing session on August 29, 1966, on its behalf with Zarzycki), Canaero associated itself with Spartan Air Services Limited in the latter's proposal on the Guyana project which was submitted under date of September 12, 1966. Prior to this submission, representatives of these two companies visited Guyana to assure officials there that Canaero was involved in the preparation of the Spartan proposal and was supporting it.

19 Terra Surveys Limited submitted its proposal on September 12, 1966, through Zarzycki, having sent a letter on that date to the External Aid Office setting out its qualifications. A report on the various proposals submitted was issued on September 16, 1966, by the Canadian government officer who had visited Guyana and had prepared the specifications for the project. He recommended that Terra Surveys Limited be the contractor, and included in his report the following observations upon its capabilities:

> This project is one of the most demanding that has been undertaken in the Canadian technical assistance program. The parts of the operation most seriously affected by the difficult conditions are the establishment of survey control and the procurement of the aerial photography, and the success of the project will depend greatly on the ability of the company selected to complete these two phases satisfactorily. The subsequent operations are somewhat less complex and are dependent on the successful completion of the initial phases. Furthermore, should the project lag in these phases, further resources are readily available in other companies in Canada.
>
> In my discussions with senior survey officials in Guyana, I was informed that an accurate framework of survey control was required to form the base for the topographical mapping now urgently required and in addition to permit the orderly completion of the national coverage in the future. Our experience is that the Aerodist system can provide the precision and density of control required more economically than any other method developed to date. Operational experience with this equipment by Canadian commercial companies has been extremely limited and has only been gained on projects where

they acted in a support role to Surveys and Mapping Branch engineers. This has been kept in mind in the examination of the proposals in evaluating the plans of approach presented for this phase....

The proposals for the control surveys and topographical mapping project in Guyana submitted to the Director General on September 12, 1966 by Lockwood Survey Corporation, Spartan Air Services Limited and Terra Surveys Limited have been carefully reviewed.

Representatives of General Photogrammetric Services Limited and Canadian Aero Services Limited submitted no proposals. However, Spartan Air Services Limited has indicated that they intend to make use of equipment and services of Canadian Aero Service Limited while Terra Surveys Limited has stated that they intend to subcontract compilation and draughting work to General Photogrammetric Services Limited....

Terra Surveys Limited has submitted a detailed proposal outlining their assessment of the major points to be considered in undertaking the proposed project in Guyana and their solution. It concludes with their proposed plan of operations and associated time schedule and is accompanied by a summary of what the Government of Guyana may expect to receive as well as the support it will be expected to provide....

Although Terra, like other Canadian companies, has had no practical experience in planning and executing a similar type of Aerodist project, the proposal indicates that its authors have studied the subject very thoroughly and in preparing their plan of operation have also taken conditions peculiar to Guyana into account....

Dr. J.M. Zarzycki is named as the project manager. He is known internationally as an outstanding photogrammetric engineer and has developed and successfully used an aerial triangulation procedure utilizing superwide angle photography, the Wild B. 8 and auxiliary data. Like most photogrammetric operations it requires good work by technicians but its success or failure hinges on the professional judgment and supervision of the engineer. Dr. Zarzycki has demonstrated this ability most clearly in past years.

Mr. M.H. Turner is to assist Dr. Zarzycki. He gained extensive experience in different field operations in Africa and has shown his ability to establish excellent working relationships with the senior survey officials as well as carrying out very difficult survey tasks. The Aerodist project will call for a high degree of theoretical knowledge in geodesy as well as practical management ability. This can be provided by Messrs. Turner and Zarzycki....

The proposal submitted by Terra Surveys Limited covered the operation in much greater detail than might normally be expected. However, the suggestions put forward indicate that all aspects of the operation have been most carefully reviewed and the plan of operation well thought out. The sections of the Terra proposal dealing with Aerodist indicate a more complete understanding of the problems in the field and subsequent operations than the other two proposals.

The treatment of many aspects of the project varies very little in the three proposals. However, appreciable differences do appear in the key phases of aerial photography and Aerodist control as explained in the preceding paragraphs. My assessment is that Terra Surveys Limited, in combination with Survair Limited and General Photogrammetric Services Limited, is best fitted to undertake this very difficult operation.

In the result, Terra Surveys Limited negotiated a contract with the External Aid Office, and on November 26, 1966, entered into an agreement with the Government of Guyana to carry out the project for the sum of $2,300,000. This was the amount indicated in the proposal of July 26, 1965, prepared by Zarzycki on behalf of Canaero.

20 There is no evidence that either Zarzycki or any other representative of Terra visited Guyana between August 23, 1966, the date when the invitations to submit proposals went out, and September 12, 1966, the date of the Terra proposal. The reference in the report of September 16, 1966, to the fact that the Terra proposal "covered the operation in much greater detail than might normally be expected" is a tribute to Zarzycki that owed much to his long involvement in the Guyana project on behalf of Canaero. From the time of his contact with certain Guyana officials in Canada in July 1966, Zarzycki had no relationship with them or any others until he went to Guyana to sign the contract which had been awarded to Terra.

21 There are four issues that arise for consideration on the facts so far recited. There is, first, the determination of the relationship of O'Malley and Zarzycki to Canaero. Second, there is the duty or duties, if any, owed by them to Canaero by reason of the ascertained relationship. Third, there is the question whether there has been any breach of duty, if any is owing, by reason of the conduct of O'Malley and Zarzycki in acting through Terra to secure the contract for the Guyana project; and, fourth, there is the question of liability for breach of duty if established.

22 Like Grant J., the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial judge in this respect, they acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, *Principles of Modern Company Law*, 3rd ed., 1969, at p. 518 as follows:

> ...these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity.

23 The distinction taken between agents and servants of an employer is apt here, and I am unable to appreciate the basis upon which the Ontario Court of Appeal concluded that O'Malley and Zarzycki were mere employees, that is servants of Canaero rather than agents. Although they were subject to supervision of the officers of the controlling company, their positions as senior officers of a subsidiary, which was a working organization, charged them with initiatives and with responsibilities far removed from the obedient role of servants.

24 It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

25 An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

26 It is this fiduciary duty which is invoked by the appellant in this case and which is resisted by the respondents on the grounds that the duty as formulated is not nor should be part of our law and that, in any event, the facts of the present case do not fall within its scope.

27 This Court considered the issue of fiduciary duty of directors in *Zwicker v. Stanbury* [1], where it found apt for the purposes of that case certain general statements of law by Viscount Sankey and by Lord Russell of Killowen in *Regal* (*Hastings*) *Ltd. v. Gulliver* [2], at pp. 381 and 389. These statements, reflecting basic principle which is not challenged in the present case, are represented in the following passages:

28 *Per* Viscount Sankey:

> In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust*. The earlier cases are concerned with trusts of specific property: *Keech v. Sandford* ((1726), Sel. Cas. Ch. 61) per Lord King, L.C. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity.

29 *Per* Lord Russell of Killowen:

> In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v. Sandford* [*supra*] and *Ex p. James* ((1803), 8 Ves. 337), and similar authorities applies ... in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui que trust* in *Keech v. Sandford* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

30 I need not pause to consider whether on the facts in *Regal* (*Hastings*) *Ltd. v. Gulliver* the equitable principle was overzealously applied; see, for example, Gower, *op. cit.*, at pp. 535-537. What I would observe is that the principle, or, indeed, principles, as stated, grew out of older cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and I do not therefore regard them as providing a rigid measure whose literal terms must be met in assessing succeeding cases. In my opinion, neither the conflict test, referred to by Viscount Sankey, nor the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touchstones of liability. In this, as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting.

31 The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Phipps v. Boardman* [3], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley* [4], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention.

32 What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the

corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behavior.

33 A particular application of the equitable principle against a director is found in an early Australian case, appealed unsuccessfully to the Privy Council, where there was a refusal to permit a director to carry out a scheme for acquiring a mining claim of the company, through unopposed enforcement of a forfeiture, on his undertaking to give all shareholders save a pledgee bank the benefit of his purchase according to their shareholdings: see *Smith v. Harrison* [5] . The High Court of Australia applied the equitable principle on a conflict of duty and self-interest basis in a case where a director, who was empowered to sell a branch of his company's business with which he was particularly associated (which would result in loss of his position), arranged with the purchaser to enter its employ, doing so with the approval of the chairman of the board of the seller company, he having consulted with his fellow directors: see *Furs Ltd. v. Tomkies* [6] . As was there pointed out, there was failure to make full disclosure to the shareholders of the financial arrangements made by the director, and it was no answer to the breach of fiduciary duty that no loss was caused to the company or that any profit made was of a kind which the company could not have obtained.

34 In the same vein is the New Zealand case of *G.E. Smith Ltd. v. Smith* [7] , which founded itself not only on *Regal* (*Hastings*) *Ltd. v. Gulliver, supra*, but as well on the proposition stated by Lord Cranworth in *Aberdeen Railway Co. v. Blakie Bros*. [8] that a possible conflict of personal interest and duty will establish a basis for relief. The case concerned acquisition by a company director in his own right of an import licence (which had been refused to the company) for goods in which the company dealt, this being done at a time when liquidation of the company was contemplated by him and the other principal shareholder but before an agreement was concluded by which the defendant sold his interest in the company to that other shareholder.

35 Cases in the United States show that early enunciations of principle, resting on particular fact situations, have been broadened to cover succeeding cases, but one cannot pretend that there is any one consistent line of approach among the different state jurisdictions: see James C. Slaughter, "The Corporate Opportunity Doctrine", 18 Southwestern L.J. 96 (1964). What emerges from a review of the American case law is an imprecise ethical standard "which prohibits an executive — here defined to include either a director or an officer — from appropriating to himself a business opportunity which in fairness should belong to the corporation": see Note, "Corporate Opportunity", 74 Harv. L. Rev. 765 (1961).

36 A useful examination of the approach to corporate opportunity in American decisions is that found in *Burg v. Horn* [9] , a majority decision of the Second Circuit Court of Appeals applying New York law in a diversity suit. What was involved in that case was not the usurpation of an opportunity which the particular company was pursuing, but the more far-reaching question whether a director was obliged to offer to the company, before taking them for himself, opportunities in its line of business of which he rather than the company became aware and which he pursued. The facts, briefly, were that directors of a company, operating low rental housing, who were known to their co-director plaintiff to have unrelated interests and also interests, acquired earlier, in other like companies, acquired a number of low rental properties which they did not offer to the company of which they and the plaintiff were co-directors. These properties had not been sought by the company nor did the defendants learn of them through the company. In denying liability, the majority expressed New York law to require a determination in each case, by considering the relationship between director and company, whether a duty to offer the company all opportunities within its line of business was fairly to be implied. The dissenting judge saw the case as one where, in the absence of a contrary understanding between the parties, the defendants were under a fiduciary obligation to offer the properties to the company before buying them for themselves.

37 That the rigorous standard of behavior enforced against directors and executives may survive their tenure of such offices was indicated as early as *Ex p. James* [10] where Lord Eldon, speaking of the fiduciary in that case who was a solicitor purchasing at a sale, said (at p. 390 E.R.):

> With respect to the question now put whether I will permit Jones to give up the office of solicitor and to bid, I cannot give that permission. If the principle is right that the solicitor cannot buy, it would lead to all the mischief of acting up to the point

> of the sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor and buying the property. ...On the other hand I do not deny that those interested in the question may give the permission.

The same principle, although applied in a master-servant case in respect of the use to his own advantage of confidential information acquired by the respondent while employed by the appellant, was recognized by this Court in *Pre-Cam Exploration & Development Ltd. v. McTavish* [11] .

38 The trial judge appeared to treat this question differently in quoting a passage from *Raines v. Toney* [12] , a judgment of the Supreme Court of Arkansas, at p.809. The passage is in the following words:

> It is, however, a common occurrence for corporate fiduciaries to resign and form a competing enterprise. Unless restricted by contract, this may be done with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business. They cannot while still corporate fiduciaries set up a competitive enterprise ... or resign and take with them the key personnel of their corporations for the purposes of operating their own competitive enterprises ... but they can, while still employed, notify their corporation's customers of their intention to resign and subsequently go into business for themselves, and accept business from them and offer it to them ... but they can use in their own enterprise the experience and knowledge they gained while working for their corporation ... They can solicit the customers of their former corporation for business unless the customer list is itself confidential.

39 Prior to quoting from *Raines v. Toney*, Grant J. had referred to and rejected a submission of the appellant that "as long as the defendants came upon the profit making possibility inherent in the Guyana contract in the course of and by reason of occupying their positions as directors and senior officers of Canaero ... the strict equitable rule must be applied against them". *Albert A. Volk Inc. v. Fleschner Bros. Inc.* [13] had been cited in support of the submission. The trial judge's position on this point was put by him as follows:

> I do not interpret the decision above quoted as indicating that the mere fact of learning of the contract or even doing extensive work and preparation in attempts to secure the same for the plaintiff while they were still in their offices for it, of itself prevents them, after severing relations with their employer, from seeking to acquire it for themselves. It is not the coming upon or learning of the proposed contract while directors that establishes liability, but rather obtaining the same because of such fiduciary position and in the course of their duties as such. I would think that when directors or senior officers leave the employ of the company they must not use confidential information which they have acquired in such employment for the purpose of assisting them in getting such a contract for themselves. Such information so acquired by them would remain an asset of their principal even after they had left their employment.

40 In so far as the trial judge, founding himself upon what Lord Russell of Killowen said in *Regal* (*Hastings*) *Ltd. v. Gulliver*, would limit the liability of directors or senior officers to the case where they obtained a contract "in the course of their duties as such", I regard his position as too narrowly conceived. *Raines v. Toney* does not support the trial judge's view, as is evident from the assertion of the Supreme Court of Arkansas that the fiduciary duty of a director or officer does not terminate upon resignation and that it cannot be renounced at will by the termination of employment: see also *Mile-O-Mo Fishing Club Inc. v. Noble* [14] . The passage quoted by Grant J. from *Raines v. Toney* was directed to a different point, namely, that of a right to compete with one's former employer unless restricted by contract.

41 The view taken by the trial judge, and affirmed by the Court of Appeal (which quoted the same passage from the reasons of Lord Russell of Killowen in *Regal* (*Hastings*) *Ltd. v. Gulliver*), tended to obscure the difference between the survival of fiduciary duty after resignation and the right to use non-confidential information acquired in the course of employment and as a result of experience. I do not see that either the question of the confidentiality of the information acquired by O'Malley and Zarzycki in the course of their work for Canaero on the Guyana project or the question of copyright is relevant to the enforcement against them of a fiduciary duty. The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.

42 Submissions and argument were addressed to this Court on the question whether or how far Zarzycki copied Canaero's documents in preparing the Terra proposal. The appellant's position is that Zarzycki was not entitled to use for Terra what he compiled for Canaero; and the respondents contended that, although Zarzycki was not entitled to use for Terra the 1965 report or proposal as such that he prepared for Canaero, he was entitled to use the information therein which came to him in the normal course and by reason of his own capacity. It was the respondents' further submission that Zarzycki did not respond in 1966 on behalf of Terra on the basis of his 1965 report as an officer of and for Canaero; and they went so far as to say that it did not matter that O'Malley and Zarzycki worked on the same contract for Terra as they had for Canaero, especially when the project was not exactly the same.

43 In my opinion, the fiduciary duty upon O'Malley and Zarzycki, if it survived their departure from Canaero, would be reduced to an absurdity if it could be evaded merely because the Guyana project had been varied in some details when it became the subject of invited proposals, or merely because Zarzycki met the variations by appropriate changes in what he prepared for Canaero in 1965 and what he proposed for Terra in 1966. I do not regard it as necessary to look for substantial resemblances. Their presence would be a factor to be considered on the issue of breach of fiduciary duty but they are not a *sine qua non*. The cardinal fact is that the one project, the same project which Zarzycki had pursued for Canaero, was the subject of his Terra proposal. It was that business opportunity, in line with its general pursuits, which Canaero sought through O'Malley and Zarzycki. There is no suggestion that there had been such a change of objective as to make the project for which proposals were invited from Canaero, Terra and others a different one from that which Canaero had been developing with a view to obtaining the contract for itself.

44 Again, whether or not Terra was incorporated for the purpose of intercepting the contract for the Guyana project is not central to the issue of breach of fiduciary duty. Honesty of purpose is no more a defence in that respect than it would be in respect of personal interception of the contract by O'Malley and Zarzycki. This is fundamental in the enforcement of fiduciary duty where the fiduciaries are acting against the interests of their principal. Then it is urged that Canaero could not in any event have obtained the contract, and that O'Malley and Zarzycki left Canaero as an ultimate response to their dissatisfaction with that company and with the restrictions that they were under in managing it. There was, however, no certain knowledge at the time O'Malley and Zarzycki resigned that the Guyana project was beyond Canaero's grasp. Canaero had not abandoned its hope of capturing it, even if Wells was of opinion, expressed during his luncheon with O'Malley and Zarzycki on August 6, 1966, that it would not get a foreign aid contract from the Canadian Government. Although it was contended that O'Malley and Zarzycki did not know of the imminence of the approval of the Guyana project, their ready run for it, when it was approved at about the time of their resignations and at a time when they knew of Canaero's continuing interest, are factors to be considered in deciding whether they were still under a fiduciary duty not to seek to procure for themselves or for their newly-formed company the business opportunity which they had nurtured for Canaero.

45 Counsel for O'Malley and Zarzycki relied upon the judgment of this Court in *Peso Silver Mines Ltd.* (*N.P.L.*) *v. Cropper* [15], as representing an affirmation of what was said in *Regal* (*Hastings*) *Ltd. v. Gulliver* respecting the circumscription of liability to circumstances where the directors or senior officers had obtained the challenged benefit by reason only of the fact that they held those positions and in the course of execution of those offices. In urging this, he did not deny that leaving to capitalize on their positions would not necessarily immunize them, but he submitted that in the present case there was no special knowledge or information obtained from Canaero during their service with that company upon which O'Malley and Zarzycki had relied in reaching for the Guyana project on behalf of Terra.

46 There is a considerable gulf between the *Peso* case and the present one on the facts as found in each and on the issues that they respectively raise. In *Peso*, there was a finding of good faith in the rejection by its directors of an offer of mining claims because of its strained finances. The subsequent acquisition of those claims by the managing director and his associates, albeit without seeking shareholder approval, was held to be proper because the company's interest in them ceased. There is some analogy to *Burg v. Horn* because there was evidence that Peso had received many offers of mining properties and, as in *Burg v. Horn*, the acquisition of the particular claims out of which the litigation arose could not be said to be essential to the success of the company. Whether evidence was overlooked in *Peso* which would have led to the result reached in *Regal* (*Hastings*)

Ltd. v. Gulliver (see the examination by Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered", (1971), 49 Can. Bar. Rev. 80, at p. 101) has no bearing on the proper disposition of the present case. What is before this Court is not a situation where various opportunities were offered to a company which was open to all of them, but rather a case where it had devoted itself to originating and bringing to fruition a particular business deal which was ultimately captured by former senior officers who had been in charge of the matter for the company. Since Canaero had been invited to make a proposal on the Guyana project, there is no basis for contending that it could not, in any event, have obtained the contract or that there was any unwillingness to deal with it.

47 It is a mistake, in my opinion, to seek to encase the principle stated and applied in *Peso*, by adoption from *Regal* (*Hastings*) *Ltd. v. Gulliver*, in the straight-jacket of special knowledge acquired while acting as directors or senior officers, let alone limiting it to benefits acquired by reason of and during the holding of those offices. As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it. So it is in the present case. Accepting the facts found by the trial judge, I find no obstructing considerations to the conclusion that O'Malley and Zarzycki continued, after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project. They entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra.

48 In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

49 Wells stands on a different footing from O'Malley and Zarzycki. The case put against Wells in the submissions to this Court is not that he personally owed a fiduciary duty to Canaero in respect of the Guyana project from the time it took shape but rather that he was a party to a conspiracy with O'Malley and Zarzycki to convert Canaero's business opportunity in respect of the Guyana project to personal benefit in breach of fiduciary obligation. Although Wells was associated with his co-defendants beyond the role of their solicitor, and was a director and substantial shareholder of Survair Limited, which was among the original intended invitees to submit proposals for the Guyana project but was dropped when the formal invitations were issued, there is no reason to interfere with the concurrent findings of fact upon which the action against Wells was dismissed and the dismissal affirmed on appeal. Unlike the case with O'Malley and Zarzycki, the findings of fact do not admit of a conclusion of law by which to fix Wells with liability.

50 There remains the question of the appropriate relief against O'Malley and Zarzycki, and against Terra through which they acted in breach of fiduciary duty. In fixing the damages at $125,000, the trial judge based himself on a claim for damages related only to the loss of the contract for the Guyana project, this being the extent of Canaero's claim as he understood it. No claim for a different amount or for relief on a different basis, as, for example, to hold Terra as constructive trustee for Canaero in respect of the execution of the Guyana contract, was made in this Court. Counsel for the respondents, although conceding that there was evidence of Terra's likely profit from the Guyana contract, emphasized the trial judge's finding that Canaero could not have obtained the contract itself in view of its association with Spartan Air Services Limited in the submission of a proposal. It was his submission that there was no evidence that that proposal would have been accepted if Terra's had been rejected and, in any event, there was no evidence of Canaero's likely share of the profit.

51 Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to

compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. The appeal is, accordingly, allowed against all defendants save Wells, and judgment should be entered against them for $125,000. The appellant should have its costs against them throughout. I would dismiss the appeal as against Wells with costs.

Appeal allowed against all defendants save Wells.

Solicitors of record:

Solicitors for the plaintiff, appellant: *Soloway, Wright, Houston, McKimm, Killeen* & *Greenberg*, Ottawa.

Solicitors for the defendant, respondent, Wells: *Herridge, Tolmie, Gray, Coyne* & *Blair*, Ottawa.

Solicitors for the defendants, respondents, O'Malley, Zarzycki and Terra Surveys Ltd.: *Nelligan/Power*, Ottawa.

Footnotes

1 [1953] 2 S.C.R. 438.

2 [1942] 1 All E.R. 378.

3 [1967] 2 A.C. 46.

4 [1972] 2 All E.R. 162.

5 (1872), 27 L.T.R. 188.

6 (1936), 54 C.L.R. 583.

7 [1952] N.Z.L.R. 470.

8 (1854), 1 Macq. 461.

9 (1967), 380 F. 2d 897.

10 (1803), 8 Ves. 337, 32 E.R. 385.

11 [1966] S.C.R. 551.

12 (1958), 313 S.W. 2d 802.

13 (1945), 60 N.Y.S. 2d 244.

14 (1965), 210 N.E. 2d 12.

15 [1966] S.C.R. 673.

12

1989 CarswellOnt 126
Supreme Court of Canada

Lac Minerals Ltd. v. International Corona Resources Ltd.

1989 CarswellOnt 126, 1989 CarswellOnt 965, [1989] 2 S.C.R. 574, [1989] C.L.D. 1140, [1989] S.C.J. No. 83, 101 N.R. 239, 16 A.C.W.S. (3d) 345, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 36 O.A.C. 57, 44 B.L.R. 1, 61 D.L.R. (4th) 14, 69 O.R. (2d) 287 (note), 6 R.P.R. (2d) 1, J.E. 89-1204, EYB 1989-67469

LAC MINERALS LTD. v. INTERNATIONAL CORONA RESOURCES LTD.

McIntyre, Lamer, Wilson, La Forest and Sopinka JJ.

Heard: October 11 and 12, 1988
Judgment: August 11, 1989
Docket: 20571

Counsel: *Earl A. Cherniak* and *J.L. McDougall*, for appellant.
Alan L. Lenczner and *Ronald G. Slaght*, for respondent.

***La Forest J. (Wilson* and *Lamer JJ.* concurring in part) :**

Introduction

1 The short issue in this appeal is whether this Court will uphold the Ontario Court of Appeal and trial Court decisions ordering LAC to deliver up to Corona land (the Williams property) on which there is a gold mine, on being compensated for the value of improvements LAC has made to the property ($153,978,000) in developing the mine.

2 The facts in this case are crucial. The trial lasted some 5-1/2 months, and the hearing before the Court of Appeal took 10 days. The trial Judge made extensive findings of fact, and the Court of Appeal examined the record in detail and with care. The latter Court emphatically dismissed any argument that the trial Judge had overlooked or misconstrued the evidence, failed to make any necessary findings or made any erroneous inferences. It stated ((1988), 44 D.L.R. (4th) 592 at 595):

> Certainly the establishment of the facts in this case was fundamental and vital to the determination of the issues. It is submitted that erroneous inferences were taken from the facts, that evidence was overlooked or misconstrued, and that relevant findings were not made at all.
>
> There is no obligation on a trial judge to refer to every bit of conflicting evidence to show he has taken it into consideration, nor is he required to cite all the evidence to support a particular finding. In the instant case, the trial judge made some rather terse findings of fact in his recital of the events and of the relationship between the parties in the course of his lengthy reasons. On occasion he encapsuled a great deal of evidence in short form. However, the trial was a lengthy one, his reasons for judgment were lengthy and, as stated, he was not called on to cite every piece of relevant evidence to show he had considered it.
>
> . . . . .
>
> We can say in opening that we have not been persuaded that the learned trial judge overlooked or misconstrued any important or relevant evidence. There was ample evidence to support his conclusions on the facts and there is no palpable or overriding error in his assessment of the facts.

3 In this Court, LAC disclaimed any attack on the facts as found by the trial Judge, but they argued that the Court of Appeal erred in making further findings and drawing inferences from the facts so found. I accept the facts as they are set out in the

judgments below, and I would respectfully add that, in my view, the Court of Appeal in no way misconstrued the purport of what it describes as the trial Judge's necessarily "rather terse findings of fact" in the course of lengthy reasons.

4 I have had the advantage of reading the reasons of my colleague, Justice Sopinka. He has given a general statement of the facts as well as the judicial history of the case, and I shall refrain from doing so. I should immediately underline, however, that while I am content to accept this statement as a general outline, it will become obvious that I, at times, take a very different view of a number of salient facts and the interpretation that can properly be put upon them, in particular as they impinge on the nature, scope and effect of the breach of confidence alleged to have been committed by LAC against Corona.

5 It is convenient to set forth any conclusions at the outset. I agree with Sopinka J. that LAC misused confidential information confided to it by Corona in breach of a duty of confidence. With respect, however, I do not agree with him about the nature and scope of that duty. Nor do I agree that in the circumstances of this case it is appropriate for this Court to substitute an award of damages for the constructive trust imposed by the Courts below. Moreover, while it is not strictly necessary for the disposition of the case, I have a conception of fiduciary duties different from that of my colleague, and I would hold that a fiduciary duty, albeit of limited scope, arose in this case. In the result, I would dismiss the appeal.

The Issues

6 Three issues must be addressed:

7 1. What was the nature of the duty of confidence that was breached by LAC?

8 2. Does the existence of the duty of confidence, alone or in conjunction with the other facts as found below, give rise to any fiduciary obligation or relationship? If so, what is the nature of that obligation or relation?

9 3. Is a constructive trust an available remedy for a breach of confidence as well as for breach of a fiduciary duty, and if so, should this Court interfere with the lower Courts' imposition of that remedy?

Breach of Confidence

10 I can deal quite briefly with the breach of confidence issue. I have already indicated that LAC breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows (p. 47):

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.

This is the test applied by both the trial Judge and the Court of Appeal. Neither party contends that it is the wrong test. LAC, however, forcefully argued that the Courts below erred in their application of the test. LAC submitted that "the real issue is whether Corona proved that LAC received confidential information from it and [whether] it should have known such information was confidential".

11 Sopinka J. has set out the findings of the trial Judge on these issues, and I do not propose to repeat them. They are all supported by the evidence and adopted by the Court of Appeal. I would not interfere with them. Essentially, the trial Judge found that the three elements set forth above were met: (1) Corona had communicated information that was private and had not been published. (2) While there was no mention of confidence with respect to the site visit, there was a mutual understanding between the parties that they were working towards a joint venture and that valuable information was communicated to LAC under circumstances giving rise to an obligation of confidence. (3) LAC made use of the information in obtaining the Williams

property and was not authorized by Corona to bid on that property. I agree with my colleague that the information provided by Corona was the springboard that led to the acquisition of the Williams property. I also agree that the trial Judge correctly applied the reasonable mean test. The trial Judge's conclusion that it was obvious to Sheehan, LAC's vice-president for exploration, that the information was being communicated in circumstances giving rise to an obligation of confidence, following as it did directly on a finding of credibility against Sheehan, is unassailable.

12 In general, then, there is no difference between my colleague and me that LAC committed a breach of confidence in the present case. Where we differ — and it is a critically important difference — is in the nature and scope of the breach. The precise extent of that difference can be seen by a closer examination of the findings and evidence on the third element of the test set forth above, and I will, therefore, set forth my views on this element at greater length.

13 With respect to this aspect of the test, it is instructive to set out the trial Judge's finding in full. He said ((1986), 25 D.L.R. (4th) 504) at 542-543:

> *Has Corona established an unauthorized use of the information to the detriment of Corona?*
>
> Where the duty of confidence is breached, the confidee will not be allowed to use the information as a springboard for activities detrimental to the confider: see *Cranleigh Precision Engineering, Ltd. v. Bryant et al.*, [1964] 3 All E.R. 289 (Q.B.).
>
> Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.
>
> Certainly Lac was not authorized by Corona to bid on the Williams property.
>
> I have already reviewed the evidence dealing with the acquisition of the Williams property by Lac and the efforts made by Corona through Mr. McKinnon and also directly to acquire the Williams property. *On a balance of probabilities I find that, but for the actions of Lac, Corona would have acquired the Williams property and therefore Lac acted to the detriment of Corona.*
>
> I conclude that Corona has established the three requirements necessary for recovery based on the doctrine of breach of confidence.

[Emphasis added.] Later in his reasons he reiterated (p. 546) that "but for the actions of Lac, Corona would probably have acquired the Williams property".

14 The Court of Appeal was of the same view. It held (p. 657, D.L.R.) that:

> the evidence also amply sustains the finding that the confidential information which LAC received from Corona was of material importance in its decision to acquire the Williams property. In this latter regard it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property.

15 It was argued that this passage in the Court of Appeal's reasoning is a finding of fact that was not made by the trial Judge and that the record will not support. In my view, the Court of Appeal in no way extended the finding of the trial Judge. The portion of Holland J.'s reasons I have set out above was directed solely at the question of whether Corona had established an unauthorized use of the information to the detriment of Corona. He concluded that there had been an unauthorized use since LAC had not been authorized by Corona to bid on the Williams property. In other words, Corona did not consent to the use of the information by LAC for the purpose of acquiring the Williams land for LAC's own account, or, for that matter, for any purpose other than furthering negotiations to jointly explore and develop these properties. He also found that the information had been used to the detriment of Corona. When the sole question the learned trial Judge was addressing was whether LAC misused the confidential information Corona had provided to it and his sole conclusion was that "but for the actions of Lac, Corona would have acquired the Williams property *and therefore Lac acted to the detriment of Corona*" (emphasis added), I find

the conclusion inescapable that the trial Judge found as a fact that but for the *confidential information received and misused*, Corona would have acquired the Williams property and that LAC was not authorized to obtain it.

16 If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy.

17 There was some suggestion that LAC was only restricted from using the information imparted by Corona to acquire the Williams property for its own account, and had LAC acquired the claims on behalf of both Corona and LAC, there would have been no breach of duty. This, as I have noted, seems to me to misconstrue the finding of the trial Judge. What is more, the evidence, in my view, does not support that position. While Sheehan's letter of May 19, relied on by my colleague, may have been unclear as to who should acquire the Williams property, the events on June 30 make clear to me that both LAC and Corona contemplated Corona's acquisition of the Williams claims. The trial Judge, again making a finding of creditbility against Sheehan and Allen (LAC's president), accepted the evidence of Corona's witnesses, Bell and Dragovan, that not only was the Williams property discussed at the meeting on this latter date, but that Corona's efforts to secure it were discussed and that Allen advised Corona that they had to be aggressive in pursuing a patent group such as this. LAC in no way indicated to Corona, at this time or any other, that they were also pursuing the property. Yet 3 days later, Sheehan spoke with Mrs. Williams about making a deal for her property, and on July 6, 1981, LAC's counsel and corporate secretary submitted a written bid for the 11 patented claims. It strains credulity to suggest that on June 30 either LAC or Corona contemplated that Corona had given LAC confidential information so that LAC could acquire the property on either its own behalf or on behalf of both parties jointly. Certainly Corona would not have allowed the use of the confidential information for LAC's acquisition of the property to Corona's exclusion. Had the joint acquisition of the property been an authorized use of the information, surely there would have been some discussion of LAC's efforts to that end at the June 30 meeting. Instead, LAC advised Corona to aggressively pursue the claims.

18 The evidence of LAC's president, Mr. Allen, and of the experts called on behalf of LAC also support the position that LAC was not entitled to bid on the property and that Corona could expect that LAC would not do so. Allen testified as follows, in a passage to which both Courts below attached central importance:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that *while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged*.

[Emphasis added.] All the experts called by LAC agreed with the tenor of this statement. The testimony of Dr. Derry is indicative. He testified as follows:

> Q. Ah, so now we have it this way: that if some — so I understand your evidence — if Sheehan knew, as apparently he does from the way you read the evidence, that Corona was intending to acquire the Williams property; correct?
>
> A. Yes
>
> Q. That, for at least some period of time, Lac is precluded from making an offer or outbidding Corona on that property?
>
> A. I would say early on, yes.
>
> Q. Yes. And that obligation or the rationale for that preclusion comes from the fact that it is recognized in the industry, is it not?

A. Yes.

Whether these statements amount to a legally enforceable custom or whether they create a fiduciary duty are separate questions, but at the very least, they show that LAC was aware that it owed some obligation to Corona to act in good faith, and that that obligation included the industry-recognized practice not to acquire the property which was being pursued by a party with which it was negotiating.

19 Corona's activity following LAC's acquisition of the property is also noteworthy. The Court of Appeal thus described it (pp. 633-634, D.L.R.):

> Upon learning from Dragovan of the LAC offer to Mrs. Williams, Pezim immediately instructed his solicitor to act for Corona in the matter and Bell ordered LAC's crew engaged in the joint geochemical sampling programme to leave Corona's property. After Sheehan had learned of the termination of the geochemical study, he telephoned Bell on August 4th and was told by him that the reason for the termination was LAC's offer to Mrs. Williams. Sheehan said that he was still interested in a deal with Corona and Bell answered that he would have to discuss the matter with Pezim. On August 18th Sheehan and Pezim met in Vancouver to discuss the Corona property. The meeting was abortive. According to Pezim's evidence, and the trial judge so found, Pezim insisted that it was a condition of any deal that LAC 'give back' to Corona the Williams property. Subsequent negotiations between Sheehan and Donald Moore, a director of Corona, also failed to resolve the differences between LAC and Corona. After his meeting with Sheehan, Pezim, according to his testimony, instructed his solicitors to press on with the matter. This action was commenced on October 27, 1981, long before it was established that a producing gold mine on the Williams property was a probability.

This is certainly inconsistent with Corona having provided LAC the information so that LAC could acquire the property, whether alone or for their joint ownership.

20 This entire inquiry appears, however, to be misdirected. In establishing a breach of a duty of confidence, the relevant question to be asked is what is the confidee entitled to do with the information, and not to what use he is prohibited from putting it. Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use. In *Coco v. A.N. Clark (Engineers) Ltd.*, supra, at 48, Megarry J. said this in regard to the burden on the confidee to repel a suggestion of confidence:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

In my view, the same burden applies where it is shown that confidential information has been used and the user is called upon to show that such use was permitted. LAC has not discharged that burden in this case.

21 I am therefore of the view that LAC breached a duty owed to Corona by approaching Mrs. Williams with a view to acquiring her property, and by acquiring that property, whether or not LAC intended to invite Corona to participate in its subsequent exploration and development. Such a holding may mean that LAC is uniquely disabled from pursuing property in the area for a period of time, but such a result is not unacceptable. LAC had the option of either pursuing a relationship with Corona in which Corona would disclose confidential information to LAC so that LAC and Corona could negotiate a joint venture for the exploration and development of the area, or LAC could, on the basis of publicly available information, have pursued property in the area on its own behalf. LAC, however, is not entitled to the best of both worlds.

22 In this regard, the case can be distinguished from *Coco v. A.N. Clark (Engineers) Ltd.*, in that here the confidential information led to the acquisition of a specific, unique asset. Imposing a disability on a party in possession of confidential information from participating in a market in which there is room for more than one participant may be unreasonable, such as where the information relates to a manufacturing process or a design detail. In such cases, it may be that the obligation on the confidee is not to use the confidential information in its possession without paying compensation for it or sharing the benefit

derived from it. Where, however, as in the present case, there is only one property from which LAC is being excluded, and there is only one property that Corona was seeking, the duty of confidence is a duty not to use the information. The fact that LAC is precluded from pursuing the Williams property does not impose an unreasonable restriction on LAC. Rather, it does the opposite by encouraging LAC to negotiate in good faith for the joint development of the property.

Fiduciary Obligation

23 Having established that LAC breached a duty of confidence owed to Corona, the existence of a fiduciary relationship is only relevant if the remedies for a breach of a fiduciary obligation differ from those available for a breach of confidence. In my view, the remedies available to one head of claim are available to the other, so that provided a constructive trust is an appropriate remedy for the breach of confidence in this case, finding a fiduciary duty is not strictly necessary. In my view, regardless of the basis of liability, a constructive trust is the only just remedy in this case. Nonetheless, in light of the argument, I think it appropriate to consider whether a fiduciary relationship exists in the circumstances here.

24 There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. Indeed, the term "fiduciary" has been described as "one of the most ill-defined, if not altogether misleading terms in our law"; see P.D. Finn, *Fiduciary Obligations* (1977), at 1. It has been said that the fiduciary relationship is "a concept in search of a principle"; see Sir Anthony Mason, "Themes and Prospects" in P.D. Finn, *Essays in Equity* (1985), at 246. Some have suggested that the principles governing fiduciary obligations may indeed be undefinable (D.R. Klinck, "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on *International Corona Resources Ltd. v. Lac Minerals Ltd.*" (1988), 33 *McGill Law Journal* 600 at 603), while others have doubted whether there can be any "universal, all-purpose definition of the fiduciary relationship" (see *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, 432; R.P. Austin, "Commerce and Equity — Fiduciary Duty and Constructive Trust" (1986), 6 O.J.L.S. 444, 445-446). The challenge posed by these criticisms has been taken up by Courts and academics convinced of the view that underlying the divergent categories of fiduciary relationships and obligations lies some unifying theme; see *Frame v. Smith*, [1987] 2 S.C.R. 99 at 134, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 78 N.R. 40, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 per Wilson J.; Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; P.D. Finn, "The Fiduciary Principle" (1988), to be published by Carswell in T. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989); J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981), 97 L.Q.R. 51; T. Frankel, "Fiduciary Law" (1983), 71 *California Law Review* 795; J.R.M. Gautreau, "Demystifying the Fiduciary Mystique" (1989), 68 C.B.R. 1. This case presents a further opportunity to consider such a principle.

25 In *Guerin v. R.*, [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161, Dickson J. (as he then was) discussed the nature of fiduciary obligations in the following passage, at 383-384 [S.C.R.]:

> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery.
>
> . . . . .
>
> Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that 'the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.' Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> *I make no comment upon whether this description is broad enough to embrace all fiduciary obligations*. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of

another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

[Emphasis added.]

26 Wilson J. had occasion to consider the extension of fiduciary obligations to new categories of relationships in *Frame v. Smith*, supra. She found (p. 136, S.C.R.) that:

there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not *the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent*.

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

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

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

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

[Emphasis added.]

27 It will be recalled that the issue in that case, though not originally raised by the parties but argued at the request of the Court, was whether the relationship of a custodial parent to a non-custodial parent could be considered a category to which fiduciary obligations could attach. Wilson J. would have been willing to extend the categories of fiduciary relations to include such parties. While the majority in that case did not consider it necessary to address the bases on which fiduciary obligations arise (essentially because it considered the statute there to constitute a discrete code), as will be seen from my reasons below, I find Wilson J.'s approach helpful.

28 Much of the confusion surrounding the term "fiduciary" stems, in my view, from its undifferentiated use in at least three distinct ways. The first is as used by Wilson J. in *Frame v. Smith*, supra. There the issue was whether a certain class of relationship, custodial and non-custodial parents, were a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the Courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. This was made clear by Southin J. (as she then was) in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (S.C.). She stated:

Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But 'fiduciary' comes from the Latin "fiducia' meaning 'trust'. Thus, the adjective, 'fiduciary' means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with

> the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. In determining whether the categories of relationships which should be presumed to give rise to fiduciary obligations should be extended, the rough and ready guide adopted by Wilson J. is a useful tool for that evaluation. This class of fiduciary obligation need not be considered further, as Corona's contention is not that "parties negotiating towards a joint-venture" constitute a category of relationship, proof of which will give rise to a presumption of fiduciary obligation, but rather that a fiduciary relationship arises out of the particular circumstances of this case.

29 This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected. I agree with this comment of Professor Finn in "The Fiduciary Principle", supra at 64:

> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the 'fiduciary expectation'. Such a role may generate an actual expectation that that other's interests are being served. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.

It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship; see D.W.M. Waters, *The Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

30 The third sense in which the term "fiduciary" is used is markedly different from the two usages discussed above. It requires examination here because, as I will endeavour to explain, it gives a misleading colouration to the fiduciary concept. This third usage of "fiduciary" stems, it seems, from a perception of remedial inflexibility in equity. Courts have resorted to fiduciary language because of the view that certain remedies, deemed appropriate in the circumstances, would not be available unless a fiduciary relationship was present. In this sense, the label fiduciary imposes no obligations, but rather is merely instrumental or facilitative in achieving what appears to be the appropriate result. The clearest example of this is the judgment of Goulding J. in *Chase Manhattan Bank v. Israel-British Bank*, [1981] Ch. 105. There the plaintiffs had transferred some $2,000,000 to the defendant's account at a third bank. Due to a clerical error, a second payment in the same amount was made later that day. Instructions to stop the payment were made, but not quickly enough. The defendant bank was put into receivership shortly after the payment made in error was received, and as it was insolvent, the plaintiff could only recover the full amount of its money if it could trace it into some identifiable asset. Responding to the argument that, even if the funds could be identified, they could not be recovered since there was no fiduciary relationship, Goulding J. made the following comments, at 118-119, which it is worth setting out extensively:

> The facts and decisions in *Sinclair v. Brougham*, [1914] A.C. 398 and in *In re Diplock*, [1948] Ch. 465 are well known and I shall not take time to recite them. I summarise my view of the *Diplock* judgment as follows: (1) The Court of Appeal's interpretation of *Sinclair v. Brougham* was an essential part of their decision and is binding on me. (2) The court thought

that the majority of the House of Lords in *Sinclair v. Brougham* had not accepted Lord Dunedin's opinion in that case, and themselves rejected it. (3) *The court (as stated in Snell, loc. cit.) held that an initial fiduciary relationship is a necessary foundation of the equitable right of tracing. (4) They also held that the relationship between the building society directors and depositors in Sinclair v. Brougham was a sufficient fiduciary relationship for the purpose: [1948] Ch. 465, 529, 540. The latter passage reads, at p. 540: 'A sufficient fiduciary relationship was found to exist between the depositors and the directors by reason of the fact that the purposes for which the depositors had handed their money to the directors were by law incapable of fulfillment*.' It is founded, I think, on the observations of Lord Parker of Waddington at [1914] A.C. 398, 441.

This fourth point shows that the fund to be traced need not (as was the case in *In Re Diplock* itself) *have been the subject of fiduciary obligations before it got into the wrong hands. It is enough that, as in Sinclair v. Brougham [1914] A.C. 398, the payment into wrong hands itself gave rise to a fiduciary relationship*. The same point also throws considerable doubt on Mr. Stubbs's submission that the necessary fiduciary relationship must originate in a consensual transaction. It was not the intention of the depositors or of the directors in *Sinclair v. Brougham* to create any relationship at all between the depositors and the directors as principals. Their object, which unfortunately disregarded the statutory limitations of the building society's powers, was to establish contractual relationships between the depositors and the society. *In the circumstances, however, the depositors retained an equitable property in the funds they parted with, and fiduciary relationships arose between them and the directors. In the same way, I would suppose a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right*.

[Emphasis added.] It is clear that if a fiduciary relationship was necessary for the plaintiff to be entitled to a proprietary tracing remedy, then such a relationship would be found. It is equally clear that this relationship has nothing to do with the imposition of obligations traditionally associated with fiduciaries. For another example, see *Goodbody v. Bank of Montreal* (1974), 4 O.R. (2d) 147, 47 D.L.R. (3d) 335 at 339 (H.C.), where a thief was considered to be a fiduciary so as to ground an equitable tracing order.

31 Professor Birks has described this approach as follows (Peter Birks, "Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity" (1987), *Lloyd's Maritime and Commercial Law Quarterly* 421 at p. 436):

> This approach moves the characterization of a relationship as fiduciary from the reasoning which justifies a conclusion to the conclusion itself: a relationship becomes fiduciary because a legal consequence traditionally associated with that label is generated by the facts in question.

Professor Weinrib has criticized it because ("The Fiduciary Obligation", supra, at 5):

> This definition in terms of the effect produced by the finding of a fiduciary relation begs the question in an obvious way: one cannot both define the relation by the remedy and use the relation as a triggering device for remedy.

Megarry V-C commented on this approach to identifying a fiduciary obligation in *Tito v. Waddell (No. 2)*, [1977] Ch. 106, [1977] 3 All E.R. 129. In that case, the argument made was that [at 231-232, E.R.]:

> A was in a fiduciary position towards B if he was performing a special job in relation to B which affected B's property rights, at any rate if A was self-dealing. This ... could be put in two ways. First, there was a fiduciary duty if there was a job to be performed and it was performed in a self-dealing way. Alternatively, there was a fiduciary duty if there was a job to perform, and equity then imposed a duty to perform it properly if there was any self-dealing.

He rejected this position as follows, at 232 [E.R.]:

> I cannot see why the imposition of a statutory duty to perform certain functions, or the assumption of such a duty, should as a general rule impose fiduciary obligations, or even be presumed to impose any. Of course, the duty may be of such a nature as to carry with it fiduciary obligations: impose a fiduciary duty and you impose fiduciary obligations. But apart from such cases, it would be remarkable indeed if in each of the manifold cases in which statute imposes a duty, or imposes

> a duty relating to property, the person on whom the duty is imposed was thereby to be put into a fiduciary relationship with those interested in the property, or towards whom the duty could be said to be owed.
>
> . . . . .
>
> Furthermore, I cannot see that coupling the job to be performed with self-dealing in the performance of it makes any difference. If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing on some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

32 Megarry V-C held in that case that there was no fiduciary relationship and so no breach of the fiduciary obligations that would have been imposed by finding such a relationship. Self-dealing would only have been a breach of fiduciary obligation if a fiduciary obligation existed. Megarry V-C rejected the notion that one can argue from a conclusion (there has been self dealing) to a duty (therefore there is a fiduciary relationship) and then back to the conclusion (therefore there has been a breach of duty).

33 In my view, this third use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term. It will only be eliminated, however, if the Courts give explicit recognition to the existence of a range of remedies, including the constructive trust, available on a principled basis even though outside the context of a fiduciary relationship.

34 To recapitulate, the first class of fiduciary is not in issue in this appeal. It is not contended that all parties negotiating towards a joint venture are a class to which fiduciary obligations should presumptively attach. As will be clear from my discussion of the third usage of the term fiduciary, I am not prepared to hold that because a constructive trust is the appropriate remedy a fiduciary label therefore attaches, though I will deal later with why, even if the relationship is not fiduciary in any sense, a constructive trust may nonetheless be appropriate. The issue that remains for immediate discussion is whether the facts in this case, as found by the Courts below, support the imposition of a fiduciary obligation within the second category discussed above, and whether, acting as it did, LAC was in breach of the obligations thereby imposed.

35 In addressing this issue, some detailed consideration must be given to the analysis made by the Court of Appeal. Before that Court, LAC was attacking the trial Judge's conclusion that LAC was in breach of its fiduciary duty to act fairly and not to the detriment of Corona by acquiring the Williams property. I note that, in their discussions of this breach, neither Court below spoke of LAC's duty not to acquire the property for its own account to the exclusion of Corona, but rather spoke of a duty not to acquire the property *at all*. For the reasons I have outlined in my discussion of breach of confidence, and for reasons which I will more fully outline later, I am of the view that the Courts below were correct in their description of the duty owed.

36 The Court of Appeal agreed with the submission made by LAC that the law of fiduciary relations does not ordinarily apply to parties involved in commercial negotiations. Such negotiations are normally conducted at arm's length. They held, however, that in certain circumstances fiduciary obligations can arise, and it is a question of fact in each case whether the relationship of the parties, one to the other, is such as to create a fiduciary relationship. *United Dominions Corp. v. Brian Pty. Ltd.* (1985), 60 A.L.R. 741, 59 A.L.J.R. 676 (Aus. H.C.), was given as an example of where such an obligation might arise. In terms of the scheme I have outlined above, the Court of Appeal accepted that the first usage of "fiduciary" was not in issue, but that the second must be more closely examined.

37 Before undertaking that examination, the Court made the following comments on the relationship between fiduciary law and the law of confidential information, at 638-639 [D.L.R.]:

> the trial judge found that Corona imparted confidential information to LAC during the course of their negotiations. He recognized that the law regarding obligations imposed by the delivery of confidential information is distinct from the law imposing fiduciary duties and that it does not depend upon any special relationship between the parties. In *Canadian Aero Service Ltd. v. O'Malley* ... [1974] S.C.R. 592 at p. 616, Laskin J. said for the court:
>
> > The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.

That statement recognizes that the courts will provide relief for a breach of confidence in proper circumstances where there is no fiduciary relationship between the parties. On the other hand, a fiduciary relationship between parties may co-exist with a right of one of the parties to an obligation of confidence with respect to information of a confidential nature given by that party to the other party. It is indeed difficult to conceive of any fiduciary relationship where the right to confidentiality would not exist with respect to such information.

In the case at bar, the trial judge concluded that the legal principles regarding the obligations imposed by the delivery of confidential information and the obligations imposed as a result of the existence of a fiduciary relationship are intertwined. We are of the opinion that he was correct in this conclusion and that the law of fiduciary relationships can apply to parties involved, at least initially, in arm's length commercial discussions.

[Emphasis added.]

38 The Court of Appeal then discussed the several factors which in its view supported the finding of a fiduciary obligation. In doing so, they were specifically responding to LAC's submission that the correct approach is to ask "whether the relationship by law, custom or agreement is such that one party is obligated to demonstrate loyalty and avoid taking advantage for himself". In light of this submission to the Court below, I must say that it lies ill in the mouth of LAC to now assert before this Court that the custom or usage found by the Courts below cannot as a matter of law give rise to fiduciary obligations. Were I not of the view that that submission is in error, I incline to think that LAC may be estopped by its conduct below from raising it in this Court.

39 The Court of Appeal relied on four main factors in upholding the imposition of the fiduciary obligation. First, LAC was a senior mining company and Corona a junior, and LAC had sought out Corona in order to obtain information and to discuss a joint venture. Second, the parties had arrived at a mutual understanding of how each would conduct itself in the course of their negotiations, were working towards a common objective and had in fact taken preliminary steps in the contemplated joint exploration and development venture. Third, Corona disclosed confidential information to LAC and LAC expected to receive that confidential information in the course of the negotiations. Finally, there was established by LAC's own evidence a custom, practice or usage in the mining industry that parties in serious negotiation to a joint venture not act to the detriment of the other, particularly with respect to the confidential information disclosed, and the parties had reached the stage in negotiations where such an industry practice applied. In all these circumstances, the Court of Appeal found that it was just and proper that a fiduciary relationship be found, and a legal obligation not to benefit at the expense of the other from information received in negotiations imposed. By acquiring the Williams property, LAC had breached this obligation.

40 While it is almost trite to say that a fiduciary relationship does not normally arise between arm's length commercial parties, I am of the view that the Courts below correctly found a fiduciary obligation in the circumstances of this case and correctly found LAC to be in breach of it. I turn then to a consideration of the factors which in this case support the imposition of that duty. These can conveniently be grouped under three headings: (1) trust and confidence, (2) industry practice and (3) vulnerability. As will be seen these factors overlap to some extent, but considered as a whole they support the proposition that Corona could reasonably expect LAC to not act to Corona's detriment by acquiring the Williams land, and that Corona's expectation should be legally protected.

Trust and Confidence

41 The relationship of trust and confidence that developed between Corona and LAC is a factor worthy of significant weight in determining if a fiduciary obligation existed between the parties. The existence of such a bond plays an important role in determining whether one party could reasonably expect the other to act or refrain from acting against the interests of the former. That said, the law of confidence and the law relating to fiduciary obligations are not coextensive. They are not, however, completely distinct. Indeed, while there may be some dispute as to the jurisdictional basis of the law of confidence, it is clear that equity is one source of jurisdiction: see *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.). In *Guerin v. R.*, supra, Dickson J. noted that the law of fiduciary obligations had its origin in the law of confidence. Professor Finn thought it was settled that confidential information, whether classified as

property or not, will attract fiduciary law's protection provided the circumstances are such as to attract a duty of confidence: "The Fiduciary Principle", supra, at 50. I agree with the view of both Courts below that the law of confidence and the law of fiduciary obligations, while distinct, are intertwined.

42 In a claim for breach of confidence, Gurry tells us (*Breach of Confidence* (1984), at 161-162):

> the court's concern is for the protection of a confidence which *has been created* by the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is *not* focused on the information as a medium by which a *pre-existing* duty is breached.

However, the facts giving rise to an obligation of confidence are also of considerable importance in the creation of a fiduciary obligation. If information is imparted in circumstances of confidence, and if the information is known to be confidential, it cannot be denied that the expectations of the parties may be affected so that one party reasonably anticipates that the other will act or refrain from acting in a certain way. A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confidor. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted.

43 There are other distinctions between the law of fiduciary obligations and that of confidence which need not be pursued further here, but among them I simply note that unlike fiduciary obligations, duties of confidence can arise outside a direct relationship, where for example a third party has received confidential information from a confidee in breach of the confidee's obligation to the confidor: see *Liquid Veneer Co. v. Scott* (1912), 29 R.P.C. 639 (Ch.), at 644. It would be a misuse of the term to suggest that the third party stood in a fiduciary position to the original confidor. Another difference is that breach of confidence also has a jurisdictional base at law, whereas fiduciary obligations are a solely equitable creation. Though this is becoming of less importance, these differences of origin give to the claim for breach of confidence a greater remedial flexibility than is available in fiduciary law. Remedies available from both law and equity are available in the former case, equitable remedies alone are available in the latter.

44 The Court of Appeal characterized the relationship in the present case as one of "trust and cooperation". LAC and Corona were negotiating, and on the evidence of Sheehan, negotiating in good faith, towards a joint venture or some other business relationship. It was expected during these negotiations that Corona would disclose confidential information to LAC, and Corona did so. This was in conformity with the normal and usual practice in the mining industry. The evidence accepted by both Courts below established a practice in the industry, known to LAC, that LAC would not use confidential information derived out of the negotiating relationship in a manner contrary to the interests of Corona. Holland J. found that it "must have been obvious" to Sheehan that he was receiving confidential information. In light of that finding, it should be apparent that the lowest possible significance can attach to the absence of discussions between the parties relating to confidentiality. LAC, in the view of the Court of Appeal, felt that it had some obligation to confirm areas of interest with Corona, and did so with respect to staking other property in the area. The trial Judge, noting that Corona had "agreed" to LAC staking in the area, thought that this gave rise to an "informal understanding as to how each would conduct itself in anticipation of" the conclusion of a formal business relationship. In all these circumstances, I am of the view that both parties would reasonably expect that a legal obligation would be imposed on LAC not to act in a manner contrary to Corona's interest with respect to the Williams property.

Industry Practice

45 Both Courts below placed considerable weight on the evidence of Allen to the effect that there was a "duty" not to act to the other party's detriment when in serious negotiations through the misuse of confidential information. For ease of reference, I set out his testimony here again:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent

enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.

All of LAC's experts agreed with this statement. The trial Judge, in reliance on this evidence said, at 537-538:

> **The Evidence of the Experts on Liability**
>
> . . . . .
>
> *Whether the conduct of the parties, according to the experts, imposed fiduciary obligations on Lac*
>
> . . . . .
>
> I conclude, following *Cunliffe-Owen*, supra, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

The Court of Appeal affirmed the conclusion that Corona had established a "custom or usage" in accordance with the principle set forth in *Cunliffe-Owen v. Teather & Greenwood*, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421 (Ch.), and that the trial Judge was correct in applying that case.

46 Undoubtedly experts on mining practice are not qualified to give evidence on whether fiduciary obligations arose between the parties, as the existence of fiduciary obligations is a question of law to be answered by the court after a consideration of all the facts and circumstances. Thus, while the term "fiduciary" was not properly used by the trial Judge in this passage, the evidence of the experts is of considerable importance in establishing standard practice in the industry from which one can determine the nature of the obligations which will be imposed by law.

47 It will be clear then, that in my view LAC's submissions relating to custom and usage were largely misdirected. The issue is not, as LAC submitted, what is "the legal effect of custom in the industry". Rather, it is what is the importance of the existence of a practice in the industry, established out of the mouth of the defendant and all its experts, in determining whether Corona could reasonably expect that LAC would act or refrain from acting against the interests of Corona. Framed thus, the evidence is of significant importance.

48 I must at this point briefly advert to the law relating to custom and usage. LAC submitted that the Court of Appeal erred in using the terms "custom" and "usage" interchangeably. "Custom" in the sense of a rule having the force of law and existing since time immemorial is not in issue in this case. Indeed, Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom. Custom in Canadian law must be given a broader definition. In any event, both Courts below were not using the term in such a technical sense, as is clear from the fact that both substituted the term "practice" as a synonym. It is not necessary to decide, and I do not decide, whether a usage, properly established on the evidence, can give rise to fiduciary obligations. For these purposes I accept the definition of "usage" from *Halsbury's Laws of England*, vol. 12, 4th ed., para. 445, at 28, as follows:

> Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life, or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary.

49 I should mention that I have the greatest hesitation in saying that the only circumstances in which a legal obligation can arise out of a notorious business practice is when a contract results. The cases cited against implying terms in a contract have no relevance to negotiating practices. When the parties have reduced their understandings to writing, it is obviously the proper course for Courts to be extremely circumspect in adding to the bargain they have set down (see, for example, *Burns v. Kelly Peters & Associates Ltd.*, 41 C.C.L.T. 257, 16 B.C.L.R. (2d) 1, [1987] 6 W.W.R. 1, [1987] I.L.R. 1-2246, 41 D.L.R. (4th) 577 (C.A.), per Lambert J.A., at 601 [D.L.R.]; *Nelson v. Dahl* (1879), 12 Ch. D. 568, 28 W.R. 57 (C.A.), aff'd (1881), 6 App. Cas. 38, [1881-85] All E.R. Rep. 572, 29 W.R. 543 (H.L.); *Norwich Winterthur Insurance (Insurance) Ltd. v. Can. Stan. Industries*

of Australia Pty. Ltd., [1983] 1 N.S.W.C.R. 461 (C.A.). In any event, it is not, in my opinion, necessary to determine if the practice established by the evidence of LAC's executives and experts amounts to a legal usage. It is clear to me that the practice in the industry is so well known that at the very least Corona could reasonably expect LAC to abide by it. There is absolutely no substance to the submission of LAC that this practice is vague or uncertain. It is premised on the disclosure of confidential information in the context of serious negotiations. I do not find it necessary to define "serious", and will not interfere with the concurrent findings of the Courts below. The industry practice therefore, while not conclusive, is entitled to significant weight in determining the reasonable expectations of Corona, and for that matter of LAC regarding how the latter should behave.

Vulnerability

50 As I indicated below, vulnerability is not, in my view, a necessary ingredient in every fiduciary relationship. It will of course often be present, and when it is found it is an additional circumstance that must be considered in determining if the facts give rise to a fiduciary obligation. I agree with the proposition put forward by Wilson J. that when determining if new classes of relationship should be taken to give rise to fiduciary obligations then the vulnerability of the class of beneficiaries of the obligation is a relevant consideration. Wilson J. put it as follows in *Frame v. Smith*, at 137-138 [S.C.R.]:

> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

However, as I indicated, this case does not require a new class of relationships to be identified, but requires instead an examination of the specific facts of this case.

51 The Oxford English Dictionary, 2nd ed., v. XIX, at 786, defines "vulnerable" as follows:

> that may be wounded; susceptible of receiving wounds or physical injury ... open to attack or injury of a non-physical nature; esp. offering an opening to the attacks of raillery, criticism, calumny, etc.

Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm. It is clear, however, that fiduciary obligations can be breached without harm being inflicted on the beneficiary. *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223, is the clearest example. In that case a fiduciary duty was breached even though the beneficiary suffered no harm and indeed could not have benefitted from the opportunity the fiduciary pursued. Beneficiaries of trusts, however, are a class that is susceptible to harm, and are therefore protected by the fiduciary regime. Not only is actual harm not necessary, susceptibility to harm will not be present in many cases. Each director of General Motors owes a fiduciary duty to that company, but one can seriously question whether General Motors is vulnerable to the actions of each and every director. Nonetheless, the fiduciary obligation is owed because, as a class, corporations are susceptible to harm from the actions of their directors.

52 I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. As I indicated above, the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other. In any event, I would have thought it beyond argument that on the facts of this case Corona was vulnerable to LAC.

53 The argument to the contrary seems to be based on two propositions. First, Corona did not give up to LAC any power or discretion to affect its interests. Second, Corona could have protected itself by a confidentiality agreement, and the Court should not interfere if the parties could have, but did not in fact protect themselves. In my view there is no substance to either of these arguments.

54 The first is rebutted by the facts. LAC would not have acquired the property but for the information received from Corona. LAC in fact acquired the property. In doing so it affected Corona's interests. All power and discretion mean in this context is the ability to cause harm. Clearly that is present in this case. LAC acquired a power or ability to harm Corona by obtaining the Williams property. Corona gave it that power by giving up information about the property and about Corona's intentions. Having regard to the well-established practice in the mining industry, Corona would have had no expectation that LAC would use this information to the detriment of Corona.

55 This leads to the second point. This Court should not deny the existence of a fiduciary obligation simply because the parties could have by means of a confidentiality agreement regulated their affairs. That, it seems to me, is an unacceptable proposition, particularly on the facts of this case. The concurrent findings below are that Sheehan was aware the information he was receiving was confidential information and that it was being received in circumstances of confidence. It is clear that a claim for breach of confidence is then available if the information is misused. Why one would then go and enter into a confidentiality agreement simply confirming what each party knows escapes me. I cannot understand why a claim for breach of confidence is available absent a confidentiality agreement, but a claim for breach of fiduciary duty is not. The fact that the parties could have concluded a contract to cover the situation but did not in fact do so does not, in my opinion, determine that matter. Many claims in tort could be avoided through more prudent negotiation of a contract, but courts do not deny tort liability; see Gautreau, supra, at 11; *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321, [1986] R.R.A. 527, var'd [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv. The existence of an alternative procedure is only relevant in my mind if the parties would realistically have been expected to contemplate it as an alternative. It is useful here to once again refer to the evidence of LAC's experts. Dr. Robertson testified as follows:

> Q. Do large companies generally or typically make use of such agreements [confidentiality agreements]?
>
> A. *They are not common*. In the last five years they have become increasingly so. Even prospectors now ask large companies for confidentiality agreements.
>
> This whole process is data dissemination. They rarely have anything so highly confidential that a large company will trade away its right to do what it wants to do in return for, in essence, very little back.

[Emphasis added.] Dr. Derry testified to similar effect:

> Q. In 1981, in your view, how could Corona have protected itself if it both wanted to acquire more ground and it also wanted to allow the visit by Lac Minerals?
>
> A. *It would be unusual*, but I think it would have to ask the visitor to make some assurance, probably a written assurance, that he would not acquire ground or conflict with the interest of the owning company.

[Emphasis added.] The present litigation is, according to the evidence of Corona's witness Dr. Bragg, one of the reasons that confidentiality agreements are being used with increasing frequency. Where it is not established that the entering of confidentiality agreements is a common, usual or expected course of action, this Court should not presume such a procedure, particularly when the law of fiduciary obligations can operate to protect the reasonable expectations of the parties. There is no reason to clutter normal business practice by requiring a contract.

56 In this case the vulnerability of Corona at LAC's hand is clearly demonstrated by the circumstances in which LAC acquired the Williams property. Even though the offer from Corona would have paid to Mrs. Williams $250,000 within 3 years plus a 3 per cent net smelter return, Mrs. Williams accepted the offer from LAC which paid only half that return. It is nothing short

of fiction to suggest that vis-à-vis third parties or each other LAC and Corona stood on an equal footing. Corona was a junior mining company which needed to raise funds in order to finance the development of its property. This is why Corona welcomed the overture of LAC in the first place. LAC was a senior mining company that had the ability to provide those funds. Indeed LAC used this as a selling point to Mrs. Williams when it advised her that it was "an exploration and development company with four gold mines in production and had been in the mining and exploration business for decades".

57 I conclude therefore that Corona was vulnerable to LAC. The fact that these are commercial parties may be a factor in determining what the reasonable expectations of the parties are, and thus it may be a rare occasion that vulnerability is found between such parties. It is, however, shown to exist in this case and is a factor deserving of considerable weight in the identification of a fiduciary obligation.

Conclusion on Fiduciary Obligations

58 Taking these factors together, I am of the view that the Courts below did not err in finding that a fiduciary obligation existed and that it was breached. LAC urged this Court not to accept this finding, warning that imposing a fiduciary relationship in a case such as this would give rise to the greatest uncertainty in commercial law, and result in the determination of the rules of commercial conduct on the basis of ad hoc moral judgments rather than on the basis of established principles of commercial law.

59 I cannot accept either of these submissions. Certainty in commercial law is, no doubt, an important value, but it is not the only value. As Mr. Justice Grange has noted ("Good Faith in Commercial Transactions" (1985), *L.S.U.C. Special Lectures* 69), at 70:

> There are many limitations on the freedom of contract both in the common law and by statute. Every one of them carries within itself the seeds of debate as to its meaning or at least its applicability to a particular set of facts.

In any event, it is difficult to see how giving legal recognition to the parties' expectations will throw commercial law into turmoil.

60 Commercial relationships will more rarely involve fiduciary obligations. That is not because they are immune from them, but because in most cases, they would not be appropriately imposed. I agree with this comment of Mason J. in *Hospital Products Ltd. v. United States Surgical Corp.*, supra, at 455:

> There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

61 A fiduciary relationship is not precluded by the fact that the parties were involved in pre-contractual negotiations. That was made clear in the *United Dominions Corp.* case, supra, where the majority held, at 680 [A.L.J.R.], that:

> A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them.

The fact that the relationship between the parties in that case was more advanced than in the case at bar does not affect the value of the conclusion. See also *Fraser Edmunston Pty. Ltd. v. A.G.T. (Qld) Pty. Ltd.* (1986), Queensland S.C. 17. It is a question to be determined on the facts whether the parties have reached a stage in their relationship where their expectations should be protected. In this case the facts support the existence of a fiduciary obligation not to act to the detriment of Corona's interest by acquiring the Williams property by using confidential information acquired during the negotiation process.

62 The argument on morality is similarly misplaced. It is simply not the case that business and accepted morality are mutually exclusive domains. Indeed, the Court of Appeal, after holding that to find a fiduciary relationship here made no broad addition

to the law, a view I take to be correct, noted that the practice established by the evidence to support the obligation was consistent with "business morality and with encouraging and enabling joint development of the natural resources of the country". This is not new. Texts from as early as 1903 refer to the obligation of "good faith by partners in their dealings with each other extend[ing] to negotiations culminating in the partnership, although in advance of its actual creation" (C.H. Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands*, 2nd ed. (Salem: Ayer Pub. Co., 1983). In my view, no distinction should be drawn here between negotiations culminating in a partnership or a joint venture.

Remedy

63 The appropriate remedy in this case can not be divorced from the findings of fact made by the Courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of LAC in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy. Both Courts below awarded the Williams property to Corona on payment to LAC of the value to Corona of the improvements LAC had made to the property. The trial Judge dealt only with the remedy available for a breach of a fiduciary duty, but the Court of Appeal would have awarded the same remedy on the claim for breach of confidence, even though it was of the view that it was artificial and difficult to consider the relief available for that claim on the hypothesis that there was no fiduciary obligation.

64 The issue then is this. If it is established that one party (here LAC) has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.

65 In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. 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, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by LAC, Corona would have acquired the property. In *Air Canada v. B.C.*, [1989] 1 S.C.R. 1161, [1989] 4 W.W.R. 97, 36 B.C.L.R. (2d) 145, 95 N.R. 1, 59 D.L.R. (4th) 161, 2 T.C.T. 4178, [1989] 1 T.S.T. 2126, 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." In my view the fact that Corona never owned the property should not preclude it from pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution* (New York: Oxford U. Press, 1985), at 133-39. LAC has therefore been enriched at the expense of Corona.

66 That enrichment is also unjust, or unjustified, so that the plaintiff is entitled to a remedy. There is, in the words of Dickson J. in *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, "an absence of any juristic reason for the enrichment". The determination that the enrichment is "unjust" does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the Courts will grant relief. Restitution is a distinct body of law governed by its own developing system of rules. Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate. It is not every case of such a breach of duty, however, that will attract recovery based on the gain of the defendant at the plaintiff's expense. Indeed this has long been recognized by the courts. In *Re Coomber*, [1911] 1 Ch. 723 at 728-29, (C.A.), Fletcher Moulton L.J. said:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it.

> They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. *There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them*.

[Emphasis added.]

67 In breach of confidence cases as well, there is considerable flexibility in remedy. Injunctions preventing the continued use of the confidential information are commonly awarded. Obviously that remedy would be of no use in this case where the total benefit accrues to the defendant through a single misuse of information. An account of profits is also often available. Indeed in both Courts below an account of profits to the date of transfer of the mine was awarded. Usually an accounting is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense. Occasionally, as in this case, the measures coincide. In a case quite relevant here, this Court unanimously imposed a constructive trust over property obtained from the misuse of confidential information: *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, 56 W.W.R 697, 50 C.P.R. 299, 57 D.L.R. (2d) 557. More recently, a compensatory remedy has been introduced into the law of confidential relations. Thus in *Seager v. Copydex Ltd.*, [1969] 2 All E.R. 718, [1969] 1 W.L.R. 809 (C.A.), an inquiry was directed concerning the market value of the information between a willing buyer and a willing seller. The defendant had unconsciously plagiarized the plaintiff's design. In those circumstances it would obviously have been unjust to exclude the defendant from the market when there was room for more than one participant.

68 I noted earlier that the jurisdictional base for the law of confidence is a matter of some dispute. In the case at bar however, it is not suggested that either the contractual or property origins of the doctrine can be used to found the remedy. Thus while there can be considerable remedial flexibility for such claims, it was not argued that the Court may not have jurisdiction to award damages as compensation and not merely in lieu of an injunction in the exercise of its equitable jurisdiction, and since I am of the view that a constructive trust is in any event the appropriate remedy, I need not consider the question of jurisdiction further.

69 In view of this remedial flexibility, detailed consideration must be given to the reasons a remedy measured by LAC's gain at Corona's expense is more appropriate than a remedy compensating the plaintiff for the loss suffered. In this case, the Court of Appeal found that if compensatory damages were to be awarded, those damages in fact equalled the value of the property. This was premised on the finding that but for LAC's breach, Corona would have acquired the property. Neither at this point nor any other did either of the Courts below find Corona would only acquire one half or less of the Williams property. While I agree that, if they could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures, even if they would not, a restitutionary measure would be appropriate.

70 The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources. The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary. If by breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset. In the present case, it is true that had negotiations been concluded, LAC could also have acquired an interest in the Corona land, but that is only an expectation and not a certainty. Had Corona acquired the Williams property, as they would have but for LAC's breach, it seems probable that negotiations with LAC would have resulted in a concluded agreement. However, if LAC, during the negotiations, breached a duty of confidence owed to Corona, it seems certain that Corona would have broken off negotiations and LAC would be left with nothing. In such circumstances, many business people, weighing the risks, would breach the obligation and acquire the asset. This does nothing for the preservation of the institution of good faith bargaining or relationships of trust and confidence.

The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect. The elements of a claim in unjust enrichment having been made out, I have found no reason why the imposition of a restitutionary remedy should not be granted.

71 This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, 35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385, 92 N.R. 1, 57 D.L.R. (4th) 321. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, supra, where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker*, supra, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In *Hunter v. Syncrude*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.

72 In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that LAC hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "the principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v. Becker*, at 847 [S.C.R.], the converse is not true. The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances. Where it could be more appropriate than in the present case, however, it is difficult to imagine.

73 The trial Judge assessed damages in this case at $700,000,000 in the event that the order that LAC deliver up the property was not upheld on appeal. In doing so he had to assess the damages in the face of evidence that the Williams property would be valued by the market at up to 1.95 billion dollars. Before us there is a cross-appeal that damages be reassessed at $1.5 billion. The trial Judge found that no one could predict future gold prices, exchange rates or inflation with any certainty, or even on the balance of probabilities. Likewise he noted that the property had not been fully explored and that further reserves may be found. The Court of Appeal made the following comment, at 651 [D.L.R.], with which I am in entire agreement:

> there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.

To award only a monetary remedy in such circumstances when an alternative remedy is both available and appropriate would in my view be unfair and unjust.

74 There is no unanimous agreement on the circumstances in which a constructive trust will be imposed. Some guidelines can, however, be suggested. First, no special relationship between the parties is necessary. I agree with this comment of Wilson J. in *Hunter v. Syncrude*, supra, at 213 [B.C.L.R.]:

> Although both *Pettkus v. Becker* and *Sorochan v. Sorochan* were 'family' cases, unjust enrichment giving rise to a constructive trust is by no means confined to such cases: see *Deglman v. Guaranty Trust Co.*, [1954] S.C.R. 725. Indeed, to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles.

As I noted earlier, the constructive trust was refused in *Hunter v. Syncrude*, not because the parties did not stand in any special relationship to one another, but because the claim for unjust enrichment was not made out. Similarly, in *Pre-Cam Exploration*, supra, it cannot be said that the parties stood in a "special relationship" to one another, but a constructive trust was nonetheless

awarded. In *Chase Manhattan*, supra, a constructive trust was imposed, but to describe the banks as standing in a special relationship one to the other would be as much of a fiction as describing them as fiduciaries. Insistence on a special relationship would undoubtedly lead to that same sort of reasoning from conclusions. Courts, coming to the conclusion that a proprietary remedy is the only appropriate result will be forced to manufacture "special relationships" out of thin air, so as to justify their conclusions. In my view that result can and should be avoided.

75 Secondly, it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property. When a constructive trust is imposed as a result of successfully tracing a plaintiff's asset into another asset, it is indeed debatable which the Court is doing. Goff and Jones, *The Law of Restitution*, 3rd ed. (London: Sweet & Maxwell, 1986), at 78, take the position that:

> the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over such assets.
>
> It is the nature of the plaintiff's claim itself which is critical in determining whether a restitutionary proprietary claim should be granted; the extent of that claim is a different matter, which should be dependent upon the defendant's knowledge of the true facts. There are certain claims which must always be personal. Such are claims for services rendered under an ineffective contract; the plaintiff is then in no different position from any unsecured creditor. In contrast there are other claims, for example, those arising from payment made under mistake, compulsion or another's wrongful act, where a restitutionary proprietary claim should presumptively be granted, although the court should always retain a discretion whether to do so or not.

76 In their view, a proprietary claim should be granted when it is just to grant the plaintiff the additional benefits that flow from the recognition of a right of property. It is not the recognition of a right of property that leads to a constructive trust. It is not necessary, therefore, to determine whether confidential information is property, though a finding that it was would only strengthen the conclusion that a constructive trust is appropriate. This is the view of Fridman and McLeod, *Restitution* (Toronto: Carswell, 1982), at 539, where they say:

> there appears to be no doubt that a fiduciary who has consciously made use of confidential information for private gain will be forced to account for the entire profits by holding such profits made from the use of the confidential information on a constructive trust for the beneficiary-estate. The proprietary remedy flows naturally from the conclusion that the information itself belonged to the beneficiary and there has been no transaction effective to divest his rights over the property.

77 I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to "some mix of judicial discretion ... subjective views about which party 'ought to win' ..., and 'the formless void of individual moral opinion'", per Deane J. in *Muschinski v. Dodds* (1985), 160 C.L.R. 583 at 616. As Deane J. further noted at 616:

> Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other.

78 Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise

once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter*, supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer. Here as well it is justified to grant a right of property since the concurrent findings below are that the defendant intercepted the plaintiff and thereby frustrated its efforts to obtain a specific and unique property that the Courts below held would otherwise have been acquired. The recognition of a constructive trust simply redirects the title of the Williams property to its original course. The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property. This situation will be more rare, since the focus of the inquiry should be upon the reasons for recognizing a right of property in the plaintiff, not on the reasons for denying it to the defendant.

79 Having specific regard to the uniqueness of the Williams property, to the fact that but for LAC's breaches of duty Corona would have acquired it, and recognizing the virtual impossibility of accurately valuing the property, I am of the view that it is appropriate to award Corona a constructive trust over that land.

80 Before turning to the cross-appeal, I must make brief reference to the relevance of the fact that Corona entered an arrangement with Teck under which the latter not only obtained an interest in the Corona property, but also an interest in the result of this lawsuit. Since I view this case as one where a restitutionary claim has been made out, the position of Teck is irrelevant. The focus must be on the enrichment LAC received at Corona's expense. That enrichment was found as a fact to be the Williams property. Subsequent to acquiring it, Corona would likely have entered a joint venture agreement with LAC. LAC has no one to blame but itself for that joint venture not coming about. Only because of LAC's breach of duty did the arrangement with Teck result. The fact that it is not proved that Teck demanded a share of the litigation as the price for joining with Corona is irrelevant. It cannot be said that such an agreement was unreasonable in the circumstances. Given LAC's breach of duty to Corona, and Corona's awareness of that breach, there is no way that LAC would ever have acquired an interest in the Williams property. Corona was entitled to cease negotiating with LAC and pursue other opportunities.

81 If, however, this case is viewed as my colleague Sopinka J. views it, as a case of compensation, then the position of Teck is relevant. Corona had to enter into an agreement with someone. Corona contemplated eventually owning approximately a one-half interest in the developed properties. To award only an estimated value of a one-half interest in the property when that half will be further subdivided is, in essence, to award Corona only a one-quarter interest in the Williams property. As I am of the view that damages are not an appropriate award, I need not discuss this matter further.

The Cross-Appeal

82 I can deal shortly with the cross-appeal. LAC has been enriched at the expense of Corona by acquiring the Williams property. Having acquired that property in breach of a duty of confidence and in breach of a fiduciary obligation, that enrichment is unjustified. Likewise, however, Corona will receive an enrichment when LAC hands over the property, in the amount of the value of the improvement of the land to Corona. That value is equal to what would have been spent by Corona to develop both properties, less what Corona in fact spent. The trial Judge made a $50,000,000 downward adjustment to the amount LAC spent, directing a reference to determine the exact amount in the event the parties disputed the adjustment. I would affirm that award. The three elements of a claim for restitution are made out, namely there is an enrichment (the mine), that enrichment accrued to Corona at LAC's expense, and the enrichment is unjustified. The enrichment is not justified since, on the assumption that Corona had acquired the Williams property, it would of necessity have had to expend funds to develop the mine. In these circumstances, LAC is entitled to a restitutionary remedy, namely a lien on the Williams property to the extent that Corona was saved a necessary expenditure.

83 In view of this conclusion it becomes unnecessary to address the contingent cross-appeal by which Corona asked that damages be reassessed at $1.5 billion. I would dismiss the appeal with costs and dismiss the cross-appeal with costs.

Lamer J. **(concurring in part):**

84 I have read the judgments of my colleagues, La Forest J. and Sopinka J. I am in agreement with my brother Sopinka J. and for the reasons set out in his judgment that the evidence does not establish in this case the existence of a fiduciary relationship.

85 I am in agreement with both of my colleagues, and concur in their reasons in support thereof, that there was a breach of confidence on the part of LAC Minerals Ltd.

86 As regards the appropriate remedy, I am of the view that the approach taken by La Forest J. is the proper one.

87 I would accordingly dismiss the appeal with costs and dismiss the cross-appeal with costs.

Wilson J. **(concurring in part):**

88 I have had the advantage of reading the reasons of my colleagues, Mr. Justice Sopinka and Mr. Justice La Forest and I agree with my colleague, Mr. Justice La Forest, as to the appropriate remedy in this case. I propose to comment briefly on the three issues before the Court on this appeal as identified by them:

(1) Fiduciary Duty

89 It is my view that, while no ongoing fiduciary *relationship* arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine, a fiduciary *duty* arose in LAC when Corona made available to LAC its confidential information concerning the Williams property, thereby placing itself in a position of vulnerability to LAC's misuse of that information. At that point LAC came under a duty not to use that information for its own exclusive benefit. LAC breached that fiduciary duty by acquiring the Williams property for itself.

90 It is, in other words, my view of the law that there are certain relationships which are almost per se fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and that where such relationships subsist they give rise to fiduciary duties. On the other hand, there are relationships which are not in their essence fiduciary, such as the relationship brought into being by the parties in the present case by virtue of their arm's length negotiations towards a joint venture agreement, but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by them or either of them within the confines of the relationship. This, in my view, is what happened here when Corona disclosed to LAC confidential information concerning the Williams property. LAC became at that point subject to a fiduciary duty *with respect to that information* not to use it for its own use or benefit.

(2) Breach of Confidence

91 I agree with my colleagues that LAC's conduct may also be characterized as a breach of confidence *at common law* with respect to the information concerning the Williams property. The breach again consisted of LAC's acquisition of the Williams property for itself, such property being the subject of the confidence.

(3) The Remedy

92 It seems to me that when the same conduct gives rise to alternate causes of action, one at common law and the other in equity, *and the available remedies are different*, the Court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy. Since the result of LAC's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust on LAC in favour of Corona with respect to the property. Full compensation may or may not be achieved

through an award of common law damages depending upon the accuracy of valuation techniques. It can most surely be achieved in this case through the award of an in rem remedy. I would therefore award such a remedy. The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award.

93 It is, however, my view that this is not a case in which the available remedies are different. I believe that the remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty. The distinction between the two causes of action as they arise on the facts of this case is a very fine one. Inherent in both causes of action are concepts of good conscience and vulnerability. It would be strange indeed if the law accorded them widely disparate remedies. In his article on "The Role of Proprietary Relief in the Modern Law of Restitution", John D. McCamus, Cambridge Lecture 1987, 141 at 150, Professor McCamus poses the rhetorical question:

> Would it not be anomalous to allow more sophisticated forms of relief for breach of fiduciary duty than for those forms of wrongdoing recognized by the law of torts, some of which, at least, would commonly be more offensive from the point of view of either public policy or our moral sensibilities than some breaches of fiduciary duty?

94 I believe that where the consequence of the breach of either duty is the acquisition by the wrongdoer of property which rightfully belongs to the plaintiff or, as in this case, ought to belong to the plaintiff if no agreement is reached between the negotiating parties, then the in rem remedy is appropriate to either cause of action.

95 I would dismiss the appeal with costs. I would also dismiss the cross-appeal with costs.

Sopinka J. **(dissenting — concurred in part by *McIntyre* and *Wilson JJ.*):**

96 This appeal and cross-appeal raise important issues relating to fiduciary duty and breach of confidence. In particular, they require this Court to consider whether fiduciary obligations can arise in the context of abortive arm's-length negotiations between parties to a prospective commercial transaction. Also at issue are the nature of confidential information and the appropriate remedy for its misuse.

The Facts

97 The facts are fully developed in the reasons for judgment of the trial Judge, Holland J., (1986) 53 O.R. (2d) 737, and in the judgment of the Ontario Court of Appeal, (1987) 62 O.R. (2d) 1. My recital of them, here, will therefore be skeletal in nature. From time to time in these reasons, some of the facts relating to specific issues will be examined in greater detail.

98 The parties to these proceedings are International Corona Resources Ltd. (which I will refer to as either "Corona" or the "respondent") and LAC Minerals Ltd. (which I will refer to as either "LAC" or the "appellant"). Corona, which was incorporated in 1979, was at material times a junior mining company listed on the Vancouver Stock Exchange. LAC is a senior mining company which owns a number of operating mines and is listed on several stock exchanges. This action arises out of negotiations between Corona and LAC relating to the Corona property, the Williams property and the Hughes property, all of which are located in the Hemlo area of northern Ontario.

99 The Corona property consists of 17 claims with an area of approximately 680 acres. The Williams property consists of 11 patented claims, covering a total of about 400 acres, and is contiguous to the Corona property and to the west. The Hughes property consists of approximately 156 claims and surrounds both the Corona and Williams properties, except to the north of the Williams property. It is now in the names of Golden Sceptre Resources Ltd., Goliath Gold Mines Ltd. and Noranda Exploration Co.

100 In October 1980, Corona had retained Mr. David Bell, a geologist consultant to carry out an extensive exploration program on its property which involved extensive diamond drilling. Bell hired Mr. John Dadds, a mining technician, to assist him. The core that was obtained from the drilling was identified, logged and then stored inside a core shack built on the Corona property. Assay results were sent to Bell and to the Corona office in Vancouver. Some of the results were communicated to the

Vancouver Stock Exchange in the form of news releases and assay results, and were published from time to time in the George Cross Newsletter, a daily newsletter published in Vancouver.

101 The results of this exploratory work led Bell to an interesting theory. The trial Judge describes it in some detail:

> Mr. Bell testified that by February, 1981, he was sufficiently encouraged by the results of the drilling programme that he decided that it was time to acquire the Williams property and the claims to the north. Mr. Bell stated that within the first month of drilling his opinion of the geology changed from what he initially thought was a secondary intrusive model, from reading the literature of the area, to a syngenetic deposit, that is a deposit formed at the same time and by the same process as the enclosing rocks. He concluded that the mineralization and gold values were not tied into a vein but rather that the mineralization was in a zone, or beds, of megasediment that indicated a volcanic origin. In Mr. Bell's opinion, in all likelihood, the distribution of gold could be spread over quite a large area and there could be pools or puddles of ore, indicating to him that the exploration programme should be extended along the zone to adjoining properties.

102 This increased the interest in surrounding properties and Bell, on behalf of Corona, requested Mr. Donald McKinnon, a prospector who was familiar with the properties, to attempt to acquire the Williams property. Representatives of LAC read about these results in the March 20, 1981 George Cross Newsletter and arranged to visit the Corona property. This property visit took place on May 6, and Bell had arranged for Dadds to have core, assay results, sections, maps and a drill plan available at the core shack. Those present at the meeting consisted of Nell Dragovan, then president of Corona, and Messrs. Bell, Dadds, Sheehan (vice-president for exploration of LAC), and Pegg (a LAC geologist). The visitors were shown cores, sections, logs with assay results added and a map showing the staking in the area. Bell discussed progress to date, plans for the future and his theory of the geology. Sheehan and Pegg both examined the cores and, after the meeting in the core shack, which Bell said lasted about 45 minutes, they went outside. Bell took a map and explained where the earlier drilling had taken place as well as the location of future holes, and discussed the geology further. He also indicated that the formation was continuing to the west on the Williams property and that Corona wanted to continue its exploration there. Outcrops in the area were also inspected. Bell said that before he left, Sheehan told him that he "wanted me to drop into Toronto when I was there and to further the discussions of their visit and talk about possible terms". A meeting was arranged for May 8 in Toronto at LAC's head office.

103 Holland J. found as a fact that there were no discussions regarding confidentiality during the May 6 property visit except in connection with an unrelated matter.

104 Following the site visit, Sheehan and Pegg returned quickly to LAC's exploration office in Toronto and instructed LAC personnel to gather information on the Hemlo area from the LAC library of files. They then went to the assessment office of the Ontario department of mines to obtain copies of all claim maps, reports, publications and assessment work files that were available on the area. Sheehan told a LAC geologist to ascertain what claims would be necessary to cover the favourable belt to the east of the Corona property. The geologist decided that about 600 claims should be staked and immediately thereafter, on May 8, LAC began staking what are now known as the White River claims.

105 On May 8, Bell and Sheehan met and discussed the geology of the area, its similarity to the Bousquet area of Quebec, at which both Pegg and Sheehan had worked, and the possible terms of an agreement between Corona and LAC. Sheehan told Bell of LAC's staking to the east. Bell said that the two men discussed the properties around the Corona property. Corona's interest in the Williams and Hughes properties was mentioned and Sheehan gave Bell advice on how to pursue a patented claim. Bell told Sheehan that Corona had somebody doing that, without mentioning McKinnon by name. A number of avenues for progress were discussed and Sheehan said that he would send a letter outlining the terms that were discussed. Again, nothing was said regarding confidentiality.

106 On May 19, Sheehan wrote to Bell as follows:

> Further to our meeting in Toronto I would like to give you this letter as further evidence of our sincerity in joining with Corona re exploration in the Hemlo area.

As we discussed there are a number of avenues that could be explored regarding a working arrangement re the property and to that end I will list the various possibilities:

(a) Corona could have our Company do a financing and ultimately we would scale it forward so as to control Corona.

(b) We form a joint venture where Long Lac [a Lac subsidiary] spends say 1.5 to 2.0 times amount spent by Corona for a 60% interest. Beyond that point we spend on a 60-40 basis or use a dilution formula down to a minimum should one party decide to stop contributing. In addition Lac would have to spend a definite amount of money to reach a threshold before they would acquire any interest.

(c) A possible significant cash payment with a variation in interests as a result of the amount of cash payment. Followed by a Lac work proposal.

As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.

I believe at some point within the next few weeks we should have an understanding that Corona and Lac should seriously examine an avenue for continual work in the area. Perhaps you could give our management a presentation of results to date i.e., sections, general geology, longitudinal presentation — location potential etc. Based on foregoing we could then arrive at a sound basis for structuring a working agreement.

107 The trial Judge found that the reference to the Hughes ground was intended to include the Williams property as well. Bell replied by letter dated May 22 as follows:

I am in receipt of your letter dated May 19, 1981 regarding the Hemlo Property.

First may I thank you for your fine hospitality during my brief visit to Toronto.

I am forwarding a copy of your proposal to Vancouver for the other directors to review. We are presently well into our Phase II, exploring and extending the previous examined parameters outlined in Phase I. Our present plans are to complete 30,000 to 35,000 feet of diamond drilling at which time a general over-all review will take place.

At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.

In the mean time I do believe we should keep in touch and maintain the fine relationship presently established.

108 Bell wrote to Dragovan by letter dated May 23 which stated, in part, the following:

Enclosed is a copy of a letter received from Long Lac Minerals Exploration Limited, also please find a copy of my letter to Lac in reply. This letter from Lac should be discussed with all directors.

109 On May 27, Corona released to the Vancouver Stock Exchange encouraging assay results of a drill hole, which the trial Judge referred to as the "discovery hole". These results were published in the George Cross Newsletter of May 29, and further results confirming an extension of the "discovery hole" were released on June 4 and published in the George Cross Newsletter of June 8.

110 Subsequently, the results of further drill holes that were encouraging were published by Corona. On June 8, Mr. Murray Pezim, a stock promoter from Vancouver, became a director of Corona. Pezim arranged for Bell to make a presentation in Vancouver on behalf of Corona to a large number of brokers. Some of the information developed by Bell was imparted to those present at this meeting.

111 On June 15 a meeting was also arranged for June 30 at LAC's head office in Toronto, at which Bell was to make a presentation in accordance with Sheehan's letter of May 19. Following the meeting, sections, a detailed drill plan and apparently a vertically longitudinal section were left with LAC. Mr. Peter Allen, the president of LAC, advised Bell to be aggressive in his pursuit of the Williams property and Bell responded that Corona had somebody pursuing this property on their behalf. Allen told Sheehan to get a proposal out to Corona and Sheehan indicated that he would have such a proposal out within 3 weeks.

112 According to Bell, no one from LAC ever told him that they would not acquire the Williams property and LAC was never told that the information given to it was private, privileged or confidential. Although the evidence was contradictory, the trial Judge found as a fact that the pursuit by Corona of the Williams property was mentioned at the meeting. This and other information revealed to LAC went beyond the information that had been made public. This finding was confirmed by the Court of Appeal. The trial Judge also found that it was agreed that a proposal would be sent by LAC to Corona within 3 weeks, and that the purpose of the meeting was to discuss a possible deal between Corona and LAC in order to provide Corona with the financing needed to develop a mine.

113 Meanwhile, on June 8, McKinnon had spoken to Mrs. Williams by telephone and made an oral offer for the Williams property, which was followed by a written offer prepared by solicitors. On July 3, after some searching, Sheehan located Mrs. Williams by telephone and made an oral offer to her. She asked for a written offer and by letter dated July 6, 1981, LAC's legal counsel put it in writing.

114 On July 21, McKinnon again spoke to Mrs. Williams who told him that she had another offer and that he should contact her Toronto solicitor. On July 22, McKinnon told Bell of the other offer and it was agreed by Bell and Dragovan that Corona should make an offer to Williams directly. At this time, no one from Corona knew that the other offer was from LAC. On July 23, Corona's solicitor prepared an offer, which was delivered on July 27. Also on July 23, Mrs. Williams' Toronto solicitor disclosed LAC's name to Corona's solicitor. LAC's offer was accepted on July 28 and a formal agreement was signed on August 25, 1981.

115 After hearing that the LAC offer had been accepted, Pezim turned the matter over to his solicitors. On August 18, 1981, Sheehan went to Vancouver to attempt to resume negotiations with Pezim, who asked for the return of the Williams property. No agreement was reached. Later, Mr. Donald Moore, another director of Corona attempted to revive negotiations with Sheehan, without success.

116 After the Corona — LAC relationship had come to an end, Corona concluded an agreement with Teck Corp. (hereinafter referred to as "Teck") dated December 10, 1981, which was subsequently amended by agreements dated August 13, 1982 and December 14, 1983. These agreements, while providing for a joint venture in connection with the possible development of a mine on the Corona property, also purport to give Teck a 50 per cent interest in the fruits of Corona's lawsuit against LAC, with Teck agreeing to pay certain costs.

The Judgments Below

Ontario High Court

117 The trial Judge considered the liability of LAC under three heads pleaded by Corona: contract, breach of confidence and breach of fiduciary duty. Holland J. concluded that no binding contract was entered into by the parties but found LAC liable under the other two heads of liability, breach of confidence and breach of fiduciary duty. He decided that the appropriate remedy for breach of fiduciary duty was the return of the Williams property to Corona but allowed LAC's claim for a lien for the cost of improvements, and the amounts paid to Williams excluding royalty payments. The actual amount spent by LAC on developing the property was $203,978,000 but this was discounted by $50,000,000 to take into account the fact that if Corona had not been deprived of the Williams property, it would have developed the property and the Williams property as one mine, thereby achieving a saving represented by the discount. Either party was entitled to undertake a reference to determine the amount by which the Williams property was enhanced by virtue of LAC's expenditure if dissatisfied with the trial Judge's estimate of the discount of $50,000,000. LAC was ordered to transfer the property to Corona upon payment by Corona to LAC of these amounts.

118 A reference was also ordered to determine the amount of the profits obtained by LAC from the Williams property. LAC was ordered to pay the amount of such profits to Corona with interest.

119 With the agreement of counsel, damages were assessed in the event that, on appeal, a court should decide that damages were the appropriate remedy. The assessment was made on the principles applicable to breach of fiduciary duty. The amount was $700,000,000 being the value of the mine as of January 1, 1986 on the basis of a discounted cash flow approach.

Court of Appeal

120 The Court of Appeal affirmed the findings of the trial Judge with respect to breach of confidence and fiduciary duty. It also confirmed the remedy with the addition of its opinion that a constructive trust was an appropriate remedy for both the breach of confidence and fiduciary duty. The Court did not deal with the appellant's attack on the assessment of damages. In the result, the appeal was dismissed with costs. I will deal more fully with the reasons of both the trial Judge and the Court of Appeal when discussing the issues.

The Issues Before This Court

121 The issues raised in this appeal can be conveniently grouped under three headings:

(1) Fiduciary Duty

122 Did a fiduciary relationship exist between Corona and LAC which was breached by LAC's acquisition of the Williams property?

(2) Breach of Confidence

123 Did LAC misuse confidential information obtained by it from Corona and thereby deprive Corona of the Williams property?

(3) Remedy

124 What is the appropriate remedy if the answer to (1) or (2) is in the affirmative?

(1) Did a Fiduciary Relationship Arise between LAC and Corona?

125 The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. Kennedy J., in "Equity in a Commercial Context" in *Equity and Commercial Relationships*, ed., P.D. Finn, The Law Book Company, 1987, explains why:

> It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.

It was submitted that the departure of the Courts below from this salutary rule has resulted in a plethora of claims that would impose fiduciary relationships in a commercial-type setting. Writing in *The Advocates' Society Journal*, Aug. 1988, Colin L. Campbell supports this point of view. He states at 44:

The *Lac-Corona* decision, together with the decision in *Standard Investments v. Canadian Imperial Bank of Commerce* determining that a banker could be held to a fiduciary duty when he revealed information obtained in confidence, has given rise to a plethora of claims to impose fiduciary obligations where the parties' relationship has been formalized by a contract. In addition to the above principles, such obligations have been imposed on bankers, lawyers, stockbrokers, accountants, and others.

126 In *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, Dawson J. continued, at 493-94:

> The undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one another was referred to in *Weinberger v. Kendrick* (1892) 34 Fed Rules Serv (2d) 450. And in *Barnes v. Addy* (1874) 9 Ch App 244 at 251, Lord Selborne LC said: 'It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.'

127 In our own Court, in *Guerin v. R.*, [1984] 2 S.C.R. 335, at 384, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 Dickson J. (as he then was) referred to a passage from Professor Weinrib's article, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1 at 4, wherein the fiduciary obligation is described as "the law's blunt tool". In my opinion, equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

128 While equity has refused to tie its hands by defining with precision when a fiduciary relationship will arise, certain basic principles must be taken into account. There are some relationships which are generally recognized to give rise to fiduciary obligations: director-corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and the like. The categories of relationships giving rise to fiduciary duties are not closed nor do the traditional relationships invariably give rise to fiduciary obligation. As pointed out by Dickson J. in *Guerin v. R.*, supra, p. 384 [S.C.R.]:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

129 The nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional circumstances it is not. See J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1986), at 21-22. Furthermore, not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature. Southin J., in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.), observed that the obligation of a solicitor to use care and skill is the same obligation as that of any person who undertakes to carry out a task for reward. Failure to do so does not necessarily result in a breach of fiduciary duty but simply a breach of contract or negligence. She issued this strong caveat against the overuse of claim for breach of fiduciary duty (at 362):

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But 'fiduciary' comes from the Latin 'fiducia' meaning 'trust'. Thus, the adjective, 'fiduciary' means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty

of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty — if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

130 When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 78 N.R. 40, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 . The majority, although disagreeing in the result, did not disapprove of the following statement, at 135-136:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts arising from the case-law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, *A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts*, (3rd ed. 1955); Ernest J. Weinrib, 'The Fiduciary Obligation' (1975), 25 U.T.L.J. 1; Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968), 84 *L.Q.R.* 472; George W. Keeton and L.A. Sheridan, *Equity* (1969), at pp. 336-52; Shepherd, *supra*, at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

131 It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

132 The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in *Hospital Products v. United States Surgical Corp.*, supra, at 488, that:

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.

133 The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin*, supra, that [at 384, S.C.R.]:

> [T]he Hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion.

To the same effect is the discussion by Professor D.S.K. Ong in "Fiduciaries: Identification and Remedies" (1986), 8 Univ. of Tasmania Law Rev. 311, in which he suggests that the element which gives rise to and is common to all fiduciary relationships is the "implicit dependency by the beneficiary on the fiduciary". This condition of dependency moves equity to subject the fiduciary to its strict standards of conduct.

134 Two caveats must be issued. First, the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. In *Tito v. Waddell (No. 2)*, [1977] Ch. 106 at 230, [1977] 3 All E.R. 129 Megarry V-C said:

> If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

135 Second, applying the same principle, the fact that confidential information is obtained and misused cannot itself create a fiduciary obligation. No doubt one of the possible incidents of a fiduciary relationship is the exchange of confidential information and restrictions on its use. Where, however, the essence of the complaint is misuse of confidential information, the appropriate cause of action in favour of the party aggrieved is breach of confidence and not breach of fiduciary duty.

136 In my opinion, both the trial Judge and the Court of Appeal erred in coming to the conclusion that a fiduciary relationship existed between Corona and LAC. In my respectful opinion, both the trial Judge and the Court of Appeal erred by not giving sufficient weight to the essential ingredient of dependency or vulnerability and too much weight to other factors. The latter are as follows:

(a) that the state of the negotiations attracted the principle in *United Dominions Corp. Ltd. v. Brian Pty. Ltd.* (1985), 60 A.L.R. 741, 59 A.L.J.R. 676 (Aust. H.C.);

(b) that LAC had sought out Corona;

(c) that the geochemical program constituted an embarkation on a joint venture;

(d) that Corona had divulged confidential information to LAC;

(e) that a practice in the mining industry supported the existence of a fiduciary relationship;

(f) that the parties were negotiating towards a common object.

The United Dominions Case

137 This is a decision of the High Court of Australia involving a joint venture between three parties, United Dominion Corp. (UDC), Security Projects Ltd. (SPL) and Brian Pty Ltd. (Brian). Land was purchased with money provided by the joint venture and was to be developed for a hotel and shopping centre. SPL acted as agent for the joint venturers and held moneys in trust which had been provided by the joint venture. UDC acted as principal financier of the project with the balance of the funds being provided by the other joint venturers. Prior to the alleged breach of fiduciary duty, the percentage participation of each joint venturer had been set and substantial amounts had been contributed by them. The land was mortgaged to UDC as security for borrowings by SPL which acted as agents for Brian and others in this respect. All this was consistent with the terms of a draft joint venture agreement that had been circulated among the participants and eventually was executed.

138 The mortgage which SPL granted to UDC contained a "collateralisation clause" which had the effect of subjecting lands of the joint venture to debts incurred by SPL extraneous to the joint venture. UDC was "fully aware that the land registered in the name of SPL was held in circumstances which required SPL to account to the intended partners" (per Gibbs C.J. at 678).

139 The enforcement of the collateralisation clause by UDC resulted in the loss of Brian's investment and of course it obtained no return thereon.

140 In light of the above, the Court concluded that the parties had embarked on a joint venture which the Court found to be plainly a partnership. The Court further found that prior to the grant of the first mortgage, the "arrangements between

the prospective joint venturers had passed far beyond the stage of mere negotiations" (at 680). Clearly, if the draft agreement had not been signed subsequently, an agreement substantially in accordance with its terms would have been found to exist by the Court. Prior to its execution, the relationship of UDC, SPL and Brian was that of a de facto partnership or joint venture. Furthermore, Brian entrusted SPL with its funds and its interest in the land with the full knowledge of UDC. Brian was therefore "at the mercy of their discretion". In this respect the case is clearly distinguishable from the case at bar. The trial Judge found that LAC and Corona "were clearly negotiating towards a joint venture or some other business relationship". The respondent had pleaded that a partnership agreement existed between it and the appellant but this claim was abandoned. In this respect, the trial Judge found as follows: "The most that can be said is that the parties came to an informal oral understanding as to how each would conduct itself in anticipation of a joint venture *or some other business arrangement*". [Emphasis added.]

141 The parties here had not advanced beyond the negotiation stage. Indeed, they had not as yet identified what precisely their relationship should be. Furthermore, Corona did not confer on LAC any discretionary power to acquire the Williams property. LAC proceeded unilaterally to acquire the property for itself allegedly making use of confidential information, and that essentially is the ground of Corona's complaint.

142 The Court of Appeal recognized that this case differed from the *United Dominions* case, supra, (p. 317). In its opinion, however, the other factors present in the case which I have enumerated above, (a) to (f), made up for the difference.

143 I cannot find that (b) adds very much to the case in favour of a finding that a fiduciary relationship existed. In every commercial venture, one of the parties approaches the other. Corona was seeking a senior mining company and LAC responded with an expression of interest. This is not an indicium of a fiduciary relationship. Nor can I accept that (c), the arrangement as to the geochemical program, was a step in the implementation of a joint venture. The trial Judge did not so find and the evidence is too sketchy to be able to relate this activity to any proposed agreement between the parties, the nature of which itself was undetermined. With respect to (d) as explained above, the supply of confidential information is not necessarily referable to a fiduciary relationship and is therefore at best a neutral factor. The other two factors, (e) and (f), require more extensive consideration.

(e) The Practice in the Industry

144 The trial Judge concluded as follows:

> I conclude, following *Cunliffe-Owen*, supra, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

145 He did so on the basis of the following evidence with which all experts were in agreement:

> [Mr. Allen] A. If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.
>
> . . . . .
>
> Q. ... Does the obligation not to harm each other that you referred to, et cetera, flow from the fact that they were in negotiation or discussion about a possible deal itself so long as it's a serious matter as you said?
>
> . . . . .
>
> [Mr. Allen]. Yes.

No examples were apparently given illustrating the operation of this practice. *Cunliffe-Owen v. Teather & Greenwood*, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421 (Ch.), which was referred to by the trial Judge and relied on by the Court of Appeal, is a contract case. The principle is well established in contract law. It is accurately expressed by Ungoed-Thomas J. at 1438 [W.L.R.]:

> For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.
>
> The burden lies on those alleging 'usage' to establish it.
>
> The practice that has to be established consists of a continuity of acts, and those acts have to be established by persons familiar with them, although, as is accepted before me, they may be sufficiently established by such persons without a detailed recital of instances. Practice is not a matter of opinion, of even the most highly qualified expert, as to what it is desirable that the practice should be. However, evidence of those versed in a market — so it seems to me — may be admissible and valuable in identifying those features of any transaction that attract usage

146 It is understandable that, in a contract setting, a practice that is notorious and clearly defined and relevant to the business under discussion should be incorporated as a term. It can readily be inferred that the parties agreed to it. It is a considerable leap from this principle to erect a fiduciary relationship on the basis of such a practice. No authority was cited to the Court that this concept can simply be transplanted in this fashion. It is significant that the trial Judge did not rely on this evidence in finding that a fiduciary obligation existed (pp. 776-777). Moreover, accepting the evidence at face value, it is more consistent with the obligation of confidence. The practice relates to a duty which arises upon the exchange of confidential information. Furthermore, in the absence of any illustrations of the operation of the practice, we are left with an expert's opinion on what is essentially a question of law — the existence of a fiduciary duty. The practice among geologists to act honourably towards each other is no doubt admirable and a practice to be fostered, but it should not be used to create a fiduciary relationship where one does not exist.

(f) Common Object

147 The Court of Appeal stressed that the parties were not simply negotiating an ordinary commercial contract but were negotiating in furtherance of a common object. This factor does not particularly distinguish negotiations in furtherance of any partnership or joint venture. All such negotiations seek to achieve a common object, namely the accomplishment of the business venture for which the partnership or joint venture is sought to be formed. I do not see how this factor can elevate negotiations to something more.

(1) Dependency or Vulnerability

148 In my opinion, this vital ingredient was virtually lacking in this case. Its absence cannot be replaced by any of the factors mentioned above. The Court of Appeal dealt with it as follows:

> It was a case of negotiations between a junior mining company (Corona) whose primary activities were those of locating, staking and evaluating mining claims and a senior mining company (LAC) whose activities included all of the above together with the practice and experience of bringing into production and operating gold mining properties. It was a case of the senior company seeking out the junior company in order to obtain information with respect to mining claims already owned by the junior company and to discuss a joint business venture. Having regard to the practice found to exist in the industry with respect to the obligation not to act to the detriment of each other, particularly with respect to confidential information disclosed, it was to be expected that Corona would divulge confidential information to LAC during the course of their negotiations. In those circumstances, it is only just and proper that the court find that there exists a fiduciary relationship with its attendant responsibilities of dealing fairly including, but not limited to, the obligation not to benefit at the expense of the other from information received by one from the other.

149 This statement seems to imply that there was a kind of physical or psychological dependency here which attracted fiduciary duty. Illustrations of this type of dependency are not difficult to find. They include parent and child, priest and penitent and the like. Clearly, a dependency of this type did not exist here. While it is perhaps possible to have a dependency of this sort between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready

access to geologists, engineers and lawyers. The fact that they were anxious to make a deal with a senior mining company surely cannot attract the special protection of equity. If confidential information was disclosed and misused, there is a remedy which falls short of classifying the relationship as fiduciary. In *Frame*, supra, Wilson J. dealt with this indicia of fiduciary duty in the following language (at 137-138 [S.C.R.]):

> This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.); affirmed [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of discretion or power to be exercised, i.e., any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power ... are adequate in such a case.

150 If Corona placed itself in a vulnerable position because LAC was given confidential information, then this dependency was gratuitously incurred. Nothing prevented Corona from exacting an undertaking from LAC that it would not acquire the Williams property unilaterally. And yet the trial Judge found that while the Williams property was discussed by Bell and Sheehan, the latter did not agree *not* to acquire the Williams property. Indeed it does not appear that LAC was ever asked to refrain from so doing. In the letter dated May 19, Sheehan wrote to Bell in part as follows:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued.

The reference to the Hughes ground included the Williams property. It would seem that the possibility of Corona participating could only come about if the property were acquired. This would suggest that the parties contemplated that LAC might acquire the property in which event Corona would have a possibility of participating. At the very least LAC might reasonably have considered that such a course of action was open to it. In view of the abandonment by Corona of any contractual claim, I conclude that even this limited protection was not secured by any contractual arrangement.

151 Accordingly, if Corona gave up confidential information, it did so without obtaining any contractual protection which was available to it. This and the fact that misuse of confidential information is the subject of an alternate remedy strongly militate against the application here of equity's blunt tool. I now turn to that alternate remedy, breach of confidence.

(2) Breach of Confidence

152 Both the trial Judge and the Court of Appeal applied three criteria in determining whether a breach of confidence had been made out by the respondent. These elements are:

> (i) Confidential Information: Did Corona supply LAC with information having a quality of confidence about it?
>
> (ii) Communication in Confidence: Did Corona communicate this information to LAC in circumstances in which an obligation of confidence arises?
>
> (iii) Misuse of Information: Did LAC, by acquiring the Williams property to the exclusion of Corona, misuse or make an unauthorized use of the information?

153 The trial Judge made findings of fact in favour of the respondent with respect to each of these criteria:

> **(i) Confidential Information**
>
> In the present case much of the information transmitted by Corona to Lac was private and had not been published. There is no doubt, however, that Corona wished to attract investors. Drill hole results were published on a regular basis

and incorporated in George Cross Newsletters. Mr. Bell permitted himself to be quoted in the March 20 George Cross Newsletter and made a presentation to a group of stockbrokers in Vancouver.

Mr. Bell also quite freely discussed the Corona results with brokers, investors and friends. Lac, however, was told more than the general public. Mr. Sheehan was shown the core, the drill plan and sections on May 6th. He discussed the geology with Mr. Bell on May 6th, May 8th and June 30th, and a full presentation with up-to-date results was made to Lac on June 30th.

(ii) Communication in Confidence

I find as a fact that on May 6, 1981, there was no mention of confidentiality with respect to the site visit, except in connection with New Cinch. I prefer the evidence of Messrs. Bell and Dadds to that of Messrs. Sheehan and Pegg. Clearly the information was confidential and this must have been obvious to Mr. Sheehan.

The information, although partly public, was, I have found, of value to Lac and was used by Lac. It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

(iii) Misuse of Information

Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.

Certainly Lac was not authorized by Corona to bid on the Williams property.

154 There are concurrent findings of fact and these should not be disturbed by this Court unless we are satisfied that they are clearly wrong. The appellant did not attack either the basic criteria or these findings of fact as such, but rather "the rules by which the existence of the elements as a matter of law are to be determined".

155 With respect to the first element, the appellant submitted that although some of the information was private, much of it was public. This combination did not act as a springboard to give the appellant an advantage over others. Essentially, the appellant submitted that the desirability of acquiring the Williams property could have been deduced from information which was public and it got no head start by obtaining information from the respondent.

156 In this regard the statement of Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Coy.* (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.), (leave to appeal to House of Lords refused) at 215 [R.P.C.], which was quoted by the trial Judge, is apposite:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

157 *Seager v. Copydex*, [1967] 2 All E.R. 415, [1967] 1 W.L.R. 923 (C.A.), cited by the appellant, provides a useful illustration of the concept of the use of added information to get a head start or to use it as a springboard. The plaintiff Seager was the inventor of a patented carpet grip. He negotiated with the defendant Copydex with a view to development of his invention. Negotiations were terminated without a contract. Copydex then proceeded to produce a competing grip. The Court found that much of the information which Seager gave to Copydex was public. But there was some private information that resulted from Seager's efforts such as the difficulties which had to be overcome in making a satisfactory grip. At 931 [W.L.R.], Lord Denning M.R. stated:

> When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.

158 Corona had conducted an extensive exploration program on its own property. The information which it obtained was pertinent in evaluating the Williams property. Its geologist, Bell, had developed a theory that the source of the zone of gold mineralization on Corona's property was volcanogenic. This meant that gold could be spread over a large area with "pools" of ore throughout. This led him to conclude that the exploration program should be extended to the neighbouring properties which included the Williams property. Bell was the geologist who first firmly believed that it was the land of Havilah and his enthusiasm spread to his principals. This information was developed from the results of the exploration program and the application of Bell's knowledge as a geologist. LAC got the benefit of this information. It had the advantage of several discussions with Bell who interpreted his findings and explained his volcanogenic theory. Bell allowed LAC's representatives to examine the drill cores and the individual assays. LAC's representatives were also advised that Corona was actively pursuing the Williams property. The trial Judge found as a result that:

> On all the evidence I conclude that the site visit and the information disclosed by Corona to Lac was of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams.

159 This information was the springboard which led to the acquisition of the Williams property. Sheehan admitted that the offer to Mrs. Williams was based in part on information obtained from Corona. The degree of reliance on Bell's input is graphically illustrated by the fact that after LAC had optioned the Williams property, it located its three drill holes on the Williams property in the same area in which Bell would have located his next three holes, westerly from the Corona property.

160 It was suggested in argument that although some of the information was of a private nature, it was not incremental in the sense that it did not enhance the information so as to make the Williams property more desirable. This contention is effectively refuted by the actions of LAC. Immediately after the May 6 meeting, something in that meeting triggered a frenzy of activity on the part of LAC, including a staking of 640 claims, several further meetings with Corona and the acquisition of the Williams property. I agree therefore with the conclusion of the Courts below that the information obtained from Corona by LAC went beyond what had been imparted publicly in the George Cross Newsletters or the public investors' meeting. Furthermore, it put LAC in a preferred position vis-à-vis others with respect to knowledge of the desirability of acquiring the Williams property.

161 With respect to the second element the appellant submitted that the trial Judge did not apply the reasonable man test in determining whether the information was imparted in circumstances in which an obligation of confidence arises. The trial Judge in his reasons cited with approval the reasonable man test enunciated in *Coco v. A. N. (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.). Moreover, the trial Judge referred to the passage of Megarry J. at 48 which follows the articulation of that test:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

The trial Judge found that it was obvious to Sheehan that the information was confidential and that:

> It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

162 These findings were made at least in part on the basis of a preference of the evidence of Bell and Dadds to that of Sheehan and Pegg. As did the Court of Appeal, I accept them.

163 With respect to the third element, LAC submits that it did not misuse the information because it went to the public record and then started staking and making the inquiries which eventually culminated in the acquisition of the Williams property. The trial Judge has found, however, that the information obtained from Corona was of value to LAC in assessing the merits of the Williams property and LAC made use of this information to the detriment of Corona. This finding is amply supported by the evidence and should be accepted.

164 The trial Judge also found that LAC was not authorized by Corona to bid on the Williams property. I interpret this to mean that Corona did not advise LAC that it could bid on the Williams property. Furthermore, as noted above, Sheehan never expressly agreed that LAC would refrain from acquiring the Williams property. The trial Judge so found. There was an "informal oral understanding as to how each would conduct itself in anticipation of a joint venture or some other business arrangement". The terms of this informal arrangement as they relate to the acquisition of the Williams property are very sketchy. I have set out above the evidence and findings of fact that relate to this matter, including the portion of the letter of May 19, 1981 which states:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued.

165 As I said earlier in my reasons, that statement is neutral as to who would acquire the property. It is consistent with either Corona or LAC acquiring the property but subject to the loose oral arrangement that they were working toward a joint venture or other business arrangement which would involve participation by Corona in accordance with one of the formulae set out in the May 19 letter or an arrangement similar thereto.

166 On this basis, acquisition by LAC of the Williams property to the exclusion of Corona was not an authorized use of the confidential information which it received from Corona and which was of assistance in enabling LAC to get the property for itself.

167 In summary, the three elements of breach of confidence were made out at trial, affirmed on appeal, and notwithstanding the able submissions for the appellant, I find the decision of the trial Judge and the Court of Appeal unassailable on this branch of the case. Accordingly, with respect to liability for breach of confidence, the appeal fails.

(3) Nature of Remedy for Breach of Confidence

168 The trial Judge dealt with remedy solely on the basis of breach of a fiduciary duty. On this basis he ordered that upon payment to LAC of the amounts referred to above, the mine be transferred to Corona.

169 The Court of Appeal affirmed the trial Judge but after expressing the view that it "is artificial and difficult to consider the question of the proper remedy for breach of the obligation of confidence on the hypothesis that there is no co-existing fiduciary obligation", it concluded that a constructive trust would in such circumstances be a possible remedy.

170 Furthermore, based on the fact that (i) but for "LAC's actions, Corona would have acquired the Williams property" and (ii) "it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property", the Court of Appeal concluded that it was the appropriate remedy.

Constructive Trust or Damages

171 The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected. See Gurry, *Breach of Confidence*, (Oxford: Clarendon Press, 1984) at 25-26, and Goff & Jones, *The Law of Restitution*, 3rd ed., (London: Sweet & Maxwell, 1986) at 664-667.

172 This multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy. See *Nichrotherm Electrical Co. v. Percy*, [1957] R.P.C. 207, 213-14; Gurry, supra, at 26-27; and Goff & Jones, supra, at 664-65.

A constructive trust is ordinarily reserved for those situations where a right of property is recognized. As stated by the learned authors of Goff & Jones, supra, at 673:

> In restitution, a constructive trust should be imposed if it is just to grant the plaintiff the additional benefits which flow from the recognition of a right of property.

Although confidential information has some of the characteristics of property, its foothold as such is tenuous (see Goff and Jones, supra, at 665). I agree in this regard with the statement of Lord Evershed in *Nichrotherm*, supra, at 209, that:

> a man who thinks of a mechanical conception and then communicates it to others for the purpose of their working out means of carrying it into effect does not, because the idea was his (assuming that it was), get proprietary rights equivalent to those of a patentee. Apart from such rights as may flow from the fact, for example, of the idea being of a secret process communicated in confidence or from some contract of partnership or agency or the like which he may enter into with his collaborator, the originator of the idea gets no proprietary rights out of the mere circumstance that he first thought of it.

173 As a result, there is virtually no support in the cases for the imposition of a constructive trust over property acquired as a result of the use of confidential information. In stating that such a remedy is possible, the Court of Appeal referred to Goff & Jones, supra, at pp. 659-674. The discussion of proprietary claims commences at 673 with the statement which I have quoted above and thereafter all references to constructive trust pertain to an accounting of profits. No reference is made to any case in which a constructive trust is imposed on property acquired as a result of the use of confidential information.

174 In Canada as in the United Kingdom, the existence of the constructive trust outside of a fiduciary relationship has been recognized as a possible remedy against unjust enrichment. See Waters, *Law of Trusts in Canada*, 2nd ed., 1984, at 386-397.

175 In Canada this device has been sporadically employed where the unjust enrichment occurred in the context of a pre-existing special relationship between the parties. Thus in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, Dickson J. (as he then was) spoke of "a relationship tantamount to spousal". In *Nicholson v. St. Denis* (1975), 8 O.R. (2d) 315, 57 D.L.R. (3d) 699 (C.A.), leave to appeal to the Supreme Court of Canada refused (1975), 8 O.R. (2d) 315n, 57 D.L.R. (3d) 699n, MacKinnon J.A. refused the remedy in the absence of "a special relationship" between the parties. In *Unident v. Delong* (1981), 50 N.S.R. (2d) 1, 98 A.P.R. 1, 131 D.L.R. (3d) 225 (T.D.), Hallett J., quoting MacKinnon J.A., refused restitution where a special relationship could not be shown.

176 In *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, 56 W.W.R. 697, 50 C.P.R. 299, 57 D.L.R. (2d) 557, an employee acting on information which he obtained entirely in the course of his employment, staked certain claims which would otherwise have been staked by the employer. This Court affirmed the decision of the trial Judge who held that the employee was a trustee of the claims for his employer. In his reasons for the Court, Judson J. stated, at 555, that:

> it was a term of his employment, which McTavish on the facts of this case understood, that he could not use this information for his own advantage. The use of the term 'fraud' by the learned Chief Justice at trial was fully warranted.

In these circumstances, Judson J. referred to the use of the constructive trust. I do not consider that that decision lays down any principle that makes the remedy of a constructive trust an appropriate remedy for misuse of confidential information except in very special circumstances.

177 Although unjust enrichment has been recognized as having an existence apart from contract or tort under a heading referred to as the law of restitution, a constructive trust is not the appropriate remedy in most cases. As pointed out by Professor Waters in *Law of Trusts in Canada*, supra, at 394, although unjust enrichment gives rise to a number of possible remedies:

> the best remedy in the particular circumstances is that which corrects the unjust enrichment without contravening other established legal doctrines. In most cases, as in *Deglman v. Guar. Trust Co. of Can. and Constantineau* itself, a personal action will accomplish that end, whether its source is the common law or equity, providing as it often will monetary compensation.

178 While the remedy of the constructive trust may continue to be employed in situations where other remedies would be inappropriate or injustice would result, there is no reason to extend it to this case.

179 The conventional remedies for breach of confidence are an accounting of profits or damages. An injunction may be coupled with either of these remedies in appropriate circumstances. A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust. In a breach of confidence case, the focus is on the loss to the plaintiff and, as in tort actions, the particular position of the plaintiff must be examined. The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed. See *Dowson & Mason Ltd. v. Potter*, [1986] 2 All E.R. 418, [1986] 1 W.L.R. 1419 (C.A.) and *Talbot v. General Television Corp. Pty. Ltd.*, [1980] V.R. 224. Accordingly, this object is generally achieved by an award of damages, and a restitutionary remedy is inappropriate.

180 The Williams property was acquired as a result of information which was in part public and in part private. It would be impossible to assess the role of each. The trial Judge went no further than to find that the confidential information was "of value" to LAC and

> of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams.

181 The Court of Appeal went further and stated that "but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property". The reasons do not disclose any factual basis for extending the finding of the trial Judge and I see no basis for so doing. The best that can therefore be said is that it played a part. When the extent of the connection between the confidential information and the acquisition of the property is uncertain, it would be unjust to impress the whole of the property with a constructive trust.

182 The case has been presented on the basis that either a transfer of the property or damages is the appropriate remedy. The respondent contends that the former is appropriate and the appellant the latter. No submissions were made in oral argument for or against an accounting of profits. Moreover, damages were assessed in the alternative in the event that on appeal this was considered the appropriate remedy. In all the circumstances, therefore, I have concluded that of the two alternatives presented, damages is the proper remedy.

183 It is, therefore, necessary to determine the basis upon which damages will be assessed. The formula for the measure of damages does not appear to be seriously disputed, although the application of the formula is. In *Dowson & Mason Ltd. v. Potter*, supra, Sir Edward Eveleigh adopted the statement of Lord Wilberforce in *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co.*, [1975] 2 All E.R. 173, [1975] 1 W.L.R. 819 (H.L.) in a breach of confidence action. Lord Wilberforce was dealing with the measure of damages applicable to economic torts. He stated, at 177 [E.R.]:

> As in the case of any other tort (leaving aside cases where exemplary damages can be given) the object of damages is to compensate for loss or injury. The general rule at any rate in relation to 'economic' torts is that the measure of damages is to be, so far as possible, that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the wrong (*Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn).

184 In applying this test it is necessary to consider what the wrong is and what the position of the plaintiff would have been if he had not sustained the wrong. To put it shortly, what loss was caused to the plaintiff by the defendant's wrong?

185 In my opinion, the wrong committed by LAC was the acquisition of the Williams property for itself and to the exclusion of Corona. That was contrary to the understanding found to exist by the trial Judge that the parties were working towards a joint venture or some other business arrangement.

186 This set the parameters of the permitted use of the confidential information and its use within these parameters was not a misuse of it. LAC did not agree to refrain from acquiring the property and Corona did not tell LAC not to acquire the property. This would be surprising unless the parties thought that in keeping with their efforts to conclude a joint business arrangement,

either one could acquire it for that purpose. This is supported by the letter of May 19 in which Sheehan set out three alternative "possibilities" for a working arrangement with Corona. That is followed with a paragraph relating to the Williams property. For ease of reference I will again reproduce the relevant correspondence:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.

Bell's reply states in part:

> At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.

187 The correspondence reflected the discussion between the parties up to that point. In my view it can only be read as envisaging a participation by Corona with LAC in the Williams property. Either party could acquire it for this purpose. This is further supported by the following evidence of Sheehan which was elicited on cross-examination. This evidence was relied on by the trial Judge in concluding that a statement made by Bell at the meeting of May 8 that Corona was "happy with our land position" was made in the context of additional staking and not that it (Corona) was not interested in acquiring the Williams property:

> Q. Mr. Sheehan, on May 8th — and, my Lord, page 803, question 3971:
>
> > Q. Can you tell me now then, please, your discussion with Mr. Bell on the 8th as it concerns the Hughes property?
> >
> > A. My best recollection of that discussion was where the Hughes property was concerned was I was discussing the area in general. I believe I had indicated to Mr. Bell that we would be staking in the area.
> >
> > MR. McDOUGALL: You have given that evidence.
> >
> > THE DEPONENT: With respect to the Hughes property, I had suggested the possibilities that we pick up the Hughes property, that is to say Lac, that Corona may pick it up, that any combination of those factors could be addressed. In other words, if indeed we were going to make a deal, Lac could fund Corona since he had indicated that they were just a small company without much money.
>
> A. Yes, that's correct.
>
> Q. Were you asked those questions and did you give those answers?
>
> A. Yes.
>
> MR. LENCZNER: And we have this already in one of the tabs, my Lord, with regard to the May 19th letter, but let me just — I had better pull out the tab. It is tab 146.
>
> Q. Page 863, the answer you gave:
>
> > A. Well, I think I had discussed with Mr. Bell in that meeting and I may have referred to this in previous testimony that the patented ground as well as the Hughes ground should be picked up and that's what that is referring to there.
>
> A. Yes.
>
> Q. So that you had discussed with Bell on May 8th, picking up the Hughes ground and the patented ground?
>
> A. Yes.

Q. And that Lac could pick it up, Corona could pick it up?

A. Yes.

Q. Or you would even fund Corona to pick it up?

A. Yes, we would do the funding.

Q. In addition to all of that, you said you had a staking programme going down to the east and he could participate in that if he wanted?

A. Yes, we could bring him into that.

Q. In that context, I suggest to you he said, 'We are happy with our land position'?

A. It was in that context that he said, 'No, I'm happy with my land position and we will continue drilling and doing the Phase II programme'.

188 The trial Judge is correct in his finding that Corona was interested in "the possession of either Williams or Hughes". There is no finding, however, that acquisition by LAC of the Williams property as part of the joint exploration program along with continued negotiations towards an agreement on the basis of one of the scenarios outlined in the letter of May 19 would have constituted a breach of mutual understanding under which the confidential information was supplied to LAC. Furthermore, I am satisfied that had that occurred, the most likely conclusion is that LAC and Corona would have continued to negotiate and Corona would have made a deal with LAC for their respective participation in a joint venture including the Williams property. Corona could not finance the development on its own property without the assistance of a senior mining company. Accordingly, it entered into an agreement with Teck on somewhat similar terms as those proposed by LAC. Even after it discovered that LAC had acquired the Williams property, a director, Moore, sought to continue the negotiations. His evidence in part is as follows:

Q. What is it that you were setting about doing then in your attempts to reach Mr. Sheehan?

A. Well, the stage — the stage was still set, even at that point, for — to continue with this joint venture. Lac had picked up a big piece of ground in the area, 600 claims, and Corona had a nice start, that Williams' claims were off on the side. We felt that they should be ours. But it was, uh, it was still possible in that scenario, in my opinion, to make a joint venture, even with — all the pieces were still there to make a good deal.

189 But for LAC's breach, those negotiations would likely have continued and it would have resulted in Corona acquiring an interest in the Williams property of 50 per cent or perhaps a small percentage interest. It would have also acquired a corresponding obligation to contribute on the same basis. Corona's damages should therefore be calculated on the basis of the loss of this interest.

190 In his reasons the trial Judge stated:

If Corona had obtained the Williams property, Corona may well have entered into a joint venture agreement with Lac covering the Corona and Williams properties together with the White River claims. Corona's damages would be assessed accordingly in an action for breach of contract.

Holland J. went on to hold that based on his finding of a fiduciary duty the appropriate remedy was a restitutionary remedy requiring the whole of the property to be returned to Corona upon payment of the added value. I have decided that there is no breach of a fiduciary duty and therefore, as in contract, account must be taken of the fact that but for the breach by LAC, a joint venture agreement would likely have resulted. Damages should be assessed accordingly.

Assessment of Damages

191 The appellant, in its factum, para. 177, submits as follows:

> If it is found that, through misuse of information relating to Corona's intentions or otherwise, the loss suffered by Corona was the loss of the opportunity to acquire and to explore the Williams property, Corona would be entitled to damages. However, its loss is not to be measured by LAC's gain. Corona is to be put in the same position it would have been if it had not sustained the wrong. In making that assessment in the case of a lost opportunity the correct approach is:
>
> i) to determine the form of business arrangement that Corona would have been obliged to have entered into with a senior mining partner and the proportionate interest that Corona would probably have conceded to that partner. The later arrangement with Teck suggests this would be 55%. Sheehan suggested 60%;
>
> ii) to value the property as improved by LAC. This was done by the trial judge and produced a figure of $700,000,000.00 after tax, being the value created by the size of the facilities LAC decided to put on the Williams property. LAC disputed this assessment on appeal but the Court of Appeal did not deal with this issue. LAC's submissions on the value of the property as improved by LAC are set out in Appendix 'A'. In addition, Corona may have decided or been compelled to exploit the property with a lower rate of extraction. The value of the property must be discounted to reflect that eventuality;
>
> iii) to deduct from that discounted figure the 60% (or 55%) interest of the senior partner;
>
> iv) to deduct from that figure a capitalized estimate of the costs Corona would have had to contribute to the exploration and exploitation of the property; and
>
> v) to deduct a further amount to reflect Corona's own share of responsibility for its loss.

192 I agree that this approach generally gives effect to the principles which I have stated above. I would not, however, include item (v) to deduct a further amount to reflect Corona's own share of responsibility for its loss. This is essentially a plea of contributory negligence for which there is no support in the findings of fact or evidence.

(i) The Business Arrangement

193 In determining the nature of the business arrangement that the parties would likely have concluded, the arrangement with Teck is very pertinent. This arrangement was set out in a number of agreements. For my purposes I refer primarily to an agreement dated December 10, 1981 (property agreement) with the "Joint Venture Agreement" attached as Schedule B, and the "Area of Interest Agreement" contained in a letter dated August 13, 1982 as amended by an agreement made as of December 19, 1983, particularly paras. 3.2 and 5. Under these agreements, the parties entered into the following arrangement.

194 (a) Corona Property: Teck undertook to complete exploration and development work and prepare a feasibility study with respect to 17 properties. The initial costs were financed out of a fund to which both Teck and Corona contributed $1,000,000. Teck acquired a 55 per cent interest upon completion of the feasibility study and election to bring the property into production, leaving Corona with 45 per cent. Thereafter development was to be financed in accordance with the respective interests of the parties, i.e. 55 per cent by Teck and 45 per cent by Corona.

195 (b) Other Property: Any property in the area not covered by the property agreement subsequently acquired by either Teck or Corona would be shared on a 50-50 basis with contributions accordingly. This provision was expressly extended to the Williams property contingent on Corona obtaining a favourable judgment.

196 In the circumstances, I conclude that Corona would have concluded with LAC a business arrangement with respect to the Williams property substantially similar to that which it concluded with Teck: a 50-50 property interest with participation in the development costs in the same ratio. Although this is a slightly higher percentage in favour of Corona than that proposed by Sheehan and agreed upon with Teck in respect of Corona's own property, it is the figure that was applied to the Williams property in the Teck agreement. The benefit of any doubt as to whether it should be 45 per cent or 50 per cent should be given to the innocent party Corona rather than to the party in breach.

(ii) Value of Improved Mine

197 The trial Judge fixed the value at $700,000,000 after tax. Both parties take issue with this assessment. While there is some merit in some of the issues raised by each side, it has not been established that this is a wholly erroneous assessment and I accept it. I will deal with several of the criticisms which raise an issue of law or principle. Other objections are primarily factual and the findings of the trial Judge should be accepted.

198 First, although not directly raised in this Court, the appellant submitted below that the date for valuation was the date of breach and not the date of trial. The trial Judge chose January 1, 1986, a date during the latter period, applying equitable principles. Having regard to the flexibility possessed by the Court to do justice in an action for breach of confidence, I have no difficulty in applying those principles to this assessment to the extent of adopting the later date. To do otherwise would be to ignore the vast potential that the Williams property possessed at the time it was acquired by LAC. That potential can best be valued by determining its value as of the date fixed by the trial Judge.

199 The trial Judge elected to adopt a discounted cash flow approach to value the Williams property as opposed to a market capitalization approach. Although I recognize that each approach has its strengths and weaknesses, I am not prepared to hold that the trial Judge erred in opting for a discounted cash flow of the mine on the Williams property over the life of the mine to ascertain its present value. In my opinion, there is ample evidence to support the conclusion that this was the proper means to assess the value of the property.

200 I am also of the opinion that the trial Judge correctly applied this Court's decision in *Florence Realty Co. Ltd. v. R.*, [1968] S.C.R. 42, 65 D.L.R. (2d) 136 in deducting corporate taxes from the cash flow to determine the value of the mine.

201 Furthermore, the figure of $700,000,000 was based on the payment of a 1-1/2 per cent net smelter return to Mrs. Williams in accordance with the contract negotiated by LAC. Although Corona offered a 3 per cent net smelter return to Mrs. Williams, which would reduce the value of the property, I accept the figure of 1-1/2 per cent as the likely figure which would have been paid if LAC had not been in breach of confidence.

(iii) Damages for Loss of Interest in Mine

202 Damages for loss of Corona's interest in the mine are therefore assessed at $350,000,000 which is 50 per cent of $700,000,000.

(iv) Contribution to Development Costs

203 I agree with the appellant that Corona should not have the value by which the mine was increased by the expenditures made by LAC without contributing in accordance with its interest. LAC presented evidence that it had expended $203,978,000 in developing the Williams property. The trial Judge held that had Corona developed the two properties together then a number of savings would have been realized over the sums expended by both LAC and Corona in developing their two mines independently. The trial Judge suggested that there would have been only two shafts rather than three, only one mill and only one group of service facilities. For this reason, he estimated that LAC spent an additional $50,000,000 by virtue of its independent development of the Williams property.

204 I agree that this sum is to be deducted from the expenditures by LAC in developing the Williams property. The operative principle of damages is to place Corona in the position it would have occupied had there been no breach of confidence by LAC. If LAC had acquired the property for the benefit of both parties, the two properties would have been developed jointly rather than separately. LAC is, therefore, responsible for the extra costs incurred as a result of the inability to take advantage of any natural economies of scale.

205 Accordingly, $50,000,000 is to be deducted from the figure of $203,978,000 representing LAC's improvements to the property, for a difference of $153,978,000. One-half of this sum ($76,989,000) must be deducted from $350,000,000 for a difference of $273,011,000.

206 This does not fully dispose of the assessment of damages. Several further items having a possible bearing on the amount require consideration. In arriving at the figure of $153,978,000 the trial Judge expressed some uncertainty with respect to the quantum of the deduction of $50,000,000 from the $203,978,000 which resulted in a difference of $153,978,000. Accordingly, a reference was directed but only if either party was dissatisfied with the trial Judge's figure. The formal order expressed it as a reference concerning the amount of $153,978,000. As I read the trial Judge's reasons, the uncertainty was in the amount of the deduction and not the $203,978,000 expenditure by LAC which was based on its records. Nevertheless, I propose to direct a reference in the same terms as the trial Judge.

207 In addition, the trial Judge ordered that the amounts paid to Mrs. Williams, exclusive of royalty payments, should also be paid by Corona. This cost of the acquisition of the property would have been necessary had no breach occurred. Corona would have been obliged to pay one-half of these payments. Accordingly, one-half of the amounts paid to Mrs. Williams exclusive of royalty payments must be deducted from the award of damages of $273,011,000 or from that figure as varied by any reference undertaken as indicated above.

208 The trial Judge also directed that the appellant pay the respondent the profits, if any, obtained by the appellant from the operation of the Williams mine. The foundation for this order was the restitutionary remedy which I have found to be inappropriate. Accordingly, no such order is made. The respondent is, however, entitled to pre-judgment interest in accordance with s. 138(1)(b) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11. If, therefore, a notice has been served as provided by that provision, the respondent will be entitled to interest in accordance with that section. The respondent is also entitled to post-judgment interest in accordance with s. 139 of the *Courts of Justice Act*.

Disposition

209 In the result, I would allow the appeal in part and dismiss the cross-appeal. I would set aside the judgment at trial and the order of the Court of Appeal and direct that judgment should issue as follows:

> 1. The plaintiff is entitled to recover from the defendant damages in the sum of $273,011,000 less one-half of all sums paid to Mrs. Williams with the exceptioon of royalties, subject to the right of either the plaintiff or defendant to undertake a reference to the Master concerning the deduction of $153,978,000.
>
> 2. The plaintiff is entitled to recover pre-judgment interest from the defendant on the sum referred to in para. 1, or as varied on a reference, in accordance with s. 138(1)(b) of the *Courts of Justice Act* from the date of service of any notice, and post-judgment interest on the said sum in accordance with s. 139 of the *Courts of Justice Act*.
>
> 3. The plaintiff's is entitled to recover from the defendant the costs of the action.

210 I would also order that the appellant recover from the respondent the costs of the appeal and cross-appeal to the Court of Appeal and the costs of the appeal and cross-appeal to this Court.

Appeal and cross-appeal dismissed.

Footnotes

1 A similar approach was taken in the British Columbia case *57134 Manitoba Ltd. v. Palmer* (1985), 30 B.L.R. 121, 65 B.C.L.R. 355, 8 C.C.E.L. 282, 7 C.P.R. (3d) 477 (S.C.), aff'd (1989), 44 B.L.R. 94, 37 B.C.L.R. (2d) 50, 26 C.P.R. (3d) 8 (C.A.).

2 See, for example, *Bahamaconsult Ltd. v. Kellogg Salada Can. Ltd.* (1976), 15 O.R. (2d) 276 (C.A.), leave to appeal to S.C.C. dismissed (1976), 15 O.R. (2d) at 276n (S.C.C.), and *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250, 15 B.L.R. 89, 130 D.L.R. (3d) 205 (C.A.).

13

2000 CarswellOnt 3155
Ontario Superior Court of Justice

Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.

2000 CarswellOnt 3155, [2000] O.J. No. 3289, 22 C.C.L.I. (3d) 221, 99 A.C.W.S. (3d) 369

Commercial Union Life Assurance Company of Canada, Plaintiff and John Ingle Insurance Group Inc., JIIG Holdings Inc., Ingle Insurance Brokers Inc., HSP Direct Health Insurance Brokers Inc., M.H.I. Brokers Ltd., Insurance Claims Management Systems Inc., John Dwight Ingle, Steven Michael Overgaard, and ICMS Canada Inc., Defendants

Stinson J.

Heard: January 17-21, 25-28, 31, February 1-4, 9-11, 14, 16-18, 23, March 1, 27-29, 31, April 3-7, 11, 13, 17-18, 20, 25-26, May 1-5, 8-11, 15-16, 29-31, June 1-2, 5-7, 12-13, 2000
Judgment: September 6, 2000
Docket: 98-CV-158672CM

Proceedings: affirmed (2002), 2002 CarswellOnt 2707 (Ont. C.A.); additional reasons at (2002), 2002 CarswellOnt 2928 (Ont. C.A.); additional reasons at (2001), 2001 CarswellOnt 77 (Ont. S.C.J.)

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W. Bruce Drake, for Defendants, John Ingle Insurance Group Inc., JIIG Holdings Inc., Ingle Insurance Brokers Inc., HSP Direct Health Insurance Brokers Inc., Insurance Claims Management Systems Inc., John Dwight Ingle, Steven Michael Overgaard, ICMS Canada Inc.
Sandra Antoniani, for Defendant, M.H.I. Brokers Ltd.

***Stinson J.*:**

Introduction

1 This dispute is a case study of the difficulties that can beset commercial parties who pay insufficient attention to the legal details of their business relationship. Following 60 days of trial, the court is required to decide what agreements (if any) governed these parties' business relationship from time to time, to determine who the actual parties to those agreements were and to assess whether any of the parties breached any legal obligations, be they contractual, statutory or common law.

2 In a nutshell, this action arises out of the decline and fall of the relationship between Commercial Union Life Assurance Company of Canada (CU) and the defendants, in connection with the underwriting by CU of a book of business of travel health insurance policies associated with the defendants. That relationship commenced in 1989 by means of a formal written agreement between CU and M.H. Ingle and Associates Insurance Brokers Ltd. (MHI — now known as M.H.I. Brokers Ltd.). By the time the relationship was formally terminated in 1998, the operation of the book of business had been transferred by MHI to some of the other defendants, with whom CU dealt for several years, notwithstanding the absence of a formal signed agreement between the two sides. At the end the parties disagreed on a large number of issues, including such fundamental elements of their relationship as the appropriate division of underwriting profits, and the status and ownership of premium moneys paid by purchasers of policies.

Facts

1. Background

3 The Ingle family has been active in the area of travel health insurance since 1946. The late John W. Ingle Sr. and his wife Muriel H. Ingle were insurance agents who developed and sold plans of travel health insurance for Canadians travelling outside Canada and hospital and medical care insurance for foreign visitors to Canada.

4 Although the business operated by John Ingle Sr. and Muriel Ingle was a licensed insurance agency or brokerage (known latterly as MHI), it carried out a variety of functions in addition to those traditionally associated with the business of an insurance agency. For example, MHI was involved in the design of particular health insurance products for travelers and other special risks, such as sporting groups, student associations and international diplomatic representatives. As part of that process MHI was involved in the development of policy terms and language and the determination of premium rates.

5 MHI was also very active in marketing these insurance products. It published and distributed consumer brochures. It created and maintained an extensive network of insurance brokers and agents as well as travel agents, through whom Ingle travel health insurance was sold to consumers. MHI itself sold these products directly to consumers and by mail, via telephone, and from offices in major cities across Canada and at airports. MHI was also involved in adjusting claims under the policies and in processing claims for reimbursement from government health insurance plans (GHIPs) and other third parties.

6 One thing that MHI did not do in relation to this book of business was underwrite the policies, that is, assume the risk and guarantee to the insured payment of any claim that might be made under a policy. Although the Ingle book of business was significant (having premium revenue in the order of $20 million by the early 1990s), until the events leading up to this litigation the policies were always underwritten, and the claims paid, by an established third party insurer. As well, prior to the events described below, the Ingle business was always family owned and operated.

7 The insurance industry in Canada is highly regulated. At the federal level, insurance companies are subject to strict supervision and control by the Office of the Superintendent of Financial Institutions (OSFI). Insurers such as those who underwrite the Ingle policies are required to maintain substantial capital reserves to respond to potential claims and to adhere to strict requirements regarding reporting and financial viability. A licensed insurer must by resolution of its board of directors designate a qualified actuary as the company's actuary, which appointment must be submitted to OSFI, who may or may not approve the appointee. An insurer's designated or chief actuary has formal duties under the *Insurance Companies Act*, S.C. 1991, c. 47, which include preparing statements of the company's policy liabilities. Among other things, the chief actuary must calculate and determine appropriate reserves to cover those liabilities.

8 CU is, as its name suggests, a life insurance company. It is registered and regulated under the federal *Insurance Companies Act*. It is also licensed and regulated under the Ontario *Insurance Act*, R.S.O. 1990 c. I.8. Under the regulatory scheme CU can underwrite travel health insurance policies.

9 Certain other types of insurance often purchased by travelers, such as lost baggage insurance, are considered to be property and casualty insurance, and cannot be underwritten by CU. These kind of policies can be underwritten, however, by CU's parent company, Commercial Union Assurance Company of Canada (CU Assurance). The two Commercial Union companies form part of a large, multi-national insurance group, with world-wide assets in the order of $120 billion.

10 The sale of insurance is also a regulated activity. At the provincial level, in Ontario at least, both the *Insurance Act* and the *Registered Insurance Brokers Act*, R.S.O. 1990, c. R.19 contain provisions that govern the conduct of salespersons, agents, brokers and insurers. That legislation (and comparable provincial legislation elsewhere in Canada) sets up a regulatory regime that addresses a variety of matters, including the registration and licensing of agents and the handling of premium money paid by customer.

2. The 1989 Agreement

11 For a period of years prior to 1980 CU was the underwriter for the Ingle book of business. Between 1980 and 1989 that function was performed by the Reliable Life Insurance Company. Pursuant to an initial and an amending agreement, both

effective September 1, 1989 (1989 Agreement), CU again agreed to underwrite the Ingle book of business. Under the 1989 Agreement the parties' material obligations were as follows:

> (a) MHI was responsible for marketing, sales, advertising and distribution, including payment of all remuneration due to third parties (such as other brokers or agents);
>
> (b) MHI was responsible for designing and printing all brochure applications, claim forms and policies;
>
> (c) MHI was responsible for issuing all policies on behalf of CU, collecting premiums and remitting net premiums to CU. Premiums were to be remitted to CU 45 days following the end of the month in which they were collected. Payments to CU were to be net of premiums refunded to customers and commissions payable to MHI. The agreement specified commission percentages that varied among the different insurance plans offered by MHI;
>
> (d) MHI was responsible for assessing all claims and sending recommendations for payment to CU;
>
> (e) CU was responsible for paying the claims.

12 The 1989 Agreement also provided for the parties to share in the underwriting profits generated by the Ingle book of business. The determination of the amount of profit earned by an insurer in relation to a particular group of policies is a complex task. The revenue portion of the calculation is relatively straightforward: the cost of sales (that is, commissions, marketing, sales administration expenses) can be deducted from total sales (that is, premiums paid by consumers) to determine net revenue over a given period, such as a calendar year. One minor complication is the fact that a policy may be sold weeks or months in advance of the date when the customer actually travels, thus deferring the date upon which a paid premium becomes an earned premium. Where a premium is partly earned in one fiscal period and partly in the next, the earned premium can be pro-rated between the two fiscal periods.

13 Far more complicated, however, is the determination of the expenses (that is, the amount of the claims) that should be matched up against and deducted from the net revenue for the relevant period. This is especially so in relation to health insurance claims such as those arising under the Ingle book of business. Among the complexities is the uncertainty about the timing and total cost of paying certain claims, which, unlike a life insurance policy with a fixed death benefit, can vary and be affected by the seriousness of the injury or illness, the length and location of treatment and so on. Additional complications arise due to the fact that claims may be incurred during one fiscal period but not be paid or reported until a subsequent period. Another factor affecting profit may be the potential recovery from GHIPs or other third parties of reimbursement for some portion of the claims expenses paid out by the insurer, and the timing of those recoveries.

14 Conceptually, it is possible to calculate with certainty the underwriting profit on a particular book of business over a specified fiscal period. Once the book has "run out", that is, once all coverage for the specified period has concluded (and, hence, the premium is fully earned), all claims have been reported, all expenses paid, and all recoveries received, the total net expenses can be subtracted from the total net premium to determine the actual profit. While the business is ongoing, however, and where a current calculation of the underwriting profit earned by a book of business over a specified fiscal period is desired, it is necessary to employ estimates and projections in lieu of actual numbers. This takes us into the world of actuaries.

15 In approaching the calculation of underwriting profit for a fiscal period, the calculation of earned premium is a straight mathematical exercise, based on the per diem price of coverage times the number of days coverage was provided during the fiscal period. Actual claims paid during the fiscal period for premium earned during the fiscal period can also be easily factored into the calculation. The determination of the appropriate amounts for future claims expenses applicable to premium revenue earned during the fiscal period requires the expertise of actuaries. For purposes of determining what future expenses should be charged to the specified fiscal period, actuaries draw on a variety of sources of information and utilize their expert training and recognized principles to arrive at as accurate as possible an estimate of the actual net costs that will be incurred in the future. This estimate, or "reserve", together with actual claims expenses, is deducted from the net earned premium in order to arrive at the underwriting profit for the fiscal period.

16 In the 1989 Agreement the parties adapted the foregoing principles to arrive at a methodology and formula for sharing underwriting profits on the Ingle book of business. The fiscal period chosen was the contract year, that is, September 1 to August 31. The methodology provided for the calculation of claims cost during a contract year by adding the total claims paid plus a reserve for claims reported but not paid and claims incurred but not reported, and subtracting from the total the amount of the prior year's reserve, if any.

17 The profit-sharing formula provided for the calculation of an actual loss ratio, being that year's claims cost, calculated as a percentage of premiums earned during the contract year. The formula went on to calculate what was termed an "earned surplus" or "earned loss" by subtracting the actual loss ratio from a specified "maximum loss ratio", and multiplying the result times the premiums earned that year. (The so-called "maximum loss ratio" was arrived at by adding MHI's selling commission and CU's own costs of issuing the policy.)

18 The calculation of earned surplus or earned loss was to be carried out for each of the various insurance plans offered by Ingle and underwritten by CU. The formula went on to provide for the earned surplus or earned loss per plan to be added together to arrive at a combined earned surplus or loss. In the event the result was a combined earned loss, the agreement provided for the deficit to be carried forward to the next year to reduce the next year's surplus. The net amount remaining after deducting prior losses was defined to be the "retrospective earned surplus" and came to be known by the parties as the "RES". The agreement further provided that if the deficit was not eliminated in the subsequent year, it was to be carried forward and would reduce further earned surpluses until it was eliminated.

19 Finally, the 1989 Agreement provided for 70 percent of the RES for a contract year to be paid out to MHI with the balance retained by CU. The terms of payment required 50 percent of the amount due to MHI to be paid by November 1 (that is, within 60 days after the end of the fiscal period) and the balance to be payable by December 1, together with interest.

20 Accordingly, as part of the 1989 Agreement, the parties agreed upon a methodology and a formula for calculation, division and payment of underwriting profit in relation to the Ingle book of business. A central element of that calculation was the inclusion of "a reasonable dollar value reserve for unpaid claims." Although their agreement did not expressly assign to one party responsibility for the determination of the reserve number, as a matter of practice this function was carried out by CU. This was the natural and logical allocation of this responsibility, given that CU had the actuarial resources necessary to carry out the calculations and as well had the statutory obligation (through its chief actuary) to calculate reserves as part of its reporting responsibilities to OSFI.

21 It is worth mentioning that the share of potential underwriting profit that MHI was to receive under the 1989 Agreement was in addition to the commission that it was paid on sales, which was fixed at either 30 percent or 40 percent of premium, depending on the type of plan sold.

3. 1989 - 1993

22 The new CU — MHI relationship was a productive one, to begin with. As contemplated by the 1989 Agreement, MHI continued and expanded its business. Several new product lines were designed and implemented, also underwritten by CU. In relation to these additional products the parties were able to agree upon an acceptable level of commission payable to MHI. The volume of business increased substantially, from an average monthly written premium of $1.25 million in 1990, to a monthly average of $1.5 million in 1991 and to a monthly average of $2.2 million in 1992.

23 Initially, the business was profitable. According to the RES statements filed at trial, for the period ending December 31, 1990, the underwriting profits were $1.95 million; for the year ending December 31, 1991 they were $450,000. (I note that the RES statements filed in evidence at trial presented the information on a calendar year basis — or in the case of the first statement, for the period of September 1, 1989 to December 31, 1990 — apparently due to the parties' later agreement to change the fiscal period to the calendar year; the original September to August statements could not be found.) The necessary reserve calculations were made by CU, and the parties' profit sharing formula was applied over this period without any apparent difficulty.

24 Although it had been profitable in calendar 1990 and 1991, in 1992 the Ingle book of business gave rise to an underwriting loss of $1.18 million, on earned premium of $21.2 million. For calendar 1993, the underwriting loss ballooned to $7.45 million on earned premium of $28.7 million. As a result of these losses, the retrospective earned surplus account was in a deficit position at the end of fiscal 1993, in the order of $8.5 million. As the underwriter, CU alone (and not MHI) was responsible for bearing and absorbing the losses. The fact that the retrospective earned surplus account was in a deficit position, however, meant that future years' surpluses would have to be supplied to erase the deficit before MHI could expect to receive any further distribution of underwriting profit.

25 There were several causes for this dramatic reversal of the parties' fortunes. The most significant was a major policy change by GHIPs, beginning in late 1991. Historically, where (for example) an Ontario resident fell ill while vacationing in, say, Florida, the Ontario Health Insurance Plan (OHIP) would more or less reimburse the individual for the expenses incurred for the Florida treatment on a dollar-for-dollar basis, without regard to the cost of similar treatment in Ontario. Where the Ontario resident had purchased an Ingle travel health policy, MHI would arrange for payment (by CU) of the Florida medical expenses on behalf of the insured and would then turn around and process a claim for reimbursement of most of those costs from OHIP. In other words, the primary insurance coverage was provided by the GHIPs, with the Ingle coverage being secondary. The Ingle policy would also respond to and pay for some expenses that were not covered by GHIP coverage.

26 Beginning in late 1991, in a major departure from the historical practice, GHIPs across Canada decided that they would limit the amount that they were prepared to pay on behalf of their citizens who required out-of-province medical care, to the amounts that the GHIPs would pay for the costs of comparable medical treatment within their province. In other words, payments became limited to the scale of charges followed by the GHIP in relation to professional services, hospital expenses and laboratory fees within the province. This left the Ontario resident who fell ill in Florida with the personal responsibility for paying the difference between OHIP rates and the (likely higher) medical charges incurred in relation to the Florida treatment. Where that individual had appropriate Ingle travel health insurance coverage, however, the policy responded so that CU was liable to make up the difference.

27 The net effect of this change was to convert Ingle travel health insurance from secondary coverage to primary coverage. The Ingle/CU policies had been priced and sold to consumers on the basis that they provided secondary coverage only. As a result, CU's exposure was significantly greater than anticipated, resulting in far higher claims costs. As well, the principal responsibility for assessing and adjusting the claims, formerly performed by the GHIPs, was turned over to the private insurers, resulting in a much greater administrative burden.

28 Other factors that contributed to the significant underwriting losses in 1992 and 1993 were an increase in the volume and size of claims and a significant decline in the value of the Canadian dollar as compared to the U.S. dollar. A sizeable portion of the Ingle book of business related to coverage purchased by "Snowbirds", that is, Canadian residents who wintered in Florida or elsewhere in the southern United States. As the Canadian dollar declined, the cost of paying for medical treatment for these insureds in U.S. dollars necessarily increased, further adversely affecting the profitability of the business.

29 It is apparent that the entire travel health insurance market was undergoing fundamental changes over this period of time. MHI and CU attempted to react to these changes, although they could not do so swiftly enough to avoid the dramatic losses of 1992 and 1993. One response was to adjust premium rates. One consequence of this change was to reduce sales of some plans and, consequently, MHI's commission income: written premium for calendar 1993 was down over $1.3 million when compared to the previous year.

30 Another response to the mounting losses was an initiative by MHI to reduce claims costs by attempting to manage the care of insureds. As part of this initiative MHI opened an office in Florida through a corporation controlled by it called Insurance Claims Management Systems Inc. (ICMS). The functions of ICMS were to assist Ingle insureds in Florida who were making claims, to arrange (if possible) to transport them to Canada where primary insurance coverage would be provided by a GHIP, and to manage the care of the insureds in Florida in such a fashion as to limit the potential claims cost. In this latter regard, ICMS sought out what is termed "Preferred Provider Organizations" (PPOs) with whom it arranged for fixed rate or discounted

services when Ingle insureds were sent to these organizations for treatment. MHI requested, and CU agreed, to contribute to the cost of the Florida operation.

31 The increased volume of business, the increased claims activity, the necessity for a more active claims assessment and adjustment function and the need to become engaged in managed care, all imposed both organizational and financial strains on MHI. These developments occurred at a time when MHI's commission income was in decline, and, in view of the underwriting losses that had been being incurred, it no longer enjoyed revenue by way of profit share. MHI became financially strapped.

32 To complicate matters further, the patriarch of the Ingle family, John Ingle Sr., died in May 1992. Following his death there emerged disputes among his heirs concerning ownership, operation and control of the business. At the time John Ingle Sr. died his younger son, Robin Ingle, was president of MHI. Robin Ingle had worked his way up in the business, having joined after leaving school. Robin's older brother, John D. Ingle and sister, Gayle Christie, had had only limited involvement in the family business over the years. The death of their father, however, resulted in all three of them becoming actively involved in the business of MHI.

33 CU was conscious of and concerned about the operational challenges that MHI was encountering over this period. The underwriting losses were understandably troublesome for CU: what had started out as a profitable venture was now anything but. In addition, MHI's efforts at processing recoveries so as to reduce the underwriting losses were "chaotic" with the result that there was a risk that substantial amounts would become non-recoverable due to the passage of time. CU began to lose confidence in the ability of existing Ingle management to adapt the Ingle operation to the new realities of the travel health insurance business, in which much more than marketing acumen was needed to succeed.

4. Steven Overgaard and JIIG

34 For its part, MHI recognized its difficulties, especially with respect to its own finances. With a view to seeking short term financing for what was (incorrectly) perceived to be a cash flow problem, John D. Ingle approached Steven Overgaard in the summer of 1993. Mr. Overgaard was a long time friend and some time business associate of John D. Ingle. While Mr. Overgaard had no experience in the insurance business, he did have experience in restructuring companies in financial trouble.

35 Mr. Overgaard initially loaned money to MHI, on the basis that he was to be repaid from the anticipated profit-sharing distribution in the latter part of 1993. There was no evidence that Mr. Overgaard received any formal security for these advances at the time. According to his testimony, in addition to earning interest on his loan, Mr. Overgaard was to receive a "share in the organization, roughly a third." To this latter end (apparently), a new corporation called John Ingle Insurance Group Inc. (JIIG — now known as JIIG Holdings Inc.) was incorporated in July 1993, although no formal documents were signed confirming such an agreement. Nor were any formal arrangements made at this time, either with MHI or CU, for JIIG to replace MHI as the operator of the Ingle book of business or the authorized issuer of CU's policies. Mr. Overgaard and the three Ingle siblings (and, briefly, Muriel Ingle) became JIIG's directors, and Mr. Overgaard became its chairman and CEO.

36 As it turned out, the 1993 underwriting losses were dramatically worse than those in 1992. By the fall of 1993 it became apparent that there would be no underwriting profit from which MHI could repay the advances made by Mr. Overgaard. For his part, Mr. Overgaard decided that he was no longer prepared to proceed on the basis of being a one-third owner of the enterprise; rather, he determined that he would insist on majority control, voting control and operational control as a condition of his continued involvement.

37 In due course Mr. Overgaard acquired control of JIIG and JIIG acquired control over the Ingle book of business. I should note at this point that there is some dispute as to the extent of CU's familiarity with these developments. According to Mr. Overgaard, JIIG began to manage the Ingle book of business effective January 1, 1994. JIIG's legal authority to do so (at least *vis-a-vis* MHI) is found in an agreement that was signed in April 1994, but which states that it was "executed as of" January 1, 1994. In that agreement MHI granted to JIIG an option to purchase all of the business assets of MHI utilized in the conduct of its insurance brokerage business. Pending the purchase, MHI granted to JIIG the right to operate the insurance brokerage business

"and the right to receive all revenues, rights and benefits therefrom for its own account." Also in April 1994, Mr. Overgaard's holding company, Whitemount Holdings Inc., acquired majority control of JIIG.

38 The purchase transaction between MHI and JIIG was completed on December 15, 1994, pursuant to an agreement signed on that date. This document contained the following recital:

> WHEREAS it has been agreed that MHI shall assign and transfer to JIIG certain assets held by MHI comprised of customer lists, insurance records, records of proposals, policy provisions, business records, the benefit of and the right to assume existing contracts and arrangements with Commercial Union Assurance Company of Canada, and insurance brokers and agents, the right to carry on the insurance business of MHI under the name and style of "John Ingle Insurance" and the goodwill of the insurance business formerly carried on by MHI and its related and affiliated entities under the name and style of "John Ingle Insurance"...;
>
> [emphasis added]

39 The foregoing two documents reflect the reality that was borne out by the evidence, namely, that from and after January 1, 1994 JIIG operated the Ingle book of business. In effect, JIIG took over the business formerly operated by MHI. JIIG became the party who was responsible for printing the brochures, overseeing the distribution network, collecting premium revenues, issuing policies, remitting net premium payments to CU, overseeing and adjusting claims and making recommendations regarding claims payments to CU and collecting recoveries. The fundamental question in this litigation is: on what terms, *vis-a-vis* CU, did JIIG carry out these activities? The answer to that question will resolve some but not all of the issues between the parties. Before I address that question, however, I propose to outline the remaining principal events that led to the present dispute.

5. 1994-1998

40 Before reviewing the events of this period it is important to note that JIIG never acquired corporate control of MHI and that Mr. Overgaard never became an officer or director of MHI. All of the Ingle siblings, however, were at one stage directors of both corporations. As well, the principal offices of both companies were located in the same premises in Toronto at all material times. Additionally, the two corporations operated in what I might describe as a "co-operative" fashion, that is, JIIG provided office space for MHI, while MHI permitted its licensing status in various jurisdictions to be used as an "accommodation" in connection with JIIG's business. More will be said on this point later.

41 It is also important to note that JIIG itself did not become a licensed insurance agent or broker. Some witnesses described JIIG's functions as those of a "third party administrator" or "TPA" to whom certain operations normally performed in-house by an insurance company (such as policy issuance and premium collection) were "outsourced".

42 A new corporation, Ingle Insurance Brokers Inc. (IIBI — now known as HSP Direct Health Insurance Brokers Inc.) had been incorporated as a JIIG subsidiary in August 1993. In order for IIBI to be licensed, however, it had to be controlled by a licensed party. In this respect, Muriel Ingle, who was no longer active in the business but maintained her licensing status, agreed to hold the shares of IIBI in trust so that it could itself be licensed. It appears to have been the intention that, to the extent that any of the activities controlled by JIIG associated with the Ingle book of business required the involvement of a licensed agent or broker, those functions were to be assigned to IIBI. The directors of IIBI initially were Muriel Ingle and Robin Ingle; subsequently (in 1995) John D. Ingle, and Steven Overgaard joined them. All four of these individuals were corporate officers of IIBI from August 1993 forward, until at least mid-1998.

43 In addition to assuming control of MHI's business, JIIG also assumed control of the business of ICMS and its Canadian subsidiary, ICMS Canada Inc. In effect, all operations were run as part of a unified whole. (I shall hereafter refer to the two ICMS companies jointly as ICMS.) In due course JIIG acquired legal ownership of the ICMS companies, in early 1995.

44 Much time at trial was spent on the subject of trademarks or the trade names under which the Ingle book of business was operated. The evidence indicates that the predominant trade name utilized by MHI before JIIG assumed the control of the business was "John Ingle Insurance". The evidence further indicates that for a period of several years thereafter JIIG continued

to utilize the name "John Ingle Insurance" in many of its business dealings. For at least some of the relevant time both before and after 1993, ownership of the trademark "John Ingle Insurance" rested with one or more of MHI, Muriel Ingle or a numbered company, but not JIIG. Nevertheless, for a period of several years after 1993 JIIG published brochures utilizing the trade name "John Ingle Insurance", negotiated cheques payable to "John Ingle Insurance" and entered into contracts in the name of "John Ingle Insurance". In due course JIIG sought to and ultimately did acquire proper legal authority over this and the other trademarks associated with the Ingle book of business.

(a) Marketing and Distribution

45 After JIIG assumed control of the Ingle book of business on January 1, 1994, Mr. Overgaard began to make changes. With respect to the distribution and sale of Ingle products, he concluded that the former practice in which MHI had acted as both a direct seller (through advertising, sales offices, airport kiosks, etc.) and as a distributor (through other insurance agents, brokers, and travel agents), was undesirable: in effect, because MHI's direct selling activities were in competition with the sales activities of the other agents and brokers, there was a built-in disincentive to increase sales through the distribution network. As a result, the direct selling activities of MHI were discontinued, and the airport and other retail locations were closed during 1994. Separate retail-like premises were obtained for IIBI, whose operations were much more independent of the main business (unlike the retail side of MHI). IIBI also performed the function of the registered agent or broker of record in relation to certain policy transactions, about which more will be said later.

46 In addition to closing down the retail operations of MHI and setting up IIBI as a separate licensed broker, JIIG moved to enhance and expand the broker/agent distribution operation. Among other things, it entered into new agency agreements with these parties. These agreements provided that where a consumer purchased Ingle insurance and paid a premium to the agent, the agent was required to hold the premium in trust for JIIG. JIIG's arrangements with the agents also provided for the option for premiums to be paid by the consumer directly to JIIG, either by cheque payable to "John Ingle Insurance" to be forwarded to JIIG by the agent, or by way of pre-authorized chequing or credit card debits to be negotiated directly by JIIG. In circumstances where premium funds flowed through the agent's account, the agreements provided for the agent to deduct its commission and to remit the net premium to JIIG. In the case of premium payments collected directly by JIIG, commission payments were to be remitted by JIIG to the agent.

47 Another step taken by JIIG in relation to the marketing side of the business was the revision of the various brochures that were published to promote the Ingle products. Over a period of time (ranging from a few to many months depending on how rapidly existing supplies were used up) the brochures were changed to include the mention of JIIG, ICMS and IIBI, and sometimes MHI, and MHI's French name, Les Assurance Ingle & Associés Ltée.

48 In some versions of the brochures JIIG and ICMS are described as "third party administrators", although the format and layout of the brochures did not necessarily make this clear. The ongoing (or perhaps intermittent) inclusion of MHI and its French equivalent on the brochures was (apparently) intended to satisfy the requirements of local regulators in British Columbia and Quebec where IIBI was not licensed but MHI was. I will return to this topic later in my reasons.

49 The brochures published by JIIG were, in some instances, mere promotional pieces that described the relevant Ingle policies and invited the consumer to inquire of his or her own broker or agent in order to obtain coverage. Other brochures included toll free telephone numbers for John Ingle Insurance, which the consumer was invited to call to apply for immediate coverage. Some brochures also contained application forms which the consumer was invited to complete and mail to John Ingle Insurance (at JIIG's Toronto address) in order to obtain coverage. Some brochures provided a blank space in which to stamp the name, address and telephone number of the agent who distributed the brochure and from whom coverage would be obtained.

50 JIIG also created and published an internet website. Portions of the website were accessible only to existing policyholders, to facilitate renewal or extension of existing coverage. Other portions of the website were accessible only to Ingle-authorized agents. A considerable portion of the website content was accessible by the general public and contained descriptions of Ingle products and other promotional material. The website also invited consumers to purchase Ingle products by telephone, fax, internet or in person by visiting "our office at 438 University Avenue, Toronto — main floor".

51 Prior to JIIG assuming control of the Ingle book of business, MHI had also received "walk-in" applications for insurance: that is, consumers attended at its office and made applications for insurance there and then. To deal with the possibility that this practice would continue, JIIG put in place arrangements for those individuals to be seen by a representative of IIBI. This was easily accomplished because IIBI operated its retail business in street level premises located in the same office tower in which JIIG ran its operations on the twelfth floor.

52 There was also evidence at trial concerning the system that JIIG put in place to deal with telephone, mail, fax and e-mail applications. I will return to that evidence when I consider the parties' submissions regarding the status of the premium moneys collected by JIIG, and in particular whether JIIG held these funds in trust.

(b) Claims Management and Recoveries

53 Claims management and pursuit of recoveries were major priorities for JIIG after it assumed control of the Ingle book of business. Mr. Overgaard recognized early on that, for the business to return to profitability, major efforts were required in each of these areas. At the same time, however, he also recognized that there would be a cost associated with effecting these improvements. As a result, he approached CU with a view to putting in place satisfactory arrangements to cover these costs.

54 The first concrete result of Mr. Overgaard's approach to CU is found in a letter agreement dated February 14, 1994 which addressed the subject of ICMS fees on recoveries. The February 14, 1994 letter agreement was the first in a series of documents signed by the parties over the course of the next three-and-a-half years by which they documented their agreements or their attempts to revise, refine or change various aspects of their relationship. The evidence over this period revealed three signed letter agreements, three signed and one draft memoranda of understanding, one handwritten note signed and initialed by senior executives of both companies, several drafts of an unsigned operating agreement and only one formally prepared and executed agreement naming CU and JIIG as the parties. Regrettably (but not surprisingly) of all these only the last-mentioned does not play a part in the current controversy.

55 Listed chronologically, the principal documents by which the parties sought to modify their relationship after January 1, 1994 are as follows:

February 14, 1994	-	Letter agreement between CU and John Ingle Insurance for administration fees payable on GHIP and subrogation recoveries (signed).
April 6, 1994	-	Letter agreement between CU and John Ingle Insurance regarding ICMS fees for case management and related activities, effective April 1, 1994 (signed).
August 8, 1994	-	Letter agreement between CU and John Ingle Insurance regarding ICMS fee schedule effective July 1, 1994 (signed).
March 22, 1995	-	Memorandum of Understanding No. 1 (MOU #1) between CU and John Ingle Insurance/ICMS providing for funding of ICMS pre-and post-January 1, 1995 (signed).
April 26, 1995	-	Memorandum of Understanding No. 2 (MOU #2) between CU and John Ingle Insurance/ICMS regarding ICMS fees and RES sharing (signed).
December 20, 1995	-	Memorandum of Understanding No. 3 (MOU #3) between CU and John Ingle Insurance/ICMS (prepared but never signed).
November 6, 1996	-	Memorandum of Understanding No. 4 (MOU #4, effective January 1, 1996) between CU and John Ingle Insurance/ICMS outlining a revised funding formula for CU, ICMS, Ingle Marketing and RES sharing (signed).
January 14, 1997	-	Handwritten note recording the parties' agreement to resolve certain issues that had arisen and providing for a new operating agreement to be executed by January 31, 1997 (signed by the president of CU and initialed by the chairman of JIIG).
January to March, 1997	-	Drafts of an operating agreement circulated between CU and JIIG (never signed).

June 13, 1997	-	Extract of an operating agreement between CU and JIIG dealing with confidentiality, nondisclosure and ownership of client list and the business software by JIIG (signed).

56 To a certain extent this list reflects the evolution of the business and the parties' main concerns over these years. To begin with, the focus was on "turning the business around." Considerable effort was expended by JIIG/ICMS to enhance the managed care function and to collect recoveries. Some of the effort was directed to collecting pre-1994 recoveries. In relation to these various efforts, Mr. Overgaard sought and achieved agreement from CU to pay fees. A number of the parties' agreement addressed the topic of ICMS funding.

(c) Funding and Profit Division

57 Another focus of Mr. Overgaard was to persuade CU to approach overall funding in a fashion that recognized his perception that there were there elements to the business: marketing, underwriting and, now, claims management. His thesis was that the true costs of carrying out the activities associated with each element should be paid out of the premium revenue, with the balance placed in the claims pool. Once the claims were paid, the balance (that is, the underwriting profit) should be divided among the three participants, namely JIIG, CU and ICMS.

58 To this end Mr. Overgaard and others at JIIG sought to elicit from CU information about the actual costs incurred by it in the underwriting process. Among the information that they sought was a detailed breakdown of the premium taxes and industry fees and assessments that CU paid in relation to this business. The evidence suggests that CU was not very eager to convert to Mr. Overgaard's approach and was even more unwilling to provide detailed information about its operating costs. (To state the obvious, the parties had no secrets from each other on the claims side, since JIIG processed the claims and CU paid them.)

59 An additional topic that was raised with CU was the appropriate division of underwriting profit. Mr. Overgaard was aware of the substantial losses suffered by CU in relation to the Ingle book of business prior to 1994. Happily, in part by reason of the efforts of JIIG/ICMS in relation to managed care and recoveries, and in part by reason of the adjustment of premium rates and policy terms to reflect the new reality, the Ingle book of business again became profitable. In calendar 1994, using the RES calculation, a modest surplus of $357,000 was realized. That surplus made only a small dent in the accumulated deficit, however.

60 Mr. Overgaard was sensitive to what he described as the "optical" problem that CU management had, having suffered significant losses in past years on the Ingle book of business. When it came time to negotiate profit share division, he agreed that the entire 1994 underwriting profit should be retained by CU.

61 When MOU #2 was negotiated in April 1995, Mr. Overgaard raised the concern that it would be many years before the deficit was recovered and therefore many years before the profit pay out would revert to 70/30 in favour of Ingle. Mr. Overgaard also reiterated a concern regarding the manner in which CU had calculated the roughly $8 million in RES losses, suggesting that if the Ingle interpretation of the profit sharing formula were used, the losses would be much smaller.

62 As a result of these discussions, MOU #2 contained the following provisions in relation to RES sharing:

> 6.1 We agreed that RES for 1995 would be split as follows:
>
> a. Half of any RES surplus would be retained by CU towards recovery of the losses incurred up to 1993 inclusive.
>
> b. The other half would be split one-third to CU and two-thirds to Ingle/ICMS.
>
> 6.2 Hence, Ingle/ICMS would get 50% × 66.7% = 33.3% of any RES surplus in 1995.
>
> 6.3 For 1996 to 1999, Overgaard proposed the following formula to split RS surplus each year:
>
> a. 25% retained by CU to recover past losses.

b. 25% retained by CU as its share of current profits

c. 25% to Ingle

d. 25% to ICMS

6.4 For the year 2000 and beyond, Overgaard proposes we revert to:

a. 33- $^{1}/_{3}$% to CU

b. 33- $^{1}/_{3}$% to Ingle

c. 33- $^{1}/_{3}$% to ICMS

6.5 If we accept this formula, we would drop any further argument about losses and sharing of expenses for events prior to 1994.

63 CU's RES calculations in January 1996 showed a healthy 1995 underwriting profit of $1.9 million. On January 19, 1996 CU paid JIIG $650,000 as JIIG's share of 1995 profit, pursuant to the profit division formula provided for in MOU #2. In June 1996, in response to requests from JIIG, CU made an interim distribution to JIIG of $400,000 on account of anticipated 1996 underwriting profit.

64 Another focus for Mr. Overgaard was the timing of profit recognition and distribution. The traditional approach followed by CU was, in effect, a once a year "snapshot" of the business. This approach was heavily oriented toward actuarial reserves calculated on the overall business. Mr. Overgaard was anxious to adopt an approach to profit calculation and distribution that was more directly related to actual claims results and a claim-by-claim analysis, and which would permit more rapid distribution of underwriting profits. This alternate approach came to be variously referred to as the "Best Estimate" or the "Accumulated Surplus Available for Distribution" (ASAD) approach.

65 As a result of Mr. Overgaard's various efforts at advancing the evolution of the financial relationship between the parties, MOU #4 was signed in October/November 1996, effective January 1, 1996. It reflected a number of the concepts that he espoused, and separately addressed the funding of CU, the funding of ICMS, the funding of Ingle Marketing, and RES sharing. In relation to RES sharing for 1996 and subsequent years, MOU #4 provided as follows:

12.2 For 1996 to 1999 inclusive, RES surplus will be split each year as follows:

a. 25% retained by CU to recover past losses.

b. 25% retained by CU as its share of current profits

c. 25% to Ingle

d. 25% to ICMS

12.3 For the year 2000 and beyond, RES will be split as follows:

a. 33- $^{1}/_{3}$% to CU

b. 33- $^{1}/_{3}$% to Ingle

c. 33- $^{1}/_{3}$% to ICMS

12.4 If the losses arising from business in 1993 and earlier are recovered from profits before the year 2000, the RES will be split on the basis in section 12.3 in all years after the recovery is complete.

12.5 For purposes of RES calculation, any losses incurred during or after 1995 will be carried forward to future years and no sharing of RES surplus will be paid until losses during or after 1995 are recovered from profits in years after the loss.

12.6 CU agrees to develop a "Best Estimate" report in parallel to the RES reports which will be used for monitoring of financial performance, but not for determination of RES sharing.

(d) The January 14, 1997 Agreement

66 Although MOU #4 addressed a variety of topics, from JIIG's perspective it did not resolve all outstanding issues between the parties. Mr. Overgaard remained anxious to implement the ASAD profit calculation and distribution approach. He was also seeking a satisfactory new commission split that would properly compensate Ingle front-end administration. In addition, there were three significant monetary issues between the parties, arising from JIIG's post-December 31, 1993 involvement in the business. These three monetary issues came to be known by the parties as the "three skunks".

67 Two of the three skunks related to the collection of recoveries by JIIG. Commencing in January 1994, JIIG collected recoveries that were due from government agencies and subrogation payments from other insurers. The actual MHI records were in a very unsatisfactory state and Mr. Overgaard testified that the parties agreed that these recoveries would be treated on a cash basis, because both parties could agree on the amount actually collected. Contrary to JIIG's expectations, however, CU sought to credit recoveries actually collected in 1994 as referable to the prior period and made no attempt to reconcile actual cash collected with the prior reserve estimate. From JIIG's perspective, this resulted in something in excess of $1 million being collected in 1994 that was not credited by CU on the RES statement.

68 In addition to the foregoing recoveries, JIIG also arranged for the collection of recoveries on a plan, known as Johnson Insurance, which was not part of the RES sharing pool. It was JIIG's evidence that, having collected these recoveries after 1993, the net amount of these recoveries should be included as part of the profit sharing.

69 The third skunk related to a significant under-reserve by CU at year end 1993 in relation to pending claims in the Ingle book of business. As it turned out, the actual amount paid for these claims in 1994 and subsequent years was greater than that provided for in the 1993 year end reserve. According to JIIG's evidence, this meant that the 1994 profit year was negatively impacted, reducing JIIG's participation in profits after January 1, 1994.

70 On January 14, 1997 Mr. Overgaard and others from JIIG met with Frank Crowley, the president of CU. The end product of that meeting was an oral agreement that was recorded in a somewhat cryptic handwritten note prepared by Mr. Overgaard, initialed by him and signed by Mr. Crowley. For ease of reference I shall refer to the parties' oral agreement reached that day as the January 14, 1997 Agreement, and Mr. Overgaard's note as the January 14, 1997 Note. Because the January 14, 1997 Agreement is the subject of some controversy and because the January 14, 1997 Note is a document of some significance, I will reproduce the body of the January 14, 1997 Note in full:

1. $800,000 — take skunks off the table

2. $400,000 in 96 — RES earned as of June/96

3. 300,000 on acct for surplus as of Dec 31/96 based on 50/50

4. roll fwd surplus distributed $^{1}/_{3}$: $^{2}/_{3}$ CU/Ingle Jan 1997

5. Steve Prince + SMO to negotiate a new deal dealing with all the above and the go forward by January 31/97 — balance of $400,000

6. make payment tomorrow upon receipt of those cheques

Initial payment of $400,000 earned when "agreement" [sic] completed and signed.

(initialled) "SMO"

(signed) "Frank Crowley"

71 Although disagreements between the parties developed and remained at trial concerning the effect of the January 14, 1997 Agreement and the meaning of some of the contents of the January 14, 1997 Note, it was common ground that a new operating agreement was to be finalized and put in place by January 31, 1997. On the CU side, responsibility for this assignment fell to Steven Prince, a senior vice president. Over the next several months Mr. Prince dealt with Mr. Overgaard and others at JIIG with a view to finalizing that new agreement, and a number of drafts were exchanged.

72 A key element of the new operating agreement was the incorporation of an underwriting profit sharing formula based on the ASAD method. In order for that formula to be operative, however, a baseline or starting point for the calculations had to be settled upon by the parties. This was due to the fact that the business was ongoing, and the parties had differing views as to the correct calculation for the various constituent numbers for the calculation. The draft operating agreement provided for the agreed status of ASAD as of December 31, 1996 to be set forth in an appendix entitled Table 3. As events unfolded, however, the parties were unable to reach agreement regarding the contents of Table 3 or the agreed status of ASAD at year end 1996. No operating agreement was ever signed.

73 In addition to the preparation and execution of a new operating agreement by January 31, 1997, the January 14, 1997 Agreement contemplated the payment of various sums by CU to JIIG. It was common ground that CU was to pay $800,000 to JIIG in order to settle the three skunks. It was also common ground that, of this sum, $400,000 was to be paid immediately and the remaining $400,000 was to be paid upon execution of the new operating agreement on or before January 31, 1997.

74 The first of the two $400,000 payments in relation to the skunks was made, as contemplated, on January 14, 1997. Although the new operating agreement was never signed, CU did pay the second $400,000 to JIIG on February 14, 1997.

75 In relation to underwriting profit, it was also common ground that the January 14, 1997 Agreement provided for $300,000 to be paid forthwith by CU to JIIG "on account for surplus as of December 31, 1996 based on 50/50." That payment was made on January 14, 1997, bringing the total payments made by CU to JIIG on account of 1996 surplus to $700,000. CU's calculation for underwriting profit in 1996 based on an RES approach showed total profit of $1,406,930. Thus the two payments by CU to JIIG in June 1996 and January 1997 on account of 1996 profit share totaled slightly less than 50 percent of the 1996 profit. MOU #4 provided for a 50/50 split for 1996.

(e) JIIG's August 1997 Invoices

76 By the summer of 1997 the parties had still not reached agreement with respect to the ASAD calculation for purposes of Table 3 to the draft operating agreement. On June 13, 1997, however, they did sign a one-page extract from the proposed operating agreement, in order to allow the parties to move certain projects forward while finalizing the main operating agreement. That extract dealt only with confidentiality, non-disclosure and ownership of client lists and business software.

77 The delay in finalizing the operating agreement and inability to persuade CU to agree upon a starting point for the ASAD profit distribution formula were sources of irritation for JIIG. Contributing to JIIG's dissatisfaction were several other profit distribution issues.

78 The largest of these issues (measured in dollar terms) was the profit share that JIIG calculated was due to it by application of the ASAD formula from January 1, 1994 forward. Applying that formula, JIIG calculated that the aggregate of underwriting profits on the Ingle book of business for 1994, 1995 and 1996 was $4,758,000. This contrasted with the CU calculation using the RES approach, which fixed profits over the same period at approximately $3,678,000. JIIG wanted to be paid its share of

the approximately $1 million difference, which it calculated (based on the $^{1}/_{3}$: $^{2}/_{3}$ CU/Ingle profit split to which the parties had agreed in the January 14, 1997 Agreement) to be more than $700,000.

79 A second issue, also involving a significant amount of money, concerned an adjustment to the profit calculation in relation to taxes and fees. From JIIG's perspective, CU had agreed to adjust the amount charged by it to the profit pool for premium taxes and industry fees and assessments to reflect actual expenses. Historically, CU had charged 3.5% of gross premium. JIIG determined that actual costs were closer to 2.1% of gross premium. Utilizing a compromise rate of 2.5%, JIIG calculated that CU's actual expenditures on this account were some $761,000 less than CU had charged over the 1994-1996 period. JIIG wanted to be paid $^{2}/_{3}$ of this amount, more than $500,000.

80 A third profit sharing issue concerned the payout of premium income from a specific Ingle insurance plan, namely Flight Accident (FLACC). Almost all of the FLACC policies had been written prior to 1994, and the coverage had all lapsed, with no claims having been made. In view of the nature of this coverage (which would have given rise to substantial claims if an accident had occurred) CU had accumulated all premiums as unearned, and had never brought them into the profit calculation. JIIG believed that CU had agreed to at last treat these premiums as earned and bring them into the profit calculation. JIIG expected $^{2}/_{3}$ of the net sum, or approximately $127,000.

81 The final profit sharing issue arose from a claim paid by CU for a former CU employee, Arthur Dawson. In 1995 Mr. Dawson had purchased an Ingle policy and had suffered a heart attack while in Florida, resulting in a claim under his policy in the order of $99,000. It had been JIIG's understanding that neither employee premiums nor employee claims were to be included in the profit sharing calculation, but that the Dawson claim had nevertheless been deducted. JIIG therefore sought to be paid $^{2}/_{3}$ of the amount charged to the profit pool, namely $66,000.

82 The amounts claimed by JIIG in relation to the foregoing profit sharing issues totaled more than $1.4 million. From JIIG's perspective, however, CU appeared unwilling to discuss resolution of these issues. Accordingly, on August 6, 1997 Mr. Overgaard sent to Mr. Prince a memo enclosing "outstanding invoices...for profit sharing distribution [totaling] $1,406,591.62." The invoices were as follows:

(a)	Profit share due to Ingle on the basis of ASAD calculation for 1994, 1995 and 1996	$705,368.60
(b)	Taxes and fee adjustment for the same three-year period	$507,358.70
(c)	Additional Profit Share due to Ingle relating to premiums received for Flight Accident insurance	$127,863.99
(d)	Ingle profit arising from claim payment in relation to Arthur Dawson	$66,000.33

The covering memo from Mr. Overgaard to Mr. Prince stated that JIIG was proceeding on the basis of a $500,000 on-account payment to be made "either by payment from CU or deduction from our August 15, 1997 remittance". Throughout the CU/Ingle relationship, premiums collected by Ingle (whether by MHI or JIIG) had been remitted to CU on the 45th day following the end of the month in which they were collected, net of commissions and other agreed-upon deductions such as ICMS fees.

83 The suggestion in Mr. Overgaard's memo that JIIG might proceed to deduct $500,000 from the next regular premium remittance drew an immediate response from Mr. Prince. In a memo to Mr. Overgaard dated August 7, 1997 he stated:

> We do not agree with your view of the profit sharing agreement or the other items you have invoiced. ... I am not authorizing payment of the $500,000 mentioned in your fax. If you withhold it from premium payments due to us on August 15, you will be in violation of our agreement.

84 Following the foregoing exchange, the parties engaged in a series of meetings, discussions, and exchanges of memoranda and correspondence all directed at resolving the various issues between them. Payment of the August 15, 1997 premium

remittance was delayed by JIIG until August 27. At a meeting on August 27, in exchange for the August premium remittances, CU provided JIIG with a cheque for $500,000 on account, pending resolution of the issues between the parties. On September 16, 1997 CU paid a further $200,000 to JIIG for "surplus sharing on account."

85 On October 17, 1997 Mr. Crowley sent to Mr. Overgaard a cheque for $169,746 as a proposed settlement of JIIG's claim with respect to the taxes and fees and Dawson invoices. That cheque was returned by Mr. Overgaard and on October 21, 1997 JIIG withheld $150,000 from premium remittances to CU. This withholding was stated to be an on-account payment for JIIG's claims with respect to the taxes and fees and Dawson invoices.

(f) The Creation of Ingle Life and Health Assurance Company

86 While these various (and ultimately fruitless) efforts were being made to resolve the various monetary issues between the parties and to reach agreement on the contents of Table 3 to the draft operating agreement, other relevant events were unfolding as well. For some time Mr. Overgaard had been advancing the idea of the creation of a separate insurance company to underwrite the Ingle book of business. That proposal initially surfaced in October 1996, but CU's response was lukewarm. By August 1997 Mr. Overgaard had prepared a detailed draft proposal in which he set out a plan to raise sufficient capital to purchase an existing insurance company, American Family Life Assurance Corporation (AFLAC) from its owner, Hartford Life Insurance Company of Canada. The concept was that AFLAC would then acquire and operate the travel health insurance business. AFLAC was an existing insurer that was no longer writing new policies, but whose charter was still in good standing.

87 In October 1997 Mr. Overgaard established direct contact with the chairman of CU's parent, CU Assurance, and invited it to become a 50/50 partner in the new company. The response from CU Assurance was an expression of interest in acquiring all of the assets of the Ingle organization. These discussions ultimately led to the preparation by CU Assurance in late November 1997, of a term sheet for a proposed purchase of all of the assets of JIIG. Although discussions regarding a suitable purchase price and terms continued into early 1998, they were formally terminated by CU Assurance in March 1998, following termination of CU's relationship with JIIG, as described below.

88 In parallel with the negotiations with CU Assurance regarding a possible transaction with JIIG, Mr. Overgaard took steps to advance his plan to acquire AFLAC. In December 1997 JIIG agreed to purchase AFLAC. On December 23, 1997 JIIG entered into an operating agreement with AFLAC by which Ingle agreed to perform marketing and administration services and AFLAC agreed to act as the underwriter of policies marketed and administered by JIIG. This agreement became effective on January 23, 1998, when AFLAC's name was changed to Ingle Life and Health Assurance Company (Ingle Life). In mid February, 1998 JIIG publicly announced that it had "secured an additional underwriting facility for health insurance programs — Ingle Life...". In mid-March, 1998 JIIG ceased using CU as an underwriter and began issuing policies underwritten by Ingle Life, in the circumstances described below.?

(g) Withholdings by JIIG

89 As noted previously, in October 1997 JIIG withheld $150,000 from the premium remittance as an on-account payment for JIIG's claims with respect to its invoices for taxes and fees and the Dawson claim. On December 15, 1997 JIIG was due to remit to CU the net premiums collected during the month of October 1996. JIIG withheld $250,000 from this remittance also as a part payment for its outstanding invoices. On January 15, 1998 the November 1997 premium remittance was due. JIIG withheld $20,339.67 from that remittance. On February 15, 1998 the December 1997 premium remittance was due. JIIG withheld $117,265.50 from that remittance. JIIG's total withholdings in relation to 1997 premium remittances were thus $537,605.17.

90 Between January 1 and March 15, 1998, JIIG continued to issue CU policies. In relation to these policies, during this period JIIG collected net premiums of $2,620,338.39 (before any deductions in respect of ICMS fees). With the exception of $350,000 paid over to CU to be applied against claims, JIIG retained all of these premiums to apply against its unpaid invoices and claims for additional profit sharing and ICMS fees.

91 For its part, CU considered the withholding of premium remittances by JIIG to be unauthorized and a fundamental breach of the parties' arrangements, as well as a breach of JIIG's obligations under the *Registered Insurance Brokers Act*. Through its

solicitors, on December 23, 1997, CU gave JIIG written notice of that position. On February 5, 1998 CU's solicitors served a notice referring the disputed issues between the parties, including the withheld premiums, to arbitration. On the same day, JIIG sent to Mr. Crowley additional invoices for a profit sharing totaling $413,341.50, calculated on an ASAD basis. Mr. Crowley's response was a further statement that JIIG was not authorized to deduct any amount with respect to these invoices from the premiums due to CU on February 15, 1998. As noted previously, on the latter date JIIG withheld $117,265.50.

92 On February 26, 1998 CU sent a letter addressed to MHI, JIIG and ICMS formally terminating the parties' "arrangements and contractual relationships" effective August 30, 1998. Paragraph 14 of the 1989 agreement provided that either party could terminate the contract by giving 180 days notice in writing. Although CU gave 180 days notice of termination, JIIG stopped issuing CU policies a little more than two weeks later on March 15, 1998. Thereafter, all Ingle travel health policies were underwritten by Ingle Life.

93 Although after March 15, 1998 CU no longer underwrote any new Ingle policies, a substantial number of CU-underwritten Ingle policies remained in force after that date. Through arrangements between the parties, JIIG and ICMS continued to administer claims on these policies as well as claims that were pending prior to March 15. This effort included dealing with insureds, PPOs and others in relation to claims management and in pursuing recoveries from GHIPs and other third parties. The parties did not agree, however, on the basis for compensation for such services, giving rise to one of the issues before me. CU remained responsible for paying the claims.

94 On August 27, 1998, shortly before the expiration of CU's six-month notice, the parties signed an agreement providing for the post-termination administration of the remaining claims under the CU-underwritten Ingle policies. JIIG agreed to complete the administration of those claims at no additional charge to CU. The parties expressly acknowledged that all other issues not dealt with in the agreement remained unresolved.

95 At the end of their business relationship the parties had numerous unresolved issues between them. These included such fundamental questions as the appropriate division of underwriting profits and the status and ownership of premium moneys. Further disputes concerned JIIG's various withholdings, the three unpaid invoices, and the $800,000 paid by CU in relation to the settlement of the three skunks. A solicitor who was consulted by one of the parties during the final breakdown of their relationship aptly described the state of legal relations between them as "a bowl of cooked spaghetti."

6. The Litigation

96 The attempt by CU to resolve the parties' disputes by arbitration was unsuccessful. Instead, CU commenced a proceeding by way of notice of application on June 23, 1998. That process, too, proved unsuccessful. The application was argued on July 27, 1998 and in written reasons released October 19, 1998, Beaulieu J. concluded that the parties' dispute would have to proceed to trial. The statement of claim by which this action was initiated was issued on November 13, 1998.

97 In its statement of claim CU seeks a declaration that the defendants hold the premiums and the recoveries in trust for CU and an order requiring the defendants to account for and pay over to CU the net premiums and recoveries. CU also seeks damages for breach of contract, breach of trust and conversion, together with punitive damages. In essence, the CU pleading alleges that the parties' relationship was governed throughout by the 1989 Agreement, as amended by the MOUs. It asserts that the 1997 payments by CU to JIIG were payments on account of future surplus sharing and that JIIG's withholding of premiums was a breach of trust in which Mr. Overgaard and John Ingle personally participated.

98 In their statement of defence and counterclaim the defendants other than MHI assert that the 1989 Agreement had no application to the parties' relationship after 1993 and that all parties understood that MHI was no longer part of the business. They assert that with the involvement of JIIG, there was a new arrangement for sharing the profits on the sale of travel health insurance policies, which changed from time to time for 1994, 1995, 1996 and 1997. These defendants further assert that CU has not paid JIIG all of its share of the profits due and that further fees are due to ICMS for the period ending August 31, 1998. These defendants admit that JIIG has set off amounts owing to it and ICMS against payments to which CU would otherwise be entitled; they deny, however, that the funds are the subject of any trust. Finally, they assert that CU owes substantially more

to JIIG/ICMS than the amount of the payments against which JIIG has exercised the right of setoff. JIIG and ICMS claim the balance due to them.

99 The defence filed on behalf of MHI asserts that, after the introduction of JIIG in 1994, MHI ceased to have any role in any aspect of the business relationship with CU.

7. JIIG Corporate Reorganization

100 Subsequent to the June 23, 1998 commencement of proceedings by CU, JIIG concluded a series of transactions that were the culmination of Mr. Overgaard's plan to establish Ingle Life as a separate insurance company dedicated to operating and underwriting the Ingle book of business. That process had formally commenced in December 1997 when JIIG agreed to purchase AFLAC from its owner, Hartford, and entered into an operating agreement with AFLAC. The latter agreement became effective upon AFLAC's name change to Ingle Life in January 1998. To carry the plan forward, however, it was still necessary for Mr. Overgaard to gain access to the money required to fund the acquisition of Ingle Life and to provide it with the necessary level of capital to satisfy the minimum regulatory requirements. He did so in March 1998 when he obtained commitments from outside parties to loan $11 million to a new subsidiary of JIIG, which came to be known as Ingle Financial Holdings Inc. (IFHI). The borrowings were to be secured by way of debentures and warrants. A portion of the loan proceeds were to be used to purchase the shares of Ingle Life from Hartford.

101 In due course the acquisition of the shares of Ingle Life was completed. As well, the reorganization of JIIG took place, in two steps. The first step was carried out in September 1998 but was effective as of June 30, 1998. It involved the transfer of JIIG's assets (including the Ingle book of business and the shares of ICMS) to IFHI in exchange for shares of IFHI and some $440,000 in cash. According to Mr. Overgaard, the cash was used to pay bonuses to certain JIIG executives (other than Mr. Overgaard or John Ingle) to allow them to purchase shares in IFHI. The second step in reorganization was completed in September 1998. It involved the transfer of IFHI's assets (other than its shares in ICMS) to Ingle Life, in exchange for shares of the latter.

102 As a result of these various transactions, the Ingle book of business is now the property of and administered by Ingle Life. Ingle Life is a subsidiary of IFHI. In turn, IFHI is owned by JIIG (which has now changed its name to JIIG Holdings Inc.). The ultimate beneficial owners of JIIG are Mr. Overgaard, through his holding company, Whitemount, as to 84%, and Gayle Christie and Yanya Ingle (spouse of John Ingle), through a jointly-owned numbered company, each as to 8%, for a total of 16%.

Issues and Analysis

103 I turn now to the analysis of the issues associated with this litigation. As might be expected, given the complex fact situation that gave rise to the disputes between the parties, the issues are numerous.

104 I am indebted to counsel for the parties who, at my request, prepared a form of "logic diagram" listing the various issues and indicating in graphic form the interrelationships among them. This helpful and co-operative spirit was typical of the level of courtesy and professionalism with which counsel conducted themselves throughout the trial. I commend and thank them.

105 The parties' logic diagram filled two 17" × 13" sheets and contained some 43 interconnected boxes listing the various issues and the necessary steps in their analysis. For purposes of these reasons I have managed to reduce the list of issues to the following:

1. What agreement (if any) governed the CU-Ingle relationship from January 1, 1994 forward?

2. What were the surplus sharing arrangements between the parties, and in particular what arrangements governed at the end of the relationship?

3. Whose calculations of surplus should be used?

4. How much surplus is owing to whom (apart from ICMS fees)?

(a) What is the correct calculation?

(b) How should the $800,000 that was paid under the January 14, 1997 Agreement in relation to the three skunks be treated?

(c) Should JIIG get credit for the three invoices?

(i) Taxes and Fees

(ii) FLACC

(iii) Dawson

(d) How should the August and September 1997 payments be treated?

(e) Reconciliation of surplus calculation and payments.

5. How much credit is due to JIIG/ICMS for ICMS fees?

6. How much is owed to whom or is an accounting reference to the Master required?

7. Were the funds collected by JIIG/ICMS trust funds held for the benefit of CU?

(a) Premiums

(b) Recoveries

8. If the funds were trust funds, was JIIG entitled to exercise a right of set-off as against them?

9. If the funds were trust funds, has there been a breach of trust and, if so, by whom?

10. Has there been oppression under the *OBCA*?

11. Should punitive damages be awarded?

I will deal with each of these issues in turn.

Issue 1. What agreement if any, governed the CU-Ingle relationship from January 1, 1994 forward?

106 I am satisfied on the evidence that, commencing January 1, 1994, JIIG controlled and operated the Ingle book of business. The evidence discloses that, to some extent, there was a period of transition in relation to certain aspects of the business. For example, the direct sales operations of MHI were wound down over a period of many months. Pre-1994 brochures that made no mention of JIIG remained in circulation for varying periods of time. Old MHI letterhead and fax cover sheets continued to be used, at least until August 1994.

107 On behalf of CU it was argued that the foregoing matters demonstrated that MHI was still operating the business in 1994. It was further pointed out that the business continued to be operated under the name "John Ingle Insurance" both before and after January 1, 1994 and that until at least July 1994 Robin Ingle continued to submit premium reports to CU on letterhead that bore MHI's name.

108 While the foregoing matters may have served to de-emphasize the fact that a new corporation was operating the Ingle book of business as of January 1, 1994, there were other changes that were obvious and known to CU. Principal among these was the involvement of Mr. Overgaard. On November 8, 1993 Mr. Crowley wrote to him and addressed his letter to "Mr. Steve Overgaard, CEO, John Ingle Insurance Group Inc." In the months that followed January 1994, Robin Ingle ceased to be the

principal contact person with whom CU dealt, and was replaced by Mr. Overgaard. The various letter agreements signed in 1994, while addressed to John Ingle Insurance, were signed by Mr. Overgaard and by John Ingle. All of the MOUs were signed by Mr. Overgaard. I note as well that one other formal agreement relating to a 1992 travel insurance program between Ingle and Montreal Trust (which does not directly affect the issues before me) was executed between CU and JIIG in early 1994.

109 More importantly, by the time the parties' relationship began to sour in 1997, CU clearly knew that it was dealing with JIIG. The various drafts of the operating agreement named JIIG as one of the parties. The cheques written by CU in payment of surplus sharing were made payable to JIIG. By that stage CU had ceased to have any direct dealings with MHI.

110 While I am satisfied that JIIG operated the Ingle book of business from January 1, 1994 forward, the question remains: on what terms did JIIG do so *vis-à-vis* CU? The defendants contended that at a meeting held on October 29, 1993, there was an oral agreement between JIIG and CU to enter into a new partnership under which they would jointly manage the business to cover costs and share the profit. They contended that, after January 1, 1994, the parties engaged in a continuous negotiation process to try and deal with the specifics of covering the costs and sharing the profits. They pointed to the 1994 letter agreements regarding the reimbursement of ICMS costs and the MOUs and the January 14, 1997 Agreement concerning profit sharing, as evidence of various steps in fleshing out the parties' relationship.

111 There is a conflict in the evidence about what transpired at the October 29, 1993 meeting. Indeed, there was a conflict over whether this was the first occasion (apart from a brief introduction) that Mr. Crowley met with Mr. Overgaard and discussed matters of substance. Mr. Crowley followed the meeting up with a letter dated November 8, 1993 in which he recorded "some of the issues which were discussed." That letter contained the following paragraph:

> We will prepare and agree [sic] an RES position as at the 31st of December 1993, and we will then jointly manage and review the business over the calendar year, rather than the contract year, commencing in 1994.

The defendants contended and Mr. Overgaard's evidence was to the effect that these words reflected the agreement reached at the October 29, 1993 meeting that as of January 1, 1994 CU and JIIG would jointly manage the Ingle book of business and share the profits. Mr. Overgaard also testified that there was an agreement reached at the meeting to treat recoveries on a cash basis effective January 1, 1994.

112 For his part, Mr. Crowley denied that any such agreements were reached on this occasion. The thrust of his evidence was that his letter dated November 8, 1993 confirmed the agreements reached at the October 29 meeting, namely, to change the commission rate on the NOMAD insurance line effective January 1994 and (in the paragraph quoted above) to change the fiscal year of the business to the calender year, instead of the existing September to August or "contract year" arrangement then in place. There is accordingly a clear conflict on the evidence as between Mr. Crowley and Mr. Overgaard concerning what transpired at this seminal meeting.

113 Where there is conflict in the evidence on any material point as between Mr. Crowley and Mr. Overgaard, I prefer and accept the evidence of Mr. Crowley over that of Mr. Overgaard. I have little hesitation in reaching this conclusion for the following reasons:

> (a) On numerous occasions Mr. Overgaard's trial testimony was at variance with his testimony at discovery. By contrast, Mr. Crowley's trial testimony was not contradicted in any material way by his discovery answers.
>
> (b) On cross-examination Mr. Overgaard repeatedly gave answers that were not responsive to the questions posed. His answers were frequently evasive and he often refused to admit the obvious. He seemed at times to be trying to "think his way around" potentially problematic answers. As a result, I was left with serious doubts as to the reliability of his testimony. By contrast, Mr. Crowley testified in a straightforward fashion.
>
> (c) In addition to non-responsive answers, Mr. Overgaard's testimony included repeated attempts by him to articulate the defendants' position in relation to various issues or to argue his case. He used the phrase "we would have" when testifying about what he did on a certain occasion. I was left with the impression that he was advocating his cause and reconstructing

events, rather than recalling them. He seemed less concerned with accurately reciting the facts he could recall and more concerned with characterizing events and documents in the fashion that was most favourable or least damaging to his case.

(d) I am also mindful of the fact that Mr. Overgaard, as the 84% beneficial owner of JIIG, has a material financial interest in the outcome of this litigation. He is also a personally named defendant.

(e) Finally, in respect of the fundamental question in this litigation (that is, on what terms, *vis-à-vis* CU, did JIIG conduct the business after January 1, 1994), Mr. Overgaard's explanation lacks a ring of truth. At the time JIIG assumed control of the Ingle book of business, annual premium volume was in the order of $25 million per year. At the same time, the book of business had an accumulated underwriting deficit of more than $8 million. It does not make sense that CU would agree to simply walk away from the past loss carry-forward, nor does it make sense that Mr. Crowley would embark upon a completely new legal relationship in relation to a book of business of this magnitude (both as to premium volume and accumulated deficit) on the basis of some vague and non-specific arrangement to "jointly manage the business and share profits". Far more logical and credible is Mr. Crowley's explanation, namely, that the previous arrangement between CU on the one hand and the Ingle organization on the other continued on the same terms as before, subject only to the express changes described in the letter of November 8, 1993. I accept Mr. Crowley's evidence, and his explanation regarding the true meaning of the quoted paragraph of his November 8, 1993 letter.

114 Another illustration of the last-mentioned measure of Mr. Overgaard's credibility (that is, whether his testimony has a ring of truth) also bears upon the so-called fundamental issue. On July 18, 1994 Mr. Crowley sent to Mr. Overgaard at JIIG a single sentence letter, the full text of which is as follows:

> This will confirm that Commercial Union underwrites the insurance products sold by John Ingle Insurance Group Inc. and that the relationship between John Ingle Insurance Group Inc. and Commercial Union is governed by the attached agreement.

This letter was accompanied by a copy of the 1989 Agreement between CU and MHI. Mr. Crowley testified that he sent the letter in response to a telephone call from Mr. Overgaard asking for a copy of the agreement.

115 Mr. Overgaard testified that he telephoned Mr. Crowley upon receipt of the July 18, 1994 letter and advised him that the agreement between MHI and CU did not apply to JIIG. By contrast, Mr. Crowley testified that he had no recollection of Mr. Overgaard calling him back and he believed that Mr. Overgaard did not call him back. There is nothing in writing that confirms such a call was made. Significantly, there is nothing in the record before me to reflect what logically would have occurred had Mr. Overgaard actually made the call he claims to have made to Mr. Crowley, namely, some further exchange between the parties (either written or oral) concerned with either correcting the supposed error made by Mr. Crowley when writing the July 18, 1994 letter, or more importantly, some effort directed to clarifying precisely what arrangements existed between the parties at this time.

116 The most logical explanation is that Mr. Overgaard did not call Mr. Crowley at this time, and I find as a fact that he did not. Thus the July 18, 1994 letter, which confirmed CU's understanding of the parties' relationship, remained on the record unchallenged.

117 While there was correspondence from Mr. Overgaard to CU in late 1994 which recited that the parties had been "unable to articulate the agreement to deal with [their] relationship for the period January 1, 1994 forward", I conclude from the content of that letter and the context in which it was written that Mr. Overgaard was seeking to advance the negotiations between the parties towards a new agreement. As described previously in my reasons, from almost the beginning of JIIG's involvement in the Ingle book of business in January 1994, there were ongoing negotiations with respect to various aspects of the parties' business relationship, covering such topics as payment of fees and division of underwriting profits.

118 Overall, I am left with the impression that, against the backdrop of the 1989 Agreement, CU continued to work with and attempted to accommodate JIIG. In a sense, this was a continuation of the pre-1994 accommodations and adjustments, such as CU's agreement to contribute to the costs of the ICMS Florida operation, or the addition of the new insurance plans with

different commission splits. From February 1994, through January 1997, from the letter agreements, through the MOUs, to the January 14, 1997 Agreement, CU participated in ongoing discussions to respond to JIIG's requests for modifications to the parties' existing arrangements, in light of the changing nature of the travel health insurance business. I do not, however, consider that CU's participation in the various discussions and negotiations with JIIG is inconsistent with the ongoing applicability of the 1989 Agreement. Ultimately, when CU was not prepared to move sufficiently far or fast in the parties' negotiations, when JIIG was sufficiently well-established, when the business was sufficiently profitable and when another insurer (AFLAC) was available to underwrite the policies on an ongoing basis, JIIG stopped remitting premiums to CU.

119 During the course of the evidence and again during argument it was suggested on behalf of the defendants that it would not have made sense for someone in Mr. Overgaard's position to invest money into JIIG if it was merely stepping into the shoes of MHI under the 1989 Agreement. He was aware of both the 1989 Agreement and the significant deficit in the RES before he acquired control of the business. Specifically, it was suggested that, rather than JIIG having to wait for the accumulated deficit to be paid out before participating in underwriting profits, it would have made more sense to merely move the Ingle book of business to a new underwriter. The defence evidence suggested that this could have been easily done had CU insisted that the parties' relationship continued to be governed by the 1989 Agreement and that the RES deficit be carried forward.

120 I do not accept that evidence or that argument. First of all, it must be remembered that these were turbulent times in the travel health insurance business. Underwriters would have been very wary of entering into this field without very careful consideration of the prospects. The Ingle book of business alone had been responsible for generating over $8 million of losses in the previous two years. Any prudent underwriter would have made the necessary inquiries to determine that information and there is no doubt in my mind that the results of that inquiry would have frightened away most of them.

121 The future prospects for the Ingle book of business were not necessarily bright, either. The recoveries process at MHI in late 1993 was described by John Ingle as "chaotic". The managed care effort was still being developed. Even after improvements were made on both of the these fronts, the book of business showed an RES profit for 1994 of only $357,000 on earned premium of $26.6 million.

122 The foregoing analysis leads me to reject the suggestion that JIIG could have easily moved the Ingle book of business to another underwriter. Mr. Crowley (the most experienced insurance executive who testified) disputed that this could have been done, and I accept his evidence.

123 It was further suggested, both in evidence and argument, that it would have made no sense for Mr. Overgaard to invest additional money in the business in the face of the deficit and the financial constraints under which MHI was operating. It must be kept in mind, however, that by late 1993 Mr. Overgaard had already loaned a significant amount of money to MHI with no security. Unless MHI was able to realize something on its assets (which principally consisted of the goodwill and know-how associated with the Ingle book of business) Mr. Overgaard would have no way to recover his loan. Through the mechanism of JIIG taking over the Ingle book of business and the ongoing support and cooperation of CU, MHI ultimately was able to repay Mr. Overgaard. There is no evidence that Mr. Overgaard told Mr. Crowley in October 1993 that the 1989 Agreement was at an end. Mr. Crowley denied being told by Mr. Overgaard that he wanted no part of past losses, and I believe Mr. Crowley. Had Mr. Overgaard done so there is good reason to believe that CU would have declined to do business with JIIG, and Mr. Overgaard's then-investment by way of his outstanding loan to MHI would have been lost.

124 I also note that when MOU #2 was negotiated in April 1995, Mr. Overgaard expressed the concern that it would be many years before the deficit was recovered and therefore many years before the underwriting profit split would revert to 70/30 in favour of Ingle. Such a statement is entirely consistent with a mutual understanding that the pre-1994 deficit was carried forward and inconsistent with Mr. Overgaard's now-assertion that that deficit had no effect on JIIG.

125 On the basis of the foregoing, I find as a fact that there were no oral agreements made as described by Mr. Overgaard, at the October 29, 1993 meeting, or otherwise, either to jointly manage the business and share the profits or to treat recoveries on a cash basis.

126 Before leaving this subject, I should also comment upon the evidence given by John Ingle and Robin Ingle concerning their involvement with Mr. Crowley in the fall of 1993.

127 John Ingle also testified about the October 29, 1993 meeting. To begin with he testified that he did not "remember the details of the meeting." He stated that he remembered the conclusions and that he believed that Mr. Crowley's November 8, 1993 letter "reflected our discussion at the time." He then went on to give more detailed evidence and asserted that at the October 29 meeting the parties agreed to "jointly manage or enter into a joint venture and share the costs and split the profits." This evidence, too, lacks a ring of truth, for the reasons articulated previously. By reason of that factor, by reason of the first portion of Mr. Ingle's evidence quoted above (that he did not remember the details of the meeting) and by reason of my conclusions as to the true meaning of the quoted paragraph of the November 8, 1993 letter, I do not accord any weight to his testimony on this point.

128 In assessing John Ingle's credibility I am also mindful of the fact that he is a personally named defendant and that his spouse has a material financial interest in the outcome of these proceedings as they affect JIIG. As well, on a very significant point, John Ingle's trial testimony was at variance with his testimony at discovery. In relation to the events of January 14, 1997 and the agreement reached that day, at discovery he testified that the parties agreed to a "new ball game" (that is, a new legal relationship) effective January 1, 1997. At trial, however, he testified that the "new ball game" was effective January 1, 1994. The latter answer is, of course, consistent with and supportive of the defendants' position at trial; the previous answer is not. This change in John Ingle's sworn evidence heightens my concerns about the reliability of his trial testimony. Where it conflicts with that of Mr. Crowley in any material respect, I prefer and accept the testimony of Mr. Crowley.

129 I am also aware that Robin Ingle testified (as did Mr. Overgaard) that Mr. Crowley attended several meetings with him and Mr. Overgaard prior to the one on October 29, 1993, at which the Ingle restructuring plans were discussed. I did not find him to be a very impressive witness, however. He seemed to have a somewhat casual approach to this litigation and his involvement in it. He claimed that his recollection of some of the events in question had improved between discovery and trial. As well, many of his answers were non-responsive or argumentative.

130 I am also troubled by Robin Ingle's testimony and actions in relation to the ongoing renewal of MHI's registrations with the provincial insurance regulators. During his examination in chief Robin Ingle testified that MHI was in dire financial difficulty in 1993, and that it was insolvent and unable to carry on business. He further testified that after 1993 MHI "was not a solvent company ... it had no business whatsoever." When challenged on cross-examination that he did not tell the regulators about MHI's difficulties, he altered his evidence to say that MHI was not technically insolvent. He acknowledged that if MHI had been insolvent it "would not have gotten a license." In his words, it wouldn't have made sense to share MHI's financial troubles with any of the provincial regulators.

131 Furthermore, in a letter to the British Columbia regulator in June 1995 Robin Ingle represented that MHI "carries on business of [sic] an insurance agent" in B.C. which, according to his trial testimony, quoted above, it did not. In a September 1996 letter to the B.C. regulator Robin Ingle represented that MHI employed licensed individuals, who were in truth JIIG's employees, not MHI's. In neither letter to the B.C. regulator did Robin Ingle disclose that JIIG was collecting premiums from B.C. residents, in many cases directly. In these various respects he was less than forthright with the regulators. I should also mention that these letters were drafted by John Ingle, and their content also reflects adversely on his credibility.

132 For these reasons, I am not prepared to place very much weight on Robin Ingle's testimony. Where his evidence conflicts with that of Mr. Crowley in any material fashion, I prefer and accept the evidence of Mr. Crowley.

133 In a further effort to challenge Mr. Crowley's credibility, the defendants pointed to various documents associated with the Ingle restructuring/JIIG strategic plan and contended that some of these documents were provided to CU at meetings allegedly attended by Mr. Crowley prior to October 29, 1993. One version (Draft 3) of the JIIG strategic plan, however, bears a December 8, 1993 date. It was clearly still an unfinished work in progress at that time. This leads me to doubt that earlier versions of it were shared with the CU representatives in October 1993. Mr. Crowley testified that the October 29, 1993 meeting was the first

business meeting that he attended with Mr. Overgaard, and that he did not see the strategic plan documents until September, 1994. I accept his testimony.

134 It is true that there was no express agreement at the meeting on October 29, 1993 that the CU-JIIG relationship would be governed by the 1989 Agreement. Based on the evidence that I accept about what transpired at that meeting, however, and the meaning of Mr. Crowley's letter of November 8, 1993, I conclude that it was implicit that the 1989 Agreement and the other arrangements in place as between CU and MHI would continue to govern. In addition, the parties' conduct after January 1, 1994, when JIIG began operating the Ingle book of business, was completely consistent with this conclusion: the CU policies were issued, the premiums were collected, the net premiums were remitted after deduction of commission (at the rates that had applied while MHI was operating the business, subject only to the change in the NOMAD rate) and other agreed-upon charges, the remittances were submitted 45 days after the end of the month in which the premiums were collected, the claims were assessed and adjusted, all in the same fashion as they had been prior to January 1, 1994. The subsequent July 18, 1994 letter from Mr. Crowley expressly confirmed the terms on which the parties were doing business.

135 I am also mindful of the language contained in the purchase agreement between MHI and JIIG dated December 15, 1994 in which it was recited that the parties had agreed that MHI would assign to JIIG "the benefit of and the right to assume existing contracts and arrangements" with CU. I interpret those "existing contracts and arrangements" to be the 1989 Agreement and other arrangements between MHI and CU as they existed as at December 31, 1993.

136 The absence of a signed contract does not preclude the creation of a binding legal relationship on terms set out in a document. This was recently confirmed by the Ontario Court of Appeal in *Kernwood Ltd. v. Renegade Capital Corp.* (1997), 97 O.A.C. 3 (Ont. C.A.) where, at paragraph 17, the Court said:

> It is well-settled law that, except in certain situations, a party's intention to be bound can be manifested by words or conduct: *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 at 261. A manifest intention to be bound can be established by conduct or words where an objective interpretation of the conduct or words of the parties would lead a reasonable person to conclude that the parties intended to be bound: *Industrial Tanning Co. v. Reliable Leather Sportwear Ltd.*, [1953] 4 D.L.R. 522 at 525 (Ont. C.A.). In such cases the requirement of a signature is treated as a mere formality.

137 In the present case, the context in which the parties began their relationship on October 29, 1993, the fashion in which they conducted the business after January 1, 1994, the July 18, 1994 letter and the recital in the December 14, 1994 Agreement, all provide abundant evidence that JIIG assented to the terms of the 1989 Agreement, and that it governed the CU-JIIG relationship.

138 Even if I were prepared to accept the defendants' argument that JIIG never intended to be bound by the 1989 Agreement (which I do not) the post-January 1, 1994 conduct of JIIG brings it within the following principle, expressed by Lord Blackburn in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 (Eng. Q.B.), at 607, and adopted by the Supreme Court of Canada in *Saint John Tug Boat Co. v. Irving Refinery Ltd.* (1964), 46 D.L.R. (2d) 1 (S.C.C.), at 7:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

139 By not expressly disclaiming the 1989 Agreement and by continuing to do business with CU in accordance with apparent acceptance of its terms, JIIG cannot now be heard to say that the agreement had no application to their relationship.

140 I therefore conclude that the CU-Ingle relationship was governed as of January 1, 1994 by the terms of the 1989 Agreement between CU and MHI as that agreement had been modified from time to time up until that date. Those arrangements included the proviso that there would be no further profit sharing until the accumulated RES deficit was eliminated. The 1989 Agreement (as modified) continued to govern the parties' relationship thereafter, subject to the modifications that were later agreed upon and which became effective as discussed below.

Issue 2. What were the surplus sharing arrangements between the parties, and in particular what arrangements governed at the end of the relationship?

141 By reason of my conclusion that the 1989 Agreement governed the CU-JIIG relationship after January 1, 1994, it follows that the profit division formula contained in that agreement also continued to apply. This means that CU was entitled to retain future underwriting profits until the accumulated deficit had been eliminated. Thereafter, the division of profits would revert to 70/30 JIIG/CU. The 1994 profit (calculated according to the RES formula at $357,000) was retained by CU, consistent with the ongoing application of the profit sharing formula contained in the 1989 Agreement.

142 The division of underwriting profit was the subject of several negotiations between the parties as the business returned to profitability. In 1995, in response to urgings from Mr. Overgaard, the parties agreed upon a new division of underwriting profit in relation to the year 1995. That agreement is reflected in MOU #2 and provides for a 66.7%/33.3% CU/JIIG division. MOU #4 provided for a 50/50 division for the years 1996 through 1999 inclusive and 33- $^{1}/_{3}$%/33- $^{1}/_{3}$%/33- $^{1}/_{3}$% CU/JIIG/ICMS division for the year 2000 and beyond. That document further provided that if the losses arising from business in 1993 and earlier were recovered from profits before the year 2000, the 33- $^{1}/_{3}$%/33- $^{1}/_{3}$%/33- $^{1}/_{3}$% division would be applicable in all years after the recovery was complete.

143 The final agreement between the parties that dealt with division of profit was the January 14, 1997 Agreement. The parties' agreement on that occasion in relation to profit division is reflected in item 4 of the January 14, 1997 Note, which states "roll fwd surplus distributed $^{1}/_{3}$: $^{2}/_{3}$ CU/Ingle Jan 1997." This division is, of course, a change from that provided in MOU #4. The parties disagree, however, on whether this change ever came into effect.

144 The January 14, 1997 Agreement was the end product of a meeting held that day among Mr. Crowley of CU and Mr. Overgaard, John Ingle and Robert Duncan of JIIG. At the end of the meeting, after Mr. Crowley had made a proposal to the JIIG representatives, Mr. Overgaard and Mr. Crowley met privately and reached agreement on the resolution of the issues that had been discussed. While their agreement was, in effect, an oral one, they recorded the fact of having reached the agreement by Mr. Overgaard initialing and Mr. Crowley signing the handwritten notes made by Mr. Overgaard on that occasion.

145 The January 14, 1997 meeting came about as a result of Mr. Crowley's decision to reinvolve himself in the CU-JIIG relationship in an attempt to resolve the various issues that had arisen between the parties. JIIG had pressed for payments in resolution of long standing items for some time and had suggested that it was time to deal with them. In order to get CU's attention and to get it to deal with these items, JIIG used as leverage the suggestion that it would contra or withhold from the premium remittance due to CU the amounts that JIIG claimed were owing to it. In the words of Mr. Crowley, if premiums were not paid to CU, it would put him in an impossible situation and he would have to respond.

146 In preparation for the meeting Mr. Crowley was briefed by Mr. Prince. As well, Mr. Crowley prepared a detailed outline for his remarks, which he followed during the course of the meeting. One of the principal issues that Mr. Crowley was prepared to address at the meeting was the settlement of the so-called skunks. In his view, CU owed nothing to JIIG in relation to these items. Nevertheless, for business purposes and in order to preserve the relationship, he determined that he would offer to pay a sum of money, which he ultimately decided would be $800,000.

147 Mr. Crowley's handwritten outline for the January 14 meeting include the following note in relation to his proposal to settle the skunks:

> cheque now $_____.
>
> not earned until agreement signed.

Mr. Crowley testified that he made it plain to the JIIG representatives that the cheque to settle the skunks was not earned until the new operating agreement was signed. His note and statement are reflected in the January 14, 1997 Note immediately above

Mr. Overgaard's initials and Mr. Crowley's signature where the statement appears "initial payment of $400,000 earned when "agreement" [sic] completed and signed." As previously noted, the parties never signed a new operating agreement.

148 Based on the foregoing evidence it was argued on behalf of CU that the January 14, 1997 Agreement was conditional, that is, it would only be of legal effect if the new operating agreement was signed. In effect, CU said, the purpose of the agreement reached on that date was to resolve all issues between the parties so that they could put the past behind them and proceed with a new, mutually acceptable agreement. Mr. Crowley's evidence was to the effect that he was investing $800,000 in the future relationship. Because no operating agreement was signed and the future relationship never materialized, it was argued, the condition that underlay the effectiveness of the January 14, 1997 Agreement was never satisfied, rendering the agreement reached that day of no effect.

149 For their part the defendants disputed CU's analysis and asserted that the January 14, 1997 Agreement was binding and enforceable. To begin with, the defendants disputed CU's characterization of Mr. Crowley's proposal and the language that appears in the January 14, 1997 Note immediately above the initials and signature. In his testimony concerning that language, however, Mr. Overgaard stated that Mr. Crowley wanted wording to be included in their memorandum that said that the $800,000 would be earned when the new operating agreement was completed and signed. According to Mr. Overgaard, that was fine with him.

150 John Ingle's testimony regarding the closing language of the January 14, 1997 Memo confirmed what Mr. Crowley said about "investing in the future". John Ingle further testified, however, that the disputed language was included in the memorandum to make sure that from an accounting standpoint the $800,000 payment was not attributed to fiscal 1996, so that it did not affect CU's year end statement. I do not give any weight to this evidence. Rather, I prefer and accept Mr. Crowley's explanation for the disputed wording, which was added by him, in his own handwriting, in his private meeting with Mr. Overgaard, in which John Ingle did not participate.

151 Mr. Duncan, the other JIIG representative at the meeting, could not recall exactly what Mr. Crowley meant when he stated that he was investing a certain number in the future, but he thought Mr. Crowley was referring to the $800,000 issue. According to Mr. Duncan, Mr. Crowley "didn't know ... how to treat it from an accounting point of view, but [Mr. Crowley] realized that it was a large sum of money and needed some kind of commitment by both sides."

152 I accept Mr. Crowley's evidence that he made it clear that the money he was prepared to pay was intended to achieve a new operating agreement and that the money would not be earned until that new agreement was put in place. What was contemplated was the resolution of the issues discussed at the meeting, by way of both the payment of money by CU and the execution of a new operating agreement by both parties. The two were inter-connected and inter-dependent aspects of the compromise that was achieved at the January 14, 1997 meeting. Put another way, part of the consideration for the $800,000 payment was long term peace with no outstanding issues, all as incorporated into a new agreement.

153 The defendants argued that Mr. Crowley was concerned with the accounting treatment of the $800,000 payment, not the substantive impact on the parties' legal relationship of signing or not signing the new operating agreement. In my opinion, the mere fact that Mr. Crowley may have said that he did not know how he was going to treat the $800,000 payment for accounting purposes does not negate the condition that he imposed, namely, that the money was not earned until the new operating agreement was signed. Mr. Duncan's testimony concerning Mr. Crowley's realization that he "needed some commitment from both sides" in relation to the $800,000 payment, reinforces the conditional nature of the deal.

154 In my view the condition of execution of a new operating agreement was a true condition precedent, the non-fulfillment of which rendered the agreement reached between Mr. Overgaard and Mr. Crowley on January 14, 1997, inoperative.

155 Even if the January 14, 1997 Agreement was conditional, the defendants argued that the condition was waived by CU. The parties agreed that the balance of $400,000 (that is, the second half of the $800,000 that CU agreed to pay in respect of the skunks) was to be paid once the new deal had been negotiated between Mr. Prince and Mr. Overgaard. Even though the new

operating agreement was not signed, on February 15, 1997 CU paid the second $400,000 installment. This, it was submitted, was a waiver by CU of the alleged condition.

156 Mr. Crowley's explanation for the payment on February 15, 1997 was that he believed that the parties were close to concluding the new operating agreement. He was also concerned about the prospect of JIIG withholding money from the premium remittance due on February 15. Mr. Prince testified that in discussions with Mr. Overgaard and possibly others at JIIG, Mr. Prince learned that JIIG was planning to withhold $400,000 from the February 15 payment if the agreement had not been reached by then. He reported this to Mr. Crowley in a memorandum dated February 10, 1997. Mr. Overgaard testified that he did not recall making that comment to Mr. Prince. JIIG had previously used the threat of premium withholding to force action (or payment) from CU. I accept the evidence of Mr. Prince and Mr. Crowley that this was done on this occasion, as well.

157 As previously stated, the execution of a new operating agreement was a true condition precedent to the legal effectiveness of the January 14, 1997 Agreement. A true condition precedent cannot be waived unilaterally: see *Zhilka v. Turney*, [1959] S.C.R. 578 (S.C.C.); and *Barnett v. Harrison* (1975), 57 D.L.R. (3d) 225 (S.C.C.), at 246. Thus the February 15, 1997 payment of the second $400,000 by CU could not, as a matter of law, effect a waiver of the condition.

158 In any event, I accept Mr. Crowley's explanation for why the payment was made on February 15, 1997 and in particular that a threat to withhold premium remittance had been made (either explicitly or implicitly) by JIIG in relation to the February 15 premium remittance. Accordingly, even if the concept of waiver were available, I would not be prepared to hold that the payment amounted to a waiver of the condition.

159 In closing argument the defendants pointed to the fact that at no time prior to the commencement of the litigation was it suggested by CU that the January 14, 1997 Agreement was not operative. The thrust of this argument appeared to be that by not previously disputing the enforceability of the agreement, CU was somehow precluded from doing so in this litigation. In light of my conclusion that the execution of the new operating agreement was a true condition precedent, this argument is of no force. Since the condition was never satisfied, CU was never bound by the January 14, 1997 Agreement.

160 Quite apart from the foregoing, my analysis of what transpired during 1997 and early 1998 leads me to the conclusion that almost throughout that period the parties engaged in a series of ongoing negotiations. To begin with, those negotiations were directed to the terms of the proposed new operating agreement. An additional focus was the reconciliation of calculations for purposes of arriving at an agreement concerning Table 3 of the new operating agreement, the ASAD calculation. Still further negotiations ensued once JIIG delivered the August 1997 invoices. Negotiations continued through the fall of 1997, and into 1998. While consensus may have been achieved, or concessions made in relation to, some points in dispute during the course of those negotiations, in my view the enforceability all these points hinged on an overall resolution, something that was never achieved.

161 In light of the conclusion that I have reached that the January 14, 1997 Agreement was conditional on the execution of the new operating agreement, it seems to me illogical that negotiations directed towards that end can be construed as a waiver of the condition itself. Rather, I would characterize those negotiations as attempts to satisfy the condition. Similarly, the attempts made in the fall of 1997 to resolve the parties' differences were, in effect, abortive settlement negotiations. Once again, given the issues between the parties and the fact that negotiations to settle Table 3 were still ongoing, I cannot construe any of the parties' negotiations as a waiver of the condition contained in the January 14, 1997 Agreement.

162 Finally, it was submitted on behalf of the defendants that the inability to reach agreement on Table 3 was the sole responsibility of CU and accordingly CU could not rely on the absence of a signed operating agreement to support its position. I do not accept that submission. The parties held significantly different views as to the proper calculation of the contents of Table 3. I cannot say that CU's views in this regard were ill-founded or ill-motivated. What in effect occurred was that on January 14, 1997 the parties entered into an agreement to agree. I attribute no fault to either side for their inability to reach a consensus.

163 In light of the fact that the parties were unable to achieve consensus and execute a new operating agreement, the condition in the January 14, 1997 Agreement was never satisfied. It follows that this agreement never became operative, as a matter of

law. I have previously observed that, in my opinion, the various aspects of the January 14, 1997 Agreement were interconnected or inter-dependent. It follows, therefore, that none of these has any legal effect.

164 The $^{2}/_{3}$ $^{1}/_{3}$ JIIG/CU division of profits contained in the January 14, 1997 Agreement was a change from the profit split contained in MOU #4. Given that the January 14, 1997 Agreement is of no force, it follows that the 50/50 profit split contained in paragraph 12.2 of MOU #4 remained operative.

Issue 3. Whose calculations of surplus should be used?

165 The evidence established that in respect of each year of the CU-Ingle and CU-JIIG relationship through and including fiscal 1996, CU prepared RES statements. During the JIIG era, these statements were the responsibility of Andrew Muirhead-Gould, CU's Chief Actuary. CU used these RES calculations for purposes of determining and distributing underwriting surplus.

166 Copies of CU's RES calculations were provided to JIIG. For its part, JIIG never accepted these calculations.

167 In relation to profit sharing for fiscal 1997, in early 1998 Mr. Muirhead-Gould prepared the 1997 profit sharing figures using the ASAD methodology. He testified that he did so as part of the continuation of his negotiations with John Ingle towards use of the new ASAD format that was contemplated under the proposed new operating agreement. As well, the data supplied by Mr. Muirhead-Gould to OSFI in respect of that year also was based upon the ASAD methodology.

168 Once the relationship between the parties had irretrievably broken down, Mr. Muirhead-Gould revisited the calculation of profit share for fiscal 1997 and prepared RES calculations for fiscal 1997 and 1998.

169 No new CU business was written by JIIG after fiscal 1998. Nevertheless, the CU/Ingle book of business is still in a run-off mode, such that reserves are being used up and/or released as claims are settled and paid. Although a profit calculation could be performed for the post-1998 period, this has not yet been done.

170 In relation to fiscal 1994 through 1998 inclusive, CU contended that the RES reports prepared by Mr. Muirhead-Gould should be accepted as the correct calculation of underwriting profit on the Ingle book of business. The defendants disputed the applicability of the RES approach, as well as the content and accuracy of the calculations contained in Mr. Muirhead-Gould's reports.

171 With respect to the applicability of the RES approach to underwriting profit and distribution, I have already concluded that the 1989 Agreement, as it stood at the end of 1993, governed the CU-JIIG relationship. Thereafter, in a series of documents signed by them, the parties agreed upon several changes to the profit split, referring in each of these documents to the "RES surplus": see MOU #2, MOU #4 and the January 14, 1997 Note. In my view, there is no doubt as to the applicability of the RES approach in respect of fiscal 1994, 1995 and 1996.

172 In relation to the fiscal 1997, it is true that in early 1998 Mr. Muirhead-Gould prepared a surplus sharing statement using the ASAD approach. I accept his explanation, however, that this was done in anticipation that the parties would be utilizing ASAD pursuant to the new operating agreement for 1997 and later years. Notwithstanding the fact that Mr. Muirhead-Gould prepared a statement on the ASAD basis (and apparently utilized in part the ASAD approach when reporting to OSFI) I do not consider those steps to be determinative of the issue. As a matter of law, neither of these actions displaces the existing contractual arrangement (that is, the 1989 Agreement) and the RES approach mandated by it. The so-called "transition to ASAD" was never effective.

173 In addition to the foregoing, it must be remembered that the parties expressly addressed the proposed transition to an ASAD approach in MOU #4. In paragraph 12.6 of that document the parties agreed that CU would develop a "Best Estimate" report in parallel to the RES reports. "Best Estimate" was another name for the ASAD approach. Paragraph 12.6 went on to provide, however, that the "Best Estimate" report was to be used "for monitoring of financial performance, but not for determination of RES sharing." Thus the parties expressly agreed not to use ASAD for purposes of profit division.

174 The defendants argued that the profit sharing formula contained in the 1989 Agreement was not adhered to by CU and MHI in the years leading up to January 1, 1994 when JIIG assumed control of the Ingle book of business and that the post-1993 RES calculations were similarly flawed. I do not accept this submission. When the CU-MHI relationship began, Ingle offered only three insurance plans. This is reflected in the first RES statement, which records premium revenue from only these plans. The 1989 Agreement expressly contemplated, however, that MHI would offer additional plans in the future. Additional plans were offered and CU and MHI agreed upon appropriate commission and an appropriate expected loss ratio in relation to those plans. They also agreed to factor in the cost of the Florida office. The RES statements for the period 1989 through 1993 reflect those arrangements and understandings. Those arrangements and understandings were, accordingly, in effect as at December 31, 1993. In view of the conclusion that I have reached that limited changes to the existing arrangements were agreed upon at the October 29, 1993 meeting, all other arrangements and understandings continued to be in effect once JIIG assumed control of the Ingle book of business on January 1, 1994.

175 The defendants further submitted that the calculations prepared by Mr. Muirhead-Gould for all years during the JIIG era did not comply with the formula spelled out in the 1989 Agreement. There was a change in the presentation format of the RES statements for 1994 and subsequent years as compared to the pre-JIIG era. Mr. Muirhead-Gould's explanation for the change in format was that it was an attempt to isolate current year activity from prior years' activity. The new presentation required that the claims reserve for future claims be split into two components, one relating to the current year's premiums and claims arising from them and another relating to the prior years' premiums and claims relating to them.

176 I accept Mr. Muirhead-Gould's explanation. The change in format provided more detail at the RES report level than had previously been the case in relation to reserves. Nevertheless, I am satisfied that these changes did not alter the net result of the calculations. I am satisfied that, to this extent, they were consistent with the formula contained in the 1989 Agreement.

177 Mr. Muirhead-Gould's calculations for RES also included line items in relation to ICMS fees, legal fees and reinsurance ceded. The former two items (ICMS fees and legal fees) were expressly agreed to be incorporated into the RES calculation by reason of a combination of the February 14, 1994 letter agreement, MOU #1 and MOU #4. With respect to reinsurance expenses incurred by CU, MOU #4 provided in paragraph 10.1 that effective January 1, 1996 premiums paid by CU to arm's length reinsurance companies would be deducted from the RES pool. Accordingly, there is no basis for the defendants to object to the inclusion of these items in the RES reports.

178 I am aware that the RES calculation for fiscal 1995 that bears the date 20-JUN-96 does include two separate line items for reinsurance ceded. Those reinsurance expenses relate to another disputed oral agreement between the parties in connection with the inclusion of premiums from Flight Accident insurance in the profit sharing calculation. I will address the propriety of those adjustments when I deal with JIIG's FLACC invoice, below.

179 Overall, I am satisfied that the RES calculations contained in the RES statements prepared by CU for the years 1994 through 1998 inclusive are based upon and correctly implement the profit sharing formula contained in the 1989 Agreement, as amended by agreement between the parties over the years. I therefore conclude that the calculations of surplus that should be used are those prepared by CU in accordance with the approach followed by Mr. Muirhead-Gould.

Issue 4. How much surplus is owing to whom (apart from ICMS fees)?

(a) What is the correct calculation?

180 For the reasons previously set forth, I conclude that the methodology and calculation format utilized by Mr. Muirhead-Gould is the correct approach to calculating the RES and that it conforms to the contractual arrangements that governed the parties' relationship. With respect to the actual amounts, I see no reason to doubt the correctness of the calculations presented by Mr. Muirhead-Gould in his formal report. He testified both as a fact witness (as the chief actuary of CU) and as an expert. He is qualified to give opinion evidence concerning the application of actuarial principles to CU financial reporting and regulatory filings, as well as the determination of reserves that were used as part of the calculation of the RES.

181 Viewing the evidence as a whole and in particular Mr. Muirhead-Gould's testimony regarding financial reporting at CU and the preparation of the RES statements, and his expert report and opinion, I can see no serious reason to doubt the reliability and accuracy of the information and calculations contained in those statements. More importantly, there was no cogent or reliable evidence tendered on behalf of the defendants that would lead me to doubt the reliability of the CU calculations. On balance I am satisfied that the RES reports that are appended to Mr. Muirhead-Gould's report dated October 15, 1999 and found at Exhibit 17, Tab 1 in Appendix 1 are accurate and reliable.

182 I accordingly accept the RES calculation for 1994 bearing date 30-Jan-95; the RES calculation for 1995 bearing date 20-Jun-96 (about which I will say more in connection with my analysis of the Flight Accident invoice below); the RES calculation for 1996 bearing date 26-Jun-97; the RES calculation for 1997 bearing date 29-Mar-99; and the RES calculation for 1998 bearing date 29-Mar-99. The following table summarizes the RES annual surplus (or deficit) from fiscal 1994 forward:

Fiscal Year	**Annual Surplus**
1994	$ 357,229
1995	1,923,630
1996	1,406,930
1997	(162,018)
1998	265,009

183 Turning to the subject of allocation of surplus, I will focus on the amount properly payable to JIIG, since the balance is to be retained by CU. In relation to the RES for fiscal 1994 of $357,229, the applicable formula (found in the 1989 Agreement) provided for the prior year's deficit to be made up before any profit distribution. Since the deficit carried forward from 1993 was some $8.7 million, CU was entitled to retain all of the $357,229 worth of surplus realized in relation to fiscal 1994.

184 In relation to fiscal 1995 MOU #2 altered the division of underwriting surplus, such that JIIG/ICMS was entitled to receive 33.3 percent of any surplus in 1995. This means that JIIG's entitlement was one-third of the 1995 surplus of $1,923,630 or $641,210.

185 MOU #4 governed surplus division for fiscal 1996 and following. Pursuant to that document, unless all losses arising from business in 1993 and earlier were recovered from profits before the year 2000, the surplus for fiscal years 1996 to 1999 inclusive was to be split on a 50/50 basis between CU and JIIG/ICMS. For the years 2000 and beyond the split was to be 33-$^{1}/_{3}$% for each of CU, JIIG and ICMS. MOU #4 also provided (in paragraph 12.5) that any losses incurred during or after 1995 were to be carried forward to future years and recovered from profits in years after the loss before there would be any additional sharing of surplus.

186 Although after 1993 the Ingle book of business was generally profitable, by the end of fiscal 1996 the accrued deficit remained in the order of $5 million. There is no evidence that the balance of that $5 million deficit has been recouped and accordingly I conclude that the 50/50 split continued to be applicable through the end of 1999.

187 Applying the foregoing principles, in relation to fiscal 1996 JIIG was entitled to 50 percent of the surplus that year of $1,406,930, or $703,465. In relation to fiscal 1997, there was a loss of $162,018, with the result that JIIG was not entitled to anything. In relation to fiscal 1998, the surplus was $265,009. Against that profit must be deducted the prior year's loss of $162,018, resulting in a net sum distributable for 1998 in the amount of $102,991. JIIG's 50 percent entitlement of this sum equals $51,496.

188 No evidence was presented to me concerning the RES calculation for fiscal 1999. CU should carry out the RES calculation for that year in accordance with the principles followed in previous RES calculations. JIIG is entitled to 50 percent of the fiscal 1999 surplus (if any) calculated in this fashion. The same calculation should be prepared by CU in relation to fiscal 2000 and future years until the CU/Ingle book of business runs out. In relation to profits (or losses) realized during fiscal 2000 and

subsequent years, the principles established in MOU #4 should be adhered to in relation to division of profit (that is, 33- $^{1}/_{3}$% for each of CU, JIIG and ICMS, subject to recoupment of prior years' deficits as provided in paragraph 12.5 of MOU #4).

(b) How should the $800,000 that was paid under the January 14, 1997 Agreement in relation to the three skunks be treated?

189 For the reasons previously set forth, the January 14, 1997 Agreement never came into effect. Nevertheless, in anticipation that it would, CU made two payments of $400,000 each, intending to settle the skunks and to preserve the business relationship.

190 On the face of it, these payments were benefits conferred in anticipation of a legal relationship that failed to materialize or, more accurately, in anticipation of a modification of the parties' existing relationship. At trial CU contended that these payments should be treated as profit distributions, and submitted that JIIG had been overpaid its share of surplus.

191 The law in relation to a benefit conferred in anticipation of a legal relationship that is subsequently found to be ineffective is summarized in Fridman, *Restitution* 2 nd ed. (Toronto: Carswell, 1990) at page 160, as follows:

> ... in appropriate circumstances the doctrine of unjust enrichment can be invoked to permit an action in restitution where money has been transferred when the plaintiff believed and intended that a contract should come into existence and govern the relationship between the parties but for some reason no contract was ever properly concluded.

192 Maddaugh and McCamus in *The Law of Restitution in Canada* (Aurora: Canada Law Book Inc., 1990) devote a full chapter of their text (Ch. 21) to an analysis of the principles of unjust enrichment applicable to contracts and gifts which do not materialize. They observe (at pp. 467-471) that to permit recovery of a payment made in anticipation of a contract that does not materialize, the plaintiff must establish non-gratuitous intent. I find that CU has done so here, since clearly both sides shared an expectation that a new operating agreement would be concluded. Maddaugh and McCamus also observe (at p. 473) that a plaintiff's claim will fail if he/she bears responsibility for the ultimate failure of negotiations. I have previously concluded that neither side can be faulted for being unable to agree on the contents of Table 3 to the proposed operating agreement.

193 I conclude that the foregoing restitutionary principles apply to the present case. It is a matter of no moment whether CU receives credit for the $800,000 by way of restitution of a benefit or by construing the two $400,00 payments as payments on account of surplus. The net result is the same, namely, an $800,000 credit in favour of CU in the parties' overall accounting.

(c) Should JIIG get credit for the three invoices?

194 Mr. Overgaard's August 6, 1997 memorandum to Mr. Prince enclosed four invoices. The first related to profit share claimed by Ingle on the basis of an ASAD calculation. I have already concluded that the ASAD method of profit calculation did not come into force. The remaining three invoices related to a taxes and fee adjustment for the years 1994, 1995, and 1996, additional profit share arising from premiums for Flight Accident insurance and Ingle profit arising from a claim payment made by CU in relation to its employee, Arthur Dawson. I shall deal with each of these in turn. Before doing so I note that during the course of argument it was conceded by counsel for the defendants that the onus was on JIIG to prove entitlement to payment for and the quantum of its invoices.

(i) Taxes and Fees

195 JIIG seeks a credit of $507,358.70 on this account. The basis for this claim is JIIG's assertion that CU had agreed to adjust the amount charged by it to the profit pool for premium taxes and industry fees and assessments to reflect actual expenses. The claim has two bases, one in relation to fiscal 1994 and 1995 and a second in relation to fiscal 1996.

196 In relation to 1994 and 1995, JIIG relied upon an alleged oral agreement said to have been reached in July 1994 during the course of a meeting between John Ingle on behalf of JIIG and Dariush Akhtari and Jeffrey Pudwell on behalf of CU. It was Mr. Pudwell who, as Manager, Special Risks for CU, negotiated and signed the February 14, 1994, April 16, 1994 and August 8, 1994 letter agreements regarding administration fees and ICMS fees. Mr. Akhtari was the manager of the actuarial department at CU.

197 John Ingle testified that the oral agreement was reached on or about July 21, 1994. For purposes of determining the date, John Ingle referred to a memorandum sent by him to Mr. Pudwell dated July 21, 1994 which summarized the basic costs of running the business. Among the items listed were taxes and fees, as a cost of the insurance operations. The thrust of John Ingle's evidence was that the items listed on that memorandum were the subject of discussions with Mr. Pudwell and Mr. Akhtari and resulted in the alleged agreement.

198 For his part, Mr. Pudwell denied that any such agreement was reached with him. On July 26, 1994 (shortly after the alleged agreement was reached) Mr. Pudwell wrote to John Ingle and Mr. Overgaard summarizing a business meeting held among the parties on July 22, 1994. That letter begins with the following sentence:

> We discussed so many things in Friday's meeting that I thought I should summarize the critical points prior to documenting them more formally where required.

Although the discussion regarding taxes and fees may have taken place on July 21, this letter records a variety of topics discussed between the parties but makes no mention of the alleged agreement to adjust taxes and fees.

199 The parties also signed a number of agreements in the following months, none of which referred to the alleged agreement to adjust taxes and fees: the August 8, 1994 Letter Agreement; MOU #1, signed March 22, 1995; and MOU #2 signed April 26, 1995. The first express mention of an adjustment for taxes and fees is found in paragraph 3.1a. of MOU #4, which was prepared in the first half of 1996 and signed in October/November 1996. That provision states as follows:

> 3.1 CU's operation will be funded as:
>
> a. 3.50% of Gross Premium on all plans, to cover taxes and industry assessments, and to be adjusted as those taxes and assessments change.

That language first appeared in a draft of MOU #4 prepared in February 1996.

200 Mr. Akhtari was asked whether CU came to an agreement with JIIG to adjust the taxes and fees to the actual amounts that were being paid by CU for those items. He responded that he did not recall. He added that "we may have", but went on to say that the agreement would not have come from him because he wasn't in a position to agree on numbers with JIIG. I conclude that Mr. Akhtari's evidence falls short of establishing, by way of admission or otherwise, the oral agreement alleged by JIIG.

201 Viewing the evidence as a whole, I am unable to find that an oral agreement was reached to adjust taxes and fees or industry assessments to actual amounts in relation to 1994 and 1995. To begin with, I am troubled by the absence of any written record of this alleged agreement, notwithstanding that most other agreements between the parties were either duly recorded or somehow reflected in writing. In addition, when the subject of a taxes and fees adjustment was first reflected in writing (in the February 1996 draft of MOU #4) the language used was prospective, not retrospective, as discussed in greater detail below. This is contrary to what John Ingle alleges the oral agreement was. There is no evidence of JIIG raising any issue about this draft language; indeed, it came to be incorporated verbatim into MOU #4.

202 After weighing the evidence of John Ingle, Mr. Pudwell and Mr. Akhtari and after considering the factors mentioned above, I conclude that, on balance, JIIG has failed to persuade me that an oral agreement as alleged was reached in July 1994 or subsequently. As such JIIG has failed to satisfy the onus on it in relation to this point and its claim for a taxes and fees adjustment for 1994 and 1995 must fail.

203 Turning to 1996, JIIG relied upon the above-quoted language in MOU #4 to establish its entitlement to a taxes and fees adjustment effective January 1, 1996, the effective date of that agreement. In essence, JIIG asserted that the language of paragraph 3.1a. of MOU #4 (quoted above) contemplated a retrospective re-adjustment to the parties' accounts once the actual expenditures for taxes and fees became known. For its part, CU contended that the intention of paragraph 3.1a. was to provide that the 3.50% figure would be adjusted from time to time in the future, when taxes and assessments changed.

204 I am unable to accept JIIG's interpretation of paragraph 3.1a. of MOU #4. On the face of it, the language is prospective only; there is no reference to a retrospective calculation or taking of accounts. In my view, the use of the words "to be adjusted as those taxes and assessments change" reflects the intention of the parties that an adjustment to the specified 3.5 percent figure will be appropriate if and when there is a change from the state of affairs that existed at the time the agreement became effective. If such an event were to occur, for example, a reduction in industry assessments, the 3.5 percent figure would be reduced by an amount equivalent to that reduction. By contrast, to give effect to JIIG's contention for a retrospective interpretation of the provision would be to read much more into the language than the plain meaning of the words. For these reasons I reject JIIG's interpretation.

205 It is further worth noting that MOU #4 was signed in October/November 1996. It used specific language that does not expressly mention a retrospective reconciliation of the 3.5% estimate for taxes and fees to the actual amounts expended. Some four months later, in early 1997, there was a new negotiation with respect to the new operating agreement. To begin with, the draft operating agreement prepared by Mr. Prince on behalf of CU used more or less the same terms as the words found in MOU #4 in relation to taxes and fees. Paragraph 4.1 of the initial draft provided as follows:

> 4.1 CU's operation will be funded as:
>
> > a. 3.25% of Gross Premium on all plans, to cover premium-related taxes and external assessments, and to be adjusted as taxes and external assessments change.

206 In his markup of an early draft Mr. Overgaard wrote the words "actual expense" beside paragraph 4.1. In his memorandum to Mr. Prince dated February 13, 1997 Mr. Overgaard suggested that 4.1 be changed to read "to be adjusted *to actual* [double underlining in original] as taxes and external assessments change." In a later draft (March 4, 1997) paragraph 4.1 was changed to read:

> 4.1 CU's operations will be funded as:
>
> > a. 3.25% of Gross Premiums on all plans, to cover premium related taxes and external assessments, and to be adjusted actual expense [sic] at the end of the calendar year ... [emphasis added]

Although the last-quoted language was in a draft agreement only, it is noteworthy that in the early part of 1997 the parties negotiated language for their new agreement (apparently at the instance of Mr. Overgaard) that apparently contemplated a retrospective adjustment to reflect actual expenditures for taxes and external assessments. Only months earlier they had signed an agreement containing different language. This change of language supposedly to achieve the same legal result (according to JIIG's interpretation of MOU #4) adds further support to my view that no retrospective adjustment was intended by MOU #4.

207 I therefore conclude that JIIG's claim in relation to a taxes and fees adjustment for fiscal 1996 fails.

(ii) FLACC

208 In relation to its FLACC invoice, JIIG also relied on an oral agreement. John Ingle testified that in 1995 the statements that he was receiving from CU showed Flight Accident as unearned premium. This was because CU had accumulated all Flight Accident premiums as unearned, notwithstanding over 90 percent of the premiums were in fact earned prior to January 1, 1994. John Ingle testified that he agreed with Mr. Pudwell that unearned premium would be "pulled down" into earned premium. He also testified that there were no other items that were agreed to be adjusted, amended, included or otherwise dealt with as part of this agreement. No documentation was prepared to record or confirm this alleged agreement.

209 On behalf of CU, Mr. Pudwell testified that the agreement to bring into the profit calculation the previously unearned premium for Flight Accident insurance was but one part of a multifaceted arrangement. It was his evidence that the parties agreed to bring the FLACC revenue and expenses for NOMAD insurance plans into the RES calculation in 1995, retroactive to 1991 and to bring the reinsurance expenses on all plans containing a FLACC benefit into the RES calculation as a claims

expense, retroactive to the plans' inception. It was further his evidence that the parties agreed to bring three other plans into the RES calculation. According to Mr. Pudwell, John Ingle wanted all business incorporated into the RES calculation.

210 In relation to fiscal 1995, CU prepared two versions of the RES calculation, one in January 1996 and the next in June, 1996. The January 1996 version showed a total net surplus of $1,913,482. The June 1996 version showed a total net surplus of $1,923,630. Both versions were circulated to JIIG at the time they were prepared. The June version included for the first time the Flight Accident premiums and reinsurance expenses, as well as premiums and expenses for other plans that were not provided for in the January version. The changes between the January and June versions of this RES calculation are consistent with Mr. Pudwell's version of the parties' agreement; they are inconsistent with John Ingle's evidence that there was no agreement to adjust any other items. Significantly, no complaint was raised by JIIG at the time that the June 1996 version of the 1995 RES calculation did not conform to the parties' agreement.

211 Having considered all of the evidence in relation to this topic, I conclude that JIIG has not persuaded me on a balance of probabilities with respect to its version of the agreement to include additional items in the RES calculation for fiscal 1995. Quite apart from the failure of JIIG to complain at the time about the June 1996 version of the RES calculation, it does not seem logical to me that CU would gratuitously agree to include in post-1994 profit calculations premiums that were largely earned prior to JIIG's involvement in the business, without additional terms. It is also counter-intuitive that CU would agree to include premium revenue but not reinsurance expenses in the calculation of profit.

212 A far more sensible explanation is that the agreement to include Flight Accident premiums as part of the profit calculation was part of a package deal, as explained by Mr. Pudwell. To this extent, his evidence on the point has a greater "ring of truth" than that of John Ingle.

213 I therefore accept Mr. Pudwell's explanation and find as a fact that the parties agreed to include in the 1995 RES calculation all Flight Accident premiums and expenses, retroactive to 1991 and to bring the reinsurance expenses on all plans containing a FLACC benefit into the RES calculation as a claims expense retroactive to the plans' inception, and to bring three other plans into the RES calculation. It follows that the RES calculation for fiscal 1995 that bears the date 20-JUN-96 is correct.

214 I therefore conclude that JIIG's claim in relation to the FLACC invoice fails.

(iii) Dawson

215 The evidence in relation to the Dawson issue was somewhat unsatisfactory. There was apparently no dispute between the parties that a claim had been paid in relation to Mr. Dawson, in the order of $99,000 and that that amount had been charged to the profit pool. There was also evidence that there had been some recoveries in relation to this outlay, both from OHIP and from Mr. Dawson himself. The net expense to the profit pool, therefore, appears to have been in the order of $85,126.23. On the evidence before me I am satisfied that that amount was charged to the profit calculation pool in fiscal 1995.

216 The Dawson issue arose because of the historical practice of the parties in relation to travel health insurance policies purchased by their own employees, that neither premiums paid by employees nor claims submitted by employees were taken into account in the calculation of the RES. Notwithstanding that practice, the Dawson claim was charged to the RES. This was apparently the only employee claim submitted over the relevant period of time.

217 Before me, CU took the position that, notwithstanding the historical arrangement for excluding premiums and claims in relation to employee policies, all premiums for employee coverage had, in fact, been included in the profit calculation. The quantum of that premium revenue, it was said, roughly equated to the net cost of the Dawson claim, reducing the net charge to the profit pool to a few thousand dollars. No witness proffered on behalf of CU, however, was able to testify with confidence that employee premiums had been included in the calculation of net profit.

218 As I have noted previously, JIIG bears the onus of proof in relation to these invoices. In relation to the Dawson invoice, I am satisfied that the Dawson claim was paid out of the profit pool. To that extent, JIIG has satisfied its burden. With respect to CU's position that employee premiums were included in the profit pool, however, I consider that CU has the burden of

establishing that proposition. To begin with, this fact is part of an affirmative defence raised by CU in response to JIIG's claim. In addition, CU, not JIIG, kept the accounts in relation to the RES calculation and had full control over the records and relevant information. In the circumstances, it follows logically that the onus of proof shifts to CU to satisfy me of its assertion that employee premiums were included in the profit calculation. In light of CU's witnesses' inability to testify with assurance on this point, I conclude that CU has failed to discharge its burden.

219 I therefore conclude that CU improperly charged the profit pool in 1995 for the net sum of $85,126.23 in relation to the Dawson claim. This means that the RES for fiscal 1995 was understated by that amount. JIIG was entitled to receive 33.3% of the surplus in 1995. Accordingly, it is entitled to a credit of one-third of the Dawson expenditure or $28,375.41.

(d) How should the August and September 1997 payments be treated?

220 On August 27, 1997, in order to secure payment of the August 15, 1997 premium remittance, CU provided JIIG with a cheque for $500,000. That cheque was accompanied by a memorandum from Mr. Crowley to Mr. Overgaard that stated as follows:

> $500,000 payable on account, subject to settlement of detail relating to 1994-1996 surplus and other outstanding issues.

221 The August 27, 1997 payment was made at a time when the parties were engaged in negotiations with a view to sorting out their differences. Those discussions continued into September 1997. On September 16, 1997 CU made another payment to JIIG, this time for $200,000. The cheque stub described that payment as "surplus sharing on account".

222 Given the circumstances under which each of these payments was made, I am satisfied that they must be treated as mere payments on account and credits in favour of CU in any accounting for surplus distributions.

(e) Reconciliation of surplus calculation and payments

223 The following summarizes the calculation of the surplus accounting between the parties through fiscal 1998:

(a) Surplus:

Fiscal Year	**Annual Surplus**	**JIIG/ICMS Share**
1994	$ 357,229	$ 0
1995	1,923,630	641,210.00
1996	1,406,930	703,465.00
1997	(162,018)	0
1998	265,009	51,496.00
Dawson adjustment		28,275.41
Total credits earned by/due to JIIG/ICMS		$1,424,546.41

(b) Payments by CU:

Date	**Amount**
19 January 1996	$650,000
18 June 1996	$400,000
14 January 1997	$300,000
14 January 1997	$400,000 (skunk)
14 February 1997	$400,000 (skunk)
27 August 1997	$500,000
16 September 1997	$200,000

Total payments made by CU	$2,850,000

(c) Reconciliation:

Total payments made by CU ((b) above)	$2,850,000.00
Total credits earned by JIIG/ICMS ((a) above)	$1,424,546.41
Net due to CU	$1,425,453.59

Issue 5. How much credit is due to JIIG/ICMS for ICMS fees?

224 As mentioned previously, on March 15, 1998 JIIG stopped issuing CU policies. At that date, a substantial number of CU-underwritten Ingle policies remained in force. Through arrangements between the parties, JIIG and ICMS continued to administer claims on these policies as well as claims that were pending prior to March 15. This arrangement was, of course, in the best interests of all parties, since proper claims management increased the prospect of underwriting profit, in which all of CU, JIIG and ICMS would share. In addition, it was in JIIG's best interest to continue to deal with its customers in a seamless fashion, notwithstanding the termination of the CU relationship, so as to preserve the goodwill associated with the Ingle book of business. The parties did not agree, however, on the basis for compensation to JIIG/ICMS for such services. This issue remains outstanding.

225 Funding of the operations of ICMS was one of the first topics that was addressed by the parties following JIIG's assumption of the operation of the Ingle book of business in 1994. The quantum and payment of fees for recoveries and claims administration were variously dealt with in the February 14, 1994 letter agreement, the April 6, 1994 letter agreement, the August 8, 1994 letter agreement, MOU #1, MOU #2 and MOU #4. The last-mentioned document (MOU #4) became effective January 1, 1996 and expressly provided that it superseded and replaced the prior MOUs. In light of the failure of the parties' negotiations in pursuit of a new operating agreement, MOU #4 remained applicable at the time the parties' relationship ended.

226 Paragraph 4.1 of MOU #4 addressed the subject of funding of ICMS and provided as follows:

> 4.1 ICMS will be funded as the sum of:
>
> a. An annual payment of $2,400,000 payable in installments of $200,000 per month, except the annual total will be adjusted:
>
> • If premiums for 12 months exceed $24,000,000, the fee will be increased by 7% of the amount by which the total annual premiums exceed $24,000,000, or
>
> • If premiums for 12 months are less than $22,000,000, the fee will be decreased 7% of the amount by which the total annual premiums are less than $22,000,000,
>
> • The 12 months will be measured on a calendar year basis.
>
> b. 15% of money recovered other insurers [sic] from Subrogation of Benefits and Coordination of Benefits
>
> c. 10% of money recovered from Government Health Insurance plans

227 The parties are in agreement that the formula contained in paragraph 4.1 was applied in relation to fiscal 1996. In relation to fiscal 1997, premiums exceeded $24,000,000. For that year, in addition to the annual payment of $2,400,000, JIIG/ICMS calculated and retained additional ICMS fees based upon the excess premiums, pursuant to paragraph 4.1.

228 In relation to fiscal 1998, however, the total of adjusted premiums for CU policies sold by JIIG was only $4,841,881.17. To state the obvious, 1998 premiums were this low because JIIG stop selling CU policies on March 15. At trial, CU contended that the formula in paragraph 4.1 a. should be applied for purposes of calculating the 1998 ICMS fees. Applying that formula would result in fees totaling $398,931.68. JIIG/ICMS disputed this approach, contending that the proper interpretation and application of the parties' agreement in the circumstances required that the 1998 fee be equal to $200,000 per month times the eight months (i.e. January through August) during which the relationship continued, for a total of $1,600,000. In the alternative, the defendants asserted that the 1998 fees should be paid on a *quantum meruit* basis.

229 The manner of calculation and payment of ICMS fees evolved over time. Initially (in the pre-JIIG era) CU agreed to contribute a portion of the costs of the Florida office. Beginning in 1994, as reflected in the letter agreements signed that year, a fee-for-service approach was followed. By the time MOU #1 was signed in March 1995, the parties acknowledged that the fee for service approach was not working to everyone's satisfaction. They agreed that as of January 1, 1995 funding for ICMS would be 8 percent of written premiums. As well, CU agreed to make payments of $200,000 and $300,000 to Ingle/ICMS in December 1994 and further payments of $50,000 per month each of January, February and March of 1995 in addition to fee-for-service payments. In MOU #2 the parties agreed that the fee-for-service payments would continue for work performed in relation to 1994 claims. In MOU #4 the parties incorporated a more refined formula, as quoted above.

230 On the face of it, the contractual provision to which the parties agreed in paragraph 4.1 of MOU #4 contemplated precisely the situation before me: where premium revenue for a calendar year was less than $22,000,000, the $2,400,000 annual payment was to be decreased as provided. It may well be that neither party contemplated that the premium revenue would be as low as it turned out to be in calendar 1998 (i.e. only $4,800,000) but that by itself does not mean that the agreed-upon formula should not be applied. After all, JIIG was certainly aware of the terms of MOU #4 when it chose to discontinue writing CU policies in March 1998: in effect, JIIG itself choose to limit the quantum of premium revenue that would form part of the formula upon which ICMS revenue was based.

231 It was argued on behalf of JIIG/ICMS that to interpret and apply paragraph 4.1 of MOU #4 in this fashion would produce a commercially unreasonable result. I do not agree. Quite apart from the foregoing (that is, the fact that JIIG chose to stop selling CU policies) the background from which the paragraph 4.1 formula evolved is noteworthy. The parties had moved from a fee-for-service arrangement to a premium-based fee to ICMS, as described above. In essence, a portion of each premium dollar was allocated to cover the cost of servicing any potential claim. In other words, the cost of claims servicing was, in a sense, prepaid. I am not prepared to accept (as some of defence evidence would suggest) that, in effect, a percentage of current premium income was to be used to pay the cost of servicing claims arising from previous policies. That is both an illogical and undesirable approach, and I reject it. A far more commercially reasonable approach is to interpret the agreement so as to require JIIG/ICMS to allocate part of the revenue it received from policy premiums against its future obligations to service those policies.

232 With respect to JIIG/ICMS' argument that compensation for servicing the claims from January through August 1998 should be *quantum meruit* and not contract based, I see no merit in this submission. Where parties have agreed to a contractual basis for compensation in relation to specified services, it is not generally open to the court to circumvent that agreement and award *quantum meruit* compensation unless the contractual provisions for such compensation have been abandoned or have ceased to apply because of the rescission or termination of the contract: see *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority (No. 2)* (1978), 85 D.L.R. (3d) 186 (B.C. C.A.), at 227, cited with approval in *Komorowski v. Van Weel* (1993), 12 O.R. (3d) 444 (Ont. Gen. Div.) per Sutherland J.

233 I therefore conclude that the amount of ICMS fees to which JIIG/ICMS are entitled in relation to fiscal 1998 is $398,931.68.

Issue 6. How much is owed to whom or is an accounting reference to the Master required?

234 Although the court was called upon to decide questions relating to the calculation of surplus and 1998 ICMS fees, the parties were able to reach agreement concerning the total amount of outstanding net premium and recoveries. That agreement (reflected in Exhibit 19) may be summarized as follows:

Total 1997 withholdings	$ 537,605.17
Total 1998 premium due	$2,620,338.39
Net recoveries due	$ 525,163.82
Less: Payment on account to CU	($ 350,000.00)
Total due	$3,333,107.38

By means of the analysis contained in the prior pages, I have concluded that JIIG/ICMS was overpaid by CU in relation to surplus in the total amount of $1,425,453.59. I have also concluded that JIIG/ICMS are entitled to 1998 ICMS fees in the amount of $398,931.68. These various sums may be reconciled as follows:

Amount due to CU per Exhibit 19	$3,333,107.38
Surplus overpayment due to CU	$1,425,453.59
Subtotal	$4,758,560.97
ICMS fees due to JIIG/ICMS	($ 398,931.68)
Net due to CU	$4,359,629.29

235 Turning to the question of who owes the foregoing sum to CU, JIIG was the party that withheld the premium remittances in 1997 and 1998 and that remitted the advance of $350,000. There is nothing to suggest that the withheld amounts came into the hands of IIBI, MHI or ICMS and thus JIIG is wholly answerable for them. With respect to the surplus payments, once again all amounts were remitted to JIIG and thus JIIG is responsible for disgorging them. With respect to the recoveries, the evidence suggests that these were collected by ICMS, although they may have been turned over to JIIG. There is also evidence to suggest that ICMS fees were collected by JIIG on behalf of ICMS. No distinction was drawn by the parties between the activities of the two ICMS companies, that is, Insurance Claims Management Systems Inc. and ICMS Canada Inc. In these circumstances I am prepared to hold that JIIG and the two ICMS companies are jointly and severally liable to remit the net recoveries of $525,163.82 to CU but that they are also entitled to credit against that sum in respect of the 1998 fees in the amount of $398,931.68.

236 In the result, I conclude that CU is entitled to recover from JIIG the net amount of $4,359,629.29. Of that sum, Insurance Claims Management Systems Inc. and ICMS Canada Inc. are jointly and severally liable, together with JIIG, to the extent of $126,232.14 (that is, net recoveries of $525,163.82 less 1998 ICMS fees of $398,931.68). The counterclaim of JIIG and ICMS was premised on alleged wrongful delay by CU in paying sums due to JIIG and ICMS and on a net balance being owed to them. This was clearly not the case. The counterclaim is therefore unfounded.

237 Counsel for the defendants other than MHI submitted that a reference to the Master would be necessary in order to take accounts between the parties. For the reasons previously given, I have concluded that I am in a position to determine the correct calculation of surplus through fiscal 1998. I have directed that CU should prepare a surplus calculation for fiscal 1999 and successive years and should submit that to JIIG, together with payment of such sum as may be due. To the extent that a dispute arises between the parties in relation to those calculations, a reference to the Master may be appropriate at some future time. Having regard to the findings and conclusions that I have arrived at, however, I see no need to direct a reference for any other purpose.

238 Having dealt with the monetary claims of CU and JIIG/ICMS in relation to surplus, withholdings, payments, invoices and ICMS fees, I turn now to the claims based upon allegations of breach of trust and oppression.

Issue 7. Were the funds collected by JIIG/ICMS trust funds held for the benefit of CU?

(a) Premiums

239 CU alleges in its statement of claim that the premiums collected by JIIG were trust funds, and the withholdings constituted a breach of trust. Whether these funds were or were not impressed with a trust in favour of CU does not alter JIIG's liability to CU for the amounts that I have previously found it responsible to pay. Nevertheless, CU placed considerable emphasis on the submission that JIIG's actions were a breach of trust, and argued that other defendants, including Mr. Overgaard and John Ingle, should be found liable for breach of trust, as well. Briefly stated, CU argued that these defendants were complicit in the alleged breach of trust by JIIG and should therefore be found equally liable to pay the withheld sums. The breach of trust issue may also bear upon the issue of punitive damages.

240 CU submitted that there were three ways by which this court could find that the premiums collected by JIIG were held in trust. First, CU submitted that s. 402(1) of the *Insurance Act*, *supra*, applied to create a statutory trust in favour of the insurer. Second, CU submitted that the facts established the existence of an express trust between JIIG and CU, since the three certainties required to create a trust at common law were present. Finally, CU submitted that a trust arose at equity, and that the funds should be impressed with a constructive trust. I will deal with each argument in turn.

(i) The statutory trust

241 Section 402(1) of the *Insurance Act* provides:

> 402. — (1) An agent or broker who acts in negotiating, or renewing or continuing a contract of insurance, other than life insurance, with a licensed insurer, and who receives any money or substitute for money as a premium for such a contract from the insured, shall be deemed to hold such premium in trust for the insurer, and, if the agent or broker fails to pay the premium over to the insurer within fifteen days after written demand made upon the agent or broker therefor, less the commission of the agent or broker and any deductions to which, by the written consent of the company, the agent or broker is entitled, such failure is proof, in the absence of evidence to the contrary, that the agent or broker has used or applied the premium for a purpose other than paying it over to the insurer [emphasis added].

242 Argument about the applicability of the section centered on two questions. First, did JIIG fit the definition of agent? Second, should the section be interpreted so as to only apply to licensed agents? JIIG submitted that based on an analysis of its functions, it did not fit the definition of agent and should instead be characterized as the third party administrator of CU's policies. In any event, it was JIIG's position that the word "licensed" should be read into the section. Although JIIG itself was not licensed, it used licensed agents to sell CU's policies. Those agents were required to hold any premiums they received in trust for JIIG pursuant to both the statute and the parties' own agreements, but JIIG submitted that once a licensed agent remitted the premium money to JIIG, the statutory trust was discharged.

Whether JIIG fell within the statutory definition of agent

243 "Agent" is defined in section 1 of the *Insurance Act*:

> "agent" means a person who, for compensation, commission, or any other thing of value,
>
> (a) solicits insurance on behalf of an insurer who has appointed the person to act as the agent of such insurer or on behalf of the Facility Association under the *Compulsory Automobile Insurance Act*, or
>
> (b) solicits insurance on behalf of an insurer or transmits, for a person other than himself, herself or itself, an application for, or a policy of insurance to or from such insurer, or offers or assumes to act in the negotiation of such insurance or in negotiating its continuance or renewal with such insurer...[emphasis added].

244 JIIG clearly did not fit the definition of agent under (a), since there was no evidence of any appointment by CU. The applicability of (b) turns on an evaluation of the functions performed by JIIG. Specifically, can JIIG be found to have

solicited insurance, transmitted policies, or negotiated insurance? CU submitted that JIIG performed all three functions, while JIIG submitted that it performed none of them.

245 By way of preamble, I note that the *Insurance Act* provides a fairly limited and narrow definition of agency that pinpoints the requisite functions. A person could carry on a number of functions, including advising about policies or collecting premiums, and still be excluded from the definition. In interpreting the meaning of "solicit", "transmit" and "negotiate", I am mindful of this intention to circumscribe the category.

Solicitation — did JIIG "solicit insurance" on behalf of CU?

246 CU relied on two facts to support its position that JIIG fit the statutory definition of agent because it solicited insurance. First, JIIG created marketing brochures that were distributed to licensed agents, and used to sell the policies to customers. Second, JIIG published a website on the internet.

The marketing brochures

247 It became clear at trial that JIIG had created a fairly elaborate system in an effort to comply with the *Insurance Act* and to ensure that any sale of insurance somehow involved a licensed person. This system was put in place pursuant to consultation with lawyers. JIIG relied on this same system in support of its argument that its activities did not fall within the definition of solicitation.

248 The creation and distribution of JIIG's marketing brochures was described in some detail at trial, and a number of them were marked as exhibits. JIIG conceded that the brochures could fairly be characterized as containing an invitation to buy the policies, since they contained invitations to the customer to respond by mail, fax, or toll-free phone number. Some brochures also contained application forms which the consumer was invited to complete and mail to JIIG directly. Although the brochures were clearly promotional items, JIIG argued that the mere creation of such items did not constitute solicitation. JIIG submitted that solicitation includes an element of direct distribution to or contact with potential customers. JIIG prepared the brochures itself, but then distributed them only to the agents, brokers and travel agents who were licensed to sell the policies. Based on this framework for distribution, it was JIIG's position that it did not solicit customers. According to JIIG, solicitation of insurance only began or occurred when the potential customer received the brochure from the licensed agent or broker.

249 Once JIIG created the brochures, it sent them to the licensed agents, brokers or travel agents who had authority under the *Insurance Act* to sell the policies. The brochures included the names of licensed brokers (IIBI and, sometimes, MHI) and could also be stamped by the brokers who received and used them. Ideally, the licensed agent was supposed to use the brochure as a marketing tool, and the customer was supposed to receive the brochure and buy the policy from the licensed agent. Of course, JIIG conceded that a customer might receive the brochure, and later call JIIG directly to buy the policy. Although JIIG operated a customer service call centre to handle these situations, if a customer called JIIG directly, one of JIIG's own licensed agents, such as IIBI or MHI, was arranged to be the licensed agent at least nominally involved in the sale. Similarly, when applications for insurance were sent in by mail and no licensed broker was listed on the customer's form, JIIG contacted the customer and gave him or her the choice of either going to a broker or using JIIG's own licensed broker, IIBI.

250 While this was a somewhat artificial way of imposing a licensed person into a sale of insurance, JIIG maintained that it did not constitute solicitation. JIIG relied on the fact that the customer must have received the brochure or the contact information from someone else. While JIIG responded to customer calls, only those distributors who conveyed JIIG's marketing tool, that is, the agents or brokers, ultimately solicited the customer. There was no evidence that JIIG was engaged in direct selling.

251 Overall, JIIG submitted that it never intended to bring itself into the definition of agent, and that the creation of the brochure, coupled with this distribution structure, did not amount to solicitation of insurance. In order to be within the definition of soliciting, JIIG would have to distribute the brochures directly to the customers.

252 Without deciding where on the continuum of solicitation brochure distribution should be located, I agree with the defendants that JIIG's role in the distribution of its brochures did not cross the line into the solicitation category. JIIG did not

use the brochures to contact potential customers directly. I agree that there is a difference between responding to customer inquiries and soliciting insurance. I also agree that, insofar as the brochures are concerned, a customer would only hear of JIIG through an intermediary.

253 With respect to the creation and distribution of the marketing brochure, therefore, I conclude that JIIG was not soliciting insurance and did not, on this basis at least, fall within the definition of agent.

The JIIG Website

254 Counsel for JIIG conceded that its internet website posed a more challenging hurdle. In the context of the brochure, JIIG relied on an interpretation of solicitation based on a component of "direct contact" between an agent and potential customers. JIIG's own website seemed to contain that very element. Although some portions of the website could only be accessed by existing policyholders, or Ingle-authorized agents, a considerable portion of the website was accessible by the general public. This latter portion contained descriptions of Ingle products and other promotional material. The website also invited consumers to purchase Ingle products by telephone, fax, internet, or in person by visiting the office on University Avenue in Toronto. I note that the website invited the general public to visit JIIG's office directly, and did not specifically mention a licensed agent (albeit the invitation was to visit "our office at 438 University Avenue, Toronto — main floor" where IIBI was located). While the system surrounding the distribution of the brochures seemed concerned with interposing a licensed agent between JIIG and the customer in the solicitation process, the website did not reflect this same concern.

255 No doubt due to the relative newness of internet technology, the precise question of whether the publication of a website constitutes solicitation appears to be a novel one.

256 JIIG made two arguments to support its position that its publication of a website did not amount to solicitation. First, JIIG attempted to liken the website to the brochure, referring to it as a marketing tool that could be used by the licensed brokers. Second, since IIBI was mentioned on a corporate page of the website, JIIG submitted that IIBI was actually soliciting through the use of the website. I will deal with these submissions in reverse order.

257 The website was published by JIIG itself, and not IIBI. Although IIBI was mentioned, there was nothing on the website that suggested that it belonged to IIBI, or that IIBI was actually marketing the policies that were promoted therein. I therefore reject the argument that IIBI, as opposed to JIIG, was soliciting through the website.

258 I likewise have difficulty with the submission that a website is a marketing tool directly analogous to a brochure. In my view, a website is a marketing tool that lies somewhere between a brochure and a billboard. It does not need to be distributed to a customer in the same way as a paper brochure. At the same time, it is not on display for any random passerby in the same way as a billboard, in which case it would clearly amount to solicitation. A potential customer must search the world wide web to gain access to JIIG's website. Given the sophisticated search tools on the internet, however, this is likely quite easy.

259 It was established on the evidence that JIIG used licensed intermediaries to get its brochures into the hands of potential customers. Indeed, JIIG relied on the existence of these intermediaries to avoid characterization as one who solicits. With the website, there was no such intermediary. A person seeking travel insurance could "go online" and search for information about travel insurance, and end up on JIIG's website. Compared to the brochure scenario, this is analogous to the traveler who walks into the licensed agency seeking travel insurance. The difference is that at this point in the brochure scenario, the licensed agent or broker intervened to provide JIIG's marketing tool to the customer. Online, the customer simply arrived at JIIG's website.

260 In my view, it is not merely the fact of a website that amounts to solicitation. Rather, it is the different distribution structure that applies to the online material. Using JIIG's own definition of solicitation, the website amounted to direct contact between JIIG and potential customers who were seeking travel insurance.

261 I find that JIIG did solicit insurance on behalf of CU through its operation of the website and that consequently it fell within the definition of agent in section 1 the *Insurance Act*. In the event that I am wrong in my consideration of the meaning

of solicitation, I will go on to consider whether JIIG fell within the definition of agent because it either transmitted applications for or policies of insurance or negotiated insurance.

Transmittal — did JIIG "transmit, for a person other than itself, applications for or policies of insurance, to or from" CU?

262 The statutory definition of agent includes someone who transmits, to or from an insurer, an application for insurance or a policy of insurance, for a person other than himself, herself or itself. JIIG argued that the wording of the section contemplates a two-step process. In other words, for the section to apply, the application must be passed from the customer to JIIG and from JIIG to CU and then the policy must be transferred back through the same structure to the customer. JIIG submitted that it did not operate according to this structure, since the application stayed with JIIG, and was never passed on to CU. Although CU underwrote the policies, JIIG issued the policies, and received the applications and premiums. Factually, this analysis is accurate: the policies emanated from JIIG and the applications were never forwarded beyond JIIG.

263 JIIG relied on the argument that although it issued the policies on behalf of CU, it did not play the kind of role contemplated by the section, since there was never any physical transferring or receiving to or from CU.

264 In my view, this argument fails for two reasons. First, following the more technical analysis advanced by JIIG, I am not persuaded that JIIG acted as some unique type of conduit, in contrast to other agents. Although JIIG may have issued the policies itself, clearly the approved content of those policies had been conveyed by CU to JIIG at some point. CU originally decided what risks it was willing to underwrite, and whom it would insure. Although JIIG had pre-authorization to issue certain policies, some kind of transmittal had to underlie that authorization. JIIG still transmitted the policy for CU, and forwarded the premiums to CU. CU had the right to request the application from JIIG at any time, although there was no evidence that it ever made such a request.

265 Second, I rely on a more principled look at the purpose of section 402(1). The section is designed to protect insurers, and to guarantee that the premium moneys for the policies they underwrite make their way back to them. As such, it is part of the overall scheme by which the financial integrity of the insurance industry and the fiscal stability of insurers is ensured. In my view, there is no policy-based reason why the insurer should be denied the protection of section 402(1) simply because a third party administrator has pre-authorization to process customers' applications and to issue the insurer's policies. There is no reason why the precise nature of the arrangement between the insurer and its administrator should determine the existence of protection, or should be allowed to eliminate it. I similarly reject the idea that there is less need for protection in situations such as the case at bar where the third party and the insurer have a relationship that is close enough to accommodate the removal of constant transmittal of policies and applications.

266 In my view, the intricacies of the arrangement between JIIG and CU do not remove JIIG's activities from the category of "transmittal". I find that JIIG may be characterized as an agent under the Act because it transmitted applications and policies on behalf of CU, even absent any physical transfer of paper to CU.

Negotiation — did JIIG "assume to act in the negotiation of" policies of insurance from CU?

267 JIIG submitted that it did not negotiate insurance. JIIG's counsel proposed a definition of negotiation grounded in ideas of bargaining. JIIG relied on the inflexible nature of the CU policies and the fact that JIIG's customer service representatives were not allowed to interpret or vary the policy terms in the brochure when taking calls.

268 "Negotiation" can be used in a number of ways. *Black's Law Dictionary* defines it as follows:

> Negotiation is process [sic] of submission and consideration of offers until acceptable offer is made and accepted. The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction.

269 "Negotiate" is defined in *Black's* as:

> To communicate or confer with another so as to arrive at the settlement of some matter. To meet with another so as to arrive through discussion at some kind of agreement or compromise about something. To discuss or arrange a sale of bargain; to arrange the preliminaries of a business transaction. Also to sell or discount negotiable paper, or assign or transfer it by indorsement and delivery. To conclude by bargain, treaty, or agreement.

270 It is clear from these definitions that while negotiation involves communication, it need not involve bargaining nor, necessarily, the exchange of proposals and counter-proposals. The problematic implications of JIIG's proposed definition of negotiation can be seen through a consideration of section 402(1) of the *Insurance Act*. As discussed above, the section provides that an agent or broker who "acts in negotiating, renewing or continuing a contract of insurance" is deemed to hold the premiums in trust for the insurer. Typical insurance policies are inflexible, and do not allow for bargaining and personally designed policies. If I were to adopt the defendants' proposed definition of "negotiation" in interpreting section 402, it would have the effect of excluding a majority of agents from the deemed statutory trust. Agents who simply sign people up for policies would not fall within the statutory definition of "agent". This is both an illogical and an undesirable result.

271 In my view, "negotiation" in the definition of "agent" in section 1 of the *Insurance Act* should be interpreted as meaning "arrangement through communication" or "agreement through discussion". It need not contain an element of bargaining and its applicability should not in any way depend on the degree of flexibility in the policy.

272 The evidence concerning JIIG's call centre established that JIIG personnel regularly received and processed telephone applications for insurance. JIIG personnel also processed applications for insurance that were submitted by mail or fax. As part of the pre-arranged procedures, in all cases JIIG personnel were to assign a licensed agent for each application. In the case of mail-in applications, if the application form had been stamped with an agent's name, that person would be the assigned agent. If the form contained no mention of an agent or if a caller did not mention a referring agent, JIIG personnel would check the company's computer records to see if the customer previously had an agent of record and, if so, would re-assign that agent.

273 If no agent was mentioned by the applicant and nothing turned up in the computer search, the applicant would be given the option of having IIBI assigned as the agent of record. Perhaps not surprisingly, IIBI was the broker with the highest dollar volume of all those who sold CU policies for JIIG. (In either case the agent of record would apparently be paid commission in relation to the sale.)

274 What is important to note regarding the foregoing practice is that it was in most cases little more than a formality: agents of record were assigned in name only, but they had no further or real involvement in the policy application and issuance process. Indeed, in my view this exercise of assigning an agent of record was little more than an attempt at lip-service compliance with the statutory requirement that an agent be involved in the sale of insurance. The real work of answering telephone applicants' questions, processing the applications, and issuing and sending the policies to the insureds, was all performed by JIIG employees, who were mainly unlicensed personnel. They are the ones who communicated with the applicants and arranged the insurance.

275 In light of the foregoing, I conclude that JIIG acted in the negotiation of insurance and, accordingly, it fell within the statutory definition of "agent".

Whether "licensed" should be read into section 402(1)

276 In making its arguments about the inapplicability of the statutory trust provision contained in section 402(1) of the *Insurance Act*, JIIG submitted that even if it could be held to be an agent by virtue of its functions, its status as an unlicensed agent/administrator excluded it from the section which imposes the statutory trust.

277 JIIG largely relied on the decision of Sharpe J. (as he then was) in *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank* (1998), 22 E.T.R. (2d) 106 (Ont. Gen. Div.). In that case, Guardall Administrative Services was an unlicensed body appointed by the insurer, Transamerica, as a credit insurance marketing consultant. Like JIIG, it collected premiums and issued policies for the insurer. Unlike in the case at bar, Transamerica appointed a different licensed agent, Lane Insurance Agencies Limited, to represent Transamerica for the solicitation of credit insurance related products and to remain

within the regulatory requirements of the *Insurance Act* regime. On a motion for summary judgment, Sharpe J. considered whether Guardall could be subject to the statutory trust in section 402.

278 In *Transamerica*, the plaintiff insurer argued that section 402 applied to Guardall. In holding that there was no genuine issue for trial respecting the statutory trust, Sharpe J. held that unlicensed agents are excluded from the reference to "agent" in section 402(1). He relied on the interaction between section 402, and the offence sections of the *Insurance Act* found in sections 393(23), 401, and 403. According to section 401, it is an offence for an unlicensed person to hold himself or herself out as an agent or adjuster. It is also an offence to "assume to act as an agent without a licence or while suspended" (section 393(23)), or for an insurer to pay any person for "placing or negotiating insurance" if the party receiving compensation is not a licensed agent (section 403).

279 Sharpe J. concluded that section 402(1) must be read as referring to licensed agents only, since to extend it to unlicensed persons would impose a trust on a party who is committing an offence. Sharpe J. also noted that the plaintiff insurer had clearly appointed Lane, a licensed agent, to act as its agent. As a result, he held that "having chosen to satisfy the regulatory requirements of the Act by naming Lane as their agent, it is not open to the plaintiffs now to shift their ground and rely on protective provisions of the same Act...with respect to activities of an entity that they knew could not legally act as their agent...." The Court of Appeal subsequently ruled that the application of section 402(1) of the Act was a genuine issue for trial, and the matter was remitted for consideration by a trial judge, where it is still outstanding: see *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank* (1999), 44 O.R. (3d) 97 (Ont. C.A.).

280 The *Insurance Act* was referred to at trial as a sort of "patchwork quilt". At times, it does not seem consistent. It is clear in some sections that the word "agent" must be read as referring to a licensed agent in order for the section to make sense. For example, section 403, which prohibits the payment of compensation to anyone who negotiates insurance who is not an agent or broker, must be interpreted as referring to a licensed agent or broker.

281 At the same time, it is also clear that not every reference to "agent" in the Act is meant to refer to a licensed agent. First, I rely on the specific functions outlined in the definition section of the Act. Section 1 is clear that characterization as an agent is function-based as opposed to license-based. Second, I note that there is one reference to "licensed agent" in the *Insurance Act*. It is found in section 400(5) and deals with prohibitions on non-residents to amalgamate. I conclude from this reference that the Legislature did not intend all references to "agent" to be read as "licensed agent".

282 With the greatest of respect for the analysis of Sharpe J. in *Transamerica*, I am not prepared to hold that an insurer should not enjoy the protection afforded by the statutory trust simply because someone who performs the functions of an agent is not licensed. To accept that approach would mean that if an agent's license is suspended or lapses, any premiums subsequently received by that party would cease to be held in trust for the benefit of the insurer. This is an undesirable result. Moreover, pursuant to this analysis, an unlicensed agent would actually be in a better position than a licensed one. An unlicensed agent could commingle premium funds or use them for its own purposes, while a licensed agent would be in breach of trust for those same actions. In the former case, the insurer would be unable to trace misappropriated funds based upon the statutory trust that would be imposed upon them in the latter example. In my respectful view, it is undesirable to interpret the insurance regime as containing a built-in incentive to avoid holding a license.

283 In my view, the *Insurance Act* as a whole envisions a regime that is dominated by licensed agents. Agency is function-based, and once a third party administrator begins performing those functions it becomes classified as an agent and will likely run afoul of the *Act* if it does not become licensed. Whether or not it is licensed, and regardless of the legality of the particular administrator's operation, section 402 provides protection for the insurer's money, by imposing a trust upon it. Given that section 402 aims to protect the insurer's money, it is illogical to find that the protection only applies if the agent is licensed and acting within the bounds of the law. Accordingly, I would not read "licensed" into section 402 as a matter of statutory interpretation.

284 The only remaining issue is whether CU should be precluded from relying on section 402, since it paid compensation to JIIG, apparently in violation of section 403. In my view, the case at bar is not as straightforward as the situation facing Sharpe

J. In *Transamerica*, the insurer had appointed someone else, who was licensed, to act as its agent. There, the insurer clearly did not view Guardall as its agent until it became convenient to do so in subsequent litigation.

285 In the case before me, CU did not appoint a separate licensed entity, and made payments to JIIG. Mr. Crowley testified that, in effect, he continued to deal with the Ingle organization on the basis that he was satisfied that it would continue to comply with all relevant licensing requirements. While it is true that MHI maintained its license and IIBI obtained one, CU's direct dealings during the 1994-1998 era were all with JIIG. Accepting CU's argument that JIIG was an agent as defined in the *Insurance Act*, by paying compensation to JIIG for agent's services CU breached the statute. I am driven to the conclusion that no one at CU paid particular attention to the provisions of section 403 in connection with CU's dealings with JIIG.

286 Be that as it may, the fact that an insurer may have violated section 403 does not negate the existence of the statutory trust under section 402(1). To hold that such a violation somehow dissolves the trust or puts the trust funds out of the reach of the beneficiary does not, in my view, make sense. For example, if the plaintiff were the administrator of a now-insolvent insurer who was seeking to collect trust funds, should it be met with the argument that no recovery would be forthcoming merely because the insurer had paid out commission in violation of section 403? If the intention of the legislative scheme is to transmit premium money to the insurer to cover policy claims, the answer to that question should be "no". CU stands in no different position, and can be treated no differently.

287 For the foregoing reasons, I conclude that JIIG fell within the *Insurance Act* definition of "agent", that section 402 should not be interpreted to apply only to licensed agents, that the statutory trust under that section applied to the premium funds collected by JIIG and that CU is not precluded from relying on the statutory trust.

(ii) The express trust

288 It was CU's position at trial that whether or not section 402 of the *Insurance Act* applied to create a statutory trust, the facts established the existence of a trust relationship at common law. CU submitted that the three certainties required to create a trust — certainty of intention, certainty of object or beneficiary, and certainty of subject matter — were all present in this case.

289 In response, JIIG submitted that the required certainties of intention and object could not be found on the facts. As a result, the argument continued, the relationship between JIIG and CU should be characterized as a simple debtor-creditor relationship.

Certainty of Intention

CU's position

290 CU submitted that it is generally accepted in the insurance industry that premium funds are trust funds. This is bolstered by section 402 of the *Insurance Act*, which provides for a deemed trust in situations where an agent or broker has possession of the funds. Consistent with standard practice, CU submitted that the intent of both parties at all times was that premiums net of front end commissions and authorized fees were to be remitted to CU.

291 According to CU, the manner in which JIIG handled the premium funds reflected JIIG's view that the funds were trust funds. CU relied on the evidence of Mr. Duncan and Mr. Overgaard to establish that all premiums for CU travel health policies were paid into one account, and that CU's portion of the premiums was paid directly from that account. Although ICMS fees also came to be deducted from the premiums before they were remitted to CU, this only occurred after there was a written agreement for payment of ICMS fees.

292 CU submitted that the premiums were segregated from other funds, and JIIG did not intermingle its own funds and operations. The Ingle portion of the premiums would be transferred from the premium account to either the JIIG disbursement or JIIG operating account from which payments for JIIG's expenses were made. Only customer adjustments such as refunds and declinations were paid from the premium account. CU submitted that the parties did not waiver from the practice for remitting premiums that is detailed in the 1989 Agreement, namely, remittance to CU of the net amount due on the 45th day following the month of collection, until Ingle threatened to withhold premiums in August, 1997.

293 CU's relied on its own conduct to bolster the assertion that both parties intended that the premiums be held in trust. First, CU aimed to keep the premiums sacrosanct, and warned Ingle not to convert the trust funds. Second, the 1989 Agreement was signed with a licensed broker, MHI (in whose hands the funds were impressed with a statutory trust) and outlined a procedure for collecting and remitting premium funds. At that stage all parties knew and intended the funds to be trust funds, and the practices relating to premium remittances continued uninterrupted when JIIG took over MHI's function. Third, CU refused to let JIIG deduct its alleged claims from the premium remittances, and JIIG acquiesced in this position until October, 1997. Fourth, CU warned JIIG that withholding the premiums would be a breach of trust. Fifth, for over 9 years, a practice was followed whereby premiums net only of customer adjustments, agreed commissions and fees were remitted to CU.

JIIG's Position

294 JIIG submitted that there was no evidence that the parties intended the premium funds to be trust funds. The 1989 Agreement did not specifically require that the premium funds collected by MHI be held in trust and none of the Memoranda of Understanding in evidence specifically dealt with the remittance of premiums.

295 In an internal CU audit by CU's own auditors, the lack of a trust provision in the parties' agreement was noted. The response by CU management played down the importance of such a provision, but suggested that a trust provision would be included in the next draft of the operating agreement. A review of subsequent drafts of the operating agreement revealed that a trust provision was inserted by CU, but then removed at JIIG's insistence. None of the signed written agreements made any express reference to trust funds.

296 JIIG also challenged the idea that a trust could be inferred from the nature of the relationship or the conduct of the parties. JIIG emphasized that its relationship with CU was more complex and changing than CU or the written agreements suggest. In JIIG's submission, the evidence revealed many arrangements between the parties that were implemented by practice (as opposed to written agreement) and formed part of their relationship. JIIG submitted that the parties amended by conduct those portions of the 1989 Agreement dealing with the remittance of premiums.

Certainty of Object or Beneficiary

297 CU submitted that the funds were held in trust for CU, and that CU used the trust moneys to cover its expenses, liabilities, and to pay claims.

298 JIIG disagreed. According to JIIG, if a trust existed, it was for the benefit of both JIIG and CU, since they both had an entitlement to share in the profit. The nature of the profit sharing arrangements made it clear that JIIG had an entitlement to a share of the underwriting profits regardless of the label used to describe that profit.

Certainty of Subject Matter

299 It was clear from the facts and JIIG did not contest that if a trust were found, the premium funds would be the subject matter.

The Law

300 In order to be characterized as a trust relationship, an arrangement must have three characteristics, known as the three certainties. There must be evidence upon which a court can find a certainty of intention to create a trust, certainty of the subject matter of the trust, and certainty of the object or beneficiary of the trust: *Canadian Pacific Air Lines Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233 (Ont. H.C.); affirmed (1990), 71 O.R. (2d) 63 (Ont. C.A.).

301 The intention to create a trust must be clear, and in the absence of formal trust documentation, the court must consider the circumstances and evidence as to what the parties intended, what was actually agreed to, and how the parties conducted themselves.

302 In assessing relationships to determine whether there is evidence of a trust relationship, courts will consider a number of factors. These factors include the content of any agreements between the parties, whether the alleged trust property is held in a separate account, whether the alleged trustee is permitted to commingle the alleged trust funds with his or her own funds or use the funds for his or her own general business purposes, and past events and conduct that may suggest that the parties treated the funds as trust funds.

303 The characteristics of the relationship and whether it falls into a principal-agent category are also relevant considerations. In allowing an appeal of an order for summary judgment and sending the question of the existence of an express trust back to trial, the Court of Appeal in *Transamerica*, *supra*, noted that while evidence of an agency relationship between the parties does not establish a trust relationship, it does provide some evidentiary support for it.

304 In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), the court considered the three certainties in analysing a relationship between an insurance agent and its insurer. LaForest J. held at p. 816:

> The arrangement in the present case was based on the collection of insurance premiums by the insurance agent, Drive On, and the remittance of these premiums, subject to adjustments, to the insurer, Citadel. The intent to create a trust clearly follows from this principal-agent relationship.

305 Although the existence of a separate account for the alleged trust funds is a factor, it is now settled law that "while the presence or absence of a prohibition on the commingling of funds is a factor to be considered [when deciding if the relationship is a trust relationship]...it is not necessarily determinative": *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.).

Application to the facts

306 In relation to the existence of an express trust, the real issue in the case at bar is whether a certainty of intention to create a trust arose on the facts.

307 To begin with, in my view JIIG acted as an agent for CU (quite apart from the statutory definition). JIIG had authority to act on behalf of CU, advance CU's interests, and bind CU to insurance contracts. (Because of its functions, as I have already found, JIIG also qualified as an agent pursuant to the definition in section 1 of the *Insurance Act*.) JIIG's status as a non-statutory agent provides some evidentiary support for the assertion that it was also a trustee. In addition, and consistent with its status as a trustee, in some of its brochures JIIG informed the public that it owed a fiduciary duty to CU.

308 Regardless of the subtleties and complexities of JIIG's relationship with CU, the bottom line is that JIIG was required to collect premiums, see to customer adjustments, deduct its fees, and remit the net premiums to CU. Throughout the CU/Ingle relationship, premiums collected by Ingle (whether by MHI or JIIG) were remitted to CU on the 45th day following the end of the month in which they were collected, net only of customer adjustments, commissions and agreed-upon deductions, such as ICMS fees. This practice was followed consistently up until the delayed remittance in August, 1997 and the first withholding in October, 1997. Throughout its dealing with CU, JIIG maintained a separate premium account into which premium receipts were deposited and kept until remitted to CU.

309 While I agree that industry practice cannot be determinative of the intention to create a trust in a particular case, it is significant that this type of arrangement is typically characterized as a trust relationship in the insurance industry. As noted previously, the *Insurance Act* imposes a trust on premium funds that are collected by agents in these circumstances. There is nothing to suggest that JIIG followed an atypical remittance procedure. To the contrary, JIIG continued to follow the same premium remittance procedure when it assumed MHI's functions. When MHI collected the premiums, they were trust funds; no notice was given to CU that JIIG considered them not to be. Although JIIG and CU may have had an atypical relationship in terms of the scope of JIIG's responsibilities and their profit-sharing arrangement, in my view, these are unrelated aspects of the arrangement that do not alter the nature of the fundamental obligation to remit net premiums less only front end commissions and authorized fees.

310 I am also mindful of the fact that, in many cases, JIIG received premium funds that were initially collected by the agents who sold the policies. In these cases, the funds were initially held in trust for CU by the collecting agent, pursuant to the *Insurance Act*. When receiving these moneys JIIG had to know that it was receiving trust funds due to CU. In other cases JIIG arranged to receive premium payments directly from the customer. (One example of this arrangement was with JIIG's captive broker, IIBI, which directed all its premium receipts to be paid directly to JIIG.) This latter arrangement (that is, for direct payment to JIIG) was one of convenience, and I do not consider that the funds received by JIIG in this fashion should be characterized any differently.

311 It is also significant that the facts suggest that JIIG had no authority to make other deductions from the premiums or to use the premiums for its own purposes. The profit sharing system did not allow JIIG to make deductions from the premiums; JIIG's share of any surplus was paid back to it by CU at the end of each year. On August 6, 1997, when Mr. Overgaard first suggested that JIIG might deduct the $500,000 from the next premium remittance, Mr. Prince gave an immediate response, and explained that this would violate the parties' own agreement. Although Mr. Prince did not use the words "breach of trust" in his memo, it is clear that CU did not share JIIG's view of the profit-sharing arrangement, and felt that CU had to authorize any deductions from the premium payments. At the parties' meeting in late August, 1997, Mr. Crowley made express reference to the premiums being trust funds. JIIG initially obeyed these admonitions from CU and did not begin to deduct its claims from the premium remittances until October.

312 It is true that there was no written confirmation of the trust. No mention was made of a trust in the 1989 Agreement. While there is no written documentation confirming the existence of a trust, there was likewise no evidence that JIIG had any special authority or interest in the funds that would take away from the inference that JIIG was a trustee.

313 It is also true that when the trust terminology was inserted in an early draft of the operating agreement, Mr. Overgaard removed it. I note that the deletion of that provision from the next draft (March 4, 1997) was accompanied by the addition of another paragraph (6.4) that was largely lifted from paragraph 4 of the 1989 Agreement; the latter provision had resulted in the premiums being kept in a segregated account up to that point. This suggests that even if JIIG was unwilling to include an express requirement for a separate trust account in the new operating agreement, the language reflecting the parties' original intention as contained in the 1989 Agreement was still under consideration. In any event, the new operating agreement was never finalized and there is no binding agreement from which I can definitely ascertain a newly agreed upon intention; at best, the evidence suggests that in early 1997 Mr. Overgaard's negotiating position was that he was unwilling to include a trust provision in the new operating agreement then under negotiation. In my opinion the absence of written confirmation of a trust arrangement in the signed documents is not conclusive.

314 On all of the evidence, I find that JIIG and CU intended to be in a trust relationship and were in such a relationship. The first requirement to create a trust, certainty of intention, was therefore present.

315 I do not agree that JIIG was a beneficiary of the trust. JIIG's profit share was never taken directly from the premium funds; it was calculated based upon the annual surplus, and separately remitted by CU to JIIG. JIIG did not have a beneficial interest in the net premiums. I find that CU was the only beneficiary of the trust. The second requirement, certainty of beneficiary, was also present.

316 As previously mentioned, the net premiums constituted the subject matter of the parties' trust, thus satisfying the third requirement, certainty of subject matter.

317 Accordingly, all three certainties necessary to establish an express trust at common law were present in this case. I conclude that the net premium funds, (that is, premiums collected by JIIG less only customer adjustments, agreed commission and authorized fees) were trust funds.

(iii) The constructive trust

318 Since I have found that an express trust exists at common law, it is not strictly necessary for me to consider whether the funds may be impressed with a constructive trust. Indeed, during the course of closing argument, counsel mainly referred to constructive trust law in their attempts to argue the breach of trust issue. For this reason, I will only briefly outline the arguments regarding whether the premiums may also be characterized as trust funds pursuant to the principles that underlie the imposition of constructive trusts.

319 The decision from the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.) outlines when a trust may arise by operation of law. In that case, McLachlin J. (as she then was) held that a trust can be imposed over property in a broad range of circumstances, in order to generally enforce the requirements of good conscience. In *Soulos*, a real estate broker entered into negotiations to purchase a building for his client. Instead of relaying the price information back to the client, the broker bought the property for himself. The court held that the conscience of the court had been engaged and found that the property was impressed with a constructive trust. The real estate agent was required to transfer the property to the client.

320 In my view, this case stands for the proposition that constructive trusts may be imposed either in cases involving wrongful acts such as fraud or breach of a duty of loyalty, or to remedy unjust enrichment and corresponding deprivation. *Soulos* is clear that the absence of the classic fiduciary relationship does not necessarily preclude the finding of a constructive trust, if the wrongful nature of the act constitutes a breach of a trust-like duty. The constructive trust should be used to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in good conscience they should not be permitted to retain.

321 According to *Soulos*, the following four conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed:

> (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) there must be no factors which would render imposition of a constructive trust unjust in all of the circumstances.

322 CU argued that all of the foregoing conditions were satisfied in the case at bar. JIIG submitted that there was no equitable basis for imposing a remedial constructive trust on the facts of this case, and suggested that neither JIIG nor its directors knew that they were dealing with trust funds. In addition, due to the profit-sharing arrangement, JIIG submitted that it had an entitlement to the funds.

323 While I am prepared to hold that the first condition was established on the evidence, in my view the second was not. Unlike the defendant in *Soulos*, JIIG did not breach any duty in acquiring control over the premium funds. Indeed, JIIG's original receipt of the premiums was exactly what the parties contemplated.

324 Accordingly, on the authority of *Soulos*, I find that the premiums may not be impressed with a constructive trust.

(b) Recoveries

325 Little argument at trial was devoted to the issue of whether recoveries collected by ICMS were trust funds; indeed, CU did not strenuously advance this position.

326 Unlike premium receipts, no statutory trust is applicable to recoveries. In my view, no express trust arose on the facts here, either. Unlike the settled practice in relation to premium remittances, there was no established formal practice regarding payment of recoveries. I am therefore unable to find the requisite certainty of intention needed for an express trust to arise.

327 For the same reason that I am not prepared to impose a constructive trust on the withheld premiums, I am not prepared to do so in relation to the recoveries. Once again, there was no breach of duty by JIIG or ICMS when the recoveries were collected. Accordingly, the second condition in *Soulos* was not met and no constructive trust may be imposed.

Issue 8. If the funds were trust funds, was JIIG entitled to exercise a right of set-off as against them?

328 JIIG submitted that it was entitled to set-off the amount owed to it by CU on account of the profit-sharing arrangement against the trust funds. At the heart of this submission is the more fundamental question of whether set-off (legal or equitable), which is typically a procedural remedy raised as a legal defence, can also function to justify a course of conduct. Put another way, as a matter of trust law, does a trustee have a right of self-help by which he or she can collect a debt from a beneficiary through set-off against the trust property?

329 It was JIIG's position that there is such an entitlement to set-off and that, in the case at bar, since CU owed JIIG more than JIIG owed CU, set-off effectively operated as a defence to the breach of trust claim. For the reasons that follow, I disagree.

330 The question of whether a trustee can set-off a debt against the trust has been considered by K. Palmer in *The Law of Set-Off in Canada* (Aurora: Canada Law Book Inc., 1993) at 230-31. Commenting on the surprisingly small number of Canadian cases dealing with the intersection of the ideas of trust and set-off, Palmer noted:

> A potential set-off between a trustee and a beneficiary of the trust would, at first blush, seem to run counter to the very notion of a trust. The trustee is both empowered and charged with the right and responsibility of holding the trust property on behalf of the beneficiary and cannot convert the property to his personal use. Accordingly, any debt owed by the beneficiary to the trustee in his personal capacity could not be set-off from the trust property...[E]xceptions...would include an agreement to allow such a set-off, or if the beneficiary is first required to pay into the trust fund before receiving out his share. In some cases, the satisfaction of the purpose of the trust may then allow set-off between the trustee and a beneficiary.

331 The issue was addressed by Bull J.A. in *McMahon v. Canada Permanent Trust Co.* (1979), 108 D.L.R. (3d) 71 (B.C. C.A). Bull J.A. found that a trust company that held a trust fund for a bankrupt individual could not remove money from the fund to set-off a loan due to it by the individual. Bull J.A. noted that such debts were not mutual, since the moneys in the fund were held in a fiduciary capacity, while the loan was owed to the trust company in its personal capacity. The court emphasized the basic rule that set-off is only available (short of agreement, express or implied), when the debts or accounts are mutual, between the same parties, in the same right. A person in his or her individual capacity is not in the same right as he or she is when acting as trustee for another. Bull J.A. concluded (at p.75) that:

> [I]t is trite law that, subject to certain limited exceptions, [where] an amount [is] owed by a person in his capacity as trustee holding property, credits, or funds for another...[he] cannot combine them with, or set them off against, a personal debt owed to him in his personal capacity by the beneficiary...of the trust.

332 The idea of set-off against a trust was discussed in the earlier case of *Anderson, Green & Co. v. Kickley*, [1934] S.C.R. 388 (S.C.C.). In that case, the appellant broker sold shares for the respondent, pursuant to a disputed profit-sharing arrangement. The appellant then refused to pay any of the proceeds of the sale to the respondent, claiming that it had a claim against the respondent. Duff C.J. held that the moneys were to be devoted to the payment of the purchase price of the shares, such that they were impressed with a trust. He found that it would be a breach of the trust under which the moneys were held to apply these moneys in payment of any claim against the respondent arising out of matters not connected with the particular shares.

333 The final case to which I will make reference on this issue, *Crown Life Insurance Co. v. Medipac International Inc.* (1996), 3 O.T.C. 62 (Ont. Gen. Div.), was submitted by the parties in the case at bar. In *Crown Life*, the defendant agreed to sell

insurance for the plaintiff and to maintain a trust account for the benefit of the plaintiff to be used exclusively for receipt of funds from insured individuals, payment of net premiums and administrative fees. The defendant removed a sum of money from the trust account, and attempted to claim at trial that it was entitled to an equitable set-off because the plaintiff was indebted to it. The defendant admitted that it had no express right to deduct any of its alleged claims from the funds, since the terms of the trust did not permit retention of funds for such reasons. Mandel J. found that the defendant had unilaterally set-off its claim against the trust funds without any determination of the claim by the court, and notwithstanding the fact that the claim was denied by the plaintiff. He held that the defendant was not entitled to do this, and that a claim of equitable set-off was not permitted, since the defendant did not come to equity with clean hands. Before me, JIIG emphasized that Mandel J. elected to stay the breach of trust judgment pending the determination of the counterclaim underlying the wrongful retention of funds.

334 Although the foregoing cases have addressed the issue of set-off against a trust in different ways, they confirm that a trustee cannot justify withholding trust funds in breach of his or her trust obligations on the grounds that the beneficiary is indebted to him or her. Simply stated, a trustee cannot use the concept of set-off, legal or equitable, to justify self-help by breach of trust. To allow set-off to operate in this fashion would have the perverse effect of encouraging trustees to deprive beneficiaries of their trust property pending a determination of whether the trustee's claim against the beneficiary is valid. A trustee, by the very nature of his or her position, must observe and comply with the trust pending the proper resolution of any disputes that may exist between trustee and beneficiary. Set-off is a defence that may be pleaded at the legal stage of a dispute, and may result in the ultimate "netting out" of entitlements. It cannot be used to justify a course of conduct by a trustee against a beneficiary in advance of any legal action.

335 For these reasons I conclude that JIIG should have pursued its claim against CU by way of legal action and not by means of self-help by withholding the premium funds. As a trustee, it was not entitled to withhold the trust property as payment for an alleged debt.

Issue 9. If the funds were trust funds, has there been a breach of trust and if so, by whom?

336 Since I have found that the withheld funds may be characterized as trust funds, I must now consider whether JIIG, or any other party, may be held liable for breach of trust.

(a) Liability of JIIG for breach of trust

337 A breach of trust occurs whenever a trustee fails to carry out his or her obligations under the terms of the trust, the rules of equity, or statute. The failure may take the form of doing something contrary to those obligations, or of neglecting to do something which ought to have been done. A breach of trust occurs whenever the trustee's duty to act precisely within the terms of his or her obligations is not fulfilled, although equity will intervene to protect a trustee who has acted with honesty and reasonable prudence: D.W.M. Waters, *Law of Trusts in Canada* 2d ed. (Toronto: Carswell, 1984) at 987-88.

(i) Liability as statutory trustee

338 I have found that section 402(1) of the *Insurance Act* impressed the premiums collected by JIIG with a trust in favour of CU. That section goes on to provide that:

> if the agent... fails to pay the premium over to the insurer within fifteen days after written demand..., less the commission of the agent... and any deductions to which, by written consent of the company, the agent... is entitled, such failure is proof, in the absence of evidence to the contrary, that the agent... has applied the premium for a purpose other than paying it over to the insurer.

On the evidence before me I am satisfied that JIIG's decision to withhold the premium remittances was in breach of the trust obligations flowing from section 402(1). In the event that I am wrong in my analysis of the statutory trust, I will also consider whether JIIG was in breach of either an express trust obligation.

(ii) Liability as express trustee

339 CU submitted that JIIG was liable as an express trustee, since the conversion of trust funds to other purposes was clearly a wrongful and illegal act. It was CU's submission that if an express trust was found on the facts, then the decision to withhold the premiums was clearly a breach of trust. In *Air Canada v. M & L Travel Ltd.*, *supra* there was no question that the travel agency was liable for failing to account to Air Canada for the moneys collected through the sale of its tickets, once the court held that an express trust existed.

340 Based on my finding that there was an intention to create a trust, and a trust existed at common law, it follows the decision to withhold the trust property constituted a breach of trust. The precise terms of the trust can be determined with reference to the parties' conduct throughout CU/Ingle relationship. Throughout this relationship, the premiums collected by MHI and JIIG were remitted to CU on the 45th day following the end of the month in which they were collected, net only of commissions and deductions such as ICMS fees. The terms of the trust did not allow JIIG to make other deductions from the premium moneys.

(iii) Quantum

341 In relation to quantum, JIIG's liability for breach of trust is equal to the amount wrongfully withheld by it. As previously mentioned, JIIG's 1997 withholdings were $537,605.17 and the 1998 premium due was $2,620,338.39, for a total withheld of $3,157,943.56. Of that, $350,000.00 was paid by JIIG on account. A further credit of $398,931.68 is due to JIIG on account of 1998 ICMS fees, which were historically paid by way of deduction from premium remittances. Accordingly, the balance due is $2,409,011.88 and JIIG is liable to compensate CU for this amount by reason of its breach of trust. That amount forms part of the total sum due to CU, as previously calculated.

(b) Liability of IIBI and ICMS for breach of trust

342 CU submitted that IIBI, as the licensed arm of JIIG, was clearly bound by the trust obligations found in section 402 of the *Insurance Act* and the *Registered Insurance Brokers Act*, *supra* (the "*RIBO Act*"). Although section 402 has already been discussed at length in relation to JIIG, the relevant portions of the *RIBO Act* have not yet been reproduced. IIBI clearly fell within the scope of section 32(1) of the *RIBO Act*, which states:

> All funds received or receivable by a member in the course of business on behalf of insurers from members of the public or on behalf of members of the public from insurers are deemed to be held in trust.

343 CU submitted that IIBI had an obligation to pay these deemed trust moneys into a trust account. Instead, JIIG employees completed the transactions and directed all moneys into the JIIG premium account. JIIG held IIBI out to be its licensed entity, but then did not live up to the responsibilities that accompany such a representation. Since CU did not authorize the release of the trust funds, CU submitted that IIBI was liable for breach of trust, in handing the moneys over to JIIG.

344 The flaw in this argument is that CU was aware that JIIG was receiving and collecting premium payments from and on behalf of not just IIBI, but also hundreds of other agents and brokers. Just as with MHI before 1994, JIIG was the central conduit through which all premium revenue flowed on its way to CU.

345 I have previously concluded that the funds received and held by JIIG were impressed with a trust in favour of CU. I am not prepared to hold that IIBI — or any of the other agents who sold CU/Ingle policies — breached any obligations of trust or otherwise in paying the premiums over to JIIG or in allowing JIIG to collect them directly; that is precisely what these agents were expected to do. In so doing they breached no trust.

346 I therefore conclude that IIBI is not liable for breach of trust.

347 Turning briefly to ICMS, there is no evidence to suggest that the withheld premium funds were in the possession of, or controlled by, ICMS. Its functions were always confined to and concerned with the claims management and recoveries aspects of the business. I find no basis for a finding of breach of trust as against it.

(c) Liability of MHI for breach of trust

348 CU first submitted that MHI was liable as a statutory trustee. MHI was licensed as an agent and broker in all provinces and contracted with CU. It held the licenses under which the Ingle Group sold and administered CU's policies. CU submitted that even after JIIG took over the MHI function, MHI continued to hold itself out as a licensed arm of the JIIG operation by taking such steps as renewing its licenses in ten provinces and two territories in 1994 and 1996. Further, CU submitted that MHI never terminated the 1989 Agreement. It arranged to have its ongoing obligations administered by JIIG, but representations were occasionally made which suggested that MHI was still active and operating. On this basis, CU submitted that MHI was bound by the statutory trust provisions, and had an obligation to ensure that the premiums were paid over to the insurer. MHI was in breach of trust because it failed to ensure this.

349 As a second basis for liability, CU submitted that MHI was liable for having knowingly assisted in JIIG's breach of trust. By holding itself out as part of the Ingle Group responsible for performing the functions under the 1989 Agreement, MHI owed a duty to CU to protect against the conversion of the premiums and was liable for assisting in the implementation of a fraudulent scheme or design. CU submitted that MHI knew about the decision to withhold the funds because all of its officers sat on the executive committee of JIIG.

350 In response to these submissions counsel for MHI argued that all of its principal obligations came to be performed by JIIG after 1993. JIIG became the party who was responsible for printing the brochures, overseeing the distribution network, collecting premium revenues, issuing policies, remitting net premium payments to CU, overseeing and adjusting claims and making recommendations regarding claims payments to CU, and collecting recoveries. MHI was active in name only; all of the employees performing its functions were JIIG employees. MHI submitted that there was never any confusion on this issue, and that CU knew that all premiums collected by agents and brokers were being paid to JIIG, who remitted the premiums to CU. As of January, 1994, MHI had no ongoing contractual relationship with CU, and did not complete any sales or collect any premiums. Since section 402 of the *Insurance Act* only provides that an agent or broker who receives any money as a premium shall be deemed to hold the money in trust, MHI submitted that there could be no applicable statutory trust.

351 I find that MHI was active in name only during the relevant time period when the premiums were withheld. MHI was not selling any CU policies, or collecting any premiums for CU. These facts alone remove MHI from the reach of the statutory trust obligations. I therefore conclude that MHI is not liable for breach of a statutory trust.

352 By 1997 and 1998, the functions previously discharged by MHI were being administered by JIIG, and CU knew that it was dealing with JIIG. MHI was no longer a participant in the CU sales system. Although there was no formal termination of the relationship between MHI and CU, the evidence suggests that the 1989 Agreement was abandoned as between MHI and CU, that JIIG assumed control of the MHI business, and that CU was aware of this. First, long before the time that the premiums were withheld, there were no references to MHI in letterhead or correspondence to CU from JIIG for a long period leading up to the 1997 withholding. Second, after January 1, 1994, all cheques were drawn on a JIIG bank account. Third, there was no correspondence from CU to MHI after January, 1994. Fourth, MHI was not referenced in any of the MOU's that amended the 1989 Agreement.

353 I agree with the submission of counsel for MHI that, as between CU and MHI, the parties' contractual arrangements were abandoned subsequent to 1993. The applicable legal principle was recited by the House of Lords in *Paul Wilson & Co. v. Blumenthal*, [1983] 1 All E.R. 34 (U.K. H.L.), at 47, as follows:

> The concept of the implied abandonment of a contract as a result of the conduct of the parties to it is well established in law: *see Chitty on Contracts* (23rd edn, 1968) Vol 1 para 1231 and cases there cited. Where A seeks to prove that he and B have abandoned a contract in this way, there are two ways in which A can put his case. The first way is by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract.

I find that this is what occurred as between CU and MHI.

354 Since the retail operations of MHI were closed down, I find that there was no separate MHI enterprise that could be held liable for knowing assistance in JIIG's breach of trust.

355 I therefore conclude that MHI is not liable for knowing assistance in JIIG's breach of trust.

(d) Personal liability of Steven Overgaard and John Ingle

(i) The positions of the parties

356 CU also submitted that the court should look past JIIG and find liability on the part of the individuals behind it. CU sought to lift the corporate veil and attach personal liability to the individuals who were the directing minds of the corporation, in their personal capacities.

357 Specifically, CU submitted that Mr. Overgaard and John Ingle, as the directing minds of JIIG, should be found liable as strangers to the trust who directly benefited from putting the funds to unauthorized use. CU noted that they knew or ought to have known that the premiums constituted trust funds. They agreed to remit these funds for an express purpose, but then decided to put them to an unauthorized use. Mr. Overgaard had veto power over any such decisions.

358 CU argued that liability could be imposed upon these two individuals for their knowing assistance in a fraudulent scheme. CU submitted that the requisite knowledge is easily found, since Mr. Overgaard and John Ingle directed that the premium moneys be transferred from the premium account to the operating or disbursement accounts. In other words, they expressly directed the breach by JIIG. They knew that CU treated the funds as trust moneys, and had been warned that a failure to pay over the moneys would constitute a breach of trust. CU relied on the cross-examination of Mr. Overgaard as evidence that he understood that CU required an exchange of cheques rather than a deduction from the premium remittance. CU submitted that although Mr. Overgaard testified that an executive group was involved in decision making, no minutes of meetings were produced, and both Mr. Duncan and Robin Ingle confirmed that the decision to withhold the premiums was ultimately Mr. Overgaard's. CU emphasized that the individual defendants benefited personally from the breach of trust and conversion.

359 The defendants submitted that liability should not extend to an officer or director of a corporation absent evidence of fraud or dishonesty. They argued that neither Mr. Overgaard nor John Ingle was ever in receipt of the trust funds in a personal capacity; the funds were administered by JIIG alone. Moreover, they submitted that the decisions were not personal ones, and were made in consultation with JIIG's operating team. They also noted that there was no evidence that John Ingle ever personally benefited from any of the alleged breaches, since he held no direct or indirect interest in JIIG or its assets.

(ii) Analysis

360 When assessing the question whether Mr. Overgaard and John Ingle are personally answerable for breach of trust, the most relevant case to consider is *Air Canada v. M & L Travel Ltd.*, *supra*. In that case the Supreme Court addressed the question of personal liability of the directors of a corporation that operated a travel agency that sold Air Canada tickets. Funds collected from those ticket sales were held in trust and were to be remitted to Air Canada on a regular basis. Notwithstanding this arrangement, ticket sales proceeds were kept in the company's general account. Following a dispute between the two directors of the company, the bank seized all funds in the account to pay down the company's line of credit, and refused to honour cheques drawn in favour of Air Canada. The Supreme Court considered whether personal liability could be imposed on the directors for the company's breach of trust.

361 The Supreme Court held that a director of a closely-held corporation could be held liable for a breach of trust by the company where the breach of trust was fraudulent and dishonest: see pp. 824-5. In this regard it is the nature of the breach of trust that must be examined, rather than the intent or knowledge of the stranger to the trust (that is, the corporate director): see p. 825. In explaining how to determine whether a breach of trust was fraudulent or dishonest, Iacobucci J. said (at p. 826):

> I would... "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'" ....[T]his standard best accords with the basic rationale for the imposition

> of personal liability...namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. ...In that respect, the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability.

362 The next step in the analysis in the case at bar is to assess the nature of the breach of trust by JIIG, having regard to this statement of the law. I do not consider that JIIG's breach of trust can be characterized as unwitting, technical or innocent: the withholding of the premium remittances was willful, intentional and carried out in full knowledge of CU's position (well-founded, in my view) that the funds were trust moneys. JIIG withheld the funds and used them as its own property to finance its own operations as it proceeded with the plan to set up an independent insurer. JIIG stopped selling CU policies and began to market Ingle Health ones. There was no guarantee that its new venture would succeed.

363 In my opinion, in keeping CU's premium remittances, JIIG took a risk to the prejudice of CU's rights, which JIIG knew or should have known it had no right to take. By taking such a knowingly wrongful risk, JIIG's action was a fraudulent or dishonest breach of trust sufficient to ground personal liability. While counsel for the defendants submitted that JIIG had a "colour of right" to retain the money due to CU, I do not find that excuse to be persuasive, in light of the clear assertions by CU that these were trust funds, the history of regular remittances and the very apparent disagreement whether any sums were due by to CU to JIIG. In these circumstances, I fail to see how JIIG could assert that it had an unqualified colour of right to retain almost all of the premiums that it received from sales of CU policies in 1998.

364 Having found that the legal test set out in *Air Canada v. M & L Travel Ltd.*, *supra* has been met in this case, the next step in the inquiry is to assess whether the conduct and involvement of Mr. Overgaard and John Ingle brings them within the sphere of personal liability. Both were members of the board of directors of JIIG, as were others. Both were actively involved in JIIG's senior management team, as were others. Both were involved in dealings and communications with CU, as were others.

365 Notwithstanding these similarities, in my view Mr. Overgaard's role was significantly different from that of John Ingle. From the fall of 1993 onward, Mr. Overgaard's continued involvement with the Ingle business was conditional upon his having majority control, voting control and operational control. He achieved all three and was JIIG's majority shareholder, Chairman and CEO. John Ingle's role was decidedly a secondary one, and no-one except Mr. Overgaard was senior to him.

366 It was Mr. Overgaard who informed CU in his August 6, 1997 memo that JIIG was "proceeding on the basis of a $500,000 on account payment to be made either by payment from CU or deduction from our August 15, 1997 remittance" thus formally threatening to withhold premiums. Mr. Duncan's memorandum of August 15, 1997 was telling, in that it confirmed the intention to delay JIIG's remittance of the June 1997 premiums "pending Steve Overgaard's review and authorization of the remittance." Mr. Duncan testified that Mr. Overgaard made the decision to withhold premiums.

367 Based upon all of the evidence, I am satisfied that Mr. Overgaard was the controlling and directing mind of JIIG. Notwithstanding his evidence that the decision to withhold the 1997 and 1998 premium remittances from CU was a decision by JIIG's "executive team", I find as a fact that not only did he have a veto over whether to make the payments, it was Mr. Overgaard's decision to withhold the money. I further observe that Mr. Overgaard significantly benefitted from JIIG's withholdings, in that they were used to enable JIIG to continue in operation and transform its business into that of a free-standing insurance company of which Mr. Overgaard is the majority shareholder.

368 I therefore conclude that Mr. Overgaard falls within the ambit of the decision of the Supreme Court in *Air Canada v. M & L Travel Ltd.*, *supra*, and that he is personally liable for JIIG's breach of trust. I further conclude that the evidence falls short of establishing a basis for a finding of personal liability as against John Ingle.

(iii) Quantum

369 In relation to the quantum of Mr. Overgaard's personal liability for breach of trust, he is jointly and severally liable with JIIG for the net amount of the wrongful withholdings, namely, $2,409,011.88.

Issue 10. Has there been oppression under the OBCA?

364 In light of the conclusions that I have reached in relation to the liability and breach of trust issues, I do not consider it necessary to deal with the parties' arguments concerning oppression. For the benefit of any other court that may come to consider this case, however, I want to address one factual issue that was raised in connection with this subject.

370 Part of CU's submission in relation to its oppression claim was that the corporate reorganization that I described previously was, in reality, an exercise in stripping JIIG of its assets. The argument continued that, by causing these transactions to be carried out, Mr. Overgaard and John Ingle, as directors of JIIG, caused JIIG's affairs to be administered in a fashion that was oppressive and unfairly disregarded CU's interests as a creditor.

371 It is my conclusion on the evidence before me that the corporate reorganization was carried out for a good faith purpose, namely, the establishment of an independent insurer to carry on the Ingle business. JIIG was not stripped of its assets as far as I can tell; rather, it received shares of value in IFHI in exchange for the assets that it transferred away. It is also important to note that the actions of Mr. Overgaard and JIIG in relation to the new insurer were telegraphed (at least to CU Assurance) as early as the fall of 1997, when Mr. Overgaard shared his business plan with them. It was to be expected that, absent a deal with CU or CU Assurance, Mr. Overgaard would proceed with his plan, and he did.

Issue 11. Should punitive damages be awarded?

372 CU submitted that the conduct of JIIG, Mr. Overgaard and John Ingle, in converting trust money to their own benefit and showing complete disregard for the sanctity of insurance premiums, warranted an award of punitive damages. CU also relied on the alleged "asset stripping" referred to above. I find the latter submission to be without merit, for the factual reasons mentioned above. The claim for punitive damages in connection with the withholding of premiums, however, merits further consideration.

373 The law of Ontario in relation to punitive damages in stated in *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (Ont. C.A.), (leave to appeal to Supreme Court of Canada granted [reported(1999), 249 N.R. 392 (note) (S.C.C.)] October 14, 1999) in which the Court of Appeal said (at p.649):

> For an award of punitive damages to be made, two requirements must be met: first, the defendant must have committed an independent or separate actionable wrong causing damages to the plaintiff; and second, the defendant's conduct must be sufficiently "harsh, vindictive, reprehensible or malicious" or "so malicious, oppressive and high-handed" that it offends the court's sense of decency.

374 In the present case, JIIG's failure to remit the premiums to CU on the 45th day following the end of the month in which they were collected, was a breach of the contract that I have found to have governed the parties' relationship, namely, the 1989 Agreement. In addition, as I have also found, the failure to remit the withheld funds when demanded was an actionable breach of trust. I find that the first requirement spelled out in *Whiten* is met in the case at bar.

375 Turning to the second requirement, I am compelled to observe that the actions of JIIG, directed by Mr. Overgaard, resulted in JIIG withholding of more than $2.7 million (after credit for ICMS fees), of which, up until now, it has remitted just $350,000 to be used by CU to pay claims. The entire purpose of the premium trust system that is an integral part of the agent — insurer relationship and regime, is to make sure that the premium money gets into the hands of the insurer to pay claims. JIIG's unilateral withholding has so far deprived CU of some $2.4 million that ought to have been available for this purpose. Fortunately (it would seem) the unavailability of those funds did not prevent CU from honouring all of its policy obligations, but the result might not be the same for all insurers, depending upon their asset base or the size of the claims.

376 This was no accidental withholding nor one that was caused by financial setbacks or reversals on JIIG's part. Rather, this withholding was intentional self-help by a trustee to satisfy a claim or claims that have now been determined by the court to be largely unfounded. This trustee could have paid the funds over and taken its case to court (reserving its rights to do so, if it considered that to be necessary). Instead, it chose to retain the funds and to use them to finance its operations as it proceeded to set up its new business venture, acts that were entirely inconsistent with its trust obligations.

377 I am conscious of the oft-repeated admonition that awards of punitive damages should be rare: see, for example, the comments of McIntyre J. in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193 (S.C.C.) at p. 206. Having said that, I have concluded that this is one of those rare cases in which such an award is justified. Mr. Overgaard clearly preferred his and JIIG's interests over those of CU. He was prepared to disregard an established practice dating back to 1989 of regular and timely remittance of what he knew were premium moneys. In Mr. Overgaard's own words, one of the "main considerations" or "key factors" in his decision to withhold the premiums, was to "establish some negotiating leverage" with CU. In effect, JIIG and Mr. Overgaard decided to hold the premiums hostage. In my opinion, the law is clear that JIIG and Mr. Overgaard could not prefer their own interests and use withheld premiums to establish negotiating leverage to force the insurer to settle their disputes. A trustee cannot breach his or her trust to gain a bargaining advantage with a beneficiary. I find that their conduct in this regard is completely inconsistent with the standards to be expected of participants of their standing in the insurance industry and easily meets the test of being "sufficiently reprehensible" as to justify an award of punitive damages. Put another way, it was "so... high-handed that it offends the court's sense of decency."

378 Undoubtedly there are others in positions similar to JIIG and Mr. Overgaard, who have disputes or disagreements with the insurers whose policies they market and whose premiums they collect. The premium moneys are sacrosanct and must be treated in that fashion. People who intentionally choose to disregard their obligations in this regard should not only expect to be required to turn over the trust funds, but should also anticipate a penalty for their misconduct.

379 I order JIIG and Mr. Overgaard personally to pay punitive damages in the total sum of $50,000.00, for which amount those defendants shall be jointly and severally liable.

Summary of Conclusions

380 To summarize, my conclusions in relation to liability are as follows:

(a) JIIG is liable to pay to CU the sum of $4,409,629.29, calculated as follows:

(i) 1997 withholdings	$537,605.17
(ii) 1998 premium due	$2,620,338.39
(iii) less payment on account	($350,000.00)
(iv) subtotal	$2,807,943.56
(v) net recoveries due of $525,163.82 less ICMS fees of $398,931.68	$126,232.14
(vi) surplus overpayment	$1,425,453.59
(vii) punitive damages	$ 50,000.00
TOTAL	$4,409,629.59

(b) Insurance Claims Management Systems Inc. and ICMS Canada Inc. are jointly and severally liable together with JIIG to pay to CU the amount of $126,232.14 specified in (a)(v), above;

(c) Steven Overgaard is jointly and severally liable together with JIIG to pay to CU the sum of $2,459,011.88, comprised of net withholdings of $2,409,011.88 ((a)(iv) above, less ICMS fees of $398,931.68) and punitive damages of $50,000 ((a)(vii) above);

(d) the action is dismissed as against the defendants IIBI, MHI and John Ingle; and

(e) the counterclaims of the defendants JIIG and ICMS are dismissed.

381 The parties should make arrangements through my secretary to attend before me to make submissions regarding pre-judgment interest and costs.

Order accordingly.

14

2005 CarswellOnt 7191
Ontario Superior Court of Justice

Sherwood Dash Inc. v. Woodview Products Inc.

2005 CarswellOnt 7191, [2005] O.J. No. 5298, [2005] O.T.C. 1061, 144 A.C.W.S. (3d) 730

SHERWOOD DASH INC (Plaintiff) and WOODVIEW PRODUCTS INC., CUONG NGUYEN, ANDREW G. BURTON, SARA CASTANDEDA, LEONTIN TASCA, LEE R. BURTON, REYMOND B. FENOL and MAYNARY O'HALLORAN (Defendants)

Perell J.

Heard: November 30, 2005
Judgment: December 8, 2005
Docket: 05-CV-294820 PD2

Counsel: Scott Hutchison, Aaron Dantowitz for Plaintiff
Howard J. Wolsh for Defendants, Cuong Nguyen, Andrew G. Burton, Sara Castandeda, Leontin Tasca, Lee R. Burton, Reymond B. Fenol, Maynary O'Halloran

***Perell J.*:**

Introduction

1 In this action, the plaintiff, Sherwood Dash Inc. ("Sherwood"), seeks to enforce a non-competition covenant in an employment contract. On August 11, 2005, on an *ex parte* motion brought by Sherwood, Matlow, J. granted an interim interlocutory injunction against the defendants Cuong Nguyen and Lee R. Burton, restraining them from competing against Sherwood. Messrs. Nguyen and Burton are two of the eight defendants in this action, and Matlow, J.'s order granted other injunctive relief against all the defendants. It also included an *Anton Pillar* order.

2 On August 19, 2005, Cameron, J. extended and varied Matlow, J.'s order. On September 6, 2005, C. Campbell, J., however, suspended the injunction relief against Messers Nguyen and Burton "until further order of the court without prejudice to any party."

3 Sherwood now moves for an order reinstating the relief granted by Matlow, J. and suspended by C. Campbell, J. More particularly, Sherwood moves for an order reinstating and continuing until the earlier of the trial of this action or May, 1, 2007 the interim injunctive relief granted by para. 79 of Matlow, J.'s order.

4 In other words, Sherwood is seeking the following order:

> THIS COURT ORDERS that the Defendants CUONG NGUYEN AND LEE R. BURTON, jointly and severally, and any and all persons acting on behalf of or in conjunction with either of them, are hereby restrained until the earlier of the trial of this action or May, 1, 2007 from directly or indirectly, by any means whatsoever:
>
> > (a) engaging or participating in or becoming employed by or rendering advisory or other services in connection with any business actively competitive with the business being carried on by the Plaintiff or the companies for whom the Plaintiff provides personnel and services, including the defendant Woodview Products Inc.; or

(b) making any financial investment in any firm, cooperation or business enterprise competitive in any way with any of the businesses or activities of the Plaintiff and any of the companies to whom it provides personnel and services including the defendant Woodview Products Inc.

5 Counsel for Messrs. Nguyen and Burton argues that this relief should not be granted. There are three prongs to his argument. First, he argues that the injunctive relief should not be granted because there was material non-disclosure when Sherwood obtained the *ex parte* order. Second, he argues that the injunctive relief, an equitable remedy, should not be granted because Sherwood has "unclean hands." Third, he argues that on the merits, Sherwood has not passed the test for granting an interlocutory injunction.

6 I am persuaded by counsel for Sherwood that the first two prongs of the argument on behalf of the defendants are not sound. However, despite his very able argument, I am not satisfied that the elements of the test for an interlocutory injunction have been established. Accordingly, I dismiss this motion to reinstate para. 79 of Matlow, J.'s order.

7 What follows are my reasons for judgment. I will begin by a summary of the background facts. I will add additional facts when I come to discuss the three prongs of the argument made on behalf of Messrs. Nguyen and Burton.

The Background Facts

8 Sherwood is an Ontario corporation and carries on business as a designer, manufacturer, and distributor of products to accent automobile interiors. Its products are sold in North America and abroad. Most of its sales are in the "dash kit" business. There are two main technologies in this trade. One is the "flat dash" method, and the other is the "3d-Dash" or moulded dash method. Sherwood employs both technologies, but is a leader in the flat dash method.

9 The statement of claim alleges that the flat dash method is the product of many years of investment in research and development that has resulted in unique proprietary and confidential information. It is Sherwood's evidence, provided by Peter Cosentino, vice-president of operations, that the trade secrets and confidential information is critical to the survival and growth of Sherwood. He testifies, in particular, that there is specific wood stain information for each dash model that is a "recipe" for that product. He says that this information is a proprietary and a confidential trade secret. He indicates that certain processes and techniques are proprietary or trade secrets.

10 The defendant Woodview Products Inc. ("Woodview") is an Ontario corporation and is a major competitor of Sherwood. Woodview is more prominent for the use of the 3d-Dash method.

11 The defendents Cuong Nguyen, Andrew G. Burton, Sara Castandeda, Leontin Tasca, Lee R. Burton, Reymond B. Fenol and Maynary O'Halloran are now all former employees of Sherwood. In Sherwood's statement of claim, it is alleged that during the months between January and June 2005, the defendants "without justification or lawful excuse, and without reasonable notice, wrongfully left Sherwood's employ and commenced employment with Woodview."

12 It is alleged that all of the defendants hired by Woodview had intimate knowledge of Sherwood's flat dash method. This information came to Mr. Burton in his role as leader of the flat dash engineering team. Mr. Cosentino alleges that Mr. Burton was involved in and had intimate knowledge of all of Sherwood's present and proposed product lines, pricing, systems, and strategic plans.

13 The information came to Mr. Nguyen as part of his research and development assignments. Mr. Cosentino alleges that Mr. Nguyen acquired intimate knowledge of current and proposed research projects including new automated manufacturing processes in the development stage that would revolutionize the flat dash process. Mr. Cosentino also states that Mr. Nguyen had learned detailed information of Sherwood's stain processes and formulae used to match real wood car parts.

14 During their employment with Sherwood, both Mr. Nguyen, who began his employment in June 2004, and Mr. Burton, who began his employment in September 2004, signed a variety of agreements including an Employment Agreement.

15 In this motion for an interlocutory injunction, Sherwood seeks to enforce the non-competition clause in the Employment Agreements of Messrs. Nguyen and Burton respectively. The clauses are identical. The clause in Mr. Burton's agreement states:

> 6.(a) LEE R. BURTON agrees that during the entire term of their Agreement, and for a period of two (2) years thereafter, he will not directly or indirectly, engage or participate in or become employed by or render advisory services in connection with any business activity competitive with the business then being carried o by Sherwood Dash Inc. or companies for whom Sherwood Dash Inc. provides personnel and services, and he will not make any financial investment, directly or indirectly, in any firm, corporation or business enterprise competitive in any way with any of the businesses or activities of Sherwood Dash Inc. and any of the companies to whom it provides personnel and services, or attempts to cause any of its employees, or the employees it has placed with the companies for whom it provides services to leave their employment. . . . .

16 In May 2005, Messrs. Nguyen and Burton left their employment with Sherwood and became employees of Woodview. It is alleged that Messrs. Nguyen and Burton took specific confidential proprietary information with them. They admit that they took information. For example, a compact disk was found in Mr. Burton's car, and it contained hundreds of computer files with confidential information

17 Messrs. Nguyen and Burton offer, what I presume is meant to be an innocent explanation. In his affidavit, Mr. Nguyen deposes:

> Unfortunately, it is true that I did indeed copy some files off my computer while I was still located at the Plaintiff's premises. I had built up some experience in this area of work and in this industry and I simply wanted to have some precedent material and information to take with me in my future work, whether it was going to be with Woodview or any other company. No employee or representative of Woodview ever asked me to take this step nor did I ever in fact use any of this information when I went to Woodview. Additionally, I did much work at home, so I had this on my home computer as well.

18 Virtually the same paragraph appears in Mr. Burton's affidavit sworn on September 13, 2005.

19 It is submitted by Sherwood that Messrs. Nguyen and Burton, particularly Mr. Nguyen have used the confidential information that they took with them to benefit Woodview and that there is every reason to believe that this transfer of secret information will continue. Sherwood submits that it has met the heavy burden of showing that it has a strong *prima facie* case for an interlocutory injunction and that it has satisfied the other elements of the test for an interlocutory injunction.

20 As already noted, Messrs. Nguyen and Burton advance a three-pronged argument why an interlocutory injunction should not be granted.

Material Non-Disclosure as Grounds for Dismissing the Claim for an Interlocutory Injunction

21 I am persuaded that the first two prongs of Messrs. Nguyen and Burton's argument are unsound. In this section, I address their argument that Sherwood's claim for an interlocutory injunction should be dismissed because Sherwood failed to make full and fair disclosure when it moved *ex parte* before Matlow, J.

22 By way of overview, in my opinion, this argument fails for three reasons: (1) the argument depends upon relying on the affidavit evidence of Messrs. Nguyen and Burton, and I find their evidence to be unreliable; (2) there was no material non-disclosure; and (3) if there was material non-disclosure, then I would, nevertheless, exercise the court's discretion and proceed to hear the application for an interlocutory injunction on its merits.

23 I appreciate that this is an interlocutory motion and that I have not had a proper opportunity to judge the character and demeanour of Messrs. Nguyen and Burton; however, I am not prepared to rely on their affidavit evidence. I wish to make it clear that I am not making any final or binding decision about their credibility or reliability. They should and will have an opportunity to justify their words and conduct as this action proceeds. All I am saying is that for the purposes of this motion their affidavit evidence is unreliable. I will give five examples of why I will not rely on their evidence for the purposes of this motion. I could offer more examples, but these are sufficient to make my point.

24 The first example concerns Mr. Nguyen and the circumstances of his departure from Sherwood. In his affidavit, Mr. Cosentino states that Mr. Nguyen told him that he was resigning because he had been hired by a pharmaceutical company at a salary of over $60,000, plus benefits. The truth is that Mr. Nguyen had been hired by Woodview and that his salary was not near $60,000. In his affidavit, Mr. Nguyen explains his falsehood as follows:

> I only told Mr. Cosentino that I had been offered over $60,000 plus benefits because I did not want Mr. Cosentino to attempt to match the offer I had in fact received from Woodview which was less. I did not want to get into the uncomfortable situation of telling him that I would not come back even if he matched or beat the offer that was being provided by Woodview.

25 Here, we have what appears to me a shameless admission that Mr. Nguyen will lie when telling the truth is uncomfortable.

26 I will not fully relate it but there is a similar incident involving the departure of Mr. Burton that provides a second example.

27 The third example concerns Mr. Nguyen. As his explanation for why he left Sherwood's employment, he deposes as follows:

> The main reason that I left was the falsifying of documentation that I was required to do for Leonard Copetti. He would ask me to make up test results, write false reports and exaggerate on the time and material spent on each project for RD [research and development] tax credit claims and on IRAP [a government grant program] funding claims. I was also forced to write a falsified status report for Youth Employment Strategy grants that [Sherwood] got for me and other [Sherwood] employees. The majority of these reports were false because they did not state the exact task that these employees were performing at Sherwood. . . . I falsified these reports since I was scared of losing my job if I did not do the task. I was in a bad financial situation since I had just finished school and had numerous loans to pay off.
>
> I knew all the false reports would catch up to Sherwood and the longer I stayed the more I would be involved in these projects. I could not leave before the Woodview offer since I was unable to secure a job in my field that would cover all my bills.
>
> I also kept copies of these files since I am worried that one day Sherwood may be involved in some legal action for filing false documentation and I thought I better keep records for myself in case I was called in.

28 Here we have, what appears to me, an admission that Mr. Nguyen was a party to activities that he believed to be illegal, and an admission that he did not have the courage to question his employer whether what he was doing was proper. If a fraud was being committed by Sherwood, which is denied by it, then Mr. Nguyen was undoubtedly in a difficult position, but there is little here to convince the court about his version of the events.

29 The fourth example concerns both Mr. Nguyen and Mr. Burton. I have already noted above that both of them admit taking files and they justify taking this information as precedent material for future work, whether for Woodview or any other company. It appears to me that it simply begs the question of whether this information was theirs for the taking to assert that it was just precedent material. I am not saying that their taking was necessarily illegal, but it might be, and it seems to have escaped Nguyen and Burton that their conduct might have to meet a standard other than self-interest.

30 The fifth example concerns Mr. Burton. There is evidence that he wrote a congenial and grateful resignation letter that included thanks for the experience and knowledge gained at Sherwood. This letter may be compared with the evidence of animus in a series of e-mail messages with Ms. Judy He and Ms. Lisa Chen, former Sherwood employees, whom, Mr. Burton, at a minimum, encouraged to leave Sherwood and for whom he offered to help obtain jobs at Woodview. When Ms. He and Ms. Chen leave Sherwood, Mr. Burton sent them an e-mail message saying that it is "great news" and that Sherwood "deserves everything that they have coming to them, and more." In this e-mail correspondence, Mr. Burton says: "We have to make sure that it looks like you approached them for a job, and not the other way around. My lawyer made that very clear to me, and have to make sure that we keep things very hush hush." Mr. Burton later admitted that he had no such conversation with a lawyer.

31 It is at least problematic to rely on Mr. Burton's evidence. As I have already said, Messrs. Burton and Nguyen may be able to explain all this behaviour when they get into the witness box, but for the purposes of deciding this motion, I feel I cannot rely on their evidence about material non-disclosure by Sherwood.

32 Assuming I am wrong in not relying on their evidence, I turn to my second and third reasons for rejecting the first prong of their argument. To understand their argument and my rejection of it, it is necessary to describe the law about the effect of non-disclosure of material facts where a motion or application is made without notice.

33 Rule 39.01 (6) of the *Rules of Civil Procedure* states:

> Where a motion or application is made without notice, the moving party shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

34 On a motion made without notice, there must be frank and full disclosure of all material facts: *United States v. Yemec* (2005), 75 O.R. (3d) 52 (Ont. Div. Ct.); *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.); *Robert Half Canada Inc. v. Jeewan* (2004), 71 O.R. (3d) 650 (Ont. S.C.J.).

35 A party applying for an injunction without notice must fully set out in the material all relevant facts whether they are favourable or not. The moving party must state its own case fairly and must inform the court of any points of fact or law known to it that favour the other side *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.); *United States v. Yemec* (2005), 75 O.R. (3d) 52 (Ont. Div. Ct.); *B.G. Schickedanz (Peel) Inc. v. Salna* (1997), 14 C.P.C. (4th) 253 (Ont. Gen. Div.).

36 It is not sufficient to simply attach relevant documentary evidence as an exhibit to the applicant's supporting affidavit without revealing or highlighting the material facts: *L'Unita Development Corp. v. 505369 Ontario Ltd.* (2001), 44 R.P.R. (3d) 303 (Ont. S.C.J.); *830356 Ontario Inc. v. 156170 Canada Ltd.* (1995), 6 W.D.C.P. (2d) 159 (Ont. Gen. Div.); *Cimaroli v. Pugliese* (1987), 25 C.P.C. (2d) 10 (Ont. H.C.).

37 It is often fatal to the plaintiff being able to continue the injunction, if he or she has not disclosed all the facts in his or her knowledge material to the case: *United States v. Yemec* (2003), 67 O.R. (3d) 394 (Ont. S.C.J.), and the injunction may be set aside, notwithstanding that had full disclosure been made, the injunction would have been granted in the first instance: *Forestwood Co-operative Homes Inc. v. Pritz* (2002), 31 C.B.R. (4th) 243 (Ont. Div. Ct.); *Lynian Ltd. v. Dubois* (1990), 45 C.P.C. (2d) 231 (Ont. Gen. Div.); *Bardeau Ltd. v. Crown Food Services Equipment Ltd.* (1982), 38 O.R. (2d) 411 (Ont. H.C.).

38 However, if the undisclosed facts were not material or the nondisclosure was not intentional, the court has some discretion and may continue the order: *Brink's-Mat Ltd. v. Elcombe* (1987), [1988] 3 All E.R. 188 (Eng. C.A.). I agree with the approach of Farley, J. in *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 C.P.C. (4th) 300 (Ont. S.C.J. [Commercial List]), where he denied that the court has no discretion and is obliged to set aside an *ex parte* order if there was material non-disclosure. See: *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.); *Brink's-Mat Ltd. v. Elcombe* (1987), [1988] 3 All E.R. 188 (Eng. C.A.); *Behbehani v. Salem* (1987), [1989] 1 W.L.R. 723 (Eng. C.A.); *Dormeuil Frères S.A. v. Nicolian International (Textiles) Ltd.*, [1988] 3 All E.R. 197 (Eng. Ch. Div.).

39 In *Ontario Realty Corp.* , Farley, J. pointed out that given that defendants may allege non-disclosure because they have a hopeless case on the merits, it is important to keep in mind that the reason for the disclosure requirement is firstly to deprive the person who has not observed the rule of an advantage improperly obtained and secondly to act as a deterrent to ensure that persons who make *ex parte* applications realize that they have a duty of disclosure and that they appreciate the consequences if they fail in that duty.

40 Farley, J. also observed that it is important to keep in mind the practical realities that *ex parte* motions are usually brought in circumstances of urgency and that what is material or non-material may be uncertain and that at the hearing of the motion, it may not be possible to make any concluded finding of fact on the issue of non-disclosure and it may be a huge waste of the court's and the party's time to do so when the merits of the action remain to be determined. Most importantly, he added that

that a judge-made rule should not be allowed to become an instrument of injustice. In exercising its discretion, the court should consider the extent of the culpability with regard to the non-disclosure, and the importance and significance of the matters that were not disclosed to the court to the outcome.

41 Moving from these principles to the case at bar, in my view, the instances of alleged non-disclosure by Sherwood are either sufficiently answered by Mr. Cosentino in his affidavit or relate to matters that would not have been material in the circumstances of the motion before Matlow, J.

42 In his affidavit, Mr. Nguyen summarizes seven instances of alleged material non-disclosure. Three of the seven instances concern the circumstances that lead Mr. Cosentino to allege that Messrs Nguyen and Burton improperly took information when they left Sherwood. It seems to me that the materiality of the non-disclosure in these instances must be measured against the fact that Mr. Nguyen and Burton admit that they did take information. In my opinion, these three instances do not reveal non-disclosure of material information.

43 Two of the seven instances concern the circumstances of employee departures and whether Messrs. Nguyen and Burton were intentionally harming Sherwood by orchestrating other employees to depart. These instances also concern the collateral issue of Sherwood's employee retention rate. There are disputed issues here but in my opinion no material non-disclosure by Sherwood.

44 One of the instances of alleged non-disclosure is that Mr. Cosentino did not bring to the court's attention that the non-solicitation covenant was contained in an agreement that was signed without new consideration approximately eight months after Mr. Nguyen started working at Sherwood. Here, we start from the admitted position that Mr. Nguyen is a college graduate who signed a contract. He is quite entitled to challenge the validity of the contract, but I do not see any obligation on Sherwood to raise the issue of whether there was any consideration for the non-solicitation covenant at the hearing before Matlow, J.

45 A party is obliged to take a fair position but is not obliged to refute is own case. It remains an adversary system, and while the party moving without notice must be scrupulously fair to the missing opponent, the moving party is not obliged to be unfair to its own case.

46 One of the instances of alleged non-disclosure concerns the importance of Mr. Nguyen's work matching stains and whether or not it was a trade secret or nothing special. This again is a disputed issue in which Sherwood was entitled to assert its own position, and it is not a matter of material non-disclosure.

47 In addition to these seven instances of alleged non-disclosure, Mr. Nguyen accuses Mr. Cosentino of misleading the court about Mr. Nguyen's role with Sherwood. Mr. Nguyen states:

> Mr. Cosentino, in his affidavit, not only exaggerates tremendously my importance in the company but also tremendously exaggerates the confidential nature of the skills and information that I possess. I simply helped figure out what kind of stains would work on trim in cars. This is not much different from a painter mixing paints. Anybody can go to Chemcraft or a company like Chemcraft, to purchase various stains and then attempt to match them, as closely as possible, to the stains on the dashboard wood trim on the various automobiles. This does not require a technical engineering degree.

48 I do not regard this instance as a matter of non-disclosure. It falls into the category of an issue that the parties may be expected to contest and that the moving party may fairly state its own position. Thus, I conclude that there was no material non-disclosure by Sherwood.

49 I can be very brief about the third reason for rejecting Messrs. Nguyen and Burton's argument. In my opinion, the immediate case falls within the authority of. *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* , *supra*, and if there was material non-disclosure, then I should nevertheless exercise the court's discretion and proceed to hear the application on its merits. Ironically, when I finally get to the merits, Messrs. Nguyen and Burton will succeed in resisting the imposition of an interlocutory injunction.

The "Clean Hands" Principle as Grounds for Dismissing the Claim for an Interlocutory Injunction

50 I can be relatively brief in rejecting the second prong of Messrs. Nguyen and Burtons' argument, which is that the "clean hands" principle is grounds for dismissing the claim for an interlocutory injunction. I reject this argument for two reasons. First, this argument depends, once again, on relying on the evidence of Messrs. Nguyen and Burton, and for the reasons already stated, I am not prepared to do that. Second, the clean hands principle does not apply to the circumstances of this case.

51 An injunction is an equitable remedy and it is subject to the principles that govern the grant of equitable decrees and orders. One of those principles is the maxim that "one who comes to equity with clean hands."

52 As commentators and judges have noted, the metaphor that a claimant for equitable relief must have clean hands must be put into context. Judges of the courts of equity do not deny relief because the claimant is a villain or wrongdoer; rather, the judges deny relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the court. In *Duchess of Argyll v. Duke of Argyll* (1964), [1967] Ch. 302 (Eng. Ch. Div.), Ungoed-Thomas, J. described the principle nicely at pp. 331-2, when he said: "A person coming to Equity for relief . . . must come with clean hands; but the cleanliness required is to be judged in relation to the relief sought."

53 In *Toronto (City) v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.), in describing the clean hands principle Schroeder, J.A. stated at pp. 699-70:

> The misconduct charged against the plaintiff as ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of *Jones v. Lenthal* (1669), 1 Chan. Cas. 154, 22 E.R. 739: ". . . that the iniquity must be done to the defendant himself."

54 In the immediate case, the alleged unclean hands of Sherwood are its alleged incidents of non-disclosure, which I have already dealt with, and the allegation that it filed falsified research development grant applications. Although he would have it that he was forced to do so, I note the irony of Mr. Nguyen relying on this particular misdeed when he was a party to it.

55 I also note that Sherwood denies any allegation of wrongdoing but I am not in a position to decide the issue on this motion.

56 What I can decide is whether the alleged wrongdoing taints the enforcement of a non-competition clause or whether the alleged wrongdoing is a wrong done to Mr. Nguyen or Mr. Burton. I conclude neither to be the case. Therefore, I conclude that the the "clean hands" doctrine does not apply and that I may consider the claim for an interlocutory injunction on the merits.

The Claim for an Interlocutory Injunction on the Merits

57 The judgment of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) is regarded as the leading contemporary authority about the appropriate test to be applied by a court in deciding whether to grant an interlocutory injunction. Under the *R.J.R. MacDonald* test, the court considers a three-factor test: (1) whether the plaintiff has presented a serious issued to be tried or in a narrow band of cases a strong *prima facie* case; (2) whether the plaintiff would suffer irreparable harm if the remedies for the defendant's misconduct were left to be awarded at trial; and (3) where does the balance of convenience or inconvenience lie in the granting or the refusing to grant an interlocutory injunction.

58 In the three-factor test for an interlocutory injunction, the strong *prima facie* test standard is the measure used for determining whether it is appropriate to enforce a restrictive covenant in an employment context and thus interfere with an individual's cherished ability to make a living and to use his or her knowledge and skills obtained during employment: *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 4 O.R. (3d) 191 (Ont. Gen. Div.); *Jet Print Inc. v. Cohen*, [1999] O.J. No. 2864 (Ont. S.C.J.); *Creditel of Canada Ltd. v. Faultless* (1977), 81 D.L.R. (3d) 567 (Ont. H.C.); *Cantol Ltd. v. Brodi Chemicals Ltd.* (1978), 94 D.L.R. (3d) 265 (Ont. H.C.); *Mercury Marine Ltd. v. Dillon* (1986), 56 O.R. (2d) 266 (Ont. H.C.); *W.R. Grace & Co. v. Sare* (1980), 28 O.R. (2d) 612 (Ont. H.C.); *Kohler Canada Co. v. Porter*, [2002] O.J. No. 2418 (Ont. S.C.J.); *ADGA Systems International Ltd. v. Valcom Ltd.* (1992), 40 C.P.R. (3d) 395 (Ont. Gen. Div.).

59 Thus, in the immediate case, Sherwood must show that it has a strong *prima facie* case to enforce the non-competition clause in the Employment Agreement with Messrs. Burton and Nguyen. This is no mean task because of the law associated with contracts in restraint of trade.

60 A contract in restraint of trade is one in which a party to a contract agrees to restrict his or her liberty in the future to freely carry on trade with other persons not parties to the contract: *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (Ont. C.A.) at p. 138-9; *Esso Petroleum Co. v. Harper's Garage (Stourport) Ltd.* (1967), [1968] A.C. 269 (U.K. H.L.) at p. 317. All restraints of trade are contrary to public policy and are *prima facie* void unless they can be justified as being reasonable with respect to the interests of the parties and the public: *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535 (U.K. H.L.) at p. 565; *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916 (S.C.C.).

61 A four-part inquiry is required to determine if a contract is in restraint of trade: *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 40 O.R. (2d) 219 (Ont. C.A.) The questions are: (1) Is the covenant in restraint of trade? (2) Is the restraint against public policy or is it one of several exceptional cases? (3) Is the restraint justifiable as reasonable between the parties? and (4) Is the restraint justifiable as reasonable with respect to the interests of the public. The test of reasonableness as between the parties is that the restrictive covenant not go beyond what is adequate to protect the interest of the party seeking to uphold the covenant: *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (U.K. H.L.).

62 The onus is on the party seeking to enforce the contract to establish that it is in the interests of the parties and the onus for establishing that it is not reasonable in the public interest is on the party seeking to oppose enforcement; *Stephens v. Gulf Oil Canada Ltd. ,supra*; *Tank Lining Corp. v. Dunlop Industries Ltd. , supra*.

63 In *Lyons v. Multari* (2000), 50 O.R. (3d) 526 (Ont. C.A.), leave to appeal to the S.C.C. refused [2000] S.C.C.A. No. 567 (S.C.C.), the Court of Appeal held that the general rule is that non-competition clauses are void and will only be enforced in exceptional cases when the tests established in the leading case of *Elsley v. J.G. Collins Insurance Ltd.*, *supra*, were satisfied.

64 Dickson, J., as he then was, in the *Elsley* case accepted that there were occasions where a restrictive covenant, even a non-competition clause in an employment contract, could be justified as reasonable between the parties and with respect to the interests of the public. He recognized that while there was a public policy against the restraint of trade, there was also a public policy that parties should be free to contract.

65 In *Elsley* , Dickson, J. identified three factors that were relevant to the reasonableness of a restraint in an employment context: (1) whether the employer has a proprietary interest entitled to protection; (2) whether the temporal or spatial features of the clause are too broad; and (3) whether the covenant is unenforceable as being against competition generally and not limited to proscribing solicitation of clients of the former employer.

66 Having regard to the three factors identified in the *Elsley* case, Sherwood has a reasonably strong argument that it has a proprietary interest entitled to protection. This is not a case where the employer is mainly trying to protect its trade connection with customers. This is a case where it is alleged that the departing employees took trade secrets and confidential information with them. The immediate case is about protecting an employer's product and intellectual property. In *Elsley* , Dickson, J. stated at p. 924:

> Although blanket restraints on freedom to complete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information, and trade connections of the employer.

67 However, Sherwood has a weak case that the temporal and spatial features of the restrictive covenant clause are reasonable. The covenant must not be wider than reasonably required in order to afford adequate protection for the proprietary interest entitled to protection. That the covenant could have been drafted in narrower terms will not save it, because the court will examine only the agreement actually made: *Elsley v. J.G. Collins Insurance Ltd.*, *supra* at pp. 925-6; *Mason v. Provident Clothing & Supply Co.*, [1913] A.C. 724 (U.K. H.L.) at p. 732; *Maguire v. Northland Drug Co.*, [1935] 3 D.L.R. 521 (S.C.C.).

68 The spatial feature of the restrictive covenant is particularly problematic. There is no spatial limitation, and Messrs. Nguyen and Burton are essentially disqualified from working in a field in which they have acquired skills and knowledge. The information and training provided by an employer to an employee that do not involve trade secrets are beyond the reach of a restrictive covenant: *Maguire v. Northland Drug* , *supra*; *Sir W.C. Leng & Co. v. Andrews* (1908), [1909] 1 Ch. 763 (Eng. C.A.). In my view, the non-competition clause in the immediate case goes too far in protecting the proprietary interests of Sherwood and is not reasonable as between the parties nor is it reasonable in terms of the public interest.

69 Further, as a solution, the non-competition clause in this case extends beyond the actual problem of the misappropriating of confidential information. Put somewhat differently, it is not that the former employee is competing, it is how the former employee competes. By absolutely foreclosing employment for any competitor anywhere, the covenant in this case precludes the employee from using acquired skills or knowledge that do not encroach on confidential information or the employer's proprietary interests. It is arguable in the immediate case that the restrictive covenant goes too far; colloquially speaking, it is "overkill."

70 Thus, I conclude that Sherwood's claim for an interlocutory injunction does not pass the first factor of the *R.J.R. MacDonald* test. I need not go on to consider irreparable harm or the balance of convenience, save to note that Sherwood would confront difficulties about irreparable harm and balance of convenience given that it would appear that some of the harm caused by the departures of Messrs. Nguyen and Burton would at this juncture be better remedied by an award of damages.

Conclusion

71 It follows that this motion should be dismissed. As for costs, in my view, the costs of this motion should be to the successful party in the cause but if the parties disagree, then they may make written submissions to me within 10 days after the release of these reasons for decision.

Motion dismissed.

15

2009 CarswellOnt 450
Ontario Superior Court of Justice

Green v. Mirtech International Security Inc.

2009 CarswellOnt 450, [2009] O.J. No. 385, 174 A.C.W.S. (3d) 1011, 49 E.T.R. (3d) 94

Doreen Green (Plaintiff) v. Mirtech International Security Inc., Marvin Miller, Robert Miller and Daniel Miller (Defendants)

Belobaba J.

Heard: January 22, 2009
Judgment: January 30, 2009
Docket: CV-08-361526

Counsel: Peter Danson for Plaintiff / Moving Party
Harvey Dorsey for Defendants / Responding Parties

***Belobaba J.*:**

1 The plaintiff seeks a pre-trial determination of the following question of law: whether the defence of legal or equitable set-off is available to the defendants. If the set-off defence is not available, then the plaintiff asks that the set-off pleading be struck from the statement of defence.

Background facts

2 The plaintiff, Doreen Green, is the 62 year-old widow of the late Stan Green, one of the founders and shareholders of the defendant Mirtech International Security Inc. Mirtech is a security company specializing in card access control, CCTV systems, telephone entry and lighting control systems and security consulting. Until his recent death, Stan Green was Mirtech's president.

3 The defendants, Marvin Miller and Robert Miller are also founders and shareholders of Mirtech. The defendant, Daniel Miller, is an investor.

4 In 1998, the defendants and Stan Green entered into an Agreement which provided that in the event of the death of any of the founders, the widow of the deceased founder would be placed on Mirtech's payroll of as a consultant at a salary as described in Schedule A of the Agreement. Schedule A of the Agreement provided, inter alia, that the widow's compensation would be $120,000 in the first year, $90,000 in the second year and $75,000 thereafter.

5 Mr. Green passed away unexpectedly on March 6, 2008 at the age of 64.

6 The company advised Mrs. Green that she would not be receiving widow's compensation under the Agreement because Mr. Green had allegedly misappropriated more than $129,000 in disability benefits while drawing his full salary and had also converted some $60,000 to his own use. Given the company's refusal, Mrs. Green commenced this action.

7 In their statement of defence, the defendants say that that the losses caused by Mr. Green financial misconduct should be set off against any money that may be owing to Mrs. Green under the Agreement. The defendants also raise a number of other defences relating to the validity and voidability of the Agreement itself and its overall unenforceability by the plaintiff as a third-party beneficiary.

Analysis

8 Rule 21.01 of the *Rules of Civil Procedure* provides that:

> (1) A party may move before a judge,
>
> > (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
> >
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

9 I agree with counsel for the defendant that a legal ruling regarding the availability of a set-off defence on the facts of this case will not shorten the trial substantially or result in a substantial costs saving. The trial will still proceed to determine the validity of the other defences noted above. Nonetheless, the resolution of the set-off question will definitely "dispose of part the action." The motion brought by the plaintiff therefore falls within the scope of Rule 21.01(1) (a) and, accordingly, I will proceed to determine the question of law.

10 In my view, for the reasons set out below, a set-off defence is not available on the facts of this case, whether it be legal set-off or equitable set-off. I will consider each of these in turn.

Legal Set-Off

11 Section 111 of the *Courts of Justice Act* provides the statutory framework for legal set-off. Subsections (1) and (2) provide as follows:

> (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.
>
> (2) Mutual debts may be set off against each other even if they are of a different nature.

12 The case law is clear that set-off at law requires at least two things: one, that both obligations be liquidated debts or money demands which can be ascertained with certainty; and two, that both debts constitute mutual cross-obligations (as between the parties). [1] Set-off at law is not available in response to a claim which sounds in damages. [2]

13 The plaintiff's claim is for a mandatory injunction, specific performance and damages. The plaintiff is seeking to enforce what she says is a contractual right and recover damages arising from the defendants' alleged breach of this contractual right. It is not a claim with respect to a debt. Moreover, the matters in dispute between the parties do not involve mutual cross-obligations as between Mirtech and the plaintiff.

14 I therefore agree with counsel for the plaintiff that legal set-off is not available to the defendants in the circumstances of this case.

Equitable Set-Off

15 Unlike legal set-off, the defence of equitable set-off does not require that the claims between the parties be debts or money demands that can be ascertained with certainty. Nor is there a need for strict mutuality. [3]

16 Although the requirement of mutuality is relaxed for equitable set-off, there must still be a close connection between the claims. The connection must be sufficiently close to warrant an exercise of the equitable jurisdiction of the court. And, the remedy must not result in any form of inequity. [4]

17 Equitable set-off arises where the is a relationship between the respective claims such that the claim of the defendant has been brought about by, or is otherwise closely bound up with, the rights that are relied upon by the plaintiff. It is said that the opposing claims must flow from the same transaction or relationship between the parties. If such is the case, there is the final requirement that it would be unconscionable to allow the plaintiff to proceed without permitting a set-off. [5]

18 The Court of Appeal for Ontario recently endorsed a test that was first enunciated by Lord Denning and later cited with approval by Madam Justice Wilson in *Telford v. Holt*:

> We have to ask ourselves: what should we do now as to ensure fair dealing between the parties? ... This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim. [6] [Emphasis added by Court of Appeal.]

19 This is not a case where the cross-claims arise out of the "same transaction:" Mrs. Green is suing on a "widow's compensation" agreement that is triggered following the death of one of the three founders; the company is claiming for losses allegedly caused by the founder's corporate misconduct while he was alive. By no stretch of the imagination can these claims be characterized as arising out of the "same transaction." This is also not a case where the cross-claim for the losses allegedly sustained by the company are "closely connected" to the widow's compensation agreement. These are two different matters involving two different parties. And finally, the defendants have not shown that it would be "manifestly unjust" to allow Mrs. Green to enforce the widow's compensation agreement without taking into account the company's claims against Mr. Green (or, more accurately, against Mr. Green's estate).

20 It is trite law that only the estate of a deceased can be liable for the debts and obligations of the deceased. As a practical matter, an estate beneficiary never receives any benefit from the estate unless and until all of the deceased's debts and liabilities have been paid out by the estate. As such, if Mrs. Green was a beneficiary of her husband's estate, she would not be liable for the estate's debts or obligations. [7]

21 In any event, it appears that there were no assets in Mr. Green's estate and no trustee was appointed. Thus, for all practical purposes, there was no estate and no estate beneficiaries. Even if it were otherwise, it would not be manifestly unjust to allow Mrs. Green to enforce her claim based on the widow's compensation agreement without regard to the company's claim against Mr. Green's estate.

22 In sum (tracking the language used in the case law) the defendants' set-off claims were not brought about by the plaintiff's claim and are not so closely bound up with the plaintiff's claim that it would be unconscionable to permit the plaintiff's claim, if proven, to succeed. [8]

23 The question of law presented on this motion is therefore answered as follows: the defences of legal and equitable set-off are not available to the defendants on the facts of this case.

24 Those portions of the statement of defence and rejoinder that plead set-off should be struck. The precise paragraphs have not been identified in the Notice of Motion but it is not difficult for me to do so — paragraphs 11, 12 and 13 are struck from the statement of defence and paragraphs 4 and 6 from the rejoinder.

25 The moving party is entitled to costs on a partial indemnity basis. The plaintiff asks for some $10,000 but would be content with an award of $8000. The defendants submit that a costs award in the range of $2500 to $3000 is more reasonable. I have reviewed the plaintiff's costs outline and the defendants' costs submissions and I have considered the factors set out in Rule 57.01(1). My primary obligation as a judge in fixing costs is to consider the factors set out in rule 57.01(1) and fix an amount that is fair and reasonable to the unsuccessful party in the particular proceeding rather than an amount fixed by the actual costs

incurred by the successful litigant: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.) at para. 26. In my view, it is fair and reasonable to award $4500 in costs, all-inclusive, payable by the defendants within 30 days. [9]

26 Order to go accordingly.

Order accordingly.

Footnotes

1 *Agway Metals Inc. v. Dufferin Roofing Ltd.* (1991), 46 C.P.C. (2d) 133 (Ont. Gen. Div.) at p. 4; *Marketing Products Inc. v. 1254719 Ontario Ltd.* (2000), 11 C.P.C. (5th) 201 (Ont. C.A.) at paras. 18-22; *Pierce v. Canada Trustco Mortgage Co.* (2005), 254 D.L.R. (4th) 79 (Ont. C.A.) at para. 38; *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.) at para. 25.

2 *Telford v. Holt*, *supra*, at para. 25.

3 *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 26; *Pierce v. Canada Trustco Mortgage Co.*, *supra*, at para. 39; *Canada Trustco Mortgage Co. v. Sugarman* (1999), 179 D.L.R. (4th) 548 (Ont. C.A.) at para. 18; *Telford v. Holt*, *supra*, at para. 26.

4 *Canada Trustco Mortgage Co. v. Sugarman*, *supra*, at para. 18.

5 *Agway Metals Inc. v. Dufferin Roofing Ltd.*, *supra*, at p. 5 (Q.L.).

6 *Algoma Steel Inc. v. Union Gas Ltd.*, *supra*, at para. 29; *Telford v. Holt*, *supra*, at para. 36.

7 Rules 74 and 75, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

8 *Agway Metals Inc. v. Dufferin Roofing Ltd.*, *supra* at p 5 (Q.L); *Cuddy Food Products v. Puddy Bros. Ltd.* [2002 CarswellOnt 2722 (Ont. S.C.J.)], *supra*, para. 16; *Inveresk PLC v. Precision Fine Papers Inc.* [2008 CarswellOnt 3466 (Ont. S.C.J.)], CanLII 28054 at para. 32; and *Algoma Steel Inc. v. Union Gas Ltd.*, *supra*, at para. 30.

9 My calculation was guided in part by the following allocations: research $900; motion preparation $600; drafting factum $1500; review responding material $100; counsel fee $750, preparation of costs outline $125; disbursements $300; plus GST — rounded off to $4500.

16

1999 CarswellOnt 2596
Ontario Court of Justice, General Division

Banton v. CIBC Trust Corp.

1999 CarswellOnt 2596, 182 D.L.R. (4th) 486, 30 E.T.R. (2d) 138

Muna Banton, Applicant and CIBC Trust Corporation, Victor Leonard Banton, George Raymond Banton, Joan Madeline McFater, Patricia Kathleen Heaps, and Sheila Lynn McKenzie, Respondents

Cullity J.

Heard: July 28, 1999
Judgment: August 6, 1999 *
Docket: 01-1539-96, 93566/98

Counsel: *Michael S. Deverett*, for Applicant.
Felice C. Kirsh, for Respondent, CIBC Trust Corporation.
Joel E. Shaw, for Respondents, Victor, George, Joan, Patricia and Sheila Banton.
George O. Frank, for Devry, Smith and Frank, Barristers and Solicitors, claiming to be a creditor of the Estate of George Banton, Deceased.

***Cullity J.*:**

1 In this motion, Muna Banton seeks orders with respect to matters that will arise in implementing the judgment of the Court released on August 25, 1998.

2 The motion was first heard on June 30, 1999, at which time I directed that the order of Sheard J., dated June 6, 1996, appointing CIBC Trust Corporation as custodian of the assets of the Residence Trust and the estate of the late George Banton should be continued pending resolution of the outstanding issues. These issues are concerned primarily with the apportionment of such assets between the trust and the estate, the alleged liability of CIBC Trust Corporation to reimburse the estate for amounts it has disbursed and its entitlement to compensation.

3 At the hearing on June 30, I also directed that a threshold issue affecting the question of apportionment - whether all or any part of the living expenses, debts and other liabilities incurred by George Banton during his lifetime should be paid out of the assets of the Residence Trust - should be dealt with before the other questions were determined. Submissions were made on this issue on July 28, 1999. The principal unpaid creditors of the estate, the Public Guardian and Trustee and the law firm of Devry, Smith & Frank were served with the notice of motion and counsel for the law firm attended and participated in the hearing.

4 At the hearing, counsel for Muna Banton provided me with a list of expenses incurred by, or on behalf of, Mr. Banton and by CIBC Trust Corporation and the Public Guardian and Trustee. These expenses, which amounted to $241,699.82 should, he submitted, be borne by the Residence Trust. Counsel for the sons and daughters of Mr. Banton - including George Banton Jr. and Victor Banton in their capacities as trustees of the trust - objected to these submissions on the ground that it had been agreed between counsel, subject to the approval of the Court, that an amount of $205,342.63 was to be allocated to the residence trust and paid to its trustees without any further deductions. This agreement, he claimed, was part of a compromise settlement reached between his clients and Muna Banton with respect to the costs of the trial.

5 While I accept, without reservation, counsel's statement of his understanding of the intended effect of the joint written submission, dated September 4, 1998, that was filed at the hearing of the submissions on costs, the joint submission did not

receive the Court's approval. While I gave weight to the submissions of counsel with respect to costs, I did not accept them in their entirety and the question of the apportionment of the funds held by CIBC Trust Corporation was expressly deferred for the purpose of hearing further submissions. One of the reasons why this was done was that I had been informed that there were potential creditors of the estate and that Devry, Smith & Frank, in particular, had asserted that they intended to claim over against the assets of the Residence Trust if there were insufficient funds in the estate to satisfy their account for services rendered to Mr. Banton during his lifetime. There was also the possibility that there would be claims by Muna Banton and by other persons claiming to be creditors of Mr. Banton. In determining the question of apportionment - in the particular circumstances of this case - the interests of such persons cannot be ignored.

6 In the interest of achieving the most expeditious and economical resolution of the outstanding issues, I agreed to remain seised of the remaining questions - including the division of assets - and this was incorporated in the judgment dated August 25, 1998. I was notified by counsel that the Public Guardian and Trustee and Devry, Smith & Frank had no objection to this. In consequence, I cannot accept that the questions now raised by counsel for Muna Banton were conclusively determined by an agreement between counsel that has received the approval of the Court.

7 The evidence establishes that the assets of the trust improperly delivered to Mr. Banton by its trustees in 1993 had a value of $205,342.63. Whether this is the amount the trustees are entitled to recover will depend upon whether amounts were, or should have been, properly paid out of the assets of the trust for Mr. Banton's, and Lily Banton's, maintenance and support during Mr. Banton's lifetime and whether interest or other accretions should be added. These questions fall to be determined on this motion. To a very large extent they depend upon the interpretation of the "Acknowledgement and Agreement", dated January 16, 1992, that contains the terms of the Residence Trust. In that brief document, Mr. Banton directed a transfer of his home at 23 Coral Cove Crescent, North York to his two sons and they acknowledged and confirmed:

> 1. that they agree to utilise the subject property or the proceeds of the sale of the subject property for the maintenance and support of George and Lily Banton in the event the same is required.
>
> 2. that they hold the property or in the alternative, the proceeds from the sale of such property, in trust for the five children of George Banton after the death of George and Lily Banton.

8 It is to be noted, in the first place, that the terms of the trust do not expressly refer to the income from the investment of the proceeds of sale. The direction to "utilise" the residence or the proceeds of its sale if required for the support of Mr. Banton and Lily Banton does, however, indicate sufficiently, in my view, an intention that income as well as capital should be applied for the specified purposes. Moreover, I believe, both on the basis of the most reasonable interpretation and the authority of *Watson v. Conant*, [1964] S.C.R. 312 (S.C.C.), that undistributed surplus income at Mr. Banton's death would accrue to the capital of the trust and be payable to the capital beneficiaries.

9 Paragraph 1 of the Acknowledgement and Agreement did not authorize the trustees simply to hand over the trust property to Mr. Banton, or Lily Banton, on demand. It was to be used only for "maintenance and support" - terms that traditionally have been understood to impose limitations on the powers of trustees to make distributions - and only "in the event that the same is required". These latter words attach a condition precedent to the authority of the trustees to apply the funds for the maintenance and support of Mr. and Mrs Banton. The application would not be authorised unless it was "required". Although, in everyday speech, to say that something is required may mean merely that it is demanded, the alternative meaning - that the thing is needed - is, I believe, the more natural meaning in this document. The use of the words "as required", without more, as a condition precedent in a document drafted by a solicitor - instead of "when demanded" or "at their demand" would be unusual and, given Lily's mental condition at the date the document was executed, it would not be a reasonable intention to attribute to Mr. Banton.

10 In consequence, in my judgment, the property of the Residence Trust was to be applied to the maintenance and support of Mr. Banton and his then spouse only if it was needed for these purposes. It would not be required to the extent that their other assets were sufficient but, for greater certainty, "required" means "reasonably required".

11 It must follow that, to the extent that George and Lily Banton were, or could have been, supported out of their separate property - by which I mean their property outside the trust - it would not have been proper for the trustees to apply the trust funds, or the income therefrom, for their maintenance and support. It also follows that, to the extent that their separate property was sufficient to provide for their maintenance and support, there can be no question of reimbursing George Banton's estate, or Lily's estate, out of the trust funds for the amounts applied for such purposes. There is undisputed evidence that Lily was maintained at Meadowcroft during the last years of her life out of her own funds and it is clear that Mr. Banton had sufficient funds outside the trust to pay the expenses of his residence, upkeep and care at Lifestyles and Village Park and the household and other living expenses while he was residing in Muna's apartment. The same is the case with respect to expenses paid on his behalf by the Public Guardian and Trustee. In consequence, none of these amounts can be said to have been required to be paid from the Residence Trust. In his lifetime, George Banton could not have insisted that this be done and his personal representatives, and the beneficiaries of his estate, are in no better position.

12 It is also, I believe, abundantly clear that there can be no liability of the trustees to pay, or reimburse the estate, for debts and other liabilities that arose after Mr. Banton's death when the obligation to utilise the trust funds for his maintenance and support came to an end.

13 The above conclusions dispose of many of the specific items for which Muna Banton claims that the estate should be reimbursed. The remaining items relate to a claim by the Public Guardian and Trustee for unpaid legal fees incurred in George Banton's lifetime, the outstanding account rendered by Devry, Smith & Frank for their services to Mr. Banton, a claim for income taxes paid by CIBC Trust Corporation after Mr. Banton's death and expenses incurred, and compensation claimed, by CIBC Trust Corporation with respect to the establishment, administration and the challenge to the validity of the 1994 Trust. There is, also, a claim for interest in an amount of $26,229.75 that can have no merit unless the trust has an obligation to reimburse the estate for amounts paid on behalf of George and Lily Banton in the past.

14 It follows from what I have already said that there will be no obligation of the trustees to reimburse the estate for, or to pay, these remaining amounts unless each of two conditions is satisfied:

(1) the liabilities must have related to the maintenance and support of George Banton in his lifetime; and

(2) there must have been insufficient funds in the estate at the time of Mr. Banton's death - after deduction of the costs of the trial that I have ordered to be a first charge thereon - to discharge them.

Fees of Public Guardian and Trustee

15 To the extent that the unpaid fees of the Public Guardian and Trustee were for services rendered in the guardianship proceedings, they can, in my opinion, be considered, *prima facie*, to relate to Mr. Banton's protection and, in a sufficient sense, to his support. Accordingly, subject to assessment or an agreement among the parties and the Public Guardian and Trustee, they are payable out of the Residence Trust if, and to the extent, that the assets of the estate are insufficient.

Account of Devry, Smith & Frank

16 Although I have been critical of some aspects of the manner in which one of the solicitors employed by Devry, Smith & Frank endeavoured to assert and protect Mr. Banton's interests, and while I have accepted Dr Chung's evidence that Mr. Banton lacked capacity to manage property, it does not follow that the law firm had no right to recover their fees and disbursements for their services to him. I do not question that the solicitors involved honestly believed that Mr. Banton had capacity with respect to his property and for the purpose of giving them instructions. In my reasons for judgment I expressed the opinion that solicitors who are satisfied that an individual lacks capacity to give instructions should not accept the retainer unless this has been arranged with the Public Guardian and Trustee pursuant to a direction of the Court given under the authority conferred by subsection 3(1) of the *Substitute Decisions Act*. The correctness of this view has been challenged by Professor A.H. Oosterhoff in a paper delivered at a conference conducted by the Canadian Bar Association earlier this year. Professor Oosterhoff's opinions

on the subject are worthy of the utmost respect and it is not necessary now to decide whether the additional safeguard provided by the participation of the Public Guardian and Trustee is, as I suggested, required in such a case.

17 While it may be prudent for solicitors who have doubts with respect to an individual's capacity to seek an order directing the intervention of the Public Guardian and Trustee, I do not think this should be considered to be necessary merely because doubt exists and there is a triable issue. Nor do I believe that suggestions in some of the older cases that a solicitor should not take instructions for a will unless satisfied of the client's testamentary capacity should be regarded now as defining the professional responsibility of solicitors in doubtful cases. However experienced the solicitor, the ultimate decision is for the Court to make and, quite apart from recent developments in solicitor's liability for negligence in matters relating to wills and succession, it would, in my opinion, be unreasonable and unfair, both to solicitors and testators, to require the former to take the responsibility of determining whether a will should be prepared. Unless a solicitor is satisfied that the client lacks testamentary capacity, the will should be prepared and a solicitor's responsibility should be defined in terms of the questions required to be asked for the purpose of testing capacity, the making and retention of detailed notes with respect to these and the responses of the client and a readiness to testify with respect to such matters and the conclusions drawn by the solicitor.

18 On the facts of this case, I see no reason to find fault with the solicitors with respect to their acceptance of the retainer. Their knowledge of the facts subsequently proven at the trial was limited and it is clear on the evidence - including the conflicting medical opinions - that this was not a case in which a conclusion that George Banton lacked capacity was so obvious that the solicitors should have declined to act. On the contrary, it is evident that this resilient old man was able, for short periods, to convey a superficial appearance of rationality and cognitive awareness.

19 In these circumstances, I believe the law firm was entitled to act for Mr. Banton and was entitled to be paid for its services: see *Wilson v. R.*, [1938] 3 D.L.R. 433 (S.C.C.), at p.436 *per* Duff C.J.; *Hart v. O'Connor*, [1985] A.C. 1000 (New Zealand P.C.).

20 Whether the law firm would have been entitled to claim against the Residence Trust in the event that George Banton's other assets were insufficient to enable him to pay their account is a different question. If such a claim had been made in George Banton's lifetime, the trustee could not properly have acceded to it unless the services rendered by the law firm were to be considered as required for his maintenance and support. I do not think this would have been the case. The question is not whether the law firm honestly or, given their limited knowledge of the facts, reasonably, felt that their services were required for his protection. The question is whether such services were in fact required and, on the basis of my findings, this was not so. George Banton was being manipulated by Mona Banton in her own interests throughout the period of the law firm's retainer and, unknown to the firm, it was assisting her to do this. In the circumstances, I do not believe it can be said that its services were required for George Banton's support in any meaningful sense. Nothing that the firm was retained to do was, in my judgment, in the interests of Mr. Banton and, in consequence, notwithstanding the broad meaning that I believe should be given to the concept of support, their services were not required for this purpose.

21 Accordingly, while the account rendered by Devry, Smith & Frank represents a valid claim against the estate, subject to assessment if required, it is not a claim for which recourse against the assets of the Residence Trust is available if there are insufficient assets in the estate.

Income Tax

22 The assessments for income tax relate to the 1996, 1997 and 1998 taxation years. Except to the extent of income that is deemed to have accrued in the first 35 days of 1996, none of these amounts can be considered to relate to Mr. Banton's support in his lifetime and they cannot be charged against the assets of the Residence Trust.

Expenses and Compensation of CIBC Trust Corporation

23 Although, at the conclusion of the trial, I held that the purported creation of remainder interests in the 1994 Trust should be set aside, I stated in the reasons for judgment that I was satisfied that the motivation and purpose of George Jr. and Victor Banton in establishing the trust was to discharge the moral obligation their father had imposed on them, as his attorneys, to

protect him and his assets. Their belief that something had to be done quickly was reasonable, what they did was done on legal advice and it was successful to the extent that the commingled funds were protected from dissipation in his lifetime.

24 Counsel for Muna Banton has submitted that, as I have held that the attempt to divert George Banton's capital from his estate was improper and ineffective, amounts paid in respect of the legal expenses relating to the establishment of the 1994 Trust, the expenses of its administration - including the compensation of the Trustee - and the legal expenses incurred by CIBC Trust Corporation as a result of the litigation after Mr. Banton's death should be repaid to the estate.

25 As I indicated in the reasons for judgment, I do not believe the propriety of the actions of George Jr. and Victor Banton should be determined in accordance with inflexible technical rules. This is a comparatively new, and rapidly developing, area of the law and, at the time of the creation of the 1994 Trust, there was neither any general statutory scheme in force, nor any jurisprudence that had a helpful bearing on the scope of the powers and duties of donees acting under a continuing power of attorney. For these reasons I refused to be critical of the conduct of George Jr. and Victor Banton in establishing the trust, and in the exercise of the discretion of the Court - which I believe to be no less extensive in the case of donees of a continuing power of attorney than that applicable to trustees - I do not believe it would be reasonable to focus on the invalidity of the trust rather than on the reasons that motivated the attempt to establish it in the light of the particular circumstances that existed, and the measure of success that was achieved.

26 Nor am I prepared to be critical of the solicitor, Mr. LaBerge, for not recommending immediate recourse to the courts. In my view, it was the nature of the beneficial interests attempted to be created, and not the decision to establish the trust, that was open to criticism. In these circumstances, my conclusion is that the establishment of the trust was reasonably required for Mr. Banton's protection and support. The reasonableness of the amounts paid by the trustee - including the compensation it has pretaken - must be determined on the passing of accounts as if the trust was properly established unless the parties otherwise agree. The amounts allowed on the passing should then be apportioned *pro rata* between the Residence Trust and the estate, in accordance with the respective values of their assets at the time the 1994 Trust was established, and, to the extent, if any, that the assets of the estate at the time of Mr. Banton's death - less the costs that have been charged thereon - are insufficient to pay the part of the amount allocated to the estate in respect of expenses incurred - or compensation claimed - for the period that ended on Mr. Banton's death, that part is to be paid out of the assets of the Residence Trust.

Interest

27 There is, in my opinion, no basis for adding interest to the amount to be paid to the trustees of the Residence Trust out of the funds held by CIBC Trust Corporation. In these proceedings I am dealing with the proprietary rights of the trustees of the Residence Trust to recover trust funds improperly diverted from the trust. I am not dealing with an action for damages for breach of trust brought by any of the beneficiaries of the residence trust against the trustees and Mr. Banton's estate. Recovery in such an action is, generally, based on the restitutionary principle that seeks to award full compensation including interest: *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.). The proprietary remedies I am concerned with do not involve an award of interest as such as distinct from a share of any accretions to the mixed fund by way of income receipts or capital appreciation.

28 Where trust funds have been wrongfully mingled with funds of the trustees - or with funds of another person who, like Mr. Banton, must be considered to have had notice of the breach of trust - the persons seeking to recover the trust property - whether they be the beneficiaries or the trustees - have a right to a lien or charge against the commingled funds for the amount of the trust funds that were misapplied. If the commingled funds were used to purchase other property that has increased in value, the better view is that the trustees may claim a *pro rata* share of the property in lieu of a lien. The contrary view based on remarks - and, possibly a misunderstanding of such remarks - of Jessel M.R. in *Hallett's Estate, Re* (1879), 13 Ch. D. 696 (Eng. Ch. Div.) does not seem consistent with more recent developments in the law governing the right to follow trust property in equity: see *Scott on Trusts* (4th edition), para. 516; Ford and Lee, *Principles of the Law of Trusts* (2nd ed., 1990), para. 1719; *Snell's Principles of Equity* (29th ed., 1990) at p. 304; *Burgin v. Croad*, [1967] Ch. 1179 (Eng. Ch. Div.). Whether the property acquired with the commingled funds consists of interest -bearing securities, such as bank accounts or term deposits, or assets on which there has been capital appreciation, this alternative should be available to the trustees. Accordingly, if the funds held

by CIBC Trust Corporation had increased in value by accretions of income, or otherwise, since the time of the commingling, the second alternative would be more favourable to the trust. As, however, there appears to have been no such increase in value here, the appropriate proprietary remedy is a lien for the amount of $205,342.63 and no question of an entitlement to interest arises in these proceedings.

29 I appreciate that my reasons for the conclusion with respect to the claim for interest have an obvious relevance to the question of apportionment on which I have indicated I will hear further submissions. Counsel for Muna Banton has already filed a comprehensive factum on this question and, in consequence, my finding on the question of interest should, at this stage, be regarded as provisional and open to reconsideration until any further submissions of counsel on the question of apportionment have been heard.

30 If all parties represented on the motion and the Public Guardian and Trustee consent, I will deal in chambers with any points of clarification, or other matters arising out of the orders I have made, without any necessity for a further notice of motion to be filed.

Order accordingly.

Footnotes

* Additional reasons at (1999), 30 E.T.R. (2d) 148 (Ont. Gen. Div.).

2001 CarswellOnt 828
Ontario Court of Appeal

Banton v. CIBC Trust Corp.

2001 CarswellOnt 828, [2001] O.J. No. 1023, 104 A.C.W.S. (3d) 238, 142 O.A.C. 389, 197 D.L.R. (4th) 212, 38 E.T.R. (2d) 167, 53 O.R. (3d) 567

Muna Banton (Applicant / Appellant) and CIBC Trust Corporation, Victor Leonard Banton, George Raymond Banton, Joan Madeline McFater, Patricia Kathleen Heaps and Sheila Lynn McKenzie, Devry Smith & Frank and Ministry of the Attorney General Office of the Public Guardian and Trustee (Respondents / Respondents in appeal)

Morden, Charron, Borins JJ.A.

Heard: October 24 and 25, 2000
Judgment: March 23, 2001 *
Docket: Doc. CA C32760, C33490

Proceedings: affirming (1999), 182 D.L.R. (4th) 486, 30 E.T.R. (2d) 138 (Ont. Gen. Div.); additional reasons at (1999), 182 D.L.R. (4th) 486 at 500, 30 E.T.R. (2d) 148 (Ont. S.C.J.); and affirming (1999), 182 D.L.R. (4th) 486 at 500, 30 E.T.R. (2d) 148 (Ont. S.C.J.); additional reasons to (1999), 182 D.L.R. (4th) 486, 30 E.T.R. (2d) 138 (Ont. Gen. Div.)

Counsel: *Michael S. Deverett*, for Appellant
Joel E. Shaw, for Respondents, Victor Leonard Banton, George Raymond Banton, Joan Madeline McFater, Patricia Kathleen Heaps, Sheila Lynn McKenzie

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

1 Muna Banton, the applicant in this proceeding, appeals in separate appeals from two orders made by Cullity J. The first, dated August 6, 1999, ordered that "the Residence Trust and its trustees are not liable to pay, or reimburse any expenses for the maintenance and support of George Banton Sr. or Lily Banton whether paid by them or by the Public Guardian Trustee". The second, dated December 15, 1999, ordered that "of the remaining funds held by CIBC Trust Corporation, an amount of $205,342.63 is payable to the Trustees of the Residence Trust subject to the amounts, if any, to be paid out of the Residence Trust pursuant to paragraphs 3 and 7 of the Order of this Court dated August 6, 1999".

2 The history of this matter is somewhat complicated but, fortunately, much of it is not relevant to the resolution of the particular issues raised on the two appeals before the court. This history, in the main, is set forth in the reasons for judgment of Cullity J. given on August 25, 1998 (reported at (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.)) following a nine-day trial. No appeal was taken from this judgment.

3 Cullity J. decided several issues in this judgment, among them: (1) that the deceased, George Banton, did not have testamentary capacity when he signed wills dated December 21, 1994 and May 4, 1995; (2) that the making of these wills was procured by the undue influence of Muna Banton; and (3) that the deceased had capacity to enter into a marriage with Muna Banton and that the marriage was valid. It followed from this that the deceased died intestate and that Muna Banton, as his widow, would be entitled to a preferential share of $200,000 and one third of the residue under *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, ss. 45 and 46. Cullity J. also held that a trust created in 1994, which was not the Residence Trust (see paragraph 12 of these reasons), was invalid. This holding is set forth in paragraph 4 of the judgment which is set forth in the next paragraph.

4 The overall issue on these appeals is whether the estate includes the assets of what is called the Residence Trust [1] . With respect to this question, the judgment given on August 25, 1998 provided in paragraphs 4 and 10 as follows:

> 4. THIS COURST ADJUDGES AND DECLARES that the Trust Indenture dated December 15, 1994 is invalid (the "1994 Trust"), that the capital interest in the 1994 Trust is part of the estate of the deceased, but the said estate does not include the proceeds of the sale of the deceased's house at Coral Cove Crescent, North York, Ontario and the investment thereof, to the extent that the said proceeds and investment (the "Residence Trust") can be traced to the 1994 Trust. The amount of said investment shall be determined as provided in paragraph 10 below.
>
> . . .
>
> 10. THE COURT ADJUDGES AND DECLARES THAT Mr. Justice Cullity shall remain seized for the purpose of dealing with any motions for directions relating to the determination of any compensation that may be awarded to CIBC Trust Corporation, the division of assets between the Residence Trust and the estate, the disbursement of the Funds by CIBC Trust Corporation to the trustees of the Residence Trust and the estate trustee, and, if all parties agree, to his retention of jurisdiction for the purpose of appointing an estate trustee.

5 Muna Banton brought the motion provided for in this judgment and it resulted in the two orders under appeal. Cullity J.'s reasons for these orders are reported at (1999), 182 D.L.R. (4th) 486 (Ont. Gen. Div.). The report of these reasons, as with those reported in 164 D.L.R. (4th) 176, 1998 CarswellOnt 3423 (Ont. Gen. Div.) enables me to adopt the statements of fact in them by reference and I do so. For convenience, however, I repeat the following facts.

6 George Banton, who was born on June 13, 1906, married three times. The respondents on this appeal, Victor Leonard Banton, George Raymond Banton, Joan Madeline McFater, Patricia Kathleen Heaps and Sheila Lynn McKenzie, are the children of his first marriage with Kathleen who died in 1970. In 1971, he married Kathleen's sister, Lily.

7 On October 30, 1987, George Banton gave a continuing power of attorney with respect to all of his property to his sons Victor and George Jr. On January 30, 1991, he executed a will in which he directed $25,000 be set aside for the care and maintenance of Lily only if and after her own funds were exhausted. His five children were the remainder beneficiaries.

8 On or about January 16, 1992, George Banton transferred title to his residence to Victor and George Jr. in trust. The terms of this trust, the Residence Trust, are the subject of the first issue raised on this appeal. I set forth the operative part of the document in full:

> ACKNOWLEDGEMENT AND AGREEMENT
>
> TO : GEORGE AND LILY BANTON
>
> AND TO : MURRAY P. HARRINGTON, their solicitor herein
>
> RE : Transfer of Property
>
> 22 Coral Cove Crescent
>
> North York, Ontario
>
> THE UNDERSIGNED, GEORGE BANTON, hereby authorizes and directs you to engross the Transfer/Deed of Land herein as follows:
>
> BANTON, Victor Leonard - in trust (d.o.b. May 24, 1941)
>
> BANTON, George Raymond - in trust (d.o.b. May 19, 1938)

and this shall be your good and sufficient authority for doing so.

AND THE UNDERSIGNED, VICTOR LEONARD BANTON and GEORGE RAYMOND BANTON, acknowledge and confirm as follows:

1. that they agree to utilize the subject property or the proceeds of the sale of the subject property for the maintenance and support of George and Lily Banton in the event the same is required.

2. that they hold the property or in the alternative, the proceeds from the sale of such property, in Trust for the five children of George Banton after the death of George and Lily Banton.

DATED at Scarborough, Ontario this 16th day of January 1992.

9 After George Banton had moved into a retirement home in July 1993, the trustees sold the residence at 22 Coral Crescent in October, 1993 for $205,342.63 and they transferred the sale proceeds to George Banton. The correct legal characterization of this transfer is an important matter in this appeal.

10 Lily died in June, 1994. George Banton formed a friendship, which quickly developed into a close attachment, with Muna Banton who was a waitress in the restaurant of the retirement home where George Banton was living. She was 31 years of age.

11 During the last three months of 1994, George Banton's children became increasingly concerned about his relationship with Muna Banton. In November 1994, a doctor expressed the opinion that George Banton was financially incompetent and issued a Certificate of Incompetence under the *Mental Health Act*. The doctor was not called as a witness at the trial and her opinion was not relied upon by the respondents for the purpose of these proceedings.

12 On or about December 15, 1994, the Banton sons used their power of attorney to transfer his assets of $430,000 to an irrevocable *inter vivos* trust under which Victor and George Jr. and CIBC Trust Corporation would be the trustees, George Banton would be the sole beneficiary of the income and capital during his lifetime, and his children, and substitutionally, their issue would be the ultimate capital beneficiaries.

13 On December 17, 1994, George Banton and Muna were married. On December 21, 1994, George Banton executed a will giving his estate to Muna, with a gift over to the Salvation Army in the event of her prior death. George Banton died on February 14, 1996.

The Interpretation of the Residence Trust Terms

14 The first issue which I shall address relates to the decision dated August 6, 1999 that the Residence Trust and its trustees are not liable to pay, or reimburse any expenses for the maintenance and support of George Banton Sr. or Lily Banton. Cullity J.'s reasons for this decision are set forth in paragraphs 7-12 of his reasons reported at (1999), 182 D.L.R. (4th) 486 (Ont. Gen. Div.). It is sufficient to say that I agree completely with these reasons. Cullity J. held that the more natural meaning of the words "in the event the same is required" in the Residence Trust document was "that the thing is needed" and not, as contended by Muna Banton, "when demanded".

15 In addition to saying that I agree with Cullity J.'s reasons on this issue, I would note that there is no evidence that the deceased or Lily Banton made any demand for maintenance and support from the Residence Trust. This may be an indication of the settlor's view of the meaning of the trust document, a view that accords with Cullity J.'s decision. Further, Muna Banton did not produce any bills for the support and maintenance of George or Lily Banton which had gone unpaid.

The Nature and Extent of the Residence Trust's Claim to Recover its Assets

16 The second issue relates to whether the Residence Trust is entitled to recover the $205,342.63 which the trustees, in breach of the terms of the trust, transferred to the deceased in October 1993. All of the assets involved in this appeal, those

of the estate and those of the trust, were held by CIBC Trust Corporation to be dealt with in accordance with orders made in this proceeding. We were informed on the hearing of the appeal that they have now been paid into court under an order of Greer J. As far as the nature of the Residence Trust's entitlement is concerned, I note that Cullity J. in his reasons held that its claim for the $205,342.63 was to be secured by an equitable lien. This should be reflected in the formal order that I set forth in paragraph 1 of these reasons.

17 The evidence on the amounts involved is somewhat fragmentary. The following is a rough outline of it. When the trust funds of $205,342.63 were transferred to George Banton in October of 1993, they were added to his funds which then amounted to about $225,000. The amount that was transferred to CIBC Trust Corporation in December of 1995 (the 1994 trust) was about $430,000. The remainder interest in this trust was set aside by paragraph 4 in the August 25, 1998 judgment. The total amount of the assets involved on December 31, 1999, George Banton's (the estate's) and the trust's assets, was said to be $272,523.19. This was *after* $200,463.18 fixed by Cullity J. for costs had been paid out of the estate's portion of the fund as ordered in the judgment of August 25, 1998. The amount paid into court was $256,000.

18 From the foregoing it may be seen that the total amount of the commingled fund grew from $430,000, when the deceased received the funds from the trust, to $472,986.37 before the costs of $200,463.18 were paid. Because these costs were to be paid entirely from the estate's interest in the fund by virtue of the judgment of August 25, 1998, it would appear that there was no shortfall in the fund that would make it necessary for the trust to claim proprietary relief in order to recover the full amount of the claim. This was not argued before us, possibly for good reason [2] . In what follows I shall address the submissions that were made.

19 Cullity J.'s reasons for holding that the Residence Trust was entitled to an equitable lien to secure its claim for the restoration of the $205,342.63 are, in the main, set forth in paragraph 28 of the August 6, 1999 reasons reported at (1999), 182 D.L.R. (4th) 486 (Ont. Gen. Div.) and in paragraphs 8-27 of the December 15, 1999 reasons reported at (1999), 182 D.L.R. (4th) 486 (Ont. Gen. Div.). In essence, he held that the trust was entitled to the return of the $205,342.63 secured by an equitable lien on the assets held by the CIBC Trust Corporation because, as between the estate and the trust, the equities were not equal. This was because George Benton had wrongly mingled the funds from the trust with his funds. The appellant submits that Cullity J. should have dismissed outright the trust's claim for proprietary relief or, alternately, the trust should have been granted only a *pro rata* share in it.

20 I shall address, first, threshold submissions made by the parties. The appellant submitted that because Cullity J. had not referred to George Banton as a "wrongdoer" in the course of his reasons dated August 25, 1998, following the trial, there was no basis for his doing so in the later reasons. The answer to this is that in the August 6, 1999 and December 15, 1999 reasons, it was necessary for him, in dealing with the submissions made to him relating to the competing claims to the fund, to characterize the conduct of the parties, but it was not necessary for him to do so in the earlier reasons.

21 The respondents' threshold submission was that the question of the Residence Trust's entitlement to be paid from the fund in priority to the estate's claim was decided in the August 25, 1998 judgment and was, therefore, *res judicata*. The terms of the August 25, 1998 judgment, paragraphs 4 and 10, set forth above, do not support this argument. Paragraph 4 provides that "the said estate does not include [the Residence Trust] to the extent that [the Residence Trust] can be traced to the 1994 Trust". So, clearly, the nature and extent of the trust's interest in the overall fund was a matter to be decided. This is confirmed by paragraph 10 in the judgment and, of course, by Cullity J.'s proceeding to deal with the motions which culminated in his orders of August 6, 1999 and December 15, 1999.

22 The appellant's first submission, which counsel acknowledged to reflect an "extreme" position, is that the Residence Trust should not be entitled to any tracing remedy with respect to the moneys in the fund. This submission, apparently, was not made to Cullity J. It is based on George Banton's "innocence" in receiving the funds and the intention of George Jr. and Victor to give them to him. I deal with the "innocence" of George Banton in the next part of these reasons. The allegation that the trust funds were given to George Banton is contrary to the finding of Cullity J. which was that the transfer was made by the sons under a mistake of law. I agree with this finding. I might note that, if the transfer was a gift and if the beneficiary daughters were bound by it as well as their trustee-beneficiary brothers, the trust would have no claim at all, personal or proprietary. I shall say no more on this submission.

23 The appellant's basic submission is that the fund should be divided *pro rata* in accordance with the respective "contributions" to it when the $205,342.63 was transferred to George Banton in October 1993 - as opposed to Cullity J.'s conclusion that the trust had a secured entitlement to $205,342.63 in the fund. In support of this submission, the appellant relies on *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42 O.R. (3d) 257 (Ont. C.A.) which held that the fund in question in that case should be apportioned *pro rata* among the claimants. To obtain the benefit of this decision, the appellant would be required to show that the equities as between the estate and the trust are equal. The appellant submits that Cullity J. erred in characterizing George Banton's conduct in receiving the funds as wrongful because there was nothing wrongful or dishonest involved in this receipt.

24 The respondents do not have to show fraud or dishonesty in order to have George Banton's receipt of the trust fund characterized as wrongful. It is sufficient if it is shown that he knew, or should have known, that the trustees were acting in breach of the terms of the trust in making the transfer to him: *Scott*, *The Law of Trusts*, 4th ed., §§ 288, 292, 296 and 297. "[A]n act may amount to a legal or equitable wrong even where the actor is unaware that he is infringing another's rights": Smith, *The Law of Tracing* (1997) at p. 88. On the facts of this case, it was clearly open to Cullity J. to conclude that George Banton, who was settlor of the trust in question, at least should have known of the breach of trust. [3]

25 The appellant has submitted that if George Banton should have known that the transfer was a breach of trust then the two trustees, Victor Banton and George Banton Jr., should also have known and that this should prevent the Residence Trust from making full recovery of the amount transferred. It is difficult to appreciate how the three beneficiaries who were not trustees, the sisters, could be affected by this submission but, in any event, on principle, I do not think it should have any effect. Cullity J. who heard the evidence relating to the transfer, characterized what the trustees had done as a "mistake of law" and said that it should not be a barrier to the recovery of their shares. Further, the appellant's notice of motion (paragraphs 15 and 17) which led to the order in question characterized the transfer as "mistaken."

26 The appellant appears to overlook that the governing principle is the prevention of unjust enrichment. Why should the estate, which has been enriched by the receipt of property transferred to the deceased in breach of trust at the expense of the beneficiaries of the trust, not be compelled to restore the property or its value to the trust? Cullity J. noted that there was no evidence of change of position by George Banton as a result of the payment to him. Accordingly, the equities are not equal between the estate and Residence Trust and Cullity J. was right in distinguishing *Law Society of Upper Canada v. Toronto Dominion Bank* and granting priority to the trust, securing its claim by granting an equitable lien.

27 The case, in its simplest form, is one of a transferee of trust property, with notice of the breach of trust, being liable to restore to the beneficiaries the trust funds received: *Scott*, op. cit., §288.

28 In the result, I would dismiss each of these appeals with costs to be assessed as those of one appeal payable out of the estate funds.

Appeals dismissed.

Footnotes

* Leave to appeal refused (September 6, 2001), 28587 (S.C.C.).

1 The appellant on the appeal from the December 15, 1999 order sought, in her factum, to set aside an order declaring that certain expenses paid by Victor Banton in the amount of $7,784.50 were a debt of the estate. This issue was not raised in the argument before us. In my view, the order of Cullity J. on this point was soundly based and should not be disturbed.

2 Oosterhoff and Gillese: *Text, Commentary and Cases on Trusts*, 5th ed. (1998) at p. 753 says that one of the advantages of proprietary remedies is that "they carry interest, if the property is income-producing, from the date that the defendant acquired the property, whereas personal claims such as for an accounting, only carry interest if it is claimed, at the pre-judgment interest rate, from the date the cause of action arose to the date of the order."

3 It was not argued that, even if he were not a wrongdoer, the deceased as a transferee who paid no value for the trust property would be bound by the trust. "Now, of course, it is well-settled law that where a trustee in breach of trust transfers trust property to a person who pays no value for the property, the transferee takes subject to the trust, even though he had no notice of the breach of trust or of the existence of the trust. . . . . The truth clearly is that the innocent donee takes subject to the trust, even though he has no notice of the trust, because he would otherwise be unjustly enriched at the expense of the beneficiaries as a result of the violation by the trustee of his duty to them." Scott, *op. cit*. § 289. "If a trustee in breach of trust gives trust money to a donee, the fact that the donee spends the money before he has notice of the trust is ordinarily no defense. It is sufficient if the beneficiaries of the trust show that the money was paid in breach of trust and that no consideration was given for it. If this is shown, the donee is called upon to account for the amount which he receives. To be relieved of liability, the donee must show that before he had notice of the breach of trust he so changed his position that it would be inequitable to hold him liable. The mere fact that he has spent the money is not a defense." Scott, *op. cit* § 292.2. *Diplock v. Wintle*, [1948] 1 Ch. 465 (Eng. C.A.), which treated innocent volunteer charities which had received funds in breach of trust on the same footing as the trust beneficiaries, muddies the waters on this question. See Fridman, *Restitution*, 2nd ed. (1997) at p. 433 and Maddaugh & McCamus, *The Law of Restitution* (1990) at pp. 157-58.

2001 CarswellOnt 3069
Supreme Court of Canada

Banton v. CIBC Trust Corp.

2001 CarswellOnt 3069, 2001 CarswellOnt 3070, [2001]
S.C.C.A. No. 242, 155 O.A.C. 198 (note), 276 N.R. 395 (note)

Muna Banton v. Victor Leonard Banton, George Raymond Banton, Joan Madeline McFater, Patricia Kathleen Heaps and Sheila Lynn McKenzie

Arbour J., L'Heureux-Dubé J., LeBel J.

Judgment: September 6, 2001
Docket: 28587

Proceedings: Leave to appeal refused 2001 CarswellOnt 828, 197 D.L.R. (4th) 212, (sub nom. Banton v. Banton) 142 O.A.C. 389, 53 O.R. (3d) 567, [2001] O.J. No. 1023 (Ont. C.A.); Affirmed 182 D.L.R. (4th) 486, 1999 CarswellOnt 2596, 30 E.T.R. (2d) 138 (Ont. Gen. Div.); Affirmed 182 D.L.R. (4th) 486 at 500, 1999 CarswellOnt 4161, 30 E.T.R. (2d) 148 (Ont. S.C.J.); Additional reasons 182 D.L.R. (4th) 486, 1999 CarswellOnt 2596, 30 E.T.R. (2d) 138 (Ont. Gen. Div.)

Counsel: None given.

Arbour J. **,** ***L'Heureux-Dubé J.*** **,** ***LeBel J.*** **:**

1 The application for leave to appeal is dismissed.

17

— *The* —

Law of Set-Off

in Canada

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1. Set-off and counterclaim — Canada. I. Title.

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the defendant and no record of the transaction was made. It is unclear if even the harness was ever finished, as the case report notes that: "The agent himself puts it in this way in his evidence: that the premium was paid by the harness; but as a matter of fact the harness was not completed at the time of the fire".[95] In a suit by the plaintiff for a refusal of insurance coverage, the defendant was found not to be liable. The set-off was outside the authority of the agent, as he was not authorised to receive payment in any way other than by money. Calling this an "extremely questionable and suspicious transaction",[96] the court stated:

> The general rule of law is that an authority to an agent to receive money, implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal; but, if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it, and upon that principle, it has been held as a general rule that the agent cannot receive payment in anything else but cash.[97]

E. Corporations

(i) Generally

It is clear under Canadian law that a company operates as a distinct legal personality from its shareholders, directors, subsidiaries and parent corporations. Despite this basic tenant of common law, there are a surprising number of cases which query whether a company is separate enough from these various other parties to allow, or deny, set-off. The basic rule is that a corporation will be treated as a separate legal entity for purposes of set-off and so will not have mutuality on debts owed by it to third parties with debts owed by third parties to its shareholders, directors or subsidiaries.

(ii) Set-off with shareholders

It is again clear that the shareholders of a corporation are separate from the corporation itself. Accordingly, set-off will not be available between debts between shareholders and a third party on the one hand, and the third party and the corporation on the other. In *In re Benson-Johnston*,[98] company A agreed to sell its assets to company B, with the purchase price being shares plus $500 in cash. The shares were transferred but the cash was set-off by B against the unpaid shares of its partners. The set-off was disallowed by the court, which noted that set-off might have been available had an agreement for such a step been in place.

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95. *Supra*, at p. 422.
96. *Supra*, at p. 422.
97. *Supra*, at pp. 422-3, citing *Sureting v. Pearce*, 7 C.B.N.S. 485.
98. (1925), 5 C.B.R. 505 (Ont. S.C.).

This view may, to an extent, also be applicable to unincorporated associations. In *Seeton v. Merchants' Bank*,[99] the plaintiff, an unincorporated association of forty members, paid funds to the defendant bank to indemnify it for guaranteeing costs in litigation that the plaintiff was involved with. The plaintiff eventually was successful in this litigation, and the bank refunded the moneys except for 1/40th, which was set-off against a debt owing by one member of the plaintiff to the bank. This set-off was disallowed, as the bank had previously acted with the association as a collective, and could not change its approach to its customer in this manner. While this can be seen as an example of the separation between the members of an association (incorporated or otherwise) and the body itself, the better view in this instance may be that the original deposit with the bank by the association was a joint deposit, while the debt set off was several. The debts did not exist in the same right and set-off was accordingly unavailable.

(iii) Set-off with subsidiaries

Individually incorporated subsidiaries exist separately from their parent companies, regardless of the extent of the ownership by the parent. A debt owed by a subsidiary to a third party therefore cannot be set-off against amounts owed by the third party to the parent corporation. These basic principles of corporate law, however, have not stopped debtors (and unfortunately, their lawyers) from claiming that set-off should be available in these circumstances. The arguments made in such cases have been summarized as follows:

> The defendant submits . . . that the defendant company is entitled to set-off against its own debt, any debts due to its associated company . . . by reason that the shares of such latter company were wholly owned by the defendant, and that [the subsidiary] was just one of many subsidiary companies owned by the defendant, and that the entire group of such companies embracing the parent company and its subsidiaries should be regarded as one enterprise entity so as to entitle the parent company to have the right to set-off any debt owing by a person to one of its subsidiaries against the debt owing by the parent company to the said person.[100]

While the court may, on occasion, lift the corporate veil to determine the availability of set-off (discussed below), or determine that set-off is available as the subsidiary is an agent of the parent,[101] the general rule is that in the absence of an agreement, cross-claims owed between a company and its subsidiary to a third party will not be mutual.

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99. (1885), 18 N.S.R. 113.
100. *Royal Bank of Canada v. Wallace Investments Ltd.* (1961), 30 D.L.R. (2d) 280 at p. 287, 3 C.B.R. (N.S.) 34 (B.C. Co. Ct.).
101. This was denied in *Royal Bank of Canada v. Wallace Investments Ltd., supra.* For a successful use of this claim, see *Smith, Stone and Knight, Ltd. v. Birmingham*, [1939] 4 All E.R. 116 (K.B.).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No. CV-19-629552-00CL

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF DEL EQUIPMENT INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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